

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

3 Norman B. Blumenthal (State Bar #068687)
4 Kyle R. Nordrehaug (State Bar #205975)
5 Aparajit Bhowmik (State Bar #248066)
6 Piya Mukherjee (State Bar #274217)

7 2255 Calle Clara
8 La Jolla, CA 92037
9 Telephone: (858)551-1223
10 Facsimile: (858) 551-1232

11 *(Additional Counsel on Signature Page)*
12 Attorneys for Plaintiffs

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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **IN AND FOR THE COUNTY OF SAN MATEO**

17 Coordination Proceeding Special Title
18 (Rule 3.550)

19 **SOLARCITY WAGE AND HOUR CASES**

20 Coordinated actions:

21 *Irving v. SolarCity Corp.*,
22 San Mateo County Superior Court,
23 Case No. CIV 525975

24 *Thomas v. SolarCity Corp.*,
25 San Diego County Superior Court,
26 Case No. 37-2017-00018317

JUDICIAL COUNCIL COORDINATION
PROCEEDING CASE NO. **JCCP 4945**

(Included actions: Case No. CIV 525975 and
Case No. 37-2017-00018317)

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

Hearing Date: February 1, 2019
Hearing Time: 2:00 p.m.
*[Hearing Scheduled by Oder dated
September 13, 2018]*

Judge: Hon. Marie S. Weiner
Dept: 2

Action Filed: December 24, 2013

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1 **I. INTRODUCTION**

2 The parties to this action have reached a Settlement and the Court preliminarily approved the
3 Joint Stipulation of Class Action Settlement and Release ("Stipulation" or "Settlement"), a true and
4 correct copy of which is attached as Exhibit #2 to the Declaration of Norman Blumenthal ("Blumenthal
5 Decl.").¹ In accordance with the Preliminary Approval Order dated September 13, 2018, the Court-
6 approved notice of the proposed settlement has been disseminated to the Class.²

7 The purpose of this hearing is to determine whether the proposed settlement of the litigation
8 should be finally approved. Plaintiffs Anita Irving, Les Thomas, Breana Daugherty, Jason Wool, and
9 Felicia Kim (collectively, "Plaintiffs") respectfully submit this memorandum in support of the
10 unopposed motion for final approval and the proposed entry of the Final Approval Order and Judgment,
11 submitted herewith. After disseminating notice to the members of the Class, there were no objections
12 and only one (1) opt out, which means that nearly the entire Class will be participating in the
13 Settlement. Blumenthal Decl. ¶4. This is a positive response from the class evidencing their approval
14 of the settlement. As a result, Plaintiffs respectfully submit that the class settlement should be finally
15 approved.

16
17 **II. THE SETTLEMENT BEFORE THE COURT**

18 Plaintiffs and Defendant SolarCity Corporation ("Defendant") have reached a full and final
19 settlement of the above-captioned action, which is embodied in the Stipulation filed concurrently with
20 the Court. As consideration for this Settlement, the Agreement provides that the amount to be paid by
21 Defendant is One Million Seven Hundred Eighty Thousand Dollars (\$1,780,000) (the "Gross
22 Settlement Amount"). (Stipulation at ¶ 3.15.) Blumenthal Decl. ¶3(a).

23 Under the terms of the Settlement, the Gross Settlement Amount consists of the following
24 elements: (1) payments to Settlement Class Members; (2) Class Counsel's attorneys' fees and costs

25
26 ¹ Capitalized terms are defined in the Agreement.

27 ² The "Class" is "all individuals who worked for SolarCity in California as a commissioned
28 salesperson who were classified as non-exempt from December 24, 2009 to August 28, 2018."
(Preliminary Approval Order dated September 13, 2018 at ¶ 6.)

1 (subject to Court approval); (3) Claims Administration Costs; (4) the Service Enhancement Payments
2 to the Class Representatives (subject to Court approval); (5) the PAGA Penalty Payment, and (6) the
3 employer's share of payroll taxes on the portion of the Settlement allocated to wages. (Stipulation at
4 ¶ 3.15.) The Gross Settlement Amount shall be all-in with no reversion to Defendant and Class
5 Members will be automatically paid their settlement shares without submitting a claim form.
6 (Stipulation at ¶ 8.) Blumenthal Decl. ¶3(b).

7 Defendant will pay the Gross Settlement Amount to the Claims Administrator no later than
8 seventy (70) days after the Effective Date has passed. (Stipulation at ¶ 12.3.) The Effective Date is
9 the date on which the Court's Approval Order becomes "final" which is when the last to occur of the
10 following: (a) the date of final affirmance on appeal of the Judgment; (b) the date of final dismissal of
11 any appeal from the Judgment or the final dismissal of any proceeding to review the Judgment; or (c)
12 if no appeal is filed, the expiration date of the time for the filing or noticing of any appeal from the
13 Court's Judgment, (Stipulation at ¶ 3.14.) The Settlement Payments to the Settlement Class and the
14 PAGA Penalty Payment to the LWDA will be paid by the Claims Administrator no later than 85 days
15 after the Effective Date. (Stipulation at ¶ 12.4.) Blumenthal Decl. ¶3(c).

16 The Net Settlement Amount shall equal the Gross Settlement Amount minus the Court-approved
17 amounts for the Attorneys' Fees, Litigation Expenses, Claims Administration Costs, the PAGA Penalty
18 Payment, the employer's share of payroll taxes, and the Service Enhancement Payments to the Class
19 Representatives. (Stipulation at ¶ 3.23.) The Claims Administrator will automatically make Settlement
20 Payments to each Settlement Class Member (i.e. those Class Members who do not request exclusion)
21 without the need for a claim form. (Stipulation at ¶ 12.1.) The Net Settlement Amount shall be
22 allocated as follows: Each individual Settlement Class Member's payment shall be calculated by
23 counting the number of Work Weeks all Settlement Class Members worked during the Class Period
24 (which becomes the denominator) and the number of work weeks each of these employees worked
25 during the Class Period (which becomes the numerator) and multiply this fraction by the Net Settlement
26 Fund amount allocated to the Class. (Stipulation at ¶ 8.4.) The entire Net Settlement Amount will be
27 allocated among the Participating Class Members. Blumenthal Decl. ¶ 3(d).

28 Class Members were sent the Court approved Notice of the settlement with the opportunity to

1 exclude themselves or "opt out" if they do not want to participate in the settlement. (Stipulation at ¶
2 11.1.) Class Members who did not "opt out" are deemed Settlement Class Members, will be bound
3 by the Settlement, and will be entitled to receive a Settlement Payment. (Stipulation at ¶ 3.38.) Class
4 Members were given forty-five (45) days from the date of mailing of the Class Notice to return valid
5 Dispute Forms to the Claims Administrator. (Stipulation at ¶ 11.2.) Finally, the Notice advised Class
6 members of their right to object to the Settlement. (Stipulation at ¶ 11.1.) Blumenthal Decl. ¶ 3(e).

7 This is a non-reversionary settlement and it is the intention of the Parties that the entire Gross
8 Settlement Amount will be paid out as described herein, leaving no residue. Any checks issued to
9 Settlement Class Members shall remain negotiable for a period of one hundred eighty (180) days from
10 the date of mailing. The funds associated with any checks which are not timely negotiated shall be paid
11 in favor of a *cy pres* beneficiary. (Stipulation at ¶ 12.6.) The Parties have selected Children's
12 Advocacy Institute as the *Cy pres* beneficiary, which is a not for profit child advocacy group which
13 satisfies Cal. Code Civ. Proc. § 384. As a result of this procedure, all funds will be paid out and there
14 will be no unpaid residue. Blumenthal Decl. ¶3(f).

15 KCC Class Action Services was appointed as the Claims Administrator for the Settlement.
16 (Stipulation at ¶ 10.1.) The Claims Administration Costs are the fees and expenses reasonably and
17 necessarily incurred by the Claims Administrator as a result of performing the settlement administration
18 procedures and functions expressly required in the Stipulation, which shall be paid from the Gross
19 Settlement Amount in an amount not to exceed \$40,000. (Stipulation at ¶ 3.5.) As set forth in the
20 Declaration of Cooley at ¶ 10, the Claims Administration Costs are \$35,000. Blumenthal Decl. ¶3(g).

21 Subject to Court approval, Class Counsel shall seek (a) an award of Attorneys' Fees of no more
22 than one-third (1/3) of the Gross Settlement Amount (\$593,333.00); and (b) an award of actual
23 Litigation Expenses billed to Plaintiffs as per Class Counsel's billing statement in an amount not to
24 exceed \$55,000. (Stipulation at ¶ 9.1.) Subject to Court approval, the Settlement provides for Service
25 Enhancement Payments of up to Twenty-Five Thousand Dollars (\$25,000) for Plaintiff Irving and Ten
26 Thousand U.S. Dollar (\$10,000.00) for the other Class Representatives except Thomas. (Stipulation
27 at ¶ 8.5.) In support of this separate motion, Class Counsel has provided evidentiary support, including
28 lodestar. Blumenthal Decl. ¶3(h).

1 Subject to Court approval, a PAGA Penalty Payment of \$25,000 will be paid from the Gross
2 Settlement Amount. Pursuant to the express requirements of Labor Code § 2699(i), the PAGA Penalty
3 Payment shall be allocated as follows: \$18,750.00 (75%) to the LWDA for the enforcement of labor
4 laws and education of employers, and \$6,250.00 (25%) to the Settlement Class Members on a pro rata
5 basis. (Stipulation at ¶ 8.3.) The LWDA was notified of this PAGA settlement at the time of
6 Preliminary Approval and is also being served with this motion. Blumenthal Decl. ¶3(i).

7 On December 12, 2017, the parties participated in a full day of mediation before Michael
8 Dickstein, a respected and experienced mediator of class actions and wage and hour lawsuits. The
9 negotiations were arm's length and contentious. At the conclusion of the mediation, the Parties were
10 unable to reach an agreement to settle the Action. After the mediation, Mr. Dickstein continued to
11 assist the parties with negotiations, and finally, in May 2017, Mr. Dickstein made a mediator's proposal
12 which was not subject to further negotiation. The mediator's proposal was accepted by the Parties and
13 memorialized in the form of a Memorandum of Understanding. The Parties then prepared the full
14 Agreement which received preliminary approval from the Court by Order dated September 13, 2018.
15 Blumenthal Decl. ¶3(j).

16 The Settlement is fair, adequate and reasonable to the class and should be finally approved.
17 Blumenthal Decl. ¶3(k). In sum, this settlement valued at \$1,780,000 is an excellent result for the
18 Class. This result is particularly favorable in light of the fact that liability and class certification in this
19 case were far from certain in light of the defenses asserted by Defendant. Given the complexities of
20 this case, the defenses asserted, the uncertainty of class certification, along with the uncertainties of
21 proof at trial and appeal, the proposed settlement is fair, reasonable and adequate, and should be finally
22 approved. Blumenthal Decl. ¶3(k).

23
24 **III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL**
25 **OF CLASS ACTION SETTLEMENTS**

26 Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259,
27 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly
28 appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran.*

1 v. *Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are
2 the preferred means of dispute resolution. This is especially true in complex class action litigation.")

3 "[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
4 action requires court approval." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (citing
5 *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal. App. 3d 573, 578-579 (1980).) The
6 court must decide whether the proposed settlement falls within the range of reasonable settlements,
7 taking into account that settlements are compromises between the parties reflecting subjective,
8 unquantifiable judgments concerning the risks and possible outcomes of litigation. *See Wershba v.*
9 *Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) ("The proposed settlement is not to be judged
10 against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed
11 at trial.") In *Wershba*, appellants argued that the settlement was too low given the "clear" liability,
12 however, the Court rejected this argument and held that "the merits of the underlying class claims are
13 not a basis for upsetting the settlement of a class action." *Id.*; *see also 7-Eleven, supra*, at 1150.

14 In these cases, Courts have repeatedly emphasized that there is a strong initial presumption that
15 the compromise is fair and reasonable. *Wershba*, 91 Cal. App. 4th at 245. Courts should not substitute
16 their judgment for that of the parties who negotiated the settlement. *Id.* at 246. The presumption of
17 fairness exists where: (1) investigation and discovery are sufficient to allow counsel and the court to
18 act intelligently; (2) the settlement is reached through arm's-length bargaining; (3) counsel is
19 experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal. App. 4th
20 at 1801, citing Newberg & Conte, *Newberg on Class Actions*, (3d ed. 1992) §11.41, pp. 11-91. Here,
21 all of these factors support a presumption of fairness.

22 The essential evaluation is whether, given the risks of litigation and the range of probable
23 results, the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. Here, the
24 facts and circumstances compel the conclusion that the proposed settlement satisfies that standard.

25 26 **IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE**

27 The court must determine whether the settlement is fair, adequate, and reasonable. *Dunk v.*
28 *Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); *see also Officers for Justice v. Civil Service*

1 *Com'n*, 688 F.2d 615, 625 (9th Cir. 1982). The purpose of the requirement is "the protection of those
2 class members, including the named plaintiffs, whose rights may not have been given due regard by
3 the negotiating parties." *Dunk, supra*, at 1801.

4 The trial court has broad discretion to determine whether the settlement is fair. *Cellphone*
5 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). "The well-recognized factors that the
6 trial court should consider in evaluating the reasonableness of a class action settlement agreement
7 include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further
8 litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the
9 extent of discovery completed and the stage of the proceedings, the experience and views of counsel,
10 the presence of a governmental participant, and the reaction of the class members to the proposed
11 settlement.'" *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (internal citations
12 omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of L. A.*, 186 Cal. App. 4th 399, 408 (2010).

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

20 These factors are analyzed seriatim below, and all support final approval of the class action
21 settlement before this Court.

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

23 1. The Investigation and Discovery are Sufficient to Allow Counsel and the Court
24 to Act Intelligently

25 On December 24, 2013, Anita Irving on behalf of herself and putative class members, filed a
26 lawsuit against SolarCity in San Mateo Superior Court, entitled *Irving v. SolarCity Corp.*, Case No.
27 CIV 525975. In it, she alleged violations of the California Labor Code, Unfair Competition Law, and
28 Private Attorneys General Act (see "Alleged Claims," Section 3.1 above). SolarCity moved to compel

1 arbitration, and on December 16, 2014, the Court granted the request with respect to Plaintiffs
2 individual claims and denied it with respect to the Private Attorneys General Act ("PAGA") claims.
3 The Court of Appeal affirmed the Court's ruling on November 29, 2016. The petition for review was
4 denied on March 6, 2017, and the remittitur back to this Court was issued. Blumenthal Decl. ¶6(a).

5 The Lawsuit entitled *Thomas v. SolarCity Corp.*, Case No. 37-2017-00018317, was filed in San
6 Diego County Superior Court on May 19, 2017 and involved wage and hour claims similar to those in
7 Irving. Irving and Thomas were judicially coordinated as Case No. JCCP 4945. On January 9, 2018,
8 the coordinated cases, referred to as the *SolarCity Wage and Hour Cases*, were assigned to the
9 Honorable Marie Weiner. Blumenthal Decl. at ¶6(b).

10 On July 26, 2017, Jason Wool and Felicia Kim each filed class, representative, and individual
11 claims in the United States District Court for the Southern District of California, alleging violations of
12 the California Labor Code, Unfair Competition Law, Private Attorneys General Act, and the Fair Labor
13 Standards Act based on their employment for SolarCity in commissioned salesperson positions that
14 SolarCity considered exempt ("exempt claims") as well as positions that SolarCity considered
15 non-exempt ("non-exempt claims"). Their non-exempt claims were substantially similar to the claims
16 brought in *Thomas* and *Irving*. Wool and Kim each settled their exempt claims against SolarCity on an
17 individual basis, and such claims were dismissed from the federal case with prejudice on March 29,
18 2018. SolarCity agreed that Wool and Kim could bring their non-exempt claims in the Lawsuits and
19 that they could be added to the Lawsuits as named plaintiffs and proposed class representatives.
20 Accordingly, Wool and Kim's non-exempt claims were dismissed from the federal case without
21 prejudice on March 29, 2018. Plaintiff Daugherty has dismissed without prejudice the matter pending
22 in the United States District Court for the Northern District of California entitled *Daugherty v.*
23 *SolarCity Corporation*, Case No. 16-CV-05155 WHA. Daugherty, together with Kim and Wool are
24 being added to the Lawsuits as named plaintiffs and proposed class representatives. Blumenthal Decl.
25 ¶6(c).

26 The Parties engaged in investigation and the exchange of documents and information in
27 connection with the Lawsuits. In both of the Lawsuits, the Plaintiffs and Defendant have conducted
28 formal discovery and have exchanged detailed information and data concerning the claims, defenses,

1 and alleged damages at issue in the Lawsuits. Defendant's PMK was deposed and approximately 2,000
2 pages of documents were produced. Blumenthal Decl. ¶6(d).

3 The Lawsuits generally allege that Plaintiffs and other commissioned salesperson employees
4 were not properly compensated in accordance with California law. The Lawsuits allege violations of
5 of the California Labor Code, Unfair Competition Law, and Private Attorneys General Act. Blumenthal
6 Decl. ¶6(e).

7 Prior to settlement negotiations, Defendant provided Plaintiffs with the necessary payroll and
8 other data for the Class in order to evaluate the claims. Plaintiffs analyzed the data, prepared a damage
9 valuation and prepared a detailed analysis. Plaintiffs employed DM&A, a damage expert, to prepare
10 a comprehensive valuation. The Parties engaged in mediation on December 12, 2017 with Michael
11 Dickstein, a respected and experienced mediator of wage and hour class action lawsuits. After a full
12 day of mediation, the parties were unable to reach a settlement. With the assistance of Mr. Dickstein,
13 the negotiations continued until a mediator's proposal was made in on May 4, 2018. Based on those
14 negotiations and arms-length settlement discussions between the parties, all parties agreed to accept
15 the mediator's proposal. The basic terms were set forth in a signed memorandum of understanding.
16 The parties then prepared the formal Stipulation, which received preliminary approval from this Court.
17 Blumenthal Decl. ¶6(f).

18 Accordingly, for purposes of this Settlement, the "Class" is defined as "all individuals who
19 worked for SolarCity in California as a commissioned salesperson who were classified as non-exempt
20 from December 24, 2009 to August 28, 2018." (Preliminary Approval Order dated September 13, 2018
21 at ¶ 6.).

22 Class Counsel has conducted a thorough investigation into the facts of the class action. Class
23 Counsel has diligently evaluated the Class Members' claims against Defendant. Prior to the settlement
24 negotiations, Plaintiffs performed significant discovery and counsel for Defendant provided Class
25 Counsel data and information for the Class, including payroll data and information concerning the
26 Defendant's practices. In addition, Class Counsel previously negotiated settlements with other
27 defendants in actions involving nearly identical issues and analogous defenses. Based on the foregoing
28 data and their own independent investigation, evaluation and experience, Class Counsel believes that

1 the settlement with Defendant on the terms set forth in the Stipulation is fair, reasonable, and adequate
2 and is in the best interest of the Class in light of all known facts and circumstances, including the risk
3 of significant delay, defenses asserted by Defendant, and potential appellate issues. Blumenthal Decl.
4 ¶6(g).

5 2. The Settlement was Reached Through Arm's Length Bargaining

6 This Settlement was the result of arm's-length negotiations as well as formal and informal
7 settlement conferences between the Parties through their respective attorneys. After comprehensive
8 legal and factual analysis, Class Counsel possessed sufficient information for intelligent evaluation of
9 the case for purposes of settlement. Prior to the initiation of settlement discussions, Class Counsel
10 reviewed and outlined the case based upon the information for the class, and determined the conditions
11 of settlement which would be fair and reasonable to the Class with the assistance of an expert. Class
12 Counsel was experienced in the types of settlement appropriate to resolve these wage and hour claims
13 on behalf of employees. Blumenthal Decl. ¶7(a).

14 The Parties scheduled a private mediation to take place before Michael Dickstein, a respected
15 and experienced mediator of class actions and wage and hour lawsuits. In preparation for the
16 mediation, Defendant provided Class Counsel with necessary records and information for the members
17 of the Class. Plaintiffs analyzed the data with the assistance of damages expert DM&A and prepared
18 and submitted a mediation brief to the mediator. After a full day of settlement negotiations at the
19 December 12, 2017 mediation, the parties were unable to reach an agreement. Through continued
20 negotiations, the parties reached an agreement, based upon a mediator's proposal by Mediator Dickstein
21 which was accepted in light of the uncertainties of protracted litigation. As a result of these arm's
22 length negotiations, the Parties signed a Memorandum of Understanding. Blumenthal Decl. ¶7(b).

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

1 From July 2018 through August 2018, the Stipulation and exhibits thereto were finalized and
2 executed. Plaintiffs prepared and filed the motion requesting Court preliminary approval of the
3 settlement on August 28, 2018. The Order dated September 13, 2018 preliminarily approved the class
4 settlement contained in the Stipulation as fair, reasonable and adequate. Blumenthal Decl. ¶7(c).

5 3. Class Counsel is Experienced in Similar Litigation

6 Class Counsel in this matter has extensive class action experience in many fields and has
7 represented thousands of persons in class actions including employment litigation, wage and hour class
8 actions, consumer class actions, and securities litigation. Class Counsel has previously litigated wage
9 and hour class actions involving employees as in this case. Class Counsel previously prosecuted
10 similar wage and hour claims. Class Counsel have been approved as experienced class counsel during
11 contested motions in state and federal courts throughout California. As such, Class Counsel is
12 experienced and knowledgeable in this area of law. Class Counsel have participated in every aspect of
13 the settlement discussions and have concluded the settlement is fair, adequate and reasonable and in
14 the best interests of the Class. See Blumenthal Decl. ¶2 and Exhibit #1; Declaration of Shaun Setareh
15 at ¶¶ 6-7; Declaration of Jamin Soderstrom at ¶¶ 6-7. The view of qualified and well-informed counsel
16 that a class action settlement is fair, adequate, and reasonable is entitled to significant weight. See
17 *Kullar*, 168 Cal. App. 4th at 133 (the trial court "may and undoubtedly should continue to place
18 reliance on the competence and integrity of counsel, the involvement of a qualified mediator, and the
19 paucity of objectors to the settlement."); *Dunk*, 48 Cal. App. 4th at 1802.

20
21 4. There Are No Objections and Few Opt Outs

22 The reaction of the Class unequivocally supports approval of the Settlement. Significantly, after
23 dissemination of the notice to the Class Members, which provided each class member with the terms
24 of the Settlement, including the specific, estimated payment amount to that individual, currently there
25 have been no objections and only one (1) opt out. See Declaration of Zachary Cooley at ¶¶ 6-7,
26 submitted herewith. As a result, nearly the entire Class has elected to participate in the Settlement and
27 will be sent a settlement check. Blumenthal Decl. ¶4.

28 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the

1 Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
2 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as
3 indicative of the adequacy of the settlement."); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119
4 (3d. Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l*
5 *Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
6 settlement should be considered when determining fairness of settlement). Here, where there are no
7 objections, the approval of the class is evident.

8 5. The Strength of Plaintiffs' Case

9 The Lawsuits generally allege that Plaintiffs and other commissioned salesperson employees
10 were not properly compensated in accordance with California law. The Lawsuits allege violations of
11 of the California Labor Code, Unfair Competition Law, and Private Attorneys General Act. Blumenthal
12 Decl. ¶5.

13 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
14 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
15 Defendant presented serious threats to the claims of the Plaintiffs and the other Class Members.
16 Defendant asserted that the employment practices complied with all applicable Labor laws. Defendant
17 argued that employees were required to accurately record their time and a push-button was included
18 in the time card procedure where employees could record missed meal periods or voluntarily waive the
19 break. Defendant could also argue that the Supreme Court decision in *Brinker v. Superior Court*, 53
20 Cal. 4th 1004 (2012), weakened Plaintiffs' claims, on liability, value, and class certifiability as to the
21 meal period claim. If successful, Defendant's defenses could eliminate or substantially reduce any
22 recovery to the Class. While Plaintiffs believe that these defenses could be overcome, Defendant
23 maintains these defenses have merit and therefore present a serious risk to recovery for the Class.
24 Blumenthal Decl. ¶8(a).

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

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

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

7 2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009)³; see also *Browning v. Yahoo!, Inc.*, 2007
8 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal
9 uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor
10 approval.")

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

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

22 There was also a significant risk that, if the Lawsuits were not settled, Plaintiffs would be unable
23 to obtain class certification and thereby not recover on behalf of any employee other than themselves.
24 Defendant argued that the individual experience of each employee varied with respect to the alleged
25 claim. While other cases have approved class certification of wage and hour claims, class certification
26 in this action would have been hotly disputed and was by no means a foregone conclusion. Finally,
27 even if class certification was successful, as demonstrated by the California Supreme Court decision
28 in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to overcome
for a class-wide recovery even where the class has been certified. Blumenthal Decl. ¶8(b).

In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
recovery, particularly when viewed in light of the fact that Defendant asserted serious and substantial
defenses both to liability and to class certification. Given the complexities of this case, the defenses,
along with the uncertainties of proof and appeal, the proposed Settlement is fair, reasonable and

³ Emphasis added unless otherwise indicated.

adequate, and should be finally approved. Blumenthal Decl. at ¶8(e).

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

As demonstrated by the decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), the complexities and duration of further litigation cannot be overstated. There is little doubt that Defendant would post a bond and appeal in the event of an adverse judgment. A post-judgment appeal by Defendant would have required many more years to resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total, then the case could have dragged on for years after the appeal. The benefits of a guaranteed recovery today outweigh an uncertain result three or more years in the future. Blumenthal Decl. ¶8(c).

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

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

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

1 *Id.* at *12.

2 7. The Amount Offered in Settlement

3 The Settlement in this case is fair, reasonable and adequate considering Defendant's defenses
4 to Plaintiffs' claims. As detailed during preliminary approval, the Gross Settlement Amount compares
5 favorably to the value of the claims.

6 The calculations to compensate for the amount due for the nonpayment of wages at the time this
7 Settlement was negotiated were calculated by DM&A, Plaintiffs' damage expert. For the employees
8 whose claims are at issue in the Action, Plaintiffs used DM&A to analyze the data and determine the
9 potential unpaid wages for the employees. For the Class, Plaintiffs determined that Defendant was
10 subject to maximum liability for damages in the amount of \$6,550,259, consisting of \$493,837 for
11 unpaid wages resulting from the regular rate violations, \$3,747,532 for meal period damages, and
12 \$2,308,890 for unpaid off the clock wages. Blumenthal Decl. ¶8(d).

13 Consequently, the settlement of \$1,780,000.00 represents more than 27% of the value of the
14 maximum damages at issue, assuming all of these amounts could be proven at trial. However, during
15 mediation, Plaintiffs learned that these estimates were inflated. For example, an analysis of the push
16 button data revealed that meal period violations could be as low as 1.6% of the total workdays, which
17 is significantly lower than the 42% violation rate used in the above expert valuation. Further, with
18 respect to the off-the-clock work valuation, Plaintiffs used 1 hour of unpaid work per week in the
19 valuation, however, Defendant argued that any off-the-clock work was far lower on average. Given
20 the amount of the settlement as compared to the potential value of claims in this case, the settlement
21 is fair and reasonable.⁴ Blumenthal Decl. ¶8(d).

22 Clearly the goal of this litigation to obtain redress for the class has been met by this settlement.
23 Given the amount of the Settlement, the risks of litigation and the arm's length negotiations between
24

25 ⁴ See *Glass*, at *13 (approving settlement which "constituted 25 to 35% of the amount of
26 damages"); *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
27 (approving settlement which represented "roughly one-sixth of the potential recovery");
28 *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (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.")

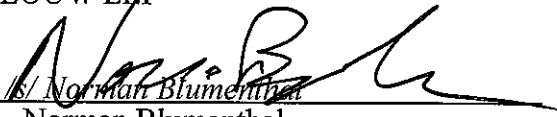
1 experienced counsel, the settlement is fair and reasonable, and is therefore entitled to final approval.

2
3 **V. CONCLUSION**

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

7
8 Dated: January 9, 2019

BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP

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10 By: 
11 Norman Blumenthal
12 Attorneys for Plaintiffs
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