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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA**

KRISTINA MURDOCK, NOEL
HUDSON, and ALEXANDRA SOTO
on behalf of themselves and on behalf
of all persons similarly situated,

Plaintiffs,

vs.

ASPEN SURGERY CENTER, LLC, a
Limited Liability Company;
SURGERY PARTNERS, INC., a
Corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No. **MSC21-02047**

[Consolidated with Case No. MSC21-02137]

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

Hearing Date: August 22, 2024

Hearing Time: 9:00 a.m.

[Hearing scheduled by Order dated April 9, 2024]

Judge: Hon. Charles S. Treat
Dept.: 12

Action Filed: October 1, 2021

Trial Date: Not set

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1 **I. INTRODUCTION**

2 The parties to this action have reached a Settlement and the Court preliminarily approved the
3 Class Action and PAGA Settlement Agreement (the “Agreement”), a true and correct copy of which
4 is attached as Exhibit #2 to the Declaration of Norman Blumenthal (“Blumenthal Decl.”).¹ In
5 accordance with the Preliminary Approval Order dated April 9, 2024 (“Preliminary Approval Order”),
6 the approved Class Notice has been disseminated to the Class.²

7 The purpose of this hearing is to determine whether the proposed settlement of the litigation
8 should be finally approved. Plaintiffs Kristina Murdock, Noel Hudson and Alexandra Soto (“Plaintiffs”)
9 respectfully move for final approval, including attorneys’ fees, costs and the service award, and the
10 proposed entry of the Final Approval Order and Judgment, submitted herewith. The settlement
11 represents an excellent result for the Class and avoids the delays, risks, and costs of further litigation.
12 After disseminating the notice to the 1,678 members of the Class, there were **no objections** and only
13 two requests for exclusion from the Class, which means that nearly the entire Class (99.88%) has
14 elected to participate in the Settlement. Blumenthal Decl. ¶4. This is a positive response from the Class
15 evidencing their collective approval of the settlement. As a result, Plaintiffs respectfully submit that
16 the settlement should be finally approved for the same reasons that the Court preliminarily approved
17 the settlement as fair, reasonable, and adequate.

18 **II. THE SETTLEMENT BEFORE THE COURT**

19 As consideration for this Settlement, the Total Settlement Amount to be paid by Defendants
20 Aspen Surgery Center, LLC and Surgery Partners, Inc. ("Defendants") is Three Million Dollars
21 (\$3,000,000) (the "Gross Settlement Amount") is to be paid by Defendants, as set forth in the
22 Agreement. Under the Settlement, the Gross Settlement Amount consists of the following elements:
23 (1) payment of the Individual Class Payments to the Participating Class Members; (2) Class Counsel

25 ¹ Capitalized terms are defined in the Agreement.

26 ² The “Class” consists of “all individuals who are or previously worked for Defendants in California
27 who were classified as non-exempt at any time during the Class Period, excluding non-exempt hourly
28 hospital workers employed by Heart Hospital of BK, LLC.” The “California Class Period” is defined
as “October 1, 2017 to June 11, 2023” (Preliminary Approval Order at ¶ 6.)

1 Fees Payment and Class Counsel Litigation Expenses Payment; (3) Administration Expenses Payment;
2 (4) the Class Representative Service Payments to the Plaintiffs; and (5) the PAGA Penalties payment.
3 (Agreement at ¶ 1.22.) Blumenthal Decl. ¶3(a). The Gross Settlement Amount does not include
4 Defendants' share of payroll taxes. (Agreement at ¶ 3.1.) The Gross Settlement Amount shall be all-in
5 with no reversion to Defendants. (Agreement at ¶ 3.1.) Blumenthal Decl. ¶3(b). The following is a
6 table of the key financial terms of the Settlement and the proposed deductions:

7 **\$3,000,000** (Gross Settlement Amount)

- 8 - \$30,000 (Plaintiffs' proposed service award not to exceed \$10,000 each)
- 9 - \$22,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
- 10 - \$1,000,000 (Class Counsel Fees Payment - not to exceed 1/3 of settlement)
- 11 - \$60,000 (PAGA Payment - 75% to LWDA / 25% to Aggrieved Employees)
- 12 - \$21,950 (Administration Expenses Payment - not to exceed amount)

13 **\$1,866,050** (Net Settlement Amount)

14 The specific details of the Settlement were discussed in the Motion for Preliminary Approval and are
15 set forth again in the Declaration of Blumenthal at ¶¶ 3(c)-3(i).

16 The Settlement is fair, adequate and reasonable to the class and should be finally approved for
17 the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement
18 is "fair, adequate, and reasonable". (Preliminary Approval Order at ¶ 3.) In sum, the Settlement valued
19 at \$3,000,000 is an excellent result for the Class. This result is particularly favorable in light of the fact
20 that liability and class certification in this case were far from certain in light of the defenses asserted
21 by Defendants. Given the complexities of this case, the defenses asserted, the uncertainty of class
22 certification, along with the uncertainties of proof at trial and appeal, the proposed settlement is fair,
23 reasonable and adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

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

The court must decide whether the proposed settlement falls within the range of reasonable

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

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

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

16 The Court must determine whether the settlement is fair, adequate, and reasonable. *Dunk v.*
17 *Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); *see also Officers for Justice v. Civil Service*
18 *Com'n*, 688 F.2d 615, 625 (9th Cir. 1982). The trial court has broad discretion to determine whether
19 the settlement is fair. *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). “The
20 well-recognized factors that the trial court should consider in evaluating the reasonableness of a class
21 action settlement agreement include 'the strength of plaintiffs' case, the risk, expense, complexity and
22 likely duration of further litigation, the risk of maintaining class action status through trial, the amount
23 offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience
24 and views of counsel, the presence of a governmental participant, and the reaction of the class members
25 to the proposed settlement.’” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008)
26 (internal citations omitted); *see also Munoz v. BCI Coca-Cola Bottling Co. of L. A.*, 186 Cal. App. 4th
27 399, 408 (2010).

28 The list of factors is not exhaustive and should be tailored to each case. *Dunk, supra*, at 1801.

1 Due regard should be given to what is otherwise a private consensual agreement between the parties.
2 *Id.* The inquiry “must be limited to the extent necessary to reach a reasoned judgment that the
3 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties,
4 and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Id.*
5 “Ultimately, the [trial] court's determination is nothing more than 'an amalgam of delicate balancing,
6 gross approximations and rough justice.' [Citation omitted.]” *Id.*

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

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

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

12 Over the course of more than three years of litigation, the Parties engaged in the investigation
13 of the claims, including the production of documents, class data, and other information, allowing for
14 the full and complete analysis of liabilities and defenses to the claims in this Action. The procedural
15 history and investigation performed was detailed at length in support of the motion for preliminary
16 approval. The Settlement was the product of one arms-length mediation and contentious negotiations
17 through an all-day mediation presided over by Hon. Carl J. West (Ret.). The details of the litigation are
18 set forth in the Blumenthal Decl. at ¶¶ 6(a)-6(g).

19 2. The Settlement was Reached Through Arm’s Length Bargaining

20 This settlement is the result of extensive and hard-fought litigation as well as negotiations before
21 an experienced and well-respected mediator. Defendants have expressly denied and continue to deny
22 any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiffs and Class
23 Counsel have determined that it is desirable and beneficial to the Class to resolve the Released Class
24 Claims of the Class in accordance with this Settlement, based upon the experience of Class Counsel
25 who has previously litigated similar claims against other employers. Blumenthal Decl. ¶7(a).

26 The Parties attended an arms-length mediation session with Hon. Carl J. West (Ret.), a respected
27 jurist and experienced mediator of wage and hour class actions, in order to reach this Settlement. In
28 preparation for the mediation, Defendants provided Class Counsel with payroll and employment data

1 and other information regarding the Class Members, various internal documents, and other
2 compensation and employment-related materials. Class Counsel analyzed the data with the assistance
3 of damages expert Berger Consulting and prepared and submitted a mediation brief to the mediator.
4 Following this all-day mediation, the Parties agreed to this Settlement. Blumenthal Decl. ¶7(b).

5 The fact that the settlement was negotiated with the assistance of an experienced mediator
6 supports approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS*
7 *Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 at *15 (N.D. Cal. 2007) (where settlement was “negotiated
8 and approved by experienced counsel on both sides of the litigation, with the assistance of a
9 well-respected mediator” this factor supports approval of the settlement”).

10 From May 2023 to September 2023, the settlement agreement and exhibits thereto were
11 finalized and executed. On April 9, 2024, the Court granted the Motion for Preliminary Approval, and
12 entered the Order granting preliminary approved of the settlement as fair and reasonable to the Class.
13 Blumenthal Decl. ¶7(c).

14 3. Class Counsel is Experienced in Similar Litigation

15 Class Counsel in this matter has extensive class action experience and has represented thousands
16 of persons in class actions including employment litigation, wage and hour class actions, and complex
17 litigation. Class Counsel has previously litigated wage and hour class actions involving employees and
18 claims similar to this case and have been approved as experienced class counsel during contested
19 motions in state and federal courts throughout California. The experience of counsel and class action
20 cases managed and settled by the Class Counsel in this action is provided to the Court in the Blumenthal
21 Decl. at Exhibit #1. Class Counsel have participated in every aspect of the settlement discussions and
22 have concluded the settlement is fair, adequate and reasonable and in the best interests of the Class.
23 Blumenthal Decl. ¶ 3(j).

24 4. There Are No Objections and Only A Few Requests for Exclusion

25 The reaction of the Class unequivocally supports approval of the Settlement. On May 8, 2024,
26 the Administrator mailed the Court-approved Class Notice to the Class Members, which provided each
27 class member with the terms of the Settlement, including notice of the claims at issue and the financial
28 terms of the settlement, including the attorneys' fees, costs, and service awards that were being sought,

1 how individual settlement awards would be calculated, and the specific, estimated payment amount to
2 that individual. See Declaration of Stephanie Molina [“Molina Decl.”], ¶ 8, Exh. A. In disseminating
3 the notice, the Administrator followed the notice procedures authorized by the Court in its Preliminary
4 Approval Order. Significantly, there have been no objections and only two (2) requests to opt-out from
5 the Settlement. Molina Decl. ¶¶13-14. As such, nearly the entire Class (99.88%) will participate in the
6 Settlement and will be sent a settlement check. See Molina Decl. at ¶¶ 17-19; Blumenthal Decl. ¶4.

7 The absence of any objector strongly supports the fairness, reasonableness and adequacy of the
8 Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175
9 (S.D.N.Y. 2000) (“If only a small number of objections are received, that fact can be viewed as
10 indicative of the adequacy of the settlement.”); *Stoetznerv. U.S. Steel Corp.*, 897 F.2d 115, 118-119 (3d.
11 Cir. 1990) (29 objections out of 281 member class “strongly favors settlement”); *Laskey v. Int’l Union*,
12 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
13 settlement should be considered when determining fairness of settlement). Here, where there are no
14 objections, the approval of the class is evident.

15 5. The Strength of Plaintiffs’ Case

16 The Action generally alleges that Plaintiffs and other Class Members were not properly paid all
17 minimum and overtime wages for hours worked and at the correct rate, were not provided meal and rest
18 periods, were not timely paid earned wages, were not provided reimbursement for required expenses,
19 were not provided accurate itemized wage statements, and were not paid all wages at the time of
20 termination. The Action seeks unpaid wages, penalties, attorney fees, litigation costs, and any other
21 equitable or legal relief allegedly due and owing to Plaintiffs and the other Class Members by virtue of
22 the foregoing claims. Blumenthal Decl. ¶5.

23 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
24 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
25 Defendants present serious threats to the claims of the Plaintiffs and the other Class Members.
26 Defendants asserted that Defendants’ practices complied with all applicable Labor laws. Defendants
27 argued that Class Members were paid for all time worked, that all work time was properly recorded, and
28 that the alternative work schedule was lawful. Defendants contend that its meal and rest period policies

1 fully complied with California law and Defendants did not fail to provide the opportunity for legally
2 required meal and rest breaks. Defendants could argue that its payment of significant meal period
3 premiums is evidence of lawful practices. Defendants contend that there was no failure to pay for
4 business expenses and any cell phone usage was merely convenient and voluntary such that
5 reimbursement was not legally required. Finally, Defendants could argue that the Supreme Court
6 decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), weakened Plaintiffs' claims, on liability,
7 value, and class certifiability as to the meal and rest period claims. Defendants also argue that based
8 on its facially lawful practices, Defendants acted in good faith and without willfulness, which if
9 accepted would negate the claims for waiting time penalties and/or inaccurate wage statements. If
10 successful, Defendants' defenses could eliminate or substantially reduce any recovery to the Class.
11 While Plaintiffs believe that these defenses could be overcome, Defendants maintain these defenses
12 have merit and therefore present a serious risk to recovery by the Class. Blumenthal Decl. ¶8(a).

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

15 Plaintiffs may have a strong case, but the risks inherent in continued litigation are great.
16 Defendants strongly deny liability for Plaintiffs' principal claim... [...T]he gross
17 settlement amount and the Class Members' expected net recovery, after fees and other
costs are deducted, appear to be a reasonable compromise, in light of the risks of
litigation.

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

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

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

1 There was also a significant risk that, if the Action was not settled, Plaintiffs would be unable
2 to obtain a certified class and maintain the certified class through trial, and thereby not recover on behalf
3 of any employees other than themselves. At the time of the mediation, Defendants forcefully opposed
4 the propriety of class certification, arguing that individual issues precluded class certification. Further,
5 as demonstrated by the California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59
6 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class-wide recovery even where the
7 class has been certified. While other cases have approved class certification in wage and hour claims,
8 class certification in this action was hotly disputed and the maintenance of a certified class through trial
9 was by no means a foregone conclusion. Blumenthal Decl. ¶8(b).

10 In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant
11 recovery, particularly when viewed in light of the fact that the Defendant asserted serious and
12 substantial defenses both to liability and to class certification. The maximum and average Participating
13 Class Member are \$3,416.36 and 1,112.07, respectively. *See* Molina Decl. ¶19. Given the complexities
14 of this case, the defenses, along with the uncertainties of proof and appeal, the proposed Settlement is
15 fair, reasonable and adequate, and should be finally approved. Blumenthal Decl. at ¶8(e).

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

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

23 Plaintiffs and Class Counsel recognize the expense and length of a trial against Defendant
24 through possible appeals which could take at least another two or three years. Class Counsel also have
25 taken into account the uncertain outcome, the risk of litigation, especially in complex actions such as
26 this one. Class Counsel are also mindful of and recognize the inherent problems of proof under, and
27 alleged defenses to, the claims asserted in the Action. Moreover, post-trial motions and appeals would
28 have been inevitable. Costs would have mounted and recovery would have been delayed if not denied,

1 thereby reducing the benefits of an ultimate victory. The Settlement confers substantial benefits upon
2 the Class. Based upon their evaluation, Plaintiffs and Class Counsel have determined that the
3 Settlement set forth in the Agreement is in the best interest of the Class. Blumenthal Decl. ¶8(c).

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

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

16 *Id.* at *12.

17 7. The Amount Offered in Settlement

18 The Settlement in this case is fair, reasonable and adequate considering Defendants' defenses
19 to Plaintiffs' claims. As set forth in the Declaration of Nordrehaug in support of preliminary approval
20 which discussed the value of the class claims in detail, the Gross Settlement Amount compares
21 favorably to the value of the claims. Based upon 1,678 Class Members who collectively worked
22 162,224 Workweeks, the Gross Settlement Amount provides an average value of \$1,787 per Class
23 Member and \$18.49 per Workweek and after deductions the Net Settlement Amount provides an
24 average recovery of \$1,112.06 per Class Member and a recovery of \$11.50 per Workweek. Blumenthal
25 Decl. at ¶8(d).

26 The calculations to compensate for the amount due for the Class at the time of the mediation
27 were calculated by Berger Consulting, Plaintiffs' damage expert. As to the Class whose claims are at
28 issue in this Action, Plaintiffs used the expert to analyze the data and determine the potential unpaid
wages for the employees. The maximum potential damages were calculated to be \$2,298,202 for the
alleged unpaid wages due to the alternative work schedule, \$1,070,877 for the alleged unpaid wages
due to reporting time, \$7,016,029 for the alleged unpaid wages due to off-the-clock work at 1 hour per

1 week, \$77,817 for the alleged unpaid wages due to the regular rate miscalculation applicable to
2 overtime, meal premiums and sick pay, \$544,984 for alleged meal period damages based upon a 15.8%
3 potential violation rate for shifts worked and after deducting the meal premiums actually paid by
4 Defendant, \$3,035,361 for alleged rest period damages based upon the same potential 15.8% violation
5 rate observed for meal periods, \$184,402 for alleged unreimbursed business expenses for personal cell
6 phone usage at \$5 per month. As a result, the total damage valuation was calculated that Defendant was
7 subject to a maximum damage claim in the amount of \$14,227,672. As to potential penalties, Plaintiffs
8 calculated that potential waiting time penalties were a maximum of between \$1,100,557 and \$2,861,447
9 and potential maximum wage statement penalties were between \$141,000 and \$2,416,000, both
10 depending on the predicate violation giving rise to the penalty.³ Defendants vigorously disputed
11 Plaintiffs' calculations and exposure theories.

12 Consequently, the Gross Settlement Amount of \$3,000,000 represents more than 21% of the
13 maximum value of the alleged damages at issue in this case at the time this Settlement was negotiated.⁴
14 Importantly, the recent decision that good faith belief of compliance by the employer in *Naranjo v.*
15 *Spectrum Sec. Servs., Inc.*, 15 Cal. 5th 1056, 1065 (2024), could completely negate the claims for
16 waiting time and wage statement penalties, even if wages were owed to the class. The above maximum
17 calculations should then be adjusted in consideration for both the risk of class certification and the risk
18 of establishing class-wide liability on all claims. Given the amount of the settlement as compared to
19 the potential value of claims in this case and the defenses asserted by Defendant, this settlement is fair
20 and reasonable.⁵ Clearly, the goal of this litigation has been met. Blumenthal Decl. ¶8(d).

21
22 ³ 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 See *Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There is no willful failure to
pay wages if the employer and employee have a good faith dispute as to whether and when the wages
were due.").

25 ⁴ Because the PAGA claim is not a class claim and primarily is paid to the State of California, the
26 PAGA claim is not included in the value of the class claims. The PAGA claim was addressed in the
27 Declaration of Nordrehaug at ¶33 filed in support of the Motion for Preliminary Approval.

28 ⁵ See *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. 2007) (approving a
settlement where the settlement amount constituted approximately 25% of the estimated overtime

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

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

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

14 The California Supreme Court has provided guidance regarding the award of attorneys' fees in
15 wage and hour class action settlements. Under California law, the award of attorneys' fees in common
16 fund wage and hour class action settlements should start with the percentage method. See *Laffitte v.*
17 *Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state
18 courts in holding that when class action litigation establishes a monetary fund for the benefit of the class
19 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court
20 may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund
21 created"). Under the percentage of the fund method, a court's objective remains to "mimic the market"
22 in fixing a reasonable fee. See *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998).

23 _____
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
26 approximately 10% of what class might have been awarded had they succeeded at trial."); *Dunleavy v.*
27 *Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) (affirming approval of
28 a class settlement which represented "roughly one-sixth of the potential recovery".) See also *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 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 maximum valuation).

1 First, the fee award representing one-third of the fund clearly falls within that range and is
2 consistent with other rulings of other courts and comprehensive surveys of class action settlements and
3 fee awards. Attorneys' fees awards of one-third of the fund are within the expected range in the market
4 in legal services. See Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Award*,
5 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and concluding that
6 "[m]ost fee awards were between 25 percent and 35 percent"). In *Laffitte v. Robert Half Int'l*, 1 Cal.
7 5th 480, 503 (2016), The California Supreme Court both (1) joined the majority of federal and state
8 courts in holding that when class action litigation establishes a monetary fund for the benefit of the class
9 members, the trial court in its equitable powers awards class counsel a fee out of that fund, and (2)
10 expressly approved of one-third as a reasonable percentage in a contingent common fund class
11 settlement. Such similar awards by other Courts are set forth in the Blumenthal Decl. ¶11.

12 Second, the results delivered by Class Counsel also support the requested percentage of the fund.
13 Here, Plaintiffs and their counsel secured a \$3,000,000 settlement for the benefit of the Class and very
14 few of the Class Members elected to opt out. Similarly, not one Class Member objected. The
15 Settlement was possible only because Class Counsel was able to convince Defendants that Plaintiffs
16 could potentially prevail on the contested issues regarding liability, maintain class certification,
17 overcome difficulties in proof as to monetary relief and take the case to trial if need be. Blumenthal
18 Decl. ¶10(f). In successfully navigating these hurdles Class Counsel displayed the necessary skills in
19 both wage and hour and class action litigation. Moreover, as discussed above, there were significant
20 risks to the contingent litigation. See *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449
21 (E.D. Cal. 2013) ("**Like this case, where recovery is uncertain, an award of one-third of the**
22 **common fund as attorneys' fees has been found to be appropriate.**")

23 Third, "the response of the class members to attorneys' fee notice, though not decisive, is
24 relevant to the ... reasonable determination" regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d 1261,
25 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court's "approximation of the
26 market" for fees is well supported. *Id.* at 1269. Here, the Class Notice specifically notified the Class that
27 Class Counsel would be seeking a one-third fee award. Again, there were no objections.
28

1 Fourth, it is recognized that one of the primary factors justifying an enhanced attorney's fees
2 reward is the attendant risks inherent in the litigation. As observed in *City of Detroit v. Grinnell Corp.*:

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

7 495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a settlement fund of \$3,000,000 has been created.
8 For Class Counsel, the fees here were wholly contingent in nature and the case presented far more risk
9 than the usual contingent fee case. Among the risks was the cost inherent in class action litigation, as
10 well as a long battle with a corporate Defendant who had retained a premier and highly experienced
11 defense firm. **Counsel retained on a contingency fee basis, whether in private matters or in class
12 action litigation, is entitled to a premium above their hourly rate in order to compensate for both
13 the risks and the delay in payment.** See e.g. *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741
14 (9th Cir. 2016) (courts "must" apply a risk enhancement); *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th
15 Cir. 2016) (abuse of discretion not to apply risk multiplier).

16 Fifth, the requested fee award is supported by the lodestar cross-check. The reasonableness of
17 the requested attorneys' fee of one-third equal to \$1,000,000 is also established by reference to Class
18 Counsel's lodestar in this matter. The contemporaneous billing records for Class Counsel evidence that
19 through July 31, 2024, Class Counsel's total lodestar is \$315,460.00, with significant additional fees
20 still to be incurred to complete final approval and the settlement process. (Blumenthal Decl. at ¶12 and
21 Exhibits #3 and 4.) The requested fee award is therefore currently equivalent to Class Counsel's total
22 lodestar with a reasonable multiplier of less than 3.2, and there will be additional lodestar incurred by
23 Class Counsel to complete the settlement process and manage the settlement distribution and reports.
24 (Blumenthal Decl. at ¶12.) Such a multiplier is within the range of multipliers approved in *Laffitte* and
25 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002).⁶

26 ⁶ See *Laffitte*, *supra*, 1 Cal. 5th at 487 (approving 1/3 fee award with multiplier of 2.13); *Vizcaino*
27 *supra*, at 1051(3.65 multiplier approved); *Pellegrino v. Robert Half Intern., Inc.*, 182 Cal.App.4th 278
28 (2010) (in class actions reasonable multipliers of 2.0 to 4.0 are often applied); *Wershba*, 91 Cal. App.
4th at 255 ("multipliers can range from 2 to 4 or even higher."); *In re Sutter Health Uninsured Pricing*
Cases, 171 Cal.App.4th 495, 512 (2009) (affirming multiplier of 2.52 as "fair and reasonable"); *Chavez*

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

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

4 The Agreement provides at paragraph 3.2(b), that Class Counsel may seek a "Class Counsel
5 Litigation Expenses Payment of not more than \$22,000." Class Counsel requests reimbursement for
6 incurred litigation expenses and costs in the amount of \$18,922.12. Class Counsel have incurred
7 \$18,922.12 based upon counsel's billing records; therefore, this requested amount is less than the
8 allocation in the Agreement. These litigation expenses include the expenses incurred for filing fees,
9 mediation expenses, expert expenses (Berger Consulting), and attorney service charges (Knox,
10 OneLegal, File&Serve Express), research charges (LexisNexis), and appearance fees, all of which are
11 costs normally billed to and paid by the client.⁷ The details of the litigation expenses incurred are set
12 forth the Blumenthal Decl. at ¶13 and Exhibits #3 and 4. These costs were reasonably incurred in the
13 prosecution of the Action. (Blumenthal Decl. at ¶13.) Because these costs were reasonable and
14 necessary to the successful prosecution of these claims, the request is reasonable and should be granted.

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

16 Plaintiffs respectfully submit that for their service as the class representatives, Plaintiffs should
17 be awarded the agreed service award of \$10,000 each, in accordance with the Agreement for their time,
18 risk and effort expended on behalf of the Class as the class representatives. (Agreement at ¶ 3.2(a).)
19 Defendants have agreed to this payment and there have been no objections to the requested service
20 awards. The Blumenthal Decl., at ¶14, provides a long list of equivalent service awards approved in
21 California in similar cases, which further supports the request in this case. The Plaintiffs' Declarations
22

23 _____
24 *v. Netflix, Inc.*, 162 Cal.App.4th 43, 66 (2008) (affirming multiplier of 2.53 as well within the approved
25 range of 2 to 4); *Taylor v. Fedex Freight, Inc.*, 2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016) (2.26
multiplier).

26 ⁷ Nontaxable costs are properly awarded where authorized by the parties' agreement. *Stetson*, 821
27 F.3d at 1165. Accordingly, "[e]xpenses such as reimbursement for travel, meals, lodging,
28 photocopying, long-distance telephone calls, computer legal research, postage, courier service,
mediation, exhibits, documents scanning, and visual equipment are typically recoverable." *Rutti v.*
Lojack Corp., Inc., 2012 WL 3151077, at *12 (C.D. Cal. 2012).

1 in support of these requests are attached as Exhibits #6, 7 and 8 to the Blumenthal Decl.

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

12 The payment of service awards to successful class representatives is appropriate and the amount
13 of \$12,500 is within the currently awarded range for similar settlements. *See, e.g., Andrews v. Plains*
14 *All Am. Pipeline L.P.*, 2022 U.S. Dist. LEXIS 172183, at *11 (C.D. Cal. 2022) (finding service awards
15 of \$15,000 are appropriate); *Reynolds v. Direct Flow Med., Inc.*, 2019 U.S. Dist. LEXIS 149865, at *19
16 (N.D. Cal. 2019) (granting \$12,500 service award); *Mathein v. Pier I Imps. (U.S.), Inc.*, 2018 U.S. Dist.
17 LEXIS 71386 (E.D. Cal. 2018) (awarding \$12,500 where average class member payment was \$351);
18 *Louie v. Kaiser Foundation Health Plan, Inc.*, 2008 WL 4473183, *7 (S.D. Cal. Oct. 06, 2008)
19 (\$25,000 service award to each of six plaintiffs); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17
20 (N.D. Cal. 2007) (awarding \$25,000 service award). Accordingly, Class Counsel respectfully request
21 approval of the requested Class Representative Service Payments in accordance with the Agreement.

22 **VI. CONCLUSION**

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

26 Respectfully submitted,

27 Dated: July 31, 2024

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