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7 Attorneys for Plaintiff JESSE GIL and individually  
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9

10 **SUPERIOR COURT OF CALIFORNIA**

11 **FOR THE COUNTY OF FRESNO**

12  
13 JESSE GIL and DANIEL AYALA,  
14 individually and on behalf of all other  
similarly situated employees,

15 Plaintiffs,

16 vs.

17 OUTBACK, INC., a California Corporation;  
18 and DOES 1 to 100, inclusive,

19 Defendants.  
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**Case No. 21CECG03273**

*Assigned for All Purposes to Hon. Jon M. Skiles  
Department 503*

**CLASS ACTION**

**PLAINTIFFS' NOTICE OF MOTION AND  
MOTION FOR PRELIMINARY APPROVAL  
OF CLASS ACTION AND PAGA  
SETTLEMENT**

Date: July 3, 2025

Time: 3:30 p.m.

Dept.: 503

Judge: Hon. Jon M. Skiles

Filed: November 3, 2021

FAC Filed: January 24, 2024

SAC Filed: November 20, 2024

Trial Date: None Set

1 David Alami (State Bar No. 314628)  
2 Daniel J. Hyun (State Bar No. 309184)  
3 Shaheen A. Etemadi (State Bar No. 319138)

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8 Attorneys for Plaintiff DANIEL AYALA individually  
9 and on behalf of similarly situated employee  
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1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on July 3, 2025, at 3:30 p.m., or as soon thereafter as the matter  
3 may be heard in Department 503 of the above-entitled Court, Plaintiffs Jesse Gil and Daniel Ayala,  
4 individually and on behalf of all other similarly situated individuals, will move for entry of an Order for  
5 the following:

- 6 1. Preliminarily certifying the proposed class herein for purposes of settlement;
- 7 2. Preliminarily appointing Plaintiffs Jesse Gil and Daniel Ayala as Class Representatives for  
8 purposes of settlement;
- 9 3. Preliminarily appointing Shimoda & Rodriguez Law, PC, and Torus LLP as Class Counsel  
10 for purposes of settlement;
- 11 4. Preliminarily approving the proposed class action and Private Attorney's General Act  
12 settlement, in the amount of \$367,500, which is incorporated herein by reference;
- 13 5. Preliminarily approving attorney's fees in an amount not to exceed 35% of the Gross  
14 Settlement Amount;
- 15 6. Preliminarily approving attorney's costs in an amount not to exceed \$15,000;
- 16 7. Preliminarily approving the appointment of ILYM Group, Inc., as the Settlement  
17 Administrator and for payment to ILYM Group, Inc. for administering said class action  
18 settlement in an amount not to exceed \$12,500;
- 19 8. Preliminarily approving the settlement of claims under the Private Attorneys General Act for  
20 the total amount of \$20,000, 75% of which will be paid to the Labor and Workforce  
21 Development Agency and 25% of which will be paid to Aggrieved Employees;
- 22 9. Approving as to form and content the Notice of Settlement, which provides Class Members  
23 information regarding the Settlement, their ability to opt out of, or object to, the Settlement,  
24 and which provides instruction on how to dispute an individual's settlement allocation under  
25 the proposed Settlement;
- 26 10. Approving the proposed procedures to notify the class and determining that they comply with  
27 Class Members' due process rights and directing the Notice of Settlement to be sent by first  
28 class mail to Class Members;

- 1 11. Directing Defendant to report employment information as set forth in the Agreement to the  
2 Settlement Administrator to administer the settlement proceeds;  
3 12. Scheduling a fairness hearing on the question of whether the proposed Settlement should be  
4 finally approved as fair, reasonable, and adequate;  
5 13. Directing that any funds from settlement checks that were not cashed by the check cashing  
6 deadline be donated equally, *i.e.* 50/50, to Capital Pro Bono, Inc., and the Center for Workers  
7 Rights under the doctrine of *cy pres*; and  
8 14. Preliminarily approving and adopting the Proposed Order and its implementation schedule,  
9 which is filed herewith and incorporated by reference.

10 This motion is being made pursuant to Code of Civil Procedure section 382, Labor Code section  
11 2699(1)<sup>1</sup>, and California Rules of Court 3.769 and 3.764, on the grounds that the proposed class action  
12 and Private Attorneys General Act settlement is fair, reasonable, and adequate for all Class Members  
13 and should be approved by the Court. This motion will be based on the notice of motion, memorandum  
14 of points and authorities, the Declaration of Justin P. Rodriguez, the Declaration of David Alami, the  
15 Declaration of Jesse Gil, the Declaration of Daniel Ayala, exhibits, the record and files of this case, and  
16 any further oral or documentary evidence introduced at the hearing of this motion.

17 **Pursuant to Local Rule 2.2.5, the court follows the tentative ruling procedure set forth in Rule**  
18 **3.1308(a)(1) of the California Rules of Court. A tentative ruling on civil law and motion matters**  
19 **may be obtained by telephoning the court at (559) 457-4943 between 3:00 p.m. and 4:00 p.m. the**  
20 **day before the hearing or by accessing tentative rulings on the court's website**  
21 **(<https://www.fresno.courts.ca.gov/online-services/tentative-rulings>), which will be available at 3:00**  
22 **p.m. the day before the hearing. If a party wishes to appear for oral argument, the notice to be**  
23 **given to the court, as required by Rule 3.1308(a)(1) of the California Rules of Court, must be given**  
24 **by telephone to the clerk in the department to which the matter is assigned for hearing.**

25 Dated: June 10, 2025

Shimoda & Rodriguez Law, PC

26 By: \_\_\_\_\_

Galen T. Shimoda

Justin P. Rodriguez

Renald Konini

Attorneys for Plaintiffs

27  
28 <sup>1</sup> Although the PAGA was recently amended, the amendments specifically state they are applicable to cases filed after June 19, 2024. *See* Cal. Lab. Code § 2699(v)(1). Because the PAGA notices in this case predate this, all references to the PAGA in this Motion will be based on the statutory numbering applicable prior to the July 1, 2024, amendment.



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7 Attorneys for Plaintiff JESSE GIL individually  
and on behalf of similarly situated employees

8 [additional parties continued on next page]  
9

10 **SUPERIOR COURT OF CALIFORNIA**  
11 **FOR THE COUNTY OF FRESNO**

12 JESSE GIL and DANIEL AYALA,  
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14 similarly situated employees,

15 Plaintiffs,

16 vs.

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18 and DOES 1 to 100, inclusive,

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**Case No. 21CECG03273**

*Assigned for All Purposes to Hon. Jon M. Skiles  
Department 503*

**CLASS ACTION**

**MEMORANDUM OF POINTS &  
AUTHORITIES IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY APPROVAL  
OF CLASS ACTION AND PAGA  
SETTLEMENT**

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## I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT

Plaintiffs Jesse Gil (“Plaintiff Gil”) and Daniel Ayala (“Plaintiff Ayala”) (Plaintiff Gil and Plaintiff Ayala sometimes collectively referred to as “Plaintiffs”) seek preliminary approval of a non-reversionary wage and hour class action and Private Attorneys General Act (“PAGA”) settlement in the gross amount of \$367,500.<sup>1</sup> *See generally* Exhibit A (Joint Stipulation Regarding Class Action and PAGA Settlement and Release [“Agreement”]). In the operative Complaint, Plaintiffs allege that Defendant Outback, Inc. (“Defendant”) (Plaintiffs and Defendant sometimes collectively referred to as the “Parties”), has committed several wage and hour violations against them and a class of similarly situated non-exempt employees. *See generally* Exhibit B (Plaintiffs’ Operative Complaint).

Plaintiffs have alleged that Defendant (1) failed to pay overtime wages, (2) failed to pay minimum wages, (3) failed to provide meal periods or pay premiums in lieu thereof, (4) failed to provide rest periods or pay premiums in lieu thereof, (5) failed to provide accurate wage statements, (6) failed to pay all final wages owed, (7) failed to reimburse expenses incurred, (8) failed to pay all wages owed, (9) failed to provide recovery periods, and (10) engaged in unfair competition. *See generally* Exhibit B; *see also* Declaration of Justin P. Rodriguez (“Decl. Rodriguez”), ¶¶ 2, 11. Plaintiffs have also alleged Defendant is liable for civil penalties under the PAGA. *See* Decl. Rodriguez, ¶¶ 2-4; Declaration of David Alami (“Decl. Alami”), ¶ 8; Exhibit C (Plaintiffs’ Ltrs. to the Labor and Workforce Development Agency [“LWDA”] Regarding PAGA Claims). Defendant has denied all of Plaintiffs’ allegations in their entirety and any liability or wrongdoing of any kind. *See* Decl. Rodriguez, ¶ 8. Defendant has also denied that this case is appropriate for class certification other than for purposes of settlement. *See id.* However, subject to Court approval, the Parties have been able to compromise and settle all asserted claims as a result of extensive investigations, document and data exchanges, and extended negotiations. *See* Exhibit A. Plaintiffs and Plaintiffs’ counsel believe the proposed Agreement is fair, reasonable, and adequate based on the investigations, discovery, employee

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<sup>1</sup> Plaintiffs previously filed a motion for preliminary approval, which was heard on May 13, 2025. Although the minute order issued after hearing stated that the Court intended to grant certification of the class for purposes of settlement, that the Settlement was shown to be fair, reasonable, and adequate, that the proposed class notice was adequate, and that intended to preliminarily approve the incentive awards to the Plaintiffs and litigation costs, Plaintiffs motion was denied without prejudice because additional information was needed regarding attorney’s fees and for clarifying the cost of settlement administration. Because the minute order did not state Plaintiffs could limit their briefing to these two issues, the motion for preliminary approval is being resubmitted in full.

1 data exchanges, negotiations, and a detailed knowledge of the issues in this case. *See* Decl. Rodriguez,  
2 ¶¶ 6, 8-12; Decl. Alami, ¶¶ 9-10; Declaration of Jesse Gil (“Decl. Gil”), ¶ 7; Declaration of Daniel  
3 Ayala (“Decl. Ayala”), ¶ 7. The Agreement was entered into in good faith by the Parties to resolve  
4 heavily contested claims and guarantees a reasonable recovery for Class Members.

5 It is well within the discretion of this Court to grant preliminary approval of the Agreement as it  
6 satisfies all applicable criteria under California law. Accordingly, Plaintiffs request that the Court: (1)  
7 certify the proposed settlement class on a preliminary and conditional basis; (2) grant preliminary and  
8 conditional approval of the proposed Agreement (Exhibit A); (3) approve the form and content of the  
9 Notice of Settlement (Exhibit F) and the method for providing notice to Class Members as set forth in  
10 the Agreement; and (4) adopt the implementation schedule contained in the proposed order.

## 11 II. PROCEDURAL AND LITIGATION HISTORY

12 Plaintiff Jesse Gil filed a notice with the LWDA on October 21, 2021, to exhaust administrative  
13 remedies and bring a claim for civil penalties under the PAGA. *See* Exhibit C; Cal. Lab. Code §  
14 2699.3(a), (c)<sup>2</sup>. Plaintiff Jesse Gil filed a wage and hour class action lawsuit in Fresno County Superior  
15 Court, Case No. 21CECG03273, on November 3, 2021 (“*Gil* Action”). Defendant removed the case to  
16 the Federal District Court for the Eastern District of California on December 22, 2021. While a motion  
17 to remand was pending, Plaintiff Jesse Gil and Defendant entered into an agreement to toll the statute  
18 of limitations with respect to any PAGA claims asserted by Plaintiff until the motion to remand was  
19 resolved rather than having Plaintiff separately file a PAGA only lawsuit in state court. *See* Decl.  
20 Rodriguez, ¶ 3. On November 3, 2023, while Plaintiff Jesse Gil’s motion to remand was still pending,  
21 Plaintiff Daniel Ayala filed a notice with the LWDA to exhaust administrative remedies under the  
22 PAGA. *See* Exhibit C. Plaintiff Daniel Ayala also filed a wage and hour class action in Fresno County  
23 Superior Court, Case No. 23CECG04940, on November 29, 2023 (“*Ayala* Action”). *See* Decl.  
24 Rodriguez, ¶ 4; Decl. Alami, ¶ 8. A First Amended Complaint was filed in the *Ayala* Action on  
25 January 11, 2024, adding a PAGA cause of action. *See* Decl. Alami, ¶ 8.

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28 <sup>2</sup> Although the PAGA was recently amended, the amendments specifically state they are applicable to cases filed after June 19, 2024. *See* Cal. Lab. Code § 2699(v)(1). Because PAGA notices predate this, all references to the PAGA in this Motion will be based on the statutory numbering applicable prior to the July 1, 2024, amendment.



1 After Plaintiff Jesse Gil's motion to remand was granted on December 5, 2023, and a First  
2 Amended Complaint including the tolled PAGA claim into the *Gil* Action was filed, the Parties agreed  
3 to attend global mediation to attempt to resolve the claims alleged in the *Gil* Action and the *Ayala*  
4 Action. *See* Decl. Rodriguez, ¶¶ 3, 6. Ultimately, the Parties were able to resolve all the asserted claims  
5 and the Court granted Plaintiffs' request to file a Second Amended Complaint in the *Gil* Action that  
6 effectively consolidated all the claims, parties, and causes of action from the *Ayala* Action into the *Gil*  
7 Action. *See id.*; Exhibit B. The Second Amended Complaint is the operative Complaint in the Action.  
8 There is no date set for a motion for certification or a trial in this matter. *See* Decl. Rodriguez, ¶ 7.

### 9 III. INVESTIGATION AND DISCOVERY CONDUCTED

10 Plaintiffs thoroughly investigated issues affecting certification, the merits of the class and  
11 PAGA claims, and potential damages for such claims. *See id.* at ¶¶ 3, 8-12; Decl. Alami, ¶¶ 9-10; Decl.  
12 Gil, ¶¶ 3, 5-8; Decl. Ayala, ¶¶ 3, 5-7. Plaintiffs worked during the time all of Defendant's policies and  
13 practices at issue in the Complaint were in effect and provided information regarding these policies and  
14 practices, enabling pre-filing investigations to take place. *See* Decl. Gil, ¶ 2; Decl. Ayala, ¶ 2. The  
15 Parties engaged in informal discovery and exchange of documents, including a representative sampling  
16 of employee data, such as timecards, paystubs, payroll data, and relevant policies for the entirety of the  
17 statute of limitations applicable to the asserted claims. The discovery covered all aspects of the  
18 asserted claims, including certification issues, merits issues, damages, the scope and configuration of  
19 Class Members, the content and implementation of the wage and hour policies at issue, and issues  
20 relating to manageability concerns at trial, among other relevant areas. *See* Decl. Rodriguez, ¶¶ 9-11.  
21 The information allowed Plaintiffs to determine the extent and frequency of any violations in  
22 accordance with Plaintiffs' contentions and create an accurate damages model to assess the  
23 reasonableness of any settlement. *See id.* at ¶¶ 9-12.

### 24 IV. NEGOTIATION AND PROPOSED SETTLEMENT

#### 25 a. Plaintiffs and Defendant Engaged in Extensive Arm's Length Negotiations

26 The final settlement occurred only after extended, arm's length negotiations. Over the course of  
27 approximately three (3) years and two separate lawsuits, Plaintiffs have been investigating the claims  
28 and discussing with Defendant's counsel the merits of the claims and issues present in this case. *See id.*

1 at ¶¶ 8-11. The Parties exchanged substantial amounts of information and legal analysis in these  
2 discussions. *See id.* It was only after these extended discussions, which included a full day mediation,  
3 a mediator’s proposal, and post-mediation negotiations after Plaintiffs rejected the mediator’s proposal,  
4 that the Parties were able resolve all claims and enter into the Agreement. *See id.* at ¶ 6.

5 **b. The Terms of the Agreement**

6 1. The following groups of individuals are covered by the Agreement: (a) Class Members,  
7 which include all individuals who have, or continue to, perform work for Defendant in California as  
8 hourly, non-exempt employees from November 3, 2017, up to December 10, 2024; and (b) Aggrieved  
9 Employees, which include all individuals who have, or continue to, perform work for Defendant in  
10 California as hourly, non-exempt employees at any time from October 21, 2020, up to December 10,  
11 2024. *See* Exhibit A, ¶¶ 1.2, 1.6. There are approximately 341 Class Members and 254 Aggrieved  
12 Employees. *See* Decl. Rodriguez, ¶ 11.

13 2. Defendant will pay the Gross Settlement Amount of \$367,500, which is exclusive of the  
14 employer’s share of payroll taxes. *See* Exhibit A, ¶ 5.1. No portion of the Gross Settlement Amount  
15 will revert to Defendant. *See id.* at ¶ 5.6. Aggrieved Employees will still be paid their share of the  
16 PAGA Payment regardless of whether they opt out of being Class Members. *See id.* at ¶¶ 7.5.1, 7.8.3.

17 3. Up to \$10,000 will be paid to each of the Plaintiffs as an Enhancement Payment. This  
18 amount will be in addition to any amount Plaintiffs may be entitled to under the terms of the  
19 Agreement. *See id.* at ¶ 5.4.

20 4. Under the Agreement, Settlement Administrator Costs shall not exceed \$12,500. *See*  
21 Exhibit A, ¶ 5.3. This amount was selected by Plaintiffs’ Counsel based on their experience with  
22 several settlement administrators in settlement administrations in other cases with a similar number of  
23 class members and/or aggrieved employees and using similar notice procedures. *See* Decl. Rodriguez,  
24 ¶ 26. Subject to Court approval, the Parties have selected ILYM Group, Inc., to act as the Settlement  
25 Administrator, who has provided a declaration stating their qualifications to act as the Settlement  
26 Administrator, the security protocols they used to ensure privacy, and a maximum cost estimate of  
27 \$8,450 for the anticipated scope of work in this case. *See* Exhibit D, ¶¶ 2-10 (ILYM Group, Inc. Bid);  
28 Exhibit A, ¶ 1.33. It is not anticipated that the actual cost of settlement administration will exceed

1 \$8,450, unless the Court were to order additional notice procedures beyond the scope of work  
2 contemplated in the bid. *See* Decl. Rodriguez, ¶ 26; Exhibit D, ¶ 10. It is important to maintain a  
3 buffer between the maximum cost estimate from a settlement administrator and the maximum amount  
4 allocated for Settlement Administrator Costs under the Agreement to avoid due process issues that can  
5 arise if additional unforeseen settlement administration costs cause the amount to exceed what Class  
6 Members are given notice of. *See Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 56 (2008) (not requiring  
7 further notice to settlement class members where change affecting the settlement's terms benefited  
8 class members). The difference between actual Settlement Administrator Costs and the maximum  
9 \$12,500 allocated under the Agreement will be paid to Participating Class Members on a pro-rata basis,  
10 increasing the amount payable to each Participating Class Member. *See* Exhibit A, ¶ 5.3; Decl.  
11 Rodriguez, ¶ 26.

12 5. The Parties agree that \$20,000 of the Gross Settlement Amount shall be allocated to  
13 resolving claims under the PAGA. Seventy-Five percent (75%) of the PAGA Payment will be paid to  
14 the LWDA and Twenty-Five percent (25%) will be paid to Aggrieved Employees. *See* Exhibit A, ¶  
15 5.5. Given the risk to proving the claims on the merits, the derivative nature of the penalties, the efforts  
16 by Defendant to maintain compliant policies and take corrective action, the presence of what may likely  
17 be deemed good faith disputes, and the Court's discretion to reduce any penalty award, the \$20,000  
18 PAGA Payment allocation represents a meaningful settlement aimed at deterring non-compliance given  
19 the facts of this case. *See* Decl. Rodriguez, ¶ 11(k); *see also Nordstrom Com. Cases*, 186 Cal.App.4th  
20 576, 589 (2010) (approving \$0 allocation to the resolution of PAGA claims based on their being  
21 disputed and being part of a class settlement which was evaluated based on the terms of the agreement  
22 overall); *Junkersfeld v. Med. Staffing Sols., Inc.*, 2022 WL 2318173, \*8 n.2 (E.D. Cal. 2022) (collecting  
23 cases with PAGA settlement values ranging from .037%-1%); *Jennings v. Open Door Marketing, LLC*,  
24 2018 WL 4773057, \*9 (N.D. Cal. 2018) (approving settlement of PAGA claims at 0.6% of total  
25 estimated value due to risk of no recovery); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, \*7 (N.D.  
26 Cal. 2016) (approving \$10,000 PAGA settlement allocation where total PAGA penalty exposure was  
27 approximately \$5.2 million, or 0.2% of total estimated value); *Davis v. Cox Commc'ns California,*  
28 *LLC*, 2017 WL 1496407, \*1 (S.D. Cal. 2017) (preliminarily approving \$4,000 PAGA allocation in

\$275,000 settlement); *Moore v. Fitness Int'l, LLC*, 2014 WL 12571448, \*5 (S.D. Cal. 2014) (approving \$2,500 PAGA allocation when attorneys' fees award alone amounted to \$200,000); *Jack v. Hartford Fire Ins. Co.*, 2011 WL 4899942, \*6 (S.D. Cal. 2011) (approving \$3,000 PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, 2010 WL 2196104, \*2 (S.D. Cal. 2010); *Hopson v. Hanesbrands Inc.*, 2009 WL 928133, \*1, \*9 (N.D. Cal. 2009) (approving \$1,500 PAGA allocation in \$1,026,000 settlement); *Syed v. M-I, L.L.C.*, 2017 WL 714367, \*13 (E.D. Cal. 2017) (approving \$100,000 PAGA allocation in \$3,950,000 gross settlement amount allocated to California class even though PAGA exposure was calculated at \$53,600,000, or 0.2% of total estimated potential value); *Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575, \*6-\*7 (E.D. Cal. 2012) (approving \$10,000 PAGA allocation in a \$3,700,000 settlement); *Franco v. Ruiz Food Prod., Inc.*, 2012 WL 5941801, \*14 (E.D. Cal. 2012) (\$10,000 PAGA allocation from \$2,500,000 settlement fund); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, \*1 (N.D. Cal. 2011) (\$10,000 PAGA allocation from \$6,900,000 settlement fund).

6. The Parties agree that up to Thirty Five Percent (35%) of the Gross Settlement Amount (\$128,625) will be paid for Plaintiffs' attorneys' fees incurred in the litigation of this case. Defendant will not oppose any application for attorneys' fees so long as it is within this threshold. *See id.* at ¶ 5.2. Additionally, the Parties agree that Plaintiffs will also be entitled to the actual litigation costs as approved by the Court in an amount not to exceed \$15,000. *See id.*; Exhibit E (Plaintiffs' Itemized Costs). The proposed notice to be sent to Class Members will state this information. *See* Exhibit F.

7. Any amounts allocated under the Agreement for Settlement Administrator Costs, any Enhancement Payments, and attorney's fees and costs that are not ultimately awarded by the Court will remain part of the Net Settlement Amount and be paid out to Participating Class Members on a pro rata basis as set forth in the Agreement. *See* Exhibit A, ¶¶ 5.1-5.5, 5.8. These amounts will be paid out from the Gross Settlement Amount, not in addition to the Gross Settlement Amount. *See* Exhibit A, ¶¶ 5.1-5.5.

8. Class Members who fail to timely opt-out of this settlement will waive all Released Class Claims as set forth in the Agreement. *See* Exhibit A, ¶¶ 1.14, 1.26, 1.30, 1.32, 6.1. Aggrieved

1 Employees will waive all Released PAGA Claims as set forth in the Agreement regardless of whether  
2 they opt out of being a Class Member. *See id.* at ¶¶ 1.2, 1.14, 1.31-1.32, 6.2, 7.5.1.

3 9. For any portion of the Net Settlement Amount or PAGA Payment allocated to  
4 Participating Class Members and/or Aggrieved Employees that is not claimed by them by cashing their  
5 respective settlement checks within 180 calendar days of issuance, that remaining amount shall be  
6 donated equally, *i.e.*, 50/50 to Capital Pro Bono, Inc., and the Center for Workers' Rights under the  
7 doctrine of *cy pres*. *See* Exhibit A, ¶ 5.6. Because the Agreement provides for the distribution of all  
8 funds such that there is no residue, the provisions of California Civil Procedure Code section 384 are  
9 inapplicable. *See In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 718, 720 (2006). The designated  
10 beneficiaries clearly promote the law consistent with the objectives and purposes underlying the lawsuit  
11 as they are non-profits aimed at assisting employees with wage and hour claims who cannot afford  
12 legal representation, including providing representation for employees in wage claims before the  
13 California Labor Commissioner. *See id.* at 722-724; *see also* Decl. Rodriguez, ¶¶ 29-37.

14 **c. Allocation of Settlement Funds**

15 Payment to Participating Class Members and Aggrieved Employees will not require the  
16 submission of a claim form. A Net Settlement Amount will be determined by subtracting from the  
17 Gross Settlement Amount any attorneys' fees and costs, any Enhancement Payments, Settlement  
18 Administrator Costs, and/or PAGA Payment that are approved and/or awarded by the Court. Each  
19 Class Member's share will be determined by dividing their total weeks worked within the Class Period  
20 by the total weeks worked by all Class Members within the Class Period. That fraction will then be  
21 multiplied by the Net Settlement Amount to arrive at the Class Member's individual share of the Net  
22 Settlement Amount. One third (1/3%) of the payment to Participating Class Members will be  
23 characterized as W-2 wages and two thirds (2/3%) will be characterized as 1099 income for tax  
24 reporting purposes. *See id.* ¶¶ 5.9.1-5.9.2.

25 Each Aggrieved Employee's share of the PAGA Payment will be determined by dividing their  
26 total weeks worked within the PAGA Claim Period by the total weeks worked by all Aggrieved  
27 Employees within the PAGA Claim Period. That fraction will then be multiplied by the 25% portion of  
28 the PAGA Payment to arrive at the Aggrieved Employee's individual share. *See* Exhibit A, ¶¶ 5.5, 5.8.

1 The payment to Aggrieved Employee's will be characterized as 1099 income for tax reporting  
2 purposes. *See id.* at ¶ 5.9.3.

3 **V. THE PROPOSED PROCEDURES TO NOTIFY CLASS MEMBERS SATISFY DUE**  
4 **PROCESS AS THEY PROVIDE THE BEST NOTICE PRACTICABLE UNDER THE**  
5 **CIRCUMSTANCES**

6 It is not required that Class Members be given actual notice of a class settlement; instead, the  
7 best practicable notice under the circumstances is all that is required. *See Silber v. Mabon*, 18 F.3d  
8 1449, 1453 (9th Cir. 1994); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017);  
9 *Walsh v. CorePower Yoga LLC*, 2017 WL 4390168, \*5 (N.D. Cal. 2017); *Wright v. Linkus Enters.*, 259  
10 F.R.D. 468, 474-75 (E.D. Cal. 2009). In *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994), the Court  
11 rejected a class member's argument that he had not received due process because he did not receive  
12 notice until after the opt out period, finding that, so long as the notice process utilized is the best  
13 practicable under the circumstances, due process is satisfied even if there is no actual receipt of the  
14 notice. *See Silber*, 18 F.3d at 1453-1454. A similar finding was made in *Briseno v. Conagra Foods,*  
15 *Inc.*, 844 F.3d 1121 (9th Cir. 2017). With regard to any potential for undeliverable notice mailings, the  
16 Court in *Rannis v. Recchia*, 380 F.App'x 646 (9th Cir. 2010) found that class members who did not  
17 receive actual notice due to their mailings being deemed undeliverable were still properly held to be  
18 part of the class settlement because they received the best notice practicable under the circumstances.  
19 *See Rannis v. Recchia*, 380 F.App'x at 650-651. In *Noel v. Thrifty Payless, Inc.*, 7 Cal.5th 955, 980-  
20 984 (2019), the California Supreme Court noted that California has adopted a similar approach  
21 regarding providing notice to class members.

22 Under the proposed notice procedures, Class Members will have sixty (60) days from the date  
23 of mailing to review and respond to the Notice of Settlement, which will also be available online. *See*  
24 Exhibit A, ¶¶ 1.21, 7.2. The Notice of Settlement contains all information necessary for Class  
25 Members to assess the litigation, the Settlement, and whether they want to participate, object, or opt-  
26 out. *See id.* at ¶¶ 7.2, 7.5.1-7.5.3; Exhibit F. National change of address database searches, skip-traces,  
27 and surveying of current employees will be utilized as set out in the Agreement to provide the best  
28 practical means of ensuring Class Members receive the notice mailing. *See* Exhibit A, ¶¶ 7.3-7.4. Any  
individual whose initial mailing was deemed undeliverable will have additional time to respond. *See*

1 *id.* at ¶ 7.4. Additional time to respond will also be provided to cure any deficiencies in opt-outs,  
2 objections, or disputes. *See id.* ¶ 7.5.4. This notice method is regularly utilized in wage and hour class  
3 actions and similar to the one approved in *Rannis*. Thus, the proposed procedures for notifying Class  
4 Members satisfy due process and should be approved in this case.

5 **VI. THE AGREEMENT WARRANTS PRELIMINARY APPROVAL AS IT IS FAIR,**  
6 **REASONABLE, AND ADEQUATE AS TO ALL CLASS MEMBERS BASED ON THE**  
7 **FACTS OF THIS CASE**

8 A class action may not be dismissed, compromised, or settled without Court approval and the  
9 decision to approve or reject a settlement is committed to the Court's sound discretion. *See* Cal. Rules  
10 of Court, Rule 3.769; Fed. R. Civ. Proc., Rule 23(e)<sup>3</sup>; *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th  
11 224, 234-35 (2001); *see also* Cal. Lab. Code § 2699(1)(2). However, "[d]ue regard should be given to  
12 what is otherwise a private consensual agreement between the parties. The inquiry 'must be limited to  
13 the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or  
14 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole,  
15 is fair, reasonable and adequate to all concerned.'" *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,  
16 1801 (1996); *see also Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1118 (2009); *In re*  
17 *Microsoft I-V Cases*, 135 Cal.App.4th at 723; *Nordstrom Com. Cases*, 186 Cal.App.4th at 581. The law  
18 favors settlement of lawsuits, particularly class actions and other complex cases where substantial  
19 resources can be conserved by avoiding the time, expense, and rigors of formal litigation. *See*  
20 *Cellphone Termination Fee Cases*, 180 Cal.App.4th at 1117-1118; *In re Microsoft I-V Cases*, 135  
21 Cal.App.4th at 723 n.14; *Nordstrom Com. Cases*, 186 Cal.App.4th at 581; *see also Neary v. Regents of*  
22 *Univ. of Cal.*, 3 Cal.4th 273, 277-81 (1992).

23 **a. The Terms of The Settlement Are Fair and Within the Range of Reasonableness**

24 The purpose of the Court's preliminary evaluation of a proposed class action settlement is to  
25 determine only whether it is within the range of possible approval such that notice to the class of its  
26 terms and conditions and the scheduling of a formal fairness hearing is warranted. *See Wershba*, 91  
27 Cal.App.4th at 234-35. If the Court finds a proposed settlement falls within "the range of

28 <sup>3</sup>The California Supreme Court has authorized California's trial courts to rely on these federal resources to decide class certification issues. *See Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

reasonableness,” it should grant preliminary approval of the class action settlement. *See, e.g., North County Contr. ’s Assn., Inc. v. Touchstone Ins. Svcs.*, 27 Cal.App.4th 1085, 1089-90 (1994); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 133 (2008). Factors to consider in determining whether the settlement is fair, reasonable, and adequate include the strength of the Plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. *See Dunk*, 48 Cal.App.4th at 1801. However, this Court should begin its analysis with a presumption that the proposed settlement is fair. “A presumption of fairness exists where: (1) the settlement is reached through arm’s length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *Id.* at 1802.

**i. The Agreement is a Result of Extensive, Non-Collusive Arm’s Length Negotiations Between the Parties**

Settlement of this case was reached only after substantial litigation and extensive arm’s length negotiations lasting nearly three (3) years across two separate cases, which included a full day mediation and post mediation negotiations. *See Decl. Rodriguez*, ¶¶ 6, 9-11. At all times, the negotiations were adversarial, although still professional in nature. *See id.*

**ii. The Extent of Investigation and Discovery Completed Provided Ample Information to Enter Into an Informed and Reasonable Settlement**

The Parties were in possession of all necessary information during the negotiations. The Parties engaged in substantial informal discovery, which included all necessary components for evaluating the class claims and creating an accurate damages model. *See id.* at ¶¶ 9-12. Plaintiffs were in possession of this information prior to calculating any damages in this case. *See id.* As a result, Plaintiffs were able to make a reasonable estimation of Defendant’s potential liability. *See id.* For these reasons, the settlement now before the Court was reached at a stage where “the parties certainly have a clear view of the strengths and weaknesses of their cases” sufficient to support the settlement. *See Kang v. Credit*



1 *Bureau Connection, Inc.*, 2023 WL 6811994, \*5 (E.D. Cal. 2023); *Monterrubio v. Best Buy Stores*,  
2 *L.P.*, 291 F.R.D. 443, 454 (E.D. Cal. 2013).

3 **iii. Plaintiffs' Counsel are Experienced in Similar Litigation**

4 Plaintiffs' counsel have considerable experience in complex litigation such as class and PAGA  
5 actions. *See* Decl. Rodriguez, ¶¶ 15-22; Decl. Alami, ¶¶ 2-6. Thus, Plaintiffs' counsel are qualified to  
6 evaluate the class claims, the value of settlement versus moving forward with litigation, and viability of  
7 possible affirmative defenses. Plaintiffs' counsel believe that the Agreement is fair, reasonable, and  
8 adequate in light of the risks associated with the claims, the uncertainties of complex litigation, and the  
9 secured benefit to Class Members. *See* Decl. Rodriguez, ¶ 12; Decl. Alami, ¶¶ 9-10.

10 **iv. The Settlement is Fair, Reasonable, and Adequate Based on the Strength of**  
11 **Plaintiffs' Case and the Risks and Costs of Further Litigation**

12 Plaintiffs' claims and the ability to obtain and maintain certification all the way through trial  
13 were heavily disputed by Defendant. *See* Decl. Rodriguez, ¶ 11. Based on the records and facts of this  
14 case, Plaintiffs have secured a gross recovery of approximately 3% of the maximum value of the claims  
15 in this matter (\$12,066,836.62) and a net recovery of approximately 4.8% and 12.2% of the more  
16 realistic maximum range of recovery (\$1,407,130.29 to \$3,566,021.27). *See* Decl. Rodriguez, ¶¶ 11-  
17 12. The average net award per Class Member is approximately \$502.57. *See id.* at ¶ 12.

18 This settlement is a reasonable compromise of the class and PAGA claims, and is within the  
19 percentile ranges of the total available damages that have been approved in other class settlements. *See*  
20 *Wershba*, 91 Cal.App.4th at 246, 250; *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117, 1139  
21 (1990); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982); *see also In re*  
22 *Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that certainty of recovery in  
23 settlement of 6% of maximum potential recovery after reduction for attorney's fees was higher than  
24 median percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from  
25 2000 through 2002); *Bravo v. Gale Triangle, Inc.*, 2017 WL 708766, \*2, \*10 (C.D. Cal. 2017)  
26 (approving a settlement where the net recovery to class members was approximately 7.5% of the  
27 projected maximum recovery amount [\$210,500/\$2,750,000]); *Avila v. Cold Spring Granite Co.*, 2018  
28 WL 400315, \*2, \*6 (E.D. Cal. 2018) (approving a settlement with a gross recovery of 11% of the

1 projected maximum damages available [\$500,000/\$4,441,633.60]) and a net recovery of approximately  
2 6.7% of the projected maximum recovery [\$297,332.98/\$4,441,633.60]); *Bellinghausen v. Tractor*  
3 *Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) (approving a settlement where the gross recovery  
4 was approximately 8.5% of the projected maximum recovery [\$1,000,000/\$11,565,677]); *Schiller v.*  
5 *David's Bridal, Inc.*, 2012 WL 2117001, \*13 (E.D. Cal. June 11, 2012) ("Class Members will receive  
6 an average of approximately \$198.70, with the highest payment to a Class Member being \$695.78 . . .  
7 Overall, the Court finds that the results achieved are good, which is highlighted by the fact that there  
8 was no objection to the settlement amount or the attorneys' fees requested"), *report and*  
9 *recommendation adopted*, 2012 WL 13040405 (E.D. Cal. 2012); *Gardner v. GC Servs., LP*, 2012 WL  
10 1119534, \*7 (S.D. Cal. 2012) ("the results achieved in this case were very favorable. Class members  
11 are provided with immediate monetary relief, with an average award of around several hundred dollars  
12 and a minimum award of \$50").

13 **v. The Proposed Settlement is a Reasonable Compromise of Claims**

14 In *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116 (2008), the Court required additional  
15 information be presented in class action settlements "to ensure that the recovery represents a reasonable  
16 compromise, given the magnitude and apparent merit of the claims being released, discounted by the  
17 risks and expenses of attempting to establish and collect on those claims by pursuing the  
18 litigation . . . ." *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th 399  
19 (2010), clarified that *Kullar* does not require an illusory prediction of the outer reaches of exposure  
20 without taking into account the actual risks of litigation such as dispositive motions and trial. *Kullar*  
21 also does not require an explicit statement of the maximum amount to be recovered if a plaintiff  
22 prevailed on all the claims, provided there is a record that allows "an understanding of the amount that  
23 is in controversy and the realistic range of outcomes of the litigation." *Id.* at 409.

24 Plaintiffs have thoroughly set forth the realistic range of outcomes in this litigation as well as  
25 the data points relied upon in reaching these ranges. See Decl. Rodriguez ¶¶ 11-12. The record  
26 demonstrates that the compromises made by Plaintiffs were reasonable and have resulted in a  
27 settlement with recovery percentage well within the range of what has been found to be sufficient in  
28 several other cases. See, *supra*, Section VI.a.iv; see also *Linney v. Cellular Alaska P'ship*, 151 F.3d

1 1234, 1242 (9th Cir. 1998) (“The fact that a proposed settlement may only amount to a fraction of the  
2 potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate  
3 and should be disapproved”); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (“In  
4 fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth  
5 or even a thousandth part of a single percent of the potential recovery”).

6 **b. Provisional Certification of the Class is Appropriate**

7 Class certification is appropriate when (1) the class is ascertainable and (2) there is “a well-  
8 defined community of interest in the questions of law and fact involved affecting the parties to be  
9 represented.” *Dunk*, 48 Cal.App.4th at 1806. The “community of interest” element “embodies three  
10 factors: (1) common questions of law or fact predominate; (2) class representatives with claims or  
11 defenses typical of the class; and (3) class representatives who can adequately represent the class.” *Id.*  
12 Here, the Parties agree that, for the purposes of settlement, these prerequisites are met. *See* Exhibit A.

13 **i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous**

14 The proposed settlement class is ascertainable because all putative Class Members can be  
15 readily identified through employee personnel and payroll files. *See Noel v. Thrifty Payless, Inc.*, 7  
16 Cal.5th 955, 980 (2019); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 932 (1981); *Lee v. Dynamex*,  
17 *Inc.*, 166 Cal.App.4th 1325, 1334 (2008). The numerosity requirement is met because there are 341  
18 individuals who fall within the definition of Class Member, which makes joinder of all members  
19 impracticable. *See Gay v. Waiters’ & Dairy Lunchmen’s Union*, 489 F.Supp. 282 (N.D. Cal. 1980),  
20 *aff’d* 694 F.2d 531 (9th Cir. 1982); *Hebbard v. Calgrove*, 28 Cal.App.3d 1017, 1030 (1972) (noting no  
21 set minimum to meet the numerosity prerequisite, but a class as few as twenty-eight (28) members is  
22 acceptable). Thus, these requirements are satisfied.

23 **ii. The Commonality, Predominance, and Typicality Requirements are Met**

24 The commonality requirement is met when there are questions of law or fact regarding the class  
25 as a whole. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Commonality requires  
26 only that some common legal or factual questions exist; Plaintiffs need not show that all issues in the  
27 litigation are identical. *See Richmond v. Dart Ind., Inc.*, 29 Cal.3d 462, 473 (1981); *City of San Jose v.*  
28 *Superior Court*, 12 Cal.3d 447, 460 (1974). Common questions of law or fact must also predominate

1 over individual questions and class-wide treatment of a dispute must be superior to individual  
2 litigation.<sup>4</sup> *See Richmond*, 29 Cal.3d at 469. Predominance requires a putative class be sufficiently  
3 cohesive to warrant adjudication by representation. *See Hanlon*, 150 F.3d at 1022. The typicality  
4 requirement is met when claims of the named representative are typical of those of the class, though  
5 “they need not be substantially identical.” *Id.* at 1020; *Classen v. Weller*, 145 Cal.App.3d 27, 46-47  
6 (1983).

7 The common questions of law and fact in this case stem from Plaintiffs’ contention that  
8 Defendant violated California law by 1) failing to pay Plaintiffs and similarly situated employees all  
9 prevailing wages they were entitled to, 2) failing to properly incorporate the value of all non-  
10 discretionary remuneration into Plaintiffs’ and similarly situated employees’ regular rates of pay for the  
11 purpose of calculating premium wages such as overtime, meal and rest period premiums, and sick leave  
12 wages, 3) failing to pay Plaintiffs and similarly situated employees for all hours worked as a result of  
13 not paying for unauthorized overtime hours, attending meetings, taking trucks to repair shops,  
14 deducting time for meal periods not taken, and completing pre/post shift paperwork and inspections, 4)  
15 failing to provide legally compliant meal, rest, and recovery periods, and 5) failing to reimburse  
16 Plaintiffs and similarly situated employees for all expenses they incurred for work. *See Exhibit B*. The  
17 waiting time penalties, unfair competition, and PAGA claims are derivative of these violations. *See id.*  
18 Plaintiffs and the Class Members seek the same remedies under state law. Under these specific  
19 circumstances, the commonality and predominance requirements are satisfied. Regarding the typicality  
20 requirement, Plaintiffs contend they suffered from the same unlawful policies, treatment, and  
21 circumstances as Class Members did, will request the same remedies, and will rely on the same  
22 methods of proof to establish liability and damages. *See id.* Thus, the typicality requirement is also  
23 satisfied for settlement purposes.

### 24 **iii. The Adequacy Requirement is Met**

25 The adequacy of representation requirement is met if the named representative and counsel have  
26 no interests adverse to those of the putative class members and are committed to vigorously prosecuting  
27

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28 <sup>4</sup>When assessing predominance and superiority, a court may consider that the class will be certified for settlement purposes only and that manageability of trial is therefore irrelevant. *See Amchem Products v. Windsor*, 521 U.S. 591 (1997).

1 the case on behalf of the class. *See Hanlon*, 150 F.3d at 1020; *McGhee v. Bank of America*, 60  
2 Cal.App.3d 442, 450-51 (1976). Those standards are met here. Under the proposed Agreement,  
3 Plaintiffs and the putative Class Members will receive a pro rata share of the settlement based on the  
4 number of workweeks they worked for Defendant. *See Exhibit A*. Finally, any settlement class  
5 member who wishes to opt-out of the settlement may do so, and he or she may also dispute the number  
6 of workweeks stated in the Notice of Settlement (Exhibit F).

7       There is no conflict of interest between Plaintiffs and Class Members. Plaintiffs and Plaintiffs’  
8 counsel have pursued the claims made in the operative Complaint vigorously on behalf of the class.  
9 Plaintiffs’ counsel, with Plaintiffs’ assistance, thoroughly investigated the claims made in this case by  
10 speaking with Plaintiffs and reviewing substantial amounts of documents. Plaintiffs’ counsel thereafter  
11 engaged Defendant’s counsel in settlement discussions over the course of approximately three years.  
12 Moreover, Plaintiffs’ counsel has experience defending and bringing wage and hour claims. Because  
13 Plaintiffs’ counsel has vigorously pursued Plaintiffs’ and the Class Members’ claims, the adequacy  
14 requirement is met. *See generally* Decl. Rodriguez; Decl. Alami.

15       **VII. ATTORNEY’S FEES AND COSTS, ENHANCEMENT PAYMENTS TO THE CLASS**  
16       **REPRESENTATIVES, AND SETTLEMENT ADMINISTRATOR COSTS**

17       Although Plaintiffs are not requesting any final determination with respect to attorney’s fees  
18 and costs, Enhancement Payments, or Settlement Administrator Costs at this time, Plaintiffs believe  
19 there are sufficient grounds to support preliminarily approving attorney’s fees in the amount of  
20 \$128,625 (35% of the Gross Settlement Amount), costs in an amount not to exceed \$15,000, Settlement  
21 Administrator Costs in an amount not to exceed \$12,500, and an Enhancement Payment for the Class  
22 Representatives in the amount of \$10,000 each.

23       Plaintiffs believe an award of attorney’s fees under the common fund doctrine is appropriate as  
24 there is a sufficiently identifiable class of beneficiaries (*e.g.* the settlement class), the benefits received  
25 can be accurately traced to the settlement Plaintiffs and Class Counsel were able to negotiate on behalf  
26 of Class Members, and the fee can be shifted with exactitude to those benefiting as the fee request is a  
27 specific, lump-sum percentage of the fund. *See Laffitte v. Robert Half Internat., Inc.*, 1 Cal.5th 480,  
28 506 (2016); *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 271 (9th Cir. 1989); *Boeing Co. v.*

1 *Van Gemert*, 444 U.S. 472, 477-478 (1980) (“A lawyer who recovers a common fund for the benefit of  
2 persons other than . . . her client is entitled to a reasonable attorney’s fee from the fund as a whole.”).  
3 In this case, the Agreement allocates Thirty Five Percent (35%) of the Gross Settlement Amount  
4 (\$128,625) as the maximum potential fee award. *See* Exhibit A, ¶ 5.2. This is well within the range of  
5 fee awards percentages approved in common fund cases. *See, e.g., Martin v. AmeriPride Servs., Inc.*,  
6 2011 WL 2313604, \*8 (S.D. Cal. 2011) (collecting cases and noting fee awards may range between  
7 30%-40% where the gross settlement amount is less than \$10 million); *Singer*, 2010 WL 2196104, \*8  
8 (collecting cases wherein the fee awards ranged from 33.33% to 40% of the gross settlement amount,  
9 including *Ingalls v. Hallmark Mktg. Corp.*, 08cv4342 VBF (Ex), Doc. No. 77, ¶ 6 (C.D. Cal. Oct. 16,  
10 2009) [awarding 33.33% fee on a \$5.6 million wage and hour class action], *Birch v. Office Depot, Inc.*,  
11 Case No. 06cv1690 DMS (WMC), Doc. No. 48, ¶ 13 (S.D. Cal. Sept. 28, 2007) [awarding a 40% fee  
12 on a \$16 million wage and hour class action], and *Rippee v. Boston Mkt. Corp.*, Case No. 05cv1359  
13 BTM (JMA), Doc. No. 70, at 7–8 (S.D. Cal. Oct. 10, 2006) [awarding a 40% fee on a \$3.75 million  
14 wage and hour class action]).

15 A lodestar cross check validates the requested common fund award. An award of attorney’s  
16 fees should include compensation for all hours reasonably spent. *See Ketchum v. Moses*, 24 Cal.4th  
17 1122, 1133 (2001); *see also Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983) (finding hours are  
18 reasonably spent if they are the kind normally billed to a fee-paying client). To date, Class Counsel  
19 will have spent approximately 354.3 hours between two firms performing tasks that would normally be  
20 billed to any fee playing client in complex litigation. *See* Decl. Rodriguez, ¶ 24; Exhibit H (Summary  
21 of Shimoda & Rodriguez Law, PC’s, Hours); Exh. A to Decl. Alami (Summary of Torus, LLP Hours);  
22 *Syers Props. III, Inc. v. Rankin*, 226 Cal.App.4th 691, 699 (2014) (“Because time records are not  
23 required under California law . . . , there is no required level of detail that counsel must achieve.”)  
24 (internal quotations omitted). At the prevailing market rates for Class Counsel’s level of experience  
25 and this type of complex litigation, this equates to a lodestar of approximately \$210,615. *See* Decl.  
26 Rodriguez, ¶¶ 23-25; *Children’s Hosp. and Med. Ctr. v. Bonta*, 97 Cal.App.4th 740, 746 (2002) (noting  
27 rates were reasonable where they were “within the range of reasonable rates charged by and judicially  
28 awarded comparable attorneys for comparable work”).

1 The reasonableness of the fee is also demonstrated by the fact that the amount to be requested  
2 would not require any multiplier of Class Counsel's lodestar. Multipliers are typically awarded in  
3 contingent fee litigation to compensate counsel for the risk of non-payment:

4 It is an established practice in the private legal market to reward attorneys  
5 for taking the risk of non-payment by paying them a premium over their  
6 normal hourly rates for winning contingency cases. *See Richard Posner, Economic Analysis of Law* § 21.9, at 534-35 (3d ed. 1986). Contingent  
7 fees that may far exceed the market value of the services if rendered on a  
8 non-contingent basis are accepted in the legal profession as a legitimate  
way of assuring competent representation for Plaintiff who could not  
afford to pay on an hourly basis regardless whether they win or lose.

9 *Chem. Bank v. City of Seattle (In re Wash. Pub. Power Supply Sys. Sec. Litig.)*, 19 F.3d 1291, 1299 (9th  
10 Cir. 1994). Moreover, "in the common fund context, attorneys whose compensation depends on their  
11 winning the case, must make up in compensation in the cases they win for the lack of compensation in  
12 the cases they lose." *Id.* at 1300-01; *see also Ketchum*, 24 Cal.4th at 1138 ("The adjustment to the  
13 lodestar figure, *e.g.*, to provide a fee enhancement reflecting the risk that the attorney will not receive  
14 payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither  
15 unexpected nor fortuitous"); *Wershba*, 91 Cal.App.4th at 255 ("Multipliers can range from 2 to 4 or  
16 even higher"). Given that the requested lodestar actually results in a negative multiplier of 0.61x of  
17 Plaintiffs' counsel's lodestar, a lodestar cross check validates the common fund percentage requested  
18 and the Court should preliminarily approve the amount requested. *See Decl. Rodriguez*, ¶¶ 23-25;  
19 *Wershba*, 91 Cal.App.4th at 255.

20 Similarly, the amounts allocated for any Enhancement Payment and Settlement Administrator  
21 Costs are also within ranges that have been approved in similar cases. *See Cellphone Termination Fee*  
22 *Cases*, 186 Cal.App.4th at 1393 (approving \$10,000 awards to each of the four (4) named plaintiffs);  
23 *West v. Circle K Stores, Inc.*, 2006 WL 8458679, \*2-3, \*7-\*8 (E.D. Cal. 2006) (awarding \$15,000 to  
24 each of the named representatives who spent 100 hours and 80 hours, respectively, prosecuting the case  
25 on behalf of class members)<sup>5</sup>; *Dent v. ITC Serv. Grp., Inc.*, 2013 WL 5437331, \*4, \*7, \*9 (D. Nev.

26  
27 <sup>5</sup> In *West*, information necessary to assess enhancement payments relative to average payments received by class members  
28 was stated in connection with preliminary approval proceedings. There were 1,752 class members in the vacation subclass  
and 14,000 class members in the meal period subclass, totaling 15,752 class members in all. Thus, in a \$5,000,000 gross  
settlement, the *West* Court approved the \$15,000 enhancements where the average gross award for class members was

2013) (awarding a \$15,000 representative enhancement out of a \$150,000 settlement for approximately 530 class members); *Patel v. Nike Retail Services, Inc.*, 2019 WL 2029061, \*1, \*4 (N.D. Cal. 2019) (\$5,261 for settlement administrator's fees was not excessive where PAGA group consisted of 40 employees). Any allocated amounts for attorney's fees and costs, any Enhancement Payment, and/or Settlement Administrator Costs that are not ultimately awarded by the Court will be distributed to Participating Class Members on a pro rata. *See* Exhibit A, ¶¶ 5.2-5.4, 5.8.

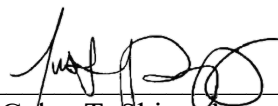
Plaintiffs' final approval briefing will include updated information and analysis regarding the appropriateness of the fee percentage sought, the lodestar cross check of the requested fee, a detailed declaration from Plaintiffs regarding their time spent on the case as well as any risks and burdens incurred as the Class Representatives, an itemized costs spreadsheet, and a declaration from the Settlement Administrator detailing the work performed and Settlement Administrator Costs incurred. *See* Decl. Rodriguez ¶ 24. The Notice of Settlement will state the amounts to be requested to provide Class Members the ability to comment thereon, providing evidence of whether the requested amounts are reasonable. *See* Exhibit F at pg. 2, § II.A; *see also In re Heritage Bond Litig.*, 2005 WL 1594403, \*21 (C.D. Cal. 2005) ("The absence of objections or disapproval by class members to Class Counsel's fee request further supports finding the fee request reasonable").

### VIII. CONCLUSION

For all of the foregoing reasons, the Court should preliminarily and conditionally certify the class for settlement purposes; grant preliminary and conditional approval of the proposed settlement; approve the proposed notification procedures, including the Notice of Settlement and proposed deadlines relating thereto; and schedule the final approval hearing. A copy of Plaintiffs' proposed order is filed concurrently herewith.

**Shimoda & Rodriguez Law, PC**

Dated: June 10, 2025

By: 

Galen T. Shimoda

Justin P. Rodriguez

Renald Konini

Attorneys for Plaintiffs

\$317.42. *Compare West v. Circle K Stores, Inc.*, 2006 WL 1652598, \*3 (E.D. Cal. 2006) with *West v. Circle K Stores, Inc.*, 2006 WL 8458679, \*2-3, \*7-8 (E.D. Cal. 2006).



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[additional parties continued on next page]

**SUPERIOR COURT OF CALIFORNIA**

**FOR THE COUNTY OF FRESNO**

JESSE GIL and DANIEL AYALA,  
individually and on behalf of all other  
similarly situated employees,

Plaintiffs,

vs.

OUTBACK, INC., a California Corporation;  
and DOES 1 to 100, inclusive,

Defendants.

**Case No. 21CECG03273**

*Assigned for All Purposes to Hon. Jon M. Skiles  
Department 503*

**CLASS ACTION**

**APPENDIX OF AUTHORITIES PURSUANT TO  
LOCAL RULE 2.2.6**

Date: July 3, 2025

Time: 3:30 p.m.

Dept.: 503

Judge: Hon. Jon M. Skiles

Filed: November 3, 2021

FAC Filed: January 24, 2024

SAC Filed: November 20, 2024

Trial Date: None Set

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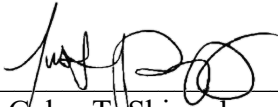
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Attorneys for Plaintiff DANIEL AYALA individually  
and on behalf of similarly situated employee

| <b><u>No.</u></b> | <b><u>DESCRIPTION</u></b>                                                                  |
|-------------------|--------------------------------------------------------------------------------------------|
| 1                 | <i>Avila v. Cold Spring Granite Co.</i> , 2018 WL 400315 (E.D. Cal. 2018)                  |
| 2                 | <i>Bravo v. Gale Triangle, Inc.</i> , 2017 WL 708766 (C.D. Cal. 2017)                      |
| 3                 | <i>Chu v. Wells Fargo Investments, LLC</i> , 2011 WL 672645 (N.D. Cal. 2011)               |
| 4                 | <i>Davis v. Cox Commc'ns California, LLC</i> , 2017 WL 1496407 (S.D. Cal. 2017)            |
| 5                 | <i>Delgado v. Lincoln Transportation Service., Inc.</i> , 2019 WL 7208416 (C.D. Cal. 2019) |
| 6                 | <i>Dent v. ITC Serv. Grp., Inc.</i> , 2013 WL 5437331 (D. Nev. 2013)                       |
| 7                 | <i>Fleming v. Covidien Inc.</i> , 2011 WL 7563047, *3–4 (C.D. Cal. 2011)                   |
| 8                 | <i>Franco v. Ruiz Food Prod., Inc.</i> , 2012 WL 5941801 (E.D. Cal. 2012)                  |
| 9                 | <i>Garcia v. Gordon Trucking, Inc.</i> , 2012 WL 5364575 (E.D. Cal. 2012)                  |
| 10                | <i>Gardner v. GC Servs., LP</i> , 2012 WL 1119534 (S.D. Cal. 2012)                         |
| 11                | <i>Gutierrez v. J.M. Distrib., Inc.</i> , 2020 WL 5356668 (C.D. Cal. 2020)                 |
| 12                | <i>Hamilton v. Juul Labs, Inc.</i> , 2021 WL 5331451 (N.D. Cal. 2021)                      |
| 13                | <i>Hopson v. Hanesbrands Inc.</i> , 2009 WL 928133 (N.D. Cal. 2009)                        |
| 14                | <i>In re Heritage Bond Litig.</i> , 2005 WL 1594403 (C.D. Cal. 2005)                       |
| 15                | <i>Insixiengmay v. Hyatt Corporation</i> , 2024 WL 4454035 (E.D. Cal. 2024)                |
| 16                | <i>Jack v. Hartford Fire Ins. Co.</i> , 2011 WL 4899942 (S.D. Cal. 2011)                   |
| 17                | <i>Jennings v. Open Door Marketing, LLC</i> , 2018 WL 4773057 (N.D. Cal. 2018)             |
| 18                | <i>Junkersfeld v. Med. Staffing Sols., Inc.</i> , 2022 WL 2318173 (E.D. Cal. 2022)         |
| 19                | <i>Kang v. Credit Bureau Connection, Inc.</i> , 2023 WL 6811994 (E.D. Cal. 2023)           |
| 20                | <i>Martin v. AmeriPride Servs., Inc.</i> , 2011 WL 2313604 (S.D. Cal. 2011)                |
| 21                | <i>Moore v. Fitness Int'l, LLC</i> , 2014 WL 12571448 (S.D. Cal. 2014)                     |

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|----|--------------------------------------------------------------------------------|
| 22 | <i>Patel v. Nike Retail Services, Inc.</i> , 2019 WL 2029061 (N.D. Cal. 2019)  |
| 23 | <i>Ruch v. AM Retail Grp., Inc.</i> , 2016 WL 5462451 (N.D. Cal. 2016)         |
| 24 | <i>Schiller v. David's Bridal, Inc.</i> , 2012 WL 2117001 (E.D. Cal. 2012)     |
| 25 | <i>Singer v. Becton Dickinson &amp; Co.</i> , 2010 WL 2196104 (S.D. Cal. 2010) |
| 26 | <i>Sobaszekiewicz v. FedEx Corporation</i> , 2022 WL 4004773 (N.D. Cal. 2022)  |
| 27 | <i>Syed v. M-I, L.L.C.</i> , 2017 WL 714367 (E.D. Cal. 2017)                   |
| 28 | <i>Walsh v. CorePower Yoga LLC</i> , 2017 WL 4390168 (N.D. Cal. 2017)          |
| 29 | <i>West v. Circle K Stores, Inc.</i> , 2006 WL 1652598 (E.D. Cal. 2006)        |
| 30 | <i>West v. Circle K Stores, Inc.</i> , 2006 WL 8458679 (E.D. Cal. 2006)        |

Date: June 10, 2025

**Shimoda & Rodriguez Law, PC**

By:   
 Galen T. Shimoda  
 Justin P. Rodriguez  
 Renald Konini  
 Attorneys for Plaintiffs

# **EXHIBIT 1**

2018 WL 400315

Only the Westlaw citation is currently available.  
United States District Court, E.D. California.

Joseph AVILA, on behalf of himself  
and others similarly situated, Plaintiff,

v.

COLD SPRING GRANITE COMPANY,  
a Minnesota Corporation, Defendants.

1:16-cv-001533-AWI-SKO

|  
Signed 01/11/2018

|  
Filed 01/12/2018

#### Attorneys and Law Firms

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Stephen L. Berry, Paul Hastings LLP, Costa Mesa, CA, for Defendants.

#### ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Anthony W. Ishii, SENIOR DISTRICT JUDGE

#### ORDER GRANTING IN PART MOTION FOR ATTORNEYS' FEES, COSTS, AND REPRESENTATIVE SERVICE PAYMENT

(Docs. 32, 33.)

#### I. Introduction

\*1 Plaintiff Joseph Avila ("Plaintiff"), on behalf of himself and others similarly situated, filed this class action complaint against Defendant Cold Spring Granite Company ("Defendant"), alleging failures to pay overtime and afford compliant meal breaks, as well as derivative claims, in violation of the California Labor Code, California Business

and Professions Code and Industrial Welfare Commission ("IWC") Wage Orders. The parties have reached a settlement prior to class certification. Plaintiff moved for and the Court granted conditional certification of the class under Rule 23 and preliminary approval of the class action settlement. Docs. 28, 31. In the Court's preliminary approval order, it set out a schedule of dates for giving of class notice, filing of a final approval motion, and holding of a final fairness hearing. All of those events have taken place. Plaintiff filed unopposed motions for final approval of class settlement and for attorney fees and costs. No class member was present at the final fairness hearing held on December 11, 2017, and no objections to the settlement have been filed. For the following reasons, Plaintiff's motion for final approval will be granted in full and Plaintiff's motion for fees and costs will be granted in part.

#### II. Background

##### A. Factual Background

Defendant is a natural stone manufacturer that operates quarries in the United States and Canada. Doc. 28 at 8; Amended Complaint, Doc. 13 ("FAC") at ¶ 5. Plaintiff and the 89<sup>1</sup> absent class members are or were Defendant's employees working at quarries in Raymond, California and Clovis, California. FAC at ¶ 11; Doc. 28 at 8. Plaintiff and the absent class members are or were all employed as non-exempt hourly employees. FAC at ¶¶ 2, 11. Defendant instituted an "Alternative Workweek Schedule" ("AWS"), whereby it scheduled class members to work "four ten-hour shifts per week," from 6:00 a.m. to 4:30 p.m. *Id.* at ¶¶ 2, 12; Doc. 28 at 8. Plaintiffs were not paid at an overtime rate when they worked more than eight hours per day. FAC at ¶ 16. "Defendant also failed to provide [class members] with off-duty meal periods prior to the end of their fifth hour of work." *Id.* at ¶¶ 2, 17.

##### B. Settlement Agreement and Anticipated Result

The preliminary approved class definition is as follows: "all non-exempt positions at Cold Spring facilities in Raymond, California and Clovis, California" from October 11, 2012 through August 16, 2017 (the date of conditional class certification and preliminary approval of class action settlement). *See* Settlement Agreement, Doc. 28–1 ("Settlement Agreement") at § A.4–6; Doc. 31. The settlement class includes 89 employees. Doc. 35 at 3. No class member has opted-out. Doc. 35 at 3.

\*2 The parties have agreed to a total maximum settlement amount of \$500,000.00 to be paid by Defendant. That settlement amount includes class counsel's attorney fees, costs, and any expenses related to the suit. Settlement Agreement at § C.12.a. The settlement provides that attorney fees "shall not exceed \$166,666.66 (i.e., 33.33% of" the gross fund). Of the remaining \$333,333.34, up to \$15,000.00 is allocated to reimburse for costs, up to \$5,000.00 is allocated to pay a representative service award to the named plaintiff, \$7,500.00 is allocated as a PAGA payment to the LWDA, and \$8,500.00 is allocated to pay the settlement administrator's fees and costs.

The remaining balance ("net settlement amount"), assuming the maximum of each allocated amount is paid, will be \$297,333.34. That net settlement amount will be distributed to class members in proportion to the weeks each worked during the class period. Settlement Agreement at § C.12.c.1. More precisely, each class member's settlement payment will be calculated by dividing the class member's weeks worked during the class period by the total weeks worked by all class members during the class period then multiplied by the net settlement amount. *Id.* at § C.12.c.2. In that way, all of the net settlement amount will be paid to class members. The average payment is \$3,340.82 per class member. Doc. 45 at 3.

Class members are not required to take any action to receive their pro rata share of the settlement fund. If the settlement is approved, a check will be mailed to the address on file for each class member. In exchange, each of the class members will release all claims that were or could have been asserted based on the allegations of the operative complaint—i.e., those claims relating to an improper alternative workweek schedule or untimely meal or rest periods. No class member has opted out of the settlement agreement.

Any settlement checks not cashed or deposited within 120 days of issuance will be transmitted to the State of California's Department of Industrial Relations Unclaimed Wages Fund.

### C. Final Fairness Hearing

The Court held a final fairness hearing on December 11, 2017 at 1:30 p.m. No class member was present. No objections were raised to the settlement.

## III. Final Approval of Settlement Agreement

### A. Legal Standard

"There is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) (citation and internal quotation marks omitted). However, "[t]he claims, issues, or defenses of a certified class may be settled ... only with the court's approval" "after a hearing and on a finding that it is fair, reasonable, and adequate." Fed. Civ. P. 23(e). When a settlement is reached by the parties prior to certification of a class, the court must confirm "the propriety of the [class] certification and the fairness of the settlement" to protect the absent class members. *Stanton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); see *In re Bluetooth Headset Prods. Liab. Litig.* ("*In re Bluetooth*"), 654 F.3d 935, 946 (9th Cir. 2011) (When settlements are reached prior to certification "an even higher level of scrutiny" is required to determine the fairness of the agreement.); *In re Mego Fin. Corp. Sec. Litig.* ("*In re Mego*"), 213 F.3d 454, 458 (9th Cir. 2000) (same).

The Rule 23 class settlement generally proceeds in two phases. In the first phase, the court conditionally certifies the class, conducts a preliminary determination of the fairness of the settlement (subject to a more stringent final review), and approves the notice to be imparted upon the class. *Ontiveros v. Zamora*, 303 F.R.D. 356, 363 (E.D. Cal. 2014). The purpose of the initial review is to ensure that an appropriate class exists and that the agreement is non-collusive, without obvious deficiencies, and within the range of possible approval as to that class. See *True v. Am. Honda Motor Co.*, 749 F.Supp.2d 1052, 1062 (C.D. Cal. 2010); Newberg on Class Actions § 13:13 (5th ed. 2014). In the second phase, the court holds a full fairness hearing where class members may present objections to class certification or to the fairness of the settlement agreement. *Ontiveros*, 303 F.R.D. at 363 (citing *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989)). Following the fairness hearing, taking into account all of the information before the court, the court must confirm that class certification is appropriate and the settlement is fair, reasonable, and adequate such that the parties should be allowed to settle the class action pursuant to the terms of the settlement agreement. See *Valdez v. Neil Jones Food Co.*, 2015 WL 6697926 (E.D. Cal. Nov. 2, 2015); *Miller v. CEVA Logistics USA, Inc.*, 2015 WL 4730176, \*3 (E.D. Cal. Aug. 10, 2015).

### B. Discussion

\*3 This Court has conducted a final fairness hearing. No class member was present at the hearing and no objections have been filed. Despite the absence of objections, the Court has conducted an in-depth review of the settlement agreement in this action. Conditional class certification is appropriate. The proposed settlement is fair, reasonable, and adequate. The attorneys' fees, costs, and representative service award are all reasonable and justified by the evidence presented. For those reasons, as more fully set out herein, Plaintiff's motions for final approval and fees, costs and service award will be granted.

#### 1. Rule 23 Class Certification

Class certification requires a showing of two sets of requirements. First, [Rule 23\(a\)](#) requires a showing of numerosity, commonality of law or fact, typicality of the representative plaintiff's claims, and adequacy of representation. [Fed. R. Civ. P. 23\(a\)](#) Second, the action must fit within one of the "types of actions" set forth by [Rule 23\(b\)](#). [Fed. R. Civ. P. 23\(b\)](#).

In the Court's August 16, 2017 order, it thoroughly considered each of the [Rule 23\(a\)](#) requirements and found that this action appropriately fell within [Rule 23\(b\)\(3\)](#). Based on the Court's consideration of the [Rule 23](#) requirements at the preliminary approval stage in combination with the information provided in Plaintiff's motion for final approval, the Court is satisfied that the [Rule 23\(a\)](#) requirements are met, that common issues predominate and that a class action is the superior vehicle to litigate the claims at issue in this action.

##### *a. Numerosity*

A class need only be so numerous that joinder of all members individually is impracticable. [Fed. R. Civ. P. 23\(a\)\(1\)](#). In this litigation, this Court found that the class comprising of 87<sup>2</sup> members is sufficiently numerous that joinder of all members would be impracticable. Doc. 31 at 5. The class is sufficiently numerous.

##### *b. Commonality and Typicality*

In its August 16, 2017 order, the Court explained that, in the wage and hour context, commonality is satisfied when all class members are injured by the same class-wide policy or practice. Doc. 31 at 5 (citations omitted). In this action, it was agreed that all class members were subject to the same alternative workweek schedule that caused the alleged

underpayment of minimum wage and meal and rest break violations. *Id.*

The typicality requirement is satisfied if "the claims and defenses of the representative parties are typical of the defenses of the class...." [Fed. R. Civ. P. 23\(a\)\(3\)](#). Effectively, the typicality inquiry is whether the representative's claims are "reasonably co-extensive with those of the absent class members...." [Hanlon v. Chrysler Corp.](#), 150 F.3d 1011, 1020 (9th Cir. 1998). In this instance, Plaintiff has shown that the class members all suffered under the same policy. Although the extent of the injury varied from member to member, the injuries all arose from the same course of conduct by Defendant. See [Hanon v. Dataproducts Corp.](#), 976 F.2d 497, 508 (9th Cir. 1992). Plaintiff's claims are reasonably co-extensive with those of the class. The typicality requirement is met.

##### *c. Adequacy*

The adequacy requirement is met if the class representative and class counsel "fairly and adequately protect the interests of the class." [Fed. R. Civ. P. 23\(a\)\(4\)](#). Two questions are normally asked to determine adequacy: "(1) do the named plaintiff[ ] and [his] counsel have any conflicts of interest with other class members and (2) will the named plaintiff[ ] and [his] counsel prosecute the action vigorously on behalf of the class?" [Hanlon](#), 150 F.3d at 1020. Because Plaintiff and the class have been injured by the same policy and seek to recover the same damages, there is no indication that any conflict exists between Plaintiff and the class. Similarly, there is no indication that class counsel has any conflict of interest with the class. Next, the named plaintiff and class counsel have diligently pursued relief in this action and have arrived at a favorable settlement, as discussed in more depth below. The adequacy requirement is met.

\*4 All of the [Rule 23\(a\)](#) requirements are satisfied.

##### *d. Predominance and Superiority*

The matter was conditional certified at the preliminary approval phase as a [Rule 23\(b\)\(3\)](#) class. Doc. 31 at 7–9. In order to maintain a [Rule 23\(b\)\(3\)](#) class action the court must find that (1) the common questions of law or fact predominate over issues affecting only individual members and (2) that a class action is the superior vehicle for litigating the claims at issue. [Fed. R. Civ. P. 23\(b\)\(3\)](#). The Court made such a finding. Specifically, in its August 16, 2017 order, this Court observed that common questions of law and fact predominated over



the individual issues and that—based on the relatively small maximum claim value—a class action is the superior method of adjudicating the claims presented. Doc. 47 at 13–14. Those determinations remain; common questions predominate and a class action is the superior vehicle for litigation of the claims at issue.

Conditional certification of the [Rule 23](#) class is confirmed for the following class:

All non-exempt positions at Cold Spring facilities in Raymond, California and Clovis, California from October 11, 2012 through [August 16, 2017].  
Doc. 31 at 8–9.

## 2. Sufficiency of the Notice Afforded

Before a proposed settlement is approved, [Rule 23\(c\)\(2\)\(b\)](#) and [\(e\)\(1\)](#) require the Court to ensure that notice is directed “in a reasonable manner to all class members who would be bound by the” proposed settlement and that such notice provides the information necessary to make an informed decision regarding participation in the action. As described in the Court’s October 8, 2015 order, additional explanation of the claims is necessary when a settlement purports to resolve FLSA and California Labor Code claims in a hybrid action. Doc. 47 at 17 (citing *Murillo*, 266, F.R.D. at 472). The Court previously approved the substance of the notice packet, noting that it informed class members of “(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under [Rule 23\(c\)\(3\)](#).” See Doc. 31 at 9 (citing [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#)). See Doc. 35 at 6–12 (notice packet).

In addition to the sufficiency of the content of the notice given, the process for giving notice was also adequate. Prior to mailing the notices, the Claims Administrator ran the class list through the United States Postal Service’s National Change of Address database (“NCOA”), and performed address searches using electronic resources which collect data from various sources such as utility records, property tax records, motor vehicle registration records and credit bureaus. None of the notices distributed have been returned as undeliverable. See Doc. 35. The Claims Administrator received 18 telephone calls from class members. *Id.*

\*5 The Court is satisfied that the notice given was substantively sufficient and sent in a manner calculated to impart notice.

## 3. Settlement Agreement Fairness

In order for this settlement to be approved, Plaintiff must demonstrate that the proposed settlement is fundamentally fair, adequate, and reasonable. [Hanlon](#), 150 F.3d at 1026 (citation omitted); see [Fed. R. Civ. P. 23\(e\)](#). In conducting a fairness determination pursuant to [Rule 23\(e\)](#) the Court considers: “(1) the strength of the plaintiff’s case, (2) the risk, expense, complexity, and likely duration of further litigation, (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.” *In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934, 944 (9th Cir. 2015) (quoting, *inter alia*, *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). When settlement occurs before class certification the court must take extra care to ensure that “the settlement is not the product of collusion among the negotiating parties.” *In re Bluetooth*, 654 F.3d at 946.

### a. The Strength of Plaintiff’s Case

The first factor, the strength of Plaintiff’s case, favors settlement. When evaluating the strength of a case, the Court should “evaluate objectively the strengths and weaknesses inherent in the litigation and the impact of those considerations on the parties’ decisions to reach these agreements.” *Adoma v. Univ. of Phoenix, Inc.*, 913 F.Supp.2d 964, 975 (E.D. Cal. 2012) (citation omitted). Class Counsel notes in his declaration that all claims rise and fall with the validity alternative work schedule and meal period claim. Doc. 32–1 at 12–13. Although Plaintiff believes that the alternative work schedule “was unlawful ... as there was no record available of any ballot approving [it,] Defendant produced declarations and other evidence ... suggest[ing] that defendant had” conducted a ballot. Doc. 31–1 at 13. Despite the evidence that a ballot may have taken place, there was a technical failure by Defendant in implementing its alternative work schedule because no documents related to that election were on file with the Department of Industrial Relations (“DIR”) until October 21, 2016.

As to Plaintiff’s meal period claim, Plaintiff acknowledges that many class members submitted declarations indicating

that they were permitted to take meal periods “whenever they wanted.” Doc. 32–1 at 14. However, Plaintiff also maintains that the noontime cessation of operation at Defendant's quarries, which was designed to allow for a meal period, took place after the fifth hour of work and therefore resulted in regular delays in the class members' ability to take timely meal periods. Doc. 32–1 at 14.

The parties have probed the strengths and weaknesses of Plaintiff's case. Settlement is a reasonable decision in this instance. This factor favors settlement.

*b. The Risk, Expense, Complexity, and Likely Duration of Further Litigation and the Risk of Maintaining Class Status*

\*6 “Approval of settlement is ‘preferable to lengthy and expensive litigation with uncertain results.’ ” *Munoz v. Giumarra Vineyards Corp.*, 2017 WL 26605075, \*9 (E.D. Cal. June 21, 2017) (citation omitted); accord *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (“[T]here is a strong policy that favors settlements, particularly where complex class action litigation is concerned.”) Moreover, “[e]mployment law class actions are, by their nature, time-consuming and expensive to litigate.” *Aguilar v. Wawona Frozen Foods*, 2017 WL 2214936, \*3 (E.D. Cal. May 19, 2017).

As noted in prior section, Plaintiff's case is not without weaknesses. Litigating those claims would risk failures in class certification (depending on the regularity of the alleged violations) and failures on the merits. See Doc. 32–1 at 17; Doc. 31 at 13. The Court also credits Class counsel's estimation that litigating the class action through a contested certification, further discovery, dispositive motions, and a possible trial would exceed \$1,000,000.00 in attorney fees and costs. Doc. 32–1 at 17. Although not overly complicated, if this action were not to be settled the class member would be highly unlikely to see any relief within two years, if ever.

The risk, costs, and delayed recovery inherent in further litigation weigh in favor of settlement.

*c. The Amount Offered in Settlement*

The amount offered in settlement is generally considered to be the most important considerations of any class settlement. See *Bayat v. Bank of the West*, 2015 WL 1744342, at \*4 (N.D. Cal. Apr. 15, 2015) (citing, *inter alia*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178–79 (9th Cir. 2013)). To determine whether that settlement amount is reasonable, the Court

must consider the amount obtained in recovery against the estimated value of the class claims if successfully litigated. *Litty v. Merrill Lynch & Co., Inc.*, 2015 WL 4698475, at \*9 (C.D. Cal. Apr. 27, 2015) (quoting *In re Mego*, 213 F.3d at 459). Courts regularly approve class settlements where class members recover less than one quarter of the maximum potential recovery amount. See *Bravo v. Gale Triangle, Inc.*, 2017 WL 708766, \*10 (C.D. Cal. Feb. 16, 2017) (approving a settlement where net recovery to class members was approximately 7.5% of the projected maximum recovery amount); *Officers for Justice v. Civil Service Com'n of City and Cty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982) (“[A] cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair.”)

Class counsel has approximated (and explained the mechanism for that approximation) that the total maximum recovery in this matter at roughly \$4,441,633.60, inclusive of penalties and interest. Doc. 32–1 at 6. Of that amount, \$2,610,874.85 is potential PAGA penalties. Because the PAGA penalties sought are at least partially duplicative of penalties granted by the underlying Labor Code violations, see, e.g., Cal. Lab. Code §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award PAGA penalties, see Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA penalties are highly uncertain. See *Guifu Li v. A Perfect Day Franchise, Inc.*, 2012 WL 2236752, \*17 (N.D. Cal. June 15, 2012).

The gross settlement amount is \$500,000.00, of which \$297,332.98 will be distributed to the class. There is no possible reversion. The claims administrator has calculated that the average settlement payment will be \$3,340.82. Doc. 35 at 3. The settlement amount that will actually be disbursed to the class members is approximately seven percent of the predicted maximum recovery amount. Excluding the highly uncertain PAGA penalties, the net settlement amount is roughly 16% of the more realistic maximum recovery amount. That settlement amount is within the acceptable range, albeit at the low end. See, e.g., *Garnett v. ADT, LLC*, 2016 WL 1572954, \*7 (E.D. Cal. Apr. 19, 2016) (approving a settlement agreement with a class payment of roughly 21 percent of the maximum potential recovery amount); *Rosales v. El Rancho Farms*, 2015 WL 4460918, at \*14 (E.D. Cal. July 21, 2015) (twenty five percent); *In re Celera Corporation Securities Litigation*, 2015 WL 1482303, at \*6 (N.D. Cal. Mar. 31, 2015) (eight percent).

\*7 This factor supports approval of the settlement.

*d. The Extent of Discovery Complete and Stage of the Proceedings*

Courts require the parties to have conducted sufficient discovery to be able to make an informed decision about the value and risks of the action and come to a fair settlement. *See Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1239 (9th Cir. 1998); *Adoma*, 913 F.Supp.2d at 977. Although no formal discovery was conducted, class counsel emphasizes that Defendant “provided a dataset sufficient to prepare a full exposure analysis, [ ] documents related to the” alternative work schedule, documents related to Defendant’s employment policies, and information regarding the hours and wages of “nearly all” class members. Doc. 32–1 at 5.

In this matter, the parties conducted sufficient discovery to be able to make an informed decision about settlement. This factor supports approval of the settlement agreement.

*e. The Experience and Views of Counsel*

The Court must consider the experience and views of counsel regarding the settlement. *See Churchill Vill.*, 361 F.3d 575; *Nat’l Rural Telecomms.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004). Class counsel is experienced, *see* Doc. 32–1 at 2–4, and is informed about the subject of this litigation, *see generally* Doc. 32–1. Class counsel recommends settlement and “believes that [it] will provide a substantial benefit to the” class. This factor weighs in favor of settlement.<sup>3</sup> Doc. 32 at 21.

*f. The Reaction of the Class Members*

In determining the fairness of a settlement, the Court should consider class member objections to the settlement and the claims rate. *See Larsen v. Trader Joes Co.*, 2014 WL 3404531, \*5 (N.D. Cal. July 11, 2014). The absence of a large number of objections to a proposed settlement raises a strong presumption that the terms of the agreement are favorable to the class. *Richardson v. THD At-Home Services, Inc.*, 2016 WL 1366952, \*6 (E.D. Cal. Apr. 6, 2016) (citation omitted). Here, all of the notice packets were delivered, all class members will receive a settlement payment, and no objections or requests for exclusion have been filed. Doc. 35 at 3. There is no evidence to indicate that any class member is dissatisfied with the proposed settlement.

Plaintiff encourages the Court to consider the class representative’s reaction. Doc. 22 at 25. Although a class representative has no veto power, the Court should consider any support or opposition to the settlement by a class representative. *See* Manual Complex Lit. § 21.642 (4th ed. 2016). Mr. Avila has spent approximately 112 hours assisting class counsel and supports the settlement. Doc. 33–3 at 6.

\*8 The reaction of the class members and class representative to the settlement has been positive. This factor weighs in favor of settlement.

*g. Absence of Collusion*

Where, as here, a settlement is negotiated before class certification, courts “must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.”

*In re Bluetooth*, 654 F.3d at 946.<sup>4</sup> The operative settlement agreement has no reversion and no clear sailing provision. The fees sought by counsel, although higher than the benchmark in this Circuit, do not indicate collusion between counsel. Although not dispositive, the fact that this action was taken to mediation tends to indicate that the resolution is not a product of collusion. *See Vargas v. Central Freight Lines, Inc.*, 2017 WL 4271893, \*7 (S.D. Cal. Sept. 25, 2017).

The Court is satisfied that this settlement agreement is not a product of collusion. This factor weighs in favor of approval of the settlement agreement.

*h. Conclusion*

The Court finds that the factors set forth by the Ninth Circuit weigh in favor of final approval of the settlement. The settlement is fair, reasonable and adequate as required by Rule 23. Final approval of the settlement agreement will be granted.

#### IV. Fees, Costs, and Representative Service Payment

Plaintiff moves for an award of attorneys’ fees and costs, and a class representative service payment for the class representative. Class counsel seeks attorneys’ fees in the amount of \$166,666.66, amounting to thirty-three percent of the gross fund value. Plaintiff also requests reimbursement for litigation costs in the amount of \$6,125.05. Finally, Plaintiff

requests a representative service award in the amount of \$5,000.00. Plaintiff's motion will be granted in part.

### A. Attorneys' Fees

[Rule 23\(h\)](#) permits the court to “award reasonable attorney's fees and nontaxable costs” in a class action when they “are authorized by law or by the parties’ agreement.” [Fed. R. Civ. P. 23\(h\)](#). Even if the parties agree on the amount of a fees award, a district court has an obligation to consider the fees award in the context of the settlement agreement to ensure that it is reasonable. *See In Re Bluetooth*, 654 F.3d at 941. Where the settlement agreement creates a common fund, a “district court ‘has the discretion to apply either the lodestar method or the percentage-of-the-fund method in calculating the fee award.’ ” *Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. May 11, 2016) (quoting *Fischel v. Equitable Life Assurance Soc’y*, 307 F.3d 997, 1006 (9th Cir. 2002)). Despite the discretion afforded to the court, the Ninth Circuit recommends that district courts cross-check the award by applying the second method. *In Re Bluetooth*, 654 F.3d at 944–945.

#### 1. Percentage of the Fund Method.

This Court will apply the percentage-of-the-fund method and cross-check by calculating the lodestar. The “benchmark” award under the percentage-of-the-fund method is twenty-five percent of the fund. *Stetson*, 821 F.3d at 1165; *In Re Bluetooth*, 654 F.3d at 942.<sup>5</sup> A district court may “adjust upward or downward to account for any unusual circumstances involved in the case.” *Stetson*, 821 F.3d at 1165; *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). Factors that would justify departure from the benchmark include, “the benefit obtained for the class,” the risk due to the complexity and novelty of the issues presented, “the risk of nonpayment,” and awards granted in similar cases. *In Re Bluetooth*, 654 F.3d at 942 (citations omitted); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). Chief among those considerations is the benefit to the class. *In Re Bluetooth*, 654 F.3d at 942 (citing, *inter alia*, *Hensley v. Eckerhart*, 461 U.S. 424, 434–436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

<sup>\*9</sup> As noted, Plaintiff seeks thirty-three percent of the gross fund amount in fees. That amount exceeds the benchmark; in order to award that percentage of the gross fund, the Court must find that unusual circumstances justify the departure. Class counsel argues that the departure is justified because “(1) [c]lass [c]ounsel have obtained a superb result

for the [class members]; (2) they faced considerable risks in prosecuting this litigation; (3) they displayed skillful representation and high-quality work that resulted in this [settlement]...; and (4) [they] carried the heavy financial burden of representing Plaintiff and the [class members] on a contingency basis.” Doc. 33 at 8. Further, class counsel contends, its lodestar calculation supports the fee award of \$166,666.66. Doc. 33 at 8.

First, the Court looks to the benefit imparted upon the class. The average recovery per class member of \$3,340.82 is higher than the recovery in most similar actions. *See, e.g., Thompson v. Costco Wholesale Corp.*, 2017 WL 3840342, \*6 (S.D. Cal. Sept. 1, 2017) (approving a settlement with an average recovery of roughly \$1700.00 per class member in a similar action); *Emmons v. Quest Diagnostics Clinical Laboratories, Inc.*, 2017 WL 749018, at \*9 (E.D. Cal. 2017). *Chavez v. PVH Corp.*, 2015 WL 9258144, \*2 (N.D. Cal. 2015) (approving a settlement with a recovery of approximately \$130.00 per class member in a similar action); *Taylor v. FedEx Freight, Inc.*, 2016 WL 6038949, \*4 (E.D. Ca. Oct. 13, 2016) (approving a settlement with a recovery of approximately \$2,600.00 per class member in a similar action); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 440 (E.D. Cal. 2013) (granting a 33% fees award where the approximate recovery was just over \$600 per class member in a similar action). However, the net payout to the class is, at best, 16% of the maximum class recovery (excluding potentially duplicative PAGA penalties); *see also Morales v. Steveco, Inc.*, 2013 WL 1222058, \*2 (E.D. Cal. Mar. 25, 2013) (noting that an average recovery of roughly \$4,300.00 per class member in a wage and hour class action weighs in favor of an award above the benchmark). Class counsel achieved a strong outcome for the class. The absence of any objections to the settlement supports that conclusion. *See National Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004). This consideration weighs in favor of granting a fee award above the benchmark.

Next, the Court considers the risks involved with litigating this action. As the Court noted, some risk for counsel existed in prevailing on the merits in light of the apparent vote taken regarding implementation of an alternative work schedule, undercutting Plaintiff's claim. Similarly, the apparent lack of consistency regarding the regularity of missed or denied meal periods caused some risk of failed class certification. Those risks are a result of the facts of the action, not complexity or novelty of legal issues. Indeed, legally, this action was



relatively straight forward. This consideration does not weigh in favor of granting a fee award above the benchmark.

The Court also looks to the contingent nature of the representation. Class counsel accepted this action on a contingency basis in August of 2016. Doc. 33–1 at 12. In that way, it encountered a risk of non-payment and forewent other employment to advance this action. This factor weighs in favor of granting a fee award above the benchmark. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002).

Courts in this Circuit have awarded attorneys’ fees amounting to 33% of the gross fund where such an award does not greatly exceed the lodestar and the recovery for the class is substantial. *See, e.g., Richardson*, 2016 WL 1366952, \*12 (awarding 30% of the gross fund amount as attorneys’ fees where the per-class member award was substantial); *Barbosa*, 297 F.R.D. at 450 (collecting cases in this district that have granted approximately 33% of the gross fund). However, the amount sought in attorney fees would yield a lodestar multiplier of roughly three (when the rates are adjusted to match the relevant legal community).

\*10 The strong results achieved, the favorable reaction of the class, that class counsel litigated this matter on contingency for nearly two years all support a fee award above the benchmark. However, the adjusted lodestar is significantly lower the fee award sought. *See Section IV(A)(2), infra*.

## 2. Lodestar Calculation

Although not required of a district court, often district courts conduct a lodestar cross-check to ensure that the percentage based fee is reasonable. *See Yamada v. Nobel Biocare Holding AG*, 821 F.3d 1058 (9th Cir. Apr. 20, 2016); *Crawford v. Astrue*, 586 F.3d 1142, 1151 (9th Cir. 2009) (the district court may conduct a lodestar cross-check as an aid in assessing the reasonableness of the fee). The lodestar amount is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Gonzales v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013). The district court must then determine whether to apply a risk multiplier. *See Yamada*, 821 F.3d at 1068 (The court may apply a multiplier to adjust the lodestar figure considering reasonableness factors such as: “the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.”) (citation omitted); *see also Stetson*, 821 F.3d at 1166 (“The district court must apply a

risk multiplier to the lodestar ‘when (1) attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence the case was risky.’ Failure to apply a risk multiplier in cases that meet these criteria is an abuse of discretion.”) (citation omitted).

### a. Reasonable Number of Hours

Class counsel spent approximately 178 hours litigating this matter and preparing the settlement.<sup>6</sup> Counsel’s time was expended conducting informal and formal discovery, drafting pleadings, communicating with Plaintiff and class members, conducting case management tasks, conducting research, engaging in mediation, and negotiating settlement. Doc. 33–1 at 14–15. The bulk of the time was spent drafting pleadings. All of these items are reasonable uses of counsel’s time. The information provided does not disclose any substantial redundancies in counsel’s use of time. *See also Stetson*, 821 F.3d at 1166 (“[T]he district court should take into account the reality that some amount of duplicative work is ‘inherent in the process of litigating over time.’”) (citation omitted).

### b. Reasonable Rate

A district court is required to determine a reasonable rate for the services provided by examining the prevailing rates in the community, charged by “lawyers of reasonably comparable skill, experience, and reputation.” *Sanchez v. Frito Lay*, 2015 WL 4662535, \*17 (E.D. Cal. Aug. 5, 2016) (quoting *Cotton v. City of Eureka*, 889 F.Supp.2d 1154, 1167 (N.D. Cal. 2012)). “The ‘relevant community’ for the purposes of determining the reasonable hourly rate is the district in which the lawsuit proceeds.” *Sanchez*, 2015 WL 4662535, \*17 (quoting *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)); *accord Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013). When a case is filed in the Fresno Division of the Eastern District of California, the hourly rate is compared against attorneys practicing in the Fresno Division of the Eastern District of California. *See, Munoz v. Giumarra Vineyards Corp.*, 2017 WL 2665075, \* 17 (E.D. Cal. June 21, 2017); *Nadarajah v. Holder*, 569 F.3d 906, 917 (9th Cir. 2009). In the Fresno Division of the Eastern District, the hourly rate for competent and experienced attorneys is between \$250 and \$400, “with the highest rates generally reserved for those attorneys who are regarded as competent and reputable and who possess in excess of 20 years of experience.” *Silvester v. Harris*, 2014 WL 7239371, \*4 (E.D. Cal. Dec. 17, 2014) (collecting cases); *see Archer v. Gibson*, 2015 WL 9473409, \*13–14 n. 6 (E.D. Cal. Dec. 28, 2015) (“A

current reasonable range of attorneys' fees, depending on the attorney's experience and expertise, is between \$250 and \$400 per hour, and \$300 is the upper range for competent attorneys with approximately 10 years of experience.”)

**\*11** Class counsel has requested hourly fees as follows: for Richard Hoyer, a partner with Hoyer & Hicks, in practice since 1990, a rate of \$700.00 per hour; Walter Haines, an attorney with United Employees Law Group, in practice since 1976, a rate of \$650.00 per hour; for Ryan Hicks, a partner with Hoyer & Hicks, in practice since 2008, a rate of \$500.00 per hour; for Jennifer McGuire, a former associate at Hoyer & Hicks, in practice since 2012, a rate of \$350.00 per hour; for Nicholas Lansdown, a former associate at Hoyer & Hicks, in practice since 2016, a rate of \$150 per hour. Doc. 33–1 at 8–9; Doc 33–2 at 2–3.

Mr. Hoyer declares that he has reviewed the rates of others in the San Francisco Bay Area to conclude that the rates sought by those in his firm are reasonable. As noted, the Fresno Division of the Eastern District of California is the relevant legal community. See *Juarez v. Villafan*, 2017 WL 6629539, \*18 (E.D. Cal. Dec. 29, 2017) (collecting cases); *Munoz*, 2017 WL 2665075 at \* 16. The Court only looks outside of the relevant community if local counsel was “‘unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case.’” *Munoz*, 2017 WL 2665075 at \*17 (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992)). Mr. Hoyer has made no such showing. He merely notes that his firm is “‘mostly contacted via the internet by potential clients who presumably have been able to find local counsel who litigate plaintiff-side wage and hour class actions....” Doc. 31–1 at 13. He does not establish—or attempt to establish—that this action required unique expertise that could not be obtained locally. Mr. Avila indicates in his declaration that he “‘contacted a number of local attorneys in the area in hopes that one of them would take” his case, however, “‘all of them refused to take the case....” Doc. 33–3 at 2–3. Such a showing is well short of the showing made in *Gates* where the plaintiffs “‘offered numerous declarations of San Francisco and Sacramento attorneys which directly support[ed] their contention that Sacramento attorneys and law firms with the requisite expertise and experience to handle” the type of complex litigation at issue were “‘unavailable” *Gates*, 987 F.2d at 1405–1406; accord *California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.*, 2016 WL 105252, \*2 (E.D. Cal. Jan. 8, 2016) (explaining that the plaintiff’s conclusory declaration

regarding his attempt to retain local counsel—which was more detailed than Mr. Avila’s declaration here—did not support a finding that local counsel was unavailable).

Mr. Haines directs the Court to a case within this Division where he was awarded attorney fees at a rate of \$625.00 per hour.<sup>7</sup> However, from the Court’s own inquiry, it appears that Mr. Haines was awarded fees at a rate not exceeding \$400.00 per hour more often than not. See, e.g., *Mitchinson v. Love’s Travel Stops*, 2017 WL 2289342, \*7 (E.D. Cal. May 25, 2017) (finding a rate of \$400 per hour for Mr. Haines was appropriate); *Morgret v. Applus Tech., Inc.*, 2015 WL 3466389, at \*17 (E.D. Cal. June 1, 2015) (finding a rate of \$380 per hour for Mr. Haines was appropriate). That rate is appropriate.

The fee rates in excess of \$400.00 are above the prevailing rates in the Fresno Division of this District for attorneys with commensurate experience and expertise. See *Sanchez v. Frito-Lay, Inc.*, 2015 WL 4662636, \*18 (E.D. Cal. Aug. 5, 2015), report and recommendation adopted, 2015 WL 5138101 (E.D. Cal. Aug. 26, 2015) (finding reasonable rate for attorney with twenty years of experience was \$350 per hour in a wage and hour class action); *Verduzco v. Ford Motor Co.*, 2015 WL 4131384, at \*4 (E.D. Cal. July 9, 2015) report and recommendation adopted, 2015 WL 4557419 (E.D. Cal. July 28, 2015) (awarding attorney with over 40 years of experience \$380.00 per hour); *Silvester v. Harris*, 2014 WL 7239371, at \*4 (E.D. Cal. Dec. 17, 2014) (awarding attorneys with twenty years of experience \$335.00 and \$375.00 per hour); *Willis v. City of Fresno*, 2014 WL 3563310, at \*12 (E.D. Cal. July 17, 2014) adhered to on reconsideration, 2014 WL 4211087 (E.D. Cal. Aug. 26, 2014) (awarding attorneys with over twenty five years of experience \$380.00 per hour); *Jadwin v. County of Kern*, 767 F.Supp.2d 1069, 1169 (E.D. Cal. 2011) (finding an hourly rate of \$350.00 is near the top range of hourly rates in the Fresno Division and awarding \$380.00 per hour to an attorney with 40 years of experience). The fee rate sought for the services of Ms. McGuire is also above the prevailing rate for an attorney with her experience and expertise. See *Silvester*, 2014 WL 7239371 at \*4, n.2 (An acceptable rate “for an attorney with less than ten years of experience” ranges “between \$175 to \$300” per hour.”)

**\*12** A reasonable fee for Mr. Hoyer is \$400.00 per hour; a reasonable fee for Mr. Haines is \$400.00 per hour; a reasonable rate for Mr. Hicks is \$350.00 per hour; a reasonable rate for Ms. McGuire is \$250.00 per hour; a reasonable rate for Mr. Lansdown is \$150.00 per hour. E.g.,

*Williams v. Ruan Transport Corp.*, 2013 WL 6623254, at \*6 (E.D.Cal. Dec. 16, 2013) (awarding \$375.00 per hour to attorney with over thirty years of experience and \$325.00 per hour to attorney with fifteen years of experience in employment action).

### c. Adjusted Lodestar Calculation

Based on the 24 hours that Mr. Hoyer has reasonably spent on this litigation, billed at a rate of \$400.00 an hour; the 16.25 hours that Mr. Haines has reasonably spent on this litigation, billed at a rate of \$400.00 an hour; the 72.1 hours that Mr. Hicks has reasonably spent on this litigation, billed at a rate of \$350.00 per hour; the 58.6 hours that Ms. McGuire reasonably spent on this litigation, billed at a rate of \$250.00 per hour; and the 7.3 hours that Mr. Lansdown reasonably spent on this litigation, billed at a rate of \$150 per hour, the lodestar amount is \$ \$57,080.00 (\$9,600.00 + \$6,500.00 + \$25,235.00 + \$14,650.00 + \$1095.00). In order to award the requested fee award of \$166,666.66, the Court would have to apply a multiplier of approximately three.

“A strong presumption exists that the lodestar” calculation, without application of a multiplier, “is a reasonable fee.” *Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1262 (9th Cir. 1987). “[U]pward adjustments of the lodestar are proper only in ‘rare’ and ‘exceptional’ cases, supported by specific evidence on the record and detailed findings by the district court.” *Jordan*, 815 F.2d at 1262 (quoting *Blum v. Stenson*, 465 U.S. 886, 898–901, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). To determine if a lodestar multiplier is reasonable, courts in this Circuit must consider the twelve *Kerr* factors:

- (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

*Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); Although the relevant *Kerr* factors were discussed above in considering the percentage of the fund method, the Court briefly considers each. Class counsel spent a relatively limited amount of time of this action. The legal questions involved were not particularly complex. Counsel is skilled

and experienced. Counsel customarily charges a rate higher than this district routinely permits. Counsel's customary rate is high, in part because it takes matters on contingency. Counsel has not indicated that Mr. Avila or the factual setting of this action imposed any time limitations. The results obtained for the class are strong. Apparently, some attorneys in the local legal community declined to take the action. The benchmark in this Circuit, and the ordinary award when the percentage of the fund calculation exceeds the lodestar calculation, is to award twenty five percent of the gross fund amount.

\*13 In light of the strong result for the class, the favorable class reaction, and counsel's willingness to take the matter on contingency, the Court will award attorney at twenty eight percent (28%) of the gross fund: \$140,000.00. That figure represents a relatively high lodestar modifier of approximately two and a half and a percentage above the benchmark to recognize class counsel's considerable efforts but avoids awarding “windfall profits for class counsel in light of the [limited number of] hours spent on the case.” *In re Bluetooth*, 654 F.3d at 942. The remaining five percent difference (between the amount sought and amount awarded) of the gross fund will be distributed between the class members using the formula agreed upon in the settlement agreement.

### B. Litigation Costs

“[A]n attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund.” *Norris v. Mazzola*, 2017 WL 6493091, \*14 (N.D. Cal. Dec. 19, 2017); *Sanchez*, 2015 WL 4662636, \*20; accord *Smith*, 2016 WL 2909429, \*9 (“An attorney is entitled to ‘recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client.’”) (quoting *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)). Such expenses regularly include postage, investigation costs, copying costs, hotel bills, meal, messenger services, court costs, electronic research, court reporter costs, delivery fees, and mediation expenses. See, e.g., *Ruiz v. XPO Last Mile, Inc.*, 2017 WL 6513962, \*8 (S.D. Cal. Dec. 20, 2017); *Leverage v. Traeger Pellet Grills, LLC*, 2017 WL 6405619, \*7 (N.D. Cal. Dec. 15, 2017).

Class Counsel has submitted an itemized list of expenses. Doc. 33 at 24; Doc. 33–1 at 17. The itemized costs include filing fees, service costs, electronic research, and mediation fees. Those costs are reasonable litigation expenses. Counsel's request for costs in the amount of \$6,124.05 will be granted.

### C. Representative Service Award

Representative service awards are “fairly typical in class action cases.” *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958–959 (9th Cir. 2009); see *Staton*, 327 F.3d at 977. Granting a service award is discretionary; in doing so the court should consider the time and effort expended by the named plaintiff, and the risk undertaken in serving as named plaintiff. *Staton*, 327 F.3d at 977; *In re Mego*, 213 F.3d at 463. The court should also consider the amount of the service award as compared to the average recovery of the class. *In re Online DVD–Rental Antitrust Litig.*, 779 F.3d at 947. Incentive awards are particularly appropriate in wage-and-hour actions where plaintiffs undertake a significant “reputational risk” by bringing suit against their present or former employers. *Rodriguez*, 563 F.3d at 958–59.

In this case, the class representative has participated extensively in the prosecution of this action on behalf of the class. Doc. 33–3. Specifically, he assisted in gathering information, discussed the action with counsel, interacted with other of Defendant's employees regarding the action, and provided the documentation that he had in his possession regarding Defendant's wage policies. Doc. 33–3 at 2–6.

A service award of \$5,000.00 is requested for Mr. Avila. That figure is presumptively reasonable in this Circuit. *Richardson*, 2016 WL 1366952, \*13 (citing *Harris v. Vector Marketing Corp.*, 2012 WL 381202, \*7 (N.D. Cal. Feb. 6, 2012)); see *In re Online DVD–Rental Antitrust Litig.*, 779 F.3d at 947. Moreover, the proposed incentive award is not dramatically higher than the average class member award.

For those reasons, the representative service award of \$5,000.00 will be granted to Mr. Avila.

### D. Administration Costs

\*14 Courts routinely award administrative costs associated with providing notice to the class. *E.g.*, *Schuchardt v. Law Office of Rory W. Clark*, 2016 WL 1701349, \*17, 314 F.R.D. 673 (N.D. Cal. Apr. 28, 2016); *Odrick v. Union Bancal Corp.*, 2012 WL 6019495, \*7 (N.D. Cal. Dec. 3, 2012). The settlement provides for up to \$8,500.00 to be paid to CPT Group, Inc., as settlement administrator. That amount is reasonable and will be awarded.

### V. Order

Based on the foregoing, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion for Final Approval of the Settlement Agreement is GRANTED;
2. Plaintiff's request for certification of the Settlement Class is GRANTED and defined as follows:
3. The above-defined settlement class has met all of the [Rule 23\(a\) and \(b\)\(3\)](#) requirements;
4. The terms of the proposed Settlement Agreement are found to be fair, adequate and reasonable and comply with [Rule 23\(e\) of the Federal Rules of Civil Procedure](#);
5. The notice provided to the settlement class members, as well as the means by which it was provided, constitutes the best notice practicable under the circumstances and is in full compliance with the United States Constitution and the requirements of Due Process and [Rule 23 of the Federal Rules of Civil Procedure](#). Further, that such notice fully and accurately informed settlement class members of all material elements of the lawsuit and proposed class action settlement, and each member's right and opportunity to object to the proposed class action settlement;
6. Plaintiff's motion for attorneys' fees, costs, and representative service award is GRANTED in part and DENIED in part;
7. Plaintiff Joseph Avila is appointed as a suitable class representative for the settlement class and awarded \$5,000.00 as a representative service payment;
8. Hoyer & Hicks and United Employees Law Group, PC are appointed as class counsel for the settlement class, and are awarded \$140,000.00 in attorneys' fees and \$6,124.05 in costs;
9. The settlement administrator CPT Group, Inc., is awarded to up to \$8,500.00 for settlement administration costs;
10. The Court directs the parties to effectuate the settlement terms as set forth in the Settlement Agreement, integrating into the class member payment the additional five percent of the gross fund amount sought but not awarded to class counsel, and the settlement



administrator to calculate and pay the claims of the class members in accordance with the terms set forth in the Settlement Agreement and the following schedule:

|                                                                                                                              |                                          |
|------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|
| Effective Date                                                                                                               | February 15, 2018                        |
| Defendant to wire the Gross Settlement Fund to CPT Group                                                                     | No later than March 1, 2018              |
| Fees and costs, Class Representative awards, Call awards to be paid by CPT Group                                             | No later than March 15, 2018             |
| CPT to stop payment on checks for Class Members who receive a payment but do not cash the settlement check.                  | 120 days after issuance of class awards. |
| CPT to transmit the funds designated for but not paid to class members to the State of California's Unclaimed Property Fund. |                                          |

**\*15** 11. By means of this Final Approval Order, this Court hereby enters final judgment in this action, as defined in [Rule 58\(a\)\(1\), Federal Rules of Civil Procedure](#);

12. The Court retains jurisdiction to consider all further applications arising out of or in connection with the Settlement.

IT IS SO ORDERED.

#### All Citations

Not Reported in Fed. Supp., 2018 WL 400315

#### Footnotes

- 1 Originally Plaintiff indicated that there were 87 putative class members. Although counsel intermittently refers to 87 and 89 class members, Doc. 32 at 7, 9, 12, 17, the majority of the documents submitted reflect the existence of 89 class members. See Docs. 32, 32–1, 32–2, 35. The calculation of average class member recovery also tends to indicate the existence of 89 class members. See Doc. 35.
- 2 Again, it appears that the class is comprised of 89 members. This difference is without significance for purposes of this section.
- 3 “Although a court might give weight to the fact that counsel for the class or the defendant favors the settlement, the court should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less than a strong, favorable endorsement.” [Smith v. American Greetings Corp.](#), 2016 WL 2909429, \*5 n 5 (N.D. Cal. May 19, 2016) (quoting Principles of the Law of Aggregate Litigation § 3.05 comment (a) (2010)).
- 4 The [In re Bluetooth](#) court instructs district courts to look for disproportionate settlement amounts, clear sailing provisions, and reversionary funds, among other things. [In re Bluetooth](#), 654 F.3d at 947.
- 5 Counsel cites [Ontiveros v. Zamora](#), 303 F.R.D. 356, 372 (E.D. Cal. 2014) for the proposition that “Class Counsel’s request for one-third of the” gross fund value “is well within the range customarily approved by California courts in comparable class actions. In [Ontiveros](#), the Court expressly declined grant fees in the amount of 33% of the gross fund. Nothing that such a fee would award a lodestar multiple of two, the court instead applied the benchmark percentage award of 25%. [Ontiveros](#), 303 F.R.D. at 374–375.
- 6 Class Counsel provides a breakdown of the hours allocated to each task and a breakdown of hours billed by each assigned attorney.
- 7 See [Novoa v. Charter Comm’ns, LLC](#), 1:13–cv–1302, Doc. 65 (E.D. Cal. June 6, 2016). The order awarding the fee award did not discuss whether the rate sought was reasonable.

# **EXHIBIT 2**

2017 WL 708766

Only the Westlaw citation is currently available.

United States District Court, C.D. California.

Sara BRAVO, et al.

v.

GALE TRIANGLE, INC., et al.

CV 16-03347 BRO (GJSx)

|

Filed 02/16/2017

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**ORDER RE PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS [18, 19]**

BEVERLY REID O'CONNELL, United States District Judge

**I. INTRODUCTION**

\*1 Currently pending before the Court are two motions related to the settlement of this class action case: (1) Plaintiffs' Motion for Final Approval of Class Action Settlement, (Dkt. No. 18 (hereinafter, "Final Approval Mot.)); and, (2) Plaintiffs' Motion for Approval of Attorneys' Fees and Costs, (Dkt. No. 19 (hereinafter, "Fees Mot.)). After considering the papers filed in support of the instant motions, the arguments advanced at the final fairness hearing held on February 13, 2017, and the entirety of the record, the Court **GRANTS** both motions, but amends the attorneys' fees award Plaintiffs' counsel requests.

**II. FACTUAL AND PROCEDURAL BACKGROUND****A. The Parties**

Plaintiffs Sara Bravo and Omar De La Rosa (the "Named Plaintiffs") bring this class action claim on their own

behalf, as well as on behalf of all others similarly situated (collectively, "Plaintiffs" or "Class Members"), against Defendant Gale/Triangle, Inc. d/b/a Performance Team ("Defendant"). (See Dkt. No. 1-1 (hereinafter, "Compl.")). Plaintiffs are California residents who were formerly employed by Defendants. (See Compl. ¶¶ 5, 17.) Defendant is incorporated and has its principal place of business in California. (Compl. ¶ 6; see also Dkt. No. 1 ¶ 29.)

**B. Factual Allegations**

Defendant handles logistics and warehousing tasks for large companies, requiring it to operate several warehouses and offices in California. (See Final Approval Mot. at 2.) Plaintiff Sara Bravo worked for Defendant as "an office clerical worker" from April 2005 until January 2015. (Compl. ¶ 18.) Plaintiff Omar De La Rosa worked for Defendant as a warehouse worker from July 2009 through July 2014. (Compl. ¶ 19.) Plaintiffs seek to represent two classes: (1) a proposed "Office Class" including those who held non-exempt positions working in Defendant's corporate offices; and, (2) a proposed "Warehouse Class" consisting of non-exempt employees working in Defendant's warehouses. (Compl. ¶¶ 13–14.)

Plaintiffs' Complaint alleged that Defendants violated several California wage and hour laws during their employment. First, Plaintiffs claim that Defendant had a uniform policy under which Defendant would deduct a thirty-minute meal break for each employee regardless of whether an employee took a meal break. (Compl. ¶ 23.) Second, Plaintiffs allege that Defendant required members of the Warehouse Class to combine their meal and rest periods. (Compl. ¶ 24.) In addition, Plaintiffs aver that until November 2014, Defendant "regularly" would not permit Plaintiffs and the Office Class Members to take meal periods before their fifth hour of work, as required by California law. (Compl. ¶ 25.) Further, Plaintiffs claim that Defendant had a uniform "time rounding policy" under which Defendant rounded time to quarter hour increments. (Compl. ¶ 26.) According to Plaintiffs', this time rounding policy resulted in systematic underreporting of the Class Members' time. (*Id.*) Plaintiffs also alleged that Defendant required all Warehouse Class Members to clock out before going through security checkpoints when leaving the facility, resulting in unpaid work time. (Compl. ¶ 27.) In addition, Plaintiffs contended that Defendant failed to include its legal name on the paystubs it provided its employees. (Compl. ¶ 30.) And finally, due to these alleged violations, Plaintiffs contend that Defendant is liable for waiting time penalties for failing to pay the Class Members

all the money due them in a timely manner. (*See* Compl. ¶¶ 28, 29–31.) Plaintiffs brought their claim under California's Private Attorney General Act ("PAGA"). (Compl. ¶ 32.)

\*2 Prior to attending mediation, the parties exchanged "thousands of pages of documents." (*See* Declaration of James K. Kawahito (Dkt. No. 18-2) (hereinafter, "Kawahito Decl.") ¶ 7.)<sup>1</sup> These documents included time sheets, wage statements, handbooks, and policies and procedures that Defendant had in place during the relevant time period. (*Id.*) Through this exchange of information, Defendant produced enough evidence to establish that no auto-deduct policy existed. (Final Approval Mot. at 3.) The parties continue to dispute whether Defendant allowed its employees to timely take their meal breaks. (*Id.*) In addition, based on the information provided, Plaintiffs concede that Defendants' rounding policy did not result in the systematic underpayment of Defendant's employees. (Final Approval Mot. at 4.)

### C. The Settlement

After attending two days of mediation, the parties reached a settlement. (*See* Kawahito Decl., Ex. 1 (hereinafter, "Settlement Agreement").) Under the terms of the settlement, Defendant agreed to pay \$375,000 to settle the claims. (*See* Settlement Agreement § II(A).) The settlement covered all members of the Office and Warehouse Classes during the Class Period, which ran from May 13, 2011, through the date the Court preliminarily approved the settlement.<sup>2</sup> (*See* Settlement Agreement § I(E).) The settlement amount consisted of the following: (1) reimbursement of the administrative costs associated with claims administration not to exceed \$12,000; (2) \$5,000 incentive awards for each Named Plaintiff; (3) up to \$112,500 in attorneys' fees; (4) reimbursement for litigation costs not to exceed \$20,000; (5) \$7,500 to be awarded to the California Labor and Workforce Development Agency based on PAGA penalties; (6) \$2,500 in PAGA penalty disbursements to aggrieved employees on a per capita basis; and, (7) \$210,500 net disbursement to the Class Members. (*See id.*)

The payment amount for each Class Member is calculated by first using Defendant's payroll records to determine the number of weeks each Class Member worked for Defendant during the Class Period. (*See* Settlement Agreement § II(C).) Then, for those employees who no longer work for Defendant, the number of workweeks is increased by ten percent. (*Id.*) The workweek count and the additional ten percent premium (if applicable) for all Class Members are added together to

create a "Workweek Denominator." (*Id.*) Each employee's total number of workweeks and premium (if applicable) are then divided by the Workweek Denominator to determine the employee's percentage of recovery of the proceeds. (*Id.*) That amount is multiplied by the net settlement amount to arrive at the Class Member's total recovery. (*Id.*)

At the time Plaintiffs filed the instant Motion, there was a total of 540 participating Class Members, at a participation rate of 98.9%, with each Class Member expected to receive an average of \$389.81, with a maximum recovery of \$1,089.71. (Declaration of Tim Cunningham (Dkt. No. 18-3) (hereinafter, "Cunningham Decl.") ¶¶ 11–12.)<sup>3</sup>

### D. Procedural History

Plaintiffs first brought this case on May 13, 2015, in the Superior Court of California, County of Los Angeles. (*See* Compl.) On May 16, 2016, Defendant removed the action to this Court, invoking the jurisdiction of the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). (Dkt. No. 1.) On May 20, 2016, the parties attended a mediation, but failed to settle. (Kawahito Decl. ¶ 9.) On June 21, 2016, Defendant filed a Motion to Dismiss. (Dkt. No. 11.) On July 21, 2016, the parties attended a second mediation, at which they reach a settlement in principal and executed a memorandum of understanding. (Kawahito Decl. ¶ 9.) The parties then agreed to withdraw Defendant's Motion and, on September 12, 2016, filed a Motion for Preliminary Approval of a Class Action Settlement. (Dkt. No. 14 (hereinafter, "Prelim. Approval Mot.")). On October 24, 2016, the Court held a hearing. (Dkt. No. 16), and two days later, granted the Motion, (Dkt. No. 17).

\*3 Following preliminary approval, the Claims Administrator, CPT Group, Inc. ("CPT") worked with counsel to finalize the class list, the amount of time each class member worked, and the estimated amount that the class member would receive under the terms of the settlement. (Kawahito Decl. ¶ 10.) On or around November 16, 2016, after counsel for both parties "signed off" on the Notice Packet,<sup>4</sup> CPT sent it to all Class Members. (Cunningham Decl. ¶ 6; *see also* Cunningham Decl., Ex. A.) The deadline for class members to opt out of the class was December 31, 2016. (*See* Cunningham Decl., Ex. A.) As of January 9, 2017, six members had opted out of the class. (Cunningham Decl. ¶ 9.)

On January 9, 2017, Plaintiffs filed the instant, unopposed Motions. (*See* Final Approval Mot.; Fees Mot.) The Court

held a final fairness hearing on Monday, February 13, 2017. Counsel for Plaintiffs and Defendant were present. No class members appeared to object or oppose the settlement.

### III. LEGAL STANDARD

There is a strong judicial policy favoring settlement agreements, “particularly where complex class action litigation is concerned.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Nevertheless, when reviewing a proposed class action settlement, district courts “have the responsibility of ensuring fairness to all members of the class.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). A district court may not approve a class settlement unless the court determines that the “proposed settlement is fundamentally fair, adequate, and reasonable.” *Id.* at 959 (internal quotation marks omitted).

#### A. Final Approval of a Class Action Settlement Under Rule 23(e)

Under Rule 23(e), the “claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.” *Fed. R. Civ. P. 23(e)*. District courts must follow a two-step process when deciding whether to approve a proposed class action settlement. *See McKenzie v. Fed. Express Corp.*, No. CV 10-02420 GAF, 2012 WL 2930201, at \*2 (C.D. Cal. July 2, 2012). “First, the court must determine whether the proposed settlement deserves preliminary approval.” *See id.* (citing *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004)). Second, once the class members receive notice of the proposed settlement, the court must hold a fairness hearing and determine whether final approval is warranted. *Id.* (citing *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 525).

“Especially in the context of a case in which the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton*, 327 F.3d at 952. Thus, the court must first “assess whether a class exists; such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.” *Id.* (internal quotation marks omitted).

If the Court finds that a class exists, under *Rule 23(e)*, a district court must next determine that the “proposed

settlement is fundamentally fair, adequate, and reasonable.” *Staton*, 327 F.3d at 959 (internal quotation marks omitted). The very circumstances of settlement negotiations raise “incentives for the negotiators to pursue their own self-interest and that of certain class members.” *Id.* at 960. Thus, a district court must review a proposed class action settlement not only for actual fraud, overreaching, or collusion, but also with an eye to whether the terms are fair, adequate, and reasonable to the class as a whole. *Id.*

\*4 In determining whether a proposed settlement meets the fundamental standard of fairness, adequacy, and reasonableness, a district court may consider the following factors; (1) “the strength of [the] plaintiffs’ case”; (2) “the risk, expense, complexity, and likely duration of further litigation”; (3) “the risk of maintaining class action status throughout the trial”; (4) “the amount offered in settlement”; (5) “the extent of discovery completed, and the stage of the proceedings”; (6) “the experience and views of counsel”; (7) “the presence of a governmental participant”; and, (8) “the reaction of the class members to the proposed settlement.” *Id.* at 959 (internal quotation marks omitted); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). “This list is not exclusive and different factors may predominate in different factual contexts.” *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

A district court’s role in evaluating a proposed settlement is “limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable[,] and adequate to all concerned.” *Officers for Justice v. Civil Serv. Comm’n of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982). Accordingly, a district court should neither judge the merits of the claims in dispute, nor compare the proposed settlement “against a hypothetical or speculative measure of what might have been achieved by the negotiators.” *Id.* “Ultimately, the district court’s determination is nothing more than an amalgam of delicate balancing, gross approximations[,] and rough justice.” *Id.* (internal quotation marks omitted).

#### B. Attorneys’ Fees Under Rule 23(h)

In any certified class action, a district court may award reasonable attorneys’ fees and nontaxable costs as authorized by law or the parties’ agreement. *Fed. R. Civ. P. 23(h)*. Where a proposed class action settlement contains a fee provision, the provision is subject to the inquiry into whether the settlement is fair, adequate, and reasonable. *Staton*, 327 F.3d at 963



(explaining that “[t]here is no exception in [Rule 23\(e\)](#) for fees provisions contained in proposed class action settlement agreements”). A district court must “carefully assess” the reasonableness of a fee provision. *Id.* The mere fact that the defendant agrees to pay the fees “does not detract from the need to carefully scrutinize the fee award.” *Id.* at 964. This is because the allocation between the class award and the attorneys’ fees “is of little or no interest to the defense.” *Id.* (internal quotation marks omitted).

“[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This doctrine is known as the “common fund” doctrine. As the Supreme Court explained:

The [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney’s fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

*Id.* (citations omitted). Thus, the common fund doctrine permits a district court to award attorneys’ fees from the total monetary fund recovered by the class to ensure that each class member “contributes proportionately to the payment of attorneys’ fees.” *Staton*, 327 F.3d at 967.

The Supreme Court has set forth three criteria for obtaining an award of attorneys’ fees from a common fund: (1) the class of persons benefiting from the fund must be “easily identifiable”; (2) the court must be able to accurately trace the benefits from the fund to the class beneficiaries; and, (3) the court must be able to shift the fee from the fund to those benefiting from it “with some exactitude.” *Van Gemert*, 444 U.S. at 478–79. Generally, these three criteria are satisfied “when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf.” *Id.*

\*5 In the Ninth Circuit, a district court presiding over a common fund case may award attorneys’ fees based on one of two methods: the lodestar method or the percentage method. *Staton*, 327 F.3d at 967–68; *see also Hanlon*, 150 F.3d at 1029. If the court adopts the lodestar method, it may apply a risk multiplier to increase or decrease the fee award based on various factors, including the risk involved and the length of

the proceedings. *Staton*, 327 F.3d at 968. If the court adopts the percentage method, “the court simply awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee.” *Hanlon*, 150 F.3d at 1029.

Although a court has discretion to apply either method, the “use of the percentage method in common fund cases appears to be dominant.” *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston, & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)). In applying the percentage method, the court “must show why [the chosen] percentage and the ultimate award are appropriate based on the facts of the case.” *Id.* (explaining that the court may not “arbitrarily apply a percentage”). The “benchmark” for percentage fee awards in the Ninth Circuit is twenty-five percent of the common fund. *Hanlon*, 150 F.3d at 1029. Notwithstanding this benchmark, the percentage should be adjusted “when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.” *Six (6) Mexican Workers*, 904 F.2d at 1311.

The ultimate goal under either the lodestar method or the percentage method is to “reasonably compensate counsel for their efforts in creating the common fund.” *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046 (citing *Paul, Johnson*, 886 F.2d at 271–72). In considering the overall fairness and reasonableness of a fee award, a court should consider the following factors: “(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden on class counsel; and (5) awards made in similar cases.” *Id.* (citing *Vizcaino*, 290 F.3d at 1048–50).

## IV. DISCUSSION

### A. Plaintiffs’ Motion for Final Approval

#### 1. Whether a Class Exists

As explained above, before the Court may approve a final class action settlement when class certification has not yet occurred, the “court must assess whether a class exists.” *Staton*, 327 F.3d at 952. “Rule 23(a) establishes four prerequisites for class action litigation, which are: (1)

numerosity, (2) commonality, (3) typicality, and, (4) adequacy of representation.” *Id.* This requires proof that:

- (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); accord *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011).

#### a. Numerosity

Numerosity is satisfied if “the class is so large that joinder of all members is impracticable.” *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (citing Fed. R. Civ. P. 23(a)). “The numerosity requirement is not tied to any fixed numerical threshold—it ‘requires examination of the specific facts of each case and imposes no absolute limitations.’” *Rannis v. Recchia*, 380 Fed.Appx. 646, 651 (9th Cir. 2010) (quoting *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980)). Although Rule 23(a) does not require a specific minimum number of class members, Ninth Circuit precedent suggests that numerosity is satisfied when the prospective class includes at least forty members. *Id.* Here, the Settlement Class consists of approximately 540 persons. (See Cunningham Decl. ¶ 11.) Therefore, the Court finds that this requirement is satisfied.

#### b. Commonality and Typicality

\*6 Next, Plaintiffs must demonstrate commonality and typicality. Rule 23(a)’s commonality and typicality factors “tend to merge” in that both commonality and typicality “serve as guideposts for determining whether, under the particular circumstances, maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Meyer v. Portfolio Recovery Assocs. LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012) (internal quotation marks omitted) (quoting *Wal-Mart Stores*, 564 U.S. at 349 n.5). “Commonality simply requires that there be at least one legal or factual issue common to the class.” *In re Verisign, Inc. Secs. Litig.*, NO. C 02-02270 JW, 2005 WL 7877645, at \*5 (N.D. Cal. Jan. 13, 2005). “Commonality is generally

satisfied where, as in this case, ‘the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.’” *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D 482, 486 (E.D. Cal. 2010) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)).

Here, the Class Members all pursue common theories; for instance, all Class Members allege that: (1) Defendant’s alleged meal break policy (or lack thereof) violated California law; (2) Defendant was required to compensate Class Members for the time they spent waiting to go through Defendant’s security checkpoints; (3) Defendant uses the incorrect name on its pay stubs; and, (4) Defendant’s time rounding policy resulted in Defendant systematically underpaying the Class Members. (Prelim. Approval Mot. at 13 n.2.) As all the Class Members would pursue claims based on the same underlying legal theories, the Court finds that the commonality requirement is satisfied. See *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 449 (E.D. Cal. 2013) (finding commonality requirement satisfied in wage and hour class action).

“The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Here, the Named Plaintiffs’ claims are typical of the Class Members’ claims. Plaintiff Bravo worked in Defendant’s corporate offices and claims that she was subject to the same allegedly unlawful conduct—such as violations of California’s wage and hour laws and Defendant’s failure to include its correct name on paystubs—as every other Office Class Member. (See Compl. ¶¶ 23, 25, 26, 30.) Similarly, Plaintiff De La Rosa worked in Defendant’s warehouse and claims that he was subject to the same claims as every other Warehouse Class Member, such as Defendant’s policies of requiring its employees to clock out before exiting through the security checkpoint and requiring warehouse employees to combine their meal and rest period. (See Compl. ¶¶ 23, 24, 26, 27, 30.) Neither Named Plaintiff appears to pursue any legal claims that are unique or that are not applicable to the class as a whole. Accordingly, the Court finds that the typicality requirement is satisfied.

#### c. Adequacy of Representation

Finally, Plaintiffs must demonstrate that the Named Plaintiffs are adequate representatives of the class. The adequacy requirement “serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (internal citation and quotation marks omitted). Adequacy depends on the resolution of two questions: (1) whether “the named plaintiffs and their counsel have any conflicts of interest with other class members”; and, (2) whether “the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class.” *Hanlon*, 150 F.3d at 1020; see also *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1101 (C.D. Cal. 2015) (“Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees.” (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011))).

\*7 The Court is satisfied that the Class is adequately represented by the Named Plaintiffs. The Named Plaintiffs indicate that they felt that they “had an important, serious responsibility to represent all members of the Class in this litigation and to place their interests above [their] own.” (See Declaration of Sara Bravo (Dkt. No. 20) (hereinafter, “Bravo Decl.”) ¶ 8; Declaration of Omar De La Rosa (Dkt. No. 21) (hereinafter, “De La Rosa Decl.”) ¶ 8.) Thus, it appears that the Named Plaintiffs have ensured that the Class's recovery was fair and sufficient. Further, the Named Plaintiffs’ “interests are aligned with those of the class—that is, both the [Named Plaintiffs] and the class are primarily interested in maximizing their recovery.” *Monterrubio*, 291 F.R.D. at 450. In addition, it appears that neither of the Named Plaintiffs nor Plaintiffs' counsel have conflicts with any of the Class Members. (See Prelim. Approval Mot. at 14.) Finally, Plaintiffs' counsel has significant experiencing litigating class actions and has been involved with this litigation since before the action was filed. (See Kawahito Decl. ¶¶ 4–5, 13–22.) Therefore, the Court is satisfied that the Named Plaintiffs and their counsel have “prosecute[d] the action vigorously on behalf of the class.” *Hanlon*, 150 F.3d at 1020. Accordingly, the Court finds that the Class is adequately represented.

#### d. Rule 23(b)(3)

##### i. Predominance

Plaintiffs assert that the proposed Class satisfies the requirements of Rule 23(b)(3). (See Prelim. Approval Mot. at 14–15.) First, to certify a class under Rule 23(b)(3), a court must find that “the questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). “The requirement is satisfied if a plaintiff establishes that a ‘common nucleus of facts and potential legal remedies’ dominates the litigation.” *Monterrubio*, 291 F.R.D. at 451 (quoting *Hanlon*, 150 F.3d at 1022).

Here, the parties agree for purpose of settlement that common issues predominate. (See Prelim. Approval Mot. at 14–15.) As determined above, there is a common nucleus of facts that is uniform amongst all class members: specifically, the fact that several of Defendant's policies and practices allegedly did not comply with California wage and hour law. See *Monterrubio*, 291 F.R.D. at 451 (“The ‘common nucleus of facts’ in the present case derives from Defendant's alleged practices that applied consistently and uniformly to class members throughout the class period....”). Though the specifics of each Class Member's individual situation may vary slightly, “these common issues prevail.” *Id.*; see also *Torchia v. W.W. Grainger, Inc.*, 304 F.R.D. 256, 267 (E.D. Cal. 2014) (“In this case, the parties agree that common issues predominate over any individual issues because the compensation and reimbursement policies implemented by Defendant uniformly applied to the Class Members.” (internal quotation marks omitted)).

##### ii. Superiority

Rule 23 also requires that the court determine whether “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The Court may consider four factors in making this determination: (1) “the class members' interests in individually controlling the prosecution or defense of separate actions”; (2) the “extent and nature” of litigation based on the same controversy that other class members have already begun; (3) the desirability, or not, of “concentrating the litigation of the claims in the particular forum”; and, (4) “the likely difficulties in managing a class action.” *Id.*

The class members' interest is particularly “relevant when class members have suffered sizeable damages or have an emotional stake in the litigation.” *Torchia*, 304 F.R.D. at 267. Here, each Class Member will receive, on average,



approximately \$389.81 each, with a maximum recovery of \$1,089.71. (See Cunningham Decl. ¶ 12.) This amount is not so sizeable as to give the Class Members a significant interest in individual litigation. See *Torchia*, 304 F.R.D. at 268 (finding that average settlement amount of \$1,400 did not provide interest in individual litigation). In addition, as of the filing of Plaintiffs' Final Approval Motion, only six members had opted out of the Class.<sup>5</sup> (*Id.*) Therefore, this factor weighs in favor of class certification.

\*8 As to the next element, there is no evidence currently before the Court of any other pending actions based on the same legal theories or facts. Thus, this factor weighs in favor of certification, as well. As for the third element, where common issues predominate, “presentation of the evidence in one consolidated action will reduce unnecessarily duplicative litigation and promote judicial economy.” *Galvan v. KDI Distribution Inc.*, No. SACV 08-0999-JVS (ANx), 2011 WL 5116585, at \*12 (C.D. Cal. Oct. 25, 2011). And as to the final element regarding manageability, “because the parties have reached a settlement agreement, it does not appear there are any problems with managing the action.” *Torchia*, 304 F.R.D. at 268. Therefore, the Court finds that all of the Rule 23(b)(3) factors weigh in favor of certification.

Accordingly, because all of the Rule 23(a) requirements are satisfied, common issues predominate, and class action litigation is the superior method of proceeding in this action, the Court finds that certification of the Class for settlement purposes is appropriate.

## 2. Rule 23's Notice Requirements

Next, the Court will determine whether Rule 23's notice requirements have been satisfied. Rule 23(c)(2)(B) requires that class members be provided “the best notice that is practicable under the circumstances.” Fed. R. Civ. P. 23(c)(2)(B). “However, actual notice is not required under Rule 23(c)(2)(B).” *Monterrubio*, 291 F.R.D. at 452. Here, the parties hired CPT, an experienced Claims Administrator to handle providing notice to the Class Members. (See Cunningham Decl. ¶¶ 1–2.) On November 16, 2016, CPT sent all identified Class Members the Notice Packets via United States mail as required by the settlement agreement. (Cunningham Decl. ¶¶ 2, 6.) Approximately twenty-one Notice Packets were returned to CPT. (Cunningham Decl. ¶ 7.) CPT made a significant effort to find viable addresses for these returned packets, resulting in nineteen of them being re-mailed.

(Cunningham Decl. ¶¶ 7–8.) As of January 6, 2017, CPT had received only six opt-outs, four of which are deficient due to missing information that CPT has since requested. (Cunningham Decl. ¶ 9.) CPT has not received any disputes or objections from any Class Members. (Cunningham Decl. ¶¶ 10–11.) Thus, CPT reports a total of 540 participating Class Members, representing a 98.9% participation rate. (Cunningham Decl. ¶ 11.) The Court finds that CPT's efforts represented the best notice that is practicable in this scenario.

Further, “[a] class action settlement notice ‘is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.’ ” *Monterrubio*, 291 F.R.D. at 453 (quoting *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009)). Rule 23(c)(2)(B) includes specific requirements for a settlement class certified under Rule 23(b)(3). See Fed. R. Civ. P. 23(c)(2)(B). The notice must clearly state: (1) the nature of the action; (2) the definition of the class; (3) the class claims, issues, or defenses; (4) that a class member may appear with or through an attorney; (5) that any member may be excluded from the class; (6) the time and manner to request exclusion; and, (7) the binding effect of any judgment. See *id.* The Notice of Class Action Settlement included in the Notice Packets here meets all of these requirements. (See Cunningham Decl., Ex. A.) Therefore, the Court finds that Rule 23's notice requirements are satisfied.

## 3. Approval of the Settlement

The Court may only approve a class action settlement “after a hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e). After considering the papers filed in connection with Plaintiffs' Motion for Final Approval, the arguments advanced at the final fairness hearing, and the relevant factors, the Court concludes that the Settlement Agreement here is fair, adequate, and reasonable within the meaning of Rule 23(e).

### a. The Strength of Plaintiffs' Case

\*9 The first fairness factor considers the strength of the plaintiffs' case. See *Staton*, 327 F.3d at 959. In assessing the strength of the case, a district court need not “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very

uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Officers for Justice*, 688 F.2d at 625.

Plaintiffs bring nine causes of action alleging that Defendant regularly failed to comply with various California employment laws by, for example, not allowing non-exempt Class Members to take their meal breaks before their fifth hour of work, requiring non-exempt members of the Warehouse Class to combine their meal and rest breaks, and including a false name on its paystubs. (Compl. ¶¶ 24, 25, 30.) If Plaintiffs were able to sufficiently prove their claims at trial, they would be entitled to a significant recovery. But during the exchange of information prior to mediation, Plaintiffs conceded that at least two of their claims failed as Defendant did not have a policy of auto-deducting thirty-minute meal breaks and Defendant's rounding system did not result in systematic underpayment of its employees. (Final Approval Mot. at 3–4.) In addition, Plaintiffs concede that “while some claims in this case could be readily susceptible to class treatment, neither class certification nor liability were assured.” (Final Approval Mot. at 9.) For instance, Defendant argued that meal and rest period claims turn on individual inquiries regarding why a break was not taken. (*Id.*) In addition, if Defendant's policies did not comply with California wage and hour law, the way each employee “understood and applied the policy would present individualized issues.” (*Id.*) Further, Plaintiffs note that other individualized issues may have arisen, including any claims of working off-the-clock, whether Defendant acted in good faith and acted willfully, and any damages. (*Id.*) Thus, in sum, Defendant argues that Plaintiffs may have been unable to establish predominance at the class certification stage. (*Id.*)

Therefore, [a]lthough Plaintiffs maintain their strong belief in the underlying merits of their case, Plaintiffs' counsel acknowledges that wage and hour cases ... can [be] difficult to prove on a class basis and considered the uncertainties surrounding proving their claims in a lengthy and complex jury trial.” *Vasquez*, 266 F.R.D. at 489. Accordingly, it appears Plaintiffs have accurately weighed the probability of success in agreeing to settle the claims. This factor weighs in favor of approval. See *Franco v. Ruiz Food Prods.*, No. 1:10-CV-02354-SKO, 2012 WL 5941801, at \*11 (E.D. Cal. Nov. 27, 2012) (finding this factor favored settlement approval where the plaintiffs properly accounted for their likelihood of success).

#### **b. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**

“In assessing the risk, expense, complexity, and likely duration of further litigation, the court evaluates the time and cost required.” *Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 976 (E.D. Cal. 2012). “In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 526 (internal quotation marks omitted).

\*10 As explained above, though Plaintiffs believe that they had gathered sufficient evidence to prove their claims, this case involved significant risk for the Class Members regarding the likelihood of certification and prevailing on the merits of their claims. (See Final Approval Mot. at 9–10.) Further, even if Plaintiffs had prevailed at trial, the case would have involved complex inquiries into individual damages calculations for each class member. (Final Approval Mot. at 10.) In addition, if the case had not settled, Plaintiffs would have been required to file a motion for class certification, participated in any further discovery post-certification, prepared for and conducted trial, and undertaken any possible appeal. (See Final Approval Mot. at 11.) As Plaintiffs acknowledge, “the preparation for a class action trial would have consumed months, and a trial would likely have spanned weeks (if not longer).” (*Id.*) The Court finds that “[i]n light of the risks and costs of continued litigation, the immediate rewards to class members are preferable.” *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 255 (N.D. Cal. 2015). Accordingly, this factor weighs in favor of approval.

#### **c. The Risk of Maintaining Class Action Status Throughout the Trial**

The third factor examines whether the class would have been able to maintain class status were the litigation to proceed. See *id.* Here, the parties agree that certification for settlement purposes is appropriate, but Plaintiffs concede that there was a significant risk that Defendant may have defeated certification if the case had continued. (Final Approval Mot. at 11.) Defendant planned on invoking “complex and comprehensive defenses to class certification.” (*Id.*) Further, as explained above, Plaintiffs' claims may have required individualized inquiries into each employee's understanding

of Defendant's policies and the facts of each employee's situation. (Final Approval Mot. at 9.) Therefore, the Court finds that this factor weighs in favor of approval. *See Bellinghausen*, 306 F.R.D. at 256 (holding that this factor weighed in favor of approval in a wage and hour class action where there was a possibility that individualized inquiries regarding each employee's circumstances may have arisen).

#### d. The Amount Offered in Settlement

Next, the Court will consider the amount of the settlement. In considering the overall fairness of a settlement, a court should view “the complete package taken as a whole, rather than the individual component parts.” *Officers for Justice*, 688 F.2d at 628. A proposed settlement may be fair, adequate, and reasonable even though greater recovery might be available to the class members at trial. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998); *Officers for Justice*, 688 F.2d at 628 (“It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair.”). Further, the Ninth Circuit has long deferred to the parties' private, consensual decisions. *See Hanlon*, 150 F.3d at 1027.

Plaintiffs have secured a gross settlement amount of \$375,000. (See Settlement Agreement § I(Y).) Of this gross settlement amount, the Class Members will receive approximate \$210,500, with each Class Member receiving an average of \$389.81 with the highest payment at \$1,089.71. (Cunningham Decl. ¶ 12.) Though Plaintiffs believe that if they had prevailed on all of their claims Defendant's liability could have been as high as \$2.75 million. Plaintiffs acknowledge that Defendant likely had viable defenses to several of their claims which would have significantly reduced their recovery. (See Prelim. Approval Mot. at 19–22.) Thus, Plaintiffs argue that a settlement for fourteen percent recovery of Plaintiffs' maximum recovery is reasonable under the circumstances. (Final Approval Mot. at 12.) The Court agrees. “Even a fractional recovery of the possible maximum recovery amount may be fair and adequate in light of the uncertainties of trial and difficulties in proving the case.” *Millan v. Cascade Water Servs.*, 310 F.R.D. 593, 611 (E.D. Cal. 2015); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving a settlement amount that was approximately one-sixth of the maximum possible recovery); *In re Celera Corp. Sec. litig.*, No. 5:10-CV-02604-EJD, 2015 WL 1482303, at \*6 (N.D. Cal. Mar. 31, 2015)

(approving settlement that was approximately thirteen percent of maximum recovery). Based on the risk of diminished recovery had the case proceeded and “the parties' agreement that this amount provides adequate compensation for class members,” the Court finds that this factor weighs in favor of approval. *Torchia*, 304 F.R.D. at 269–70.

#### e. The Extent of Discovery Completed and the Stage of Proceedings

\*11 The extent of discovery may be indicative of the parties' knowledge of the case and is therefore relevant to determining the overall fairness of a settlement. *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527. Where the parties have conducted extensive discovery, this factor favors final approval “because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.” *Id.* (internal quotation marks omitted). “A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair.” *Id.*

Though this case had not yet proceeded to the certification stage, the parties indicate that they had exchanged “substantial written discovery” during the early stages of the proceeding and in preparation for mediation. (Final Approval Mot. at 12.) Specifically, the parties exchanged “thousands of pages of documents” including time sheets, wage statements, handbooks, and relevant policies and procedures. (*Id.*) By reviewing these materials, Plaintiffs claim that they “were able to adequately assess” the strengths and weaknesses of their case and “to make reliable conclusions as to the value of the claims.” (*Id.*) Further, the parties participated in two mediations with a mediator skilled in wage and hour lawsuits and the settlement is based, at least in part, on the mediator's proposal. (See Kawahito Decl. ¶ 9; *see also* Settlement Agreement at 1.)

Therefore, the Court finds that the significant amount of discovery the parties have already conducted and the participation in mediation with a mediator who has “extensive experience in wage and hour class action[s],” (*id.*), indicates that the parties have a comprehensive understanding of their case, *see Ontiveros v. Zamora*, 303 F.R.D. 356, 371 (E.D. Cal. 2014) (finding that this factor weighed in favor of settlement where “class counsel conducted discovery and non-discovery investigation regarding class certification and the merits if their claims” and the parties participated in “four full days

of mediation”). Accordingly, the Court finds that this factor weighs in favor of approval.

#### f. The Experience and View of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.” *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiffs' counsel has extensive experience handling wage and hour class action litigation, as Kawahito Westrick LLP has prosecuted and defended more than thirty-five class actions in the last eight years, many of which were wage and hour class actions. (See Kawahito Decl. ¶¶ 13–14.) Defendant was represented by attorneys from Greenberg Traurig LLP, “a prominent national firm experienced in the defense of wage and hour class actions.” (Final Approval Mot. at 13.) Therefore, given counsel's experience in handling similar matters and their review of substantial and meaningful discovery, the Court finds that counsel's belief that the parties' settlement is a just and fair result should be given significant weight. See *Vasquez*, 266 F.R.D. at 490 (“Here, class counsel understood the complex risks and benefits of any settlement and concluded that the proposed Settlement was a just, fair and certain result. This factor weighs in favor of approval.”). Accordingly, the Court finds that this factor weighs in favor of approval.

#### g. The Presence of a Governmental Participant

There is no governmental participant in this case. As a result, this factor does not affect the Court's analysis. See *Torrisi*, 8 F.3d at 1376. However, Plaintiffs brought claims under PAGA, Cal. Labor Code § 2698 *et seq.*, and the settlement agreement provides that \$10,000 of the settlement will be designated as PAGA penalties, \$7,500 of which will be provided to the California Labor and Workforce Development Agency. (See Compl. ¶ 32; see also Settlement Agreement § II(C).) Courts have held that when a class shares PAGA penalties with the State of California, this factor weighs in favor of approving settlement. See *Ontiveros*, 303 F.R.D. at 371 (“Because plaintiff will share civil penalties of \$40,000 with the State of California, this factor weighs in favor of approval of the settlement.”); *Adoma*, 913 F. Supp. 2d at 977 (“The settlement will result in a \$50,000 payment to the California Labor and Workforce Development Agency. This factor weighs in favor of approval.”).

#### h. The Reaction of the Class Members to the Proposed Settlement

\*12 “[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms ... are favorable to the class members.” *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529; see also *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 448 (E.D. Cal. 2013) (“Where a settlement agreement enjoys overwhelming support from the class, this lends weight to a finding that the settlement agreement is fair, adequate, and reasonable.”). Following the Court's preliminary approval of the proposed settlement, the Claims Administrator distributed 546 Notice Packets to Class Members. (Cunningham Decl. ¶ 4.) As of January 6, 2017, the Claims Administrator has received six requests for exclusion and no objections, resulting in a 98.9% participation rate. (See Cunningham Decl. ¶¶ 9–11.) Further, Plaintiffs' counsel indicates that he has received communications from “several” Class Members who have expressed that they approve of the settlement. (Final Approval Mot. at 14; see also Kawahito Decl. ¶ 12.) In light of the absence of any substantive objections to the proposed settlement, the class response appears positive. Accordingly, there is a strong presumption that the settlement is fair, see *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529, and this factor strongly favors approval.

#### i. The Method of Distribution

A district court must also find that a proposed settlement's plan for allocation among the class members is fair and reasonable before granting final settlement approval. See *Class Plaintiffs*, 955 F.2d at 1284–85. “A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable.” See *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001); see also *In re Omnivision Techs.*, 559 F. Supp. 2d at 1045 (“It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits.”).

The proposed plan of allocation here purports to determine each Class Members' recovery based on the total number of workweeks Defendant employed them during the Class Period. (See Final Approval Mot. at 14; see also Settlement Agreement § 11(C).) In Plaintiffs' view, the violations were



“evenly distributed amongst the Class Members”; therefore, Class Members who were employed for longer periods during the Class Period will receive proportionally more than those who worked for less time. (Final Approval Mot. at 14.) In addition, because one of Plaintiffs’ claims is for waiting time penalties (i.e., that Defendant did not pay its employees all the money due them at the time they stopped working for the company), former employees will receive an approximately ten percent premium. (See Final Approval Mot. at 14–15.) All Class Members will receive a check directly from CPT via mail. (Final Approval Mot. at 15.) As the amount each Class Member will recover appears to be directly related to the individual harm suffered, the Court finds that the proposed method of distribution is fair.

#### j. The Bluetooth Factors

Because this case was settled prior to class certification, the court must “examine the settlement for evidence of collusion with an even higher level of scrutiny.” *Bellinghausen*, 306 F.R.D. at 258. Thus, the court is required to determine “whether the settlement was the result of good faith, arms-length negotiations or fraud and collusion.” *Id.* The Ninth Circuit has recognized three “warning signs” that suggest a settlement was the result of collusion: (1) when counsel receives a disproportionate distribution of the settlement award or the class receives no monetary distribution while class counsel is “amply rewarded”; (2) “when the parties negotiate a ‘clear sailing’ arrangement providing for the payment of attorneys’ fees separate and apart from class funds”; and, (3) “when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). However, the Court need not find collusion, even if the warning signs are present. See *Bellinghausen*, 306 F.R.D. at 258.

\*13 “First, the Court compares the payout to the class (actual and expected) to the unopposed claim of fees by class counsel.” *Id.* Here, the Class Members are receiving a net amount of approximately \$210,500, while Plaintiffs’ counsel requests \$112,500 in fees. (See Cunningham Decl. ¶ 12; Fees Mot.) Thus, Plaintiffs’ counsel’s requested fees are approximately one-half the net recovery to the Class Members. The Court finds that this amount does not suggest collusion. See *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) (determining that fee award equivalent to approximately one-half of net award to class

members did not suggest collusion); *Bellinghausen*, 306 F.R.D. at 258–59 (finding that fees request of approximately forty-percent of net class award was reasonable).

The second warning sign involves a “clear sailing arrangement,” i.e., “an agreement ‘where the party paying the [attorneys’] fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling.’ ” *In re LinkedIn*, 309 F.R.D. at 589 (quoting *In re Toys R Us-Delaware, Inc-Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 458 (CD. Cal. 2014)). The settlement agreement does contain a clear sailing agreement, as Defendant has agreed not to contest Plaintiffs’ request for attorneys’ fees so long as the request does not exceed \$112,500. (See Settlement Agreement § II(J)(2).) The presence of one warning sign on its own, however, does not invalidate a settlement agreement. See *Bellinghausen*, 306 F.R.D. at 258 (finding no collusion where two of the three warning signs were present).

As for the third warning sign, the settlement agreement provides that “in no event will any funds from the Settlement Proceeds revert to Defendant.” (Settlement Agreement § 11(A).) Thus, in sum, only the second warning sign is present here. Nonetheless, as the Court has determined above, it appears that this settlement was reached as a result of arm’s-length examination of the evidence in this case, a reasonable examination of the success of Plaintiffs’ claims, and with the assistance of an experienced mediator. Accordingly, the Court finds that the settlement was not reached as result of collusion.

#### k. Weighing the Factors

Therefore, all of the fairness factors weigh in favor of approving the settlement between Plaintiffs and Defendant. The settlement provides immediate and reasonable recovery to a class of individuals who would otherwise face a risk of lesser or no recovery at trial and would face many procedural hurdles during the course of this proceeding, such as at the class certification stage. In addition, the proposed method of distribution reasonably compensates each class member according to his or her individual injury and the settlement does not appear to have been the result of collusion or bad faith between the parties. For these reasons, the Court concludes that the proposed settlement is fair, adequate, and reasonable. The Court therefore **GRANTS** Plaintiffs’ Motion for Final Approval.

## B. Plaintiffs' Motion for Attorneys' Fees, Costs, and Expenses

Next, the Court must examine Plaintiffs' counsel's request for attorneys' fees. Plaintiffs' counsel seeks a percentage fee award based on the \$375,000 gross settlement amount. (Fees Mot. at 1.) The Court will first determine whether an award of attorneys' fees from the gross settlement fund is appropriate, and will then decide whether Plaintiffs' counsel's requested fee is fair and reasonable. The Court will also apply the lodestar method as a "cross-check" on the reasonableness of a percentage fee based award. In addition, the Court will determine whether Plaintiffs' counsel request for reimbursement of \$17,293.46 in costs and expenses, Plaintiffs' request that each Named Plaintiff receive an incentive award of \$5,000, and Plaintiffs' request that CPT be awarded \$12,000 for its Claims Administration services are reasonable.

### 1. Whether an Award of Attorneys' Fees from the Gross Settlement Fund is Appropriate

\*14 "Courts have long recognized the 'common fund' or 'common benefit' doctrine, under which attorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs to be paid out of the fund." *Vasquez*, 266 F.R.D. at 491. An award of attorneys' fees from a common fund is appropriate only where the court can: "(1) sufficiently identify the class of beneficiaries; (2) accurately trace the benefits; and (3) shift the fee to those benefitting with some exactitude." *Staton*, 327 F.3d at 972 (citing *Van Gemert*, 444 U.S. at 478–79). "[T]he criteria are satisfied when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf," whereas they are not satisfied when "litigants simply vindicate a general social grievance." *Id.* (quoting *Van Gemert*, 444 U.S. at 479). These criteria are satisfied here. First, the Class Members are easily ascertainable as they are Defendant's employees during the Class Period. (See Fees Mot. at 5.) Next, Plaintiffs' proposed plan of allocating the settlement amount based on the number of workweeks each employee worked during the Class Period and whether the employee still works for Defendant makes the method of apportionment fair and easily calculable. See *Vasquez*, 266 F.R.D. at 491 (determining that common fund award was appropriate where "each Class Member who submits a valid claim will receive a mathematically ascertainable payment"). Thus, the Court

can accurately trace the benefits and shift the requested fee with some exactitude. Therefore, a percentage fee award based upon the \$375,000 common fund is appropriate here. Accordingly, the Court approves Plaintiffs' counsel's request for a percentage fee based award of attorneys' fees.

### 2. Whether Plaintiffs' Counsel's Requested Fee is Fair and Reasonable

The Court next considers whether Plaintiffs' counsel's request for a thirty percent fee award, which, based on the \$375,000 gross settlement sum totals \$112,500, is reasonable. "The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the benchmark." *Id.*; see also *Romero v. Producers Daily Foods, Inc.*, No. 1:05cv0484 DLB, 2007 WL 3492841, at \*3 (E.D. Cal. Nov. 14, 2007) ("The Ninth Circuit has repeatedly held that 25 percent of the gross settlement amount is the benchmark for attorneys' fees awarded under the percentage method, with 20 to 30 percent as the usual range ... If the Court departs from that benchmark, the record must indicate the Court's reasons for doing so." (citation omitted)). When awarding attorneys' fees, the guiding fundamental principle is that the award be reasonable under the circumstances. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994). In considering the overall fairness and reasonableness of a fee award, a court should consider the following factors: "(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden on class counsel; and (5) awards made in similar cases." *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046 (citing *Vizcaino*, 290 F.3d at 1048–50). The Court may also consider the reaction of the class as a determining factor, and it may, as a "final check" on the reasonableness of the fee award, "compare the fee counsel seeks as a percentage with what their hourly bills would amount to under the lodestar analysis." *Id.* at 1048.

#### a. The Results Achieved

"The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046. The settlement here of \$375,000 constitutes fourteen percent of Plaintiffs' counsel's estimated \$2.75 million maximum recovery that Plaintiffs could have recovered had the case proceeded.

Plaintiffs' counsel determined, and the Court agrees, that this is a good result in this action. *See* discussion *supra* Section IV.A.3.d. Each Class Member is expected to receive, on average, \$389.81, with a maximum award of \$1,089.71. (Fees Mot. at 7; *see also* Cunningham Decl. ¶ 12.) Further, as of the date Plaintiffs filed the instant Motion, no Class Member had objected to the settlement. (Cunningham Decl. ¶ 11.) Based on the inherent risks involved in class action litigation and the potentially meritorious defenses Defendant planned to mount, as well as the seemingly positive reaction from the Class Members, the Court finds that Plaintiffs' counsel achieved a favorable result.

Plaintiffs' counsel characterizes the results achieved as “excellent” or “great” due to the likelihood of relatively small award amounts of some of Plaintiffs' claims, even assuming they had been successful. (*See* Fees Mot. at 7–8.) However, while fourteen percent of the maximum possible recovery is a favorable award for Plaintiffs, in *Monterrubio*, the court held that a recovery of thirty percent of Defendant's maximum liability fell short of “exceptional.” *Monterrubio*, 291 F.R.D. at 456; *see also* *Ontiveros*, 303 F.R.D. at 373 (expressing doubt that settlement amount of one-half to one-third of the maximum potential recovery amount was exceptional enough “to justify a departure from the 25% benchmark”); *Adoma*, 913 F. Supp. 2d at 983 (holding that recovery of \$2,000 per class member in wage and hour class action was “not so exceptional as to ... justify an increase in the 25% benchmark”). Therefore, though the Court finds that the favorable results in this case favor a standard award of fees, the results achieved do not appear to be “excellent” or exceptional and do not favor an upward adjustment from the Ninth Circuit's twenty-five percent benchmark.

#### b. The Risk of Litigation

**\*15** The risk that further litigation might result in no recovery is a “significant factor” in assessing the fairness and reasonableness of an award of attorneys' fees. *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046–47; *see also* *Vizcaino*, 290 F.3d at 1048 (discussing that “[r]isk is a relevant circumstance” in determining an attorney fee award in a common fund case). In evaluating the risk of the litigation, a court may consider the complexity of the legal issues involved. *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046–47.

As discussed above, there were certainly risks involved in the continued litigation of Plaintiffs' case. Plaintiffs recognize that there is a significant risk that, if the litigation continued, they may have failed at the certification stage, and, even if certified, they may have lost their certified status during the course of the litigation. In addition, Defendant intended to argue several potentially meritorious defenses. Further, because Plaintiffs' counsel took this case on a contingency basis, they took a significant risk in advancing funds and spending time without any guarantee of recovery. (Fees Mot. at 9–10); *see also* *Franco*, 2012 WL 5941801, at \*16 (explaining that the risks involved weighed in favor of requested fee award because “the action was taken on a contingency fee basis and, as such, Class Counsel invested time, effort, and money with no guarantee of recovery”). Thus, the high risks associated with this litigation weigh in favor of awarding Plaintiffs' counsel's requested fee.

#### c. The Skill Required and Quality of Work

The Court may also consider the skill required to prosecute and manage this litigation, as well as Plaintiffs' counsel's overall performance. *See In re Omnivision Techs.*, 559 F. Supp. 2d at 1047. As the Court recognized above, Plaintiffs' counsel has significant class action litigation experience, particularly in the area of wage and hour law. (*See* Kawahito Decl. ¶¶ 13–22, 26.) Plaintiffs' counsel argues that this extensive skill led to the successful result in this case. (*See* Fees Mot. at 9.) However, while Plaintiffs' counsel was able to secure a favorable result for Plaintiffs, as the Court noted above, this result was not exceptional. In addition, settlement was reached in this case after two mediations and before the case had reached class certification or otherwise participated in motion practice. *See Navarro v. Servisair*, No. C 08-02716 MHP, 2010 WL 1729538, at \*4 (N.D. Cal. Apr. 27, 2010) (holding that factors weighing against an upward adjustment from twenty-five percent fee benchmark included “the rapidity of the settlement and the lack of extensive motion practice”). Moreover, Plaintiffs have presented no evidence that there was anything more complex or difficult about this case than any standard wage and hour class action. *See Monterrubio*, 291 F.R.D. at 457 (determining that departure from the twenty-five percent benchmark was not warranted in “a garden-variety wage and hour class action”). Thus, the Court finds that the skill required in this case and the work Plaintiffs' counsel performed supports an award of the standard twenty-five percent fee benchmark, but does not support an upward adjustment.

#### d. The Contingent Nature of the Fee and the Financial Burden on Class Counsel

The contingent nature of the representation bears on the overall fairness and reasonableness of a fee request. *See In re Omnivision Techs.*, 559 F. Supp. 2d at 1047. The risk that counsel will not recover any award, as well as the financial burden accompanying the contingent nature of the representation, may justify a higher percentage fee award. *See id.* at 1049; *see also Vizcaino*, 290 F.3d at 1048–50.

\*16 As mentioned above, Plaintiffs' counsel took this case on a purely contingent fee basis, requiring them to advance approximately \$17,293.46 in fees and costs associated with this litigation. (See Fees Mot. at 9–10.) In addition, Plaintiffs' counsel has spent over 200 hours and have been required to turn down other cases due to the time and effort they were required to spend on this litigation. (See Kawahito Decl. ¶¶ 23–26.) Therefore, the Court finds that Plaintiffs' counsel's risk and opportunity cost in taking and pursuing this case justifies a benchmark award. Because the parties reached settlement early in the proceedings and because Plaintiffs' counsel was not required to forward a substantial amount of costs, the Court finds that this factor does not weigh in favor of an upward adjustment beyond the benchmark award. *Cf. In re Omnivision Techs.*, 559 F. Supp. 2d at 1047 (finding \$560,000 in advanced costs warranted upward adjustment).

#### e. Awards Made in Similar Cases

Defendants provide a list of approximately eight wage and hour class action settlements (along with five additional non-wage and hour cases) where courts within this Circuit have approved an attorneys' fee award of at least thirty percent. (Fees Mot. at 10–11.) But Plaintiffs' counsel does not indicate how these cases are similar to the instant case other than that they all involve wage and hour issues. Moreover, there are other cases within this Circuit that have found an award of twenty-five percent is reasonable. For instance, the Court finds *Bellinghausen* persuasive. In *Bellinghausen*, the court found that a benchmark twenty-five percent attorneys' fees award was reasonable in a wage and hour class action where the parties reached settlement prior to class certification (but after they had participated in motion practice) and each class member was to receive an average award of \$450. *See Bellinghausen*, 306 F.R.D. at 261; *see also Ontiveros*,

303 F.R.D. at 372 (finding that a twenty-five percent fee was reasonable and noting that awards above the twenty-five percent benchmark are “generally disfavored unless they are corroborated by the lodestar or reflect exceptional circumstances”); *Adoma*, 913 F. Supp. 2d at 982–83 (reducing attorneys' fees award from 33.3% to 29% where though each class member recovered over \$2,000 the court found the results were “not so exceptional as to ... justify an increase in the 25% benchmark”); *cf. Vasquez*, 266 F.R.D. at 492 (finding that fee percentage of 33.3% was appropriate where each class member was to receive an average of \$2,600). Thus, while some courts have found that an upward adjustment is supported in wage and hour class action cases, other courts have not, or have found that such adjustments are supported only when the results are exceptional. The Court finds that here a benchmark award of twenty-five percent is supported by similar cases, but that an upward adjustment is not.

#### f. Reaction of the Class

Finally, the reaction of the class is relevant in determining the overall fairness and reasonableness of an award of attorneys' fees. *See In re Heritage Bond Litig.*, No. 02-ML-1475-DT (RCX), 2005 WL 1594389, at \*15 (CD. Cal. June 10, 2005) (“The presence or absence of objections from the class is also a factor in determining the proper fee award.”). Following distribution of the Notice Packets, only six class members have opted-out and no class members have objected to the award of attorneys' fees. This factor weighs in favor of approving the award.

#### g. Balancing the Factors

The Court finds weighing the factors in this case, the factors do not weigh in favor of an upward adjustment from the benchmark twenty-five percent amount of attorneys' fees. While Plaintiffs' counsel achieved favorable results, and performed well, the results achieved, the skill required, and the quality of work performed were not so exceptional here as to support an upward adjustment. Further, while the Court recognizes that Plaintiffs' counsel took some risk in pursuing this case, that risk was not so significant as to warrant an upward adjustment on its own. And, though Plaintiffs' counsel presents several cases in which courts have awarded upward adjustments, the Court finds more persuasive other similar cases where courts have found an upward adjustment is not supported. Finally, though no Class Members have objected



to the attorneys' fees award, the Court finds that, balancing all of the factors, a twenty-five percent benchmark award of \$93,750 is more reasonable.

#### h. The Lodestar Cross-Check

\*17 Courts may apply the lodestar method as a “cross-check” on the reasonableness of a percentage-based fee award. *Vizcaino*, 290 F.3d at 1050. The lodestar “is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer.” *In re Bluetooth*, 654 F.3d at 941. A court may adjust the lodestar figure upward or downward by an appropriate multiplier to reflect “a host of ‘reasonableness’ factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.” *Id.* at 941–42 (internal quotation marks omitted). Where the attorney's investment of time in the litigation is minimal, such as in the case of an early settlement, the lodestar calculation may favor a lower percentage. *Vizcaino*, 290 F.3d at 1050 n.5 (“The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement.”).

Plaintiffs' counsel has calculated its lodestar amount as \$159,847.50, comprised of approximately 205.25 hours spent by attorneys from Kawahito Westrick LLP (for a total of \$133,037.50) and 38.3 hours by attorneys from The Law Offices of Sahag Majarian II (for a total of \$26,810). (Fees Mot. at 12; Kawahito Decl. ¶ 26.) Plaintiffs' counsel claims that James Kawahito, a partner at Kawahito Westrick LLP regularly charges \$650 per hour for his time and that he billed approximately 204 hours to this litigation, for a total of \$132,600. (Kawahito Decl. ¶ 12.) Alison Rose, an associate at Kawahito Westrick LLP charges \$350 per hour and billed 1.25 hours, for a total of \$437.50. (*Id.*) Plaintiffs' co-counsel, Sahag Majarian from The Law Offices of Sahag Majarian II bills at a rate of \$700 per hour and billed 38.3 hours for a total of \$26,810. (*Id.*)

When performing the lodestar cross-check, the first step “requires the district court to determine a reasonable hourly

rate for the fee applicant's services.” *Cotton v. City of Eureka*, 889 F. Supp. 2d 1154, 1167 (N.D. Cal. 2012). “This determination is made by examining the prevailing market rates in the relevant community charged for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Id.* (internal quotation marks omitted). The relevant community is the district in which the case is proceeding. *See id.* (citing *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)). “The fee applicant has the burden of producing satisfactory evidence ... that the requested rate is in line with those prevailing in the community.” *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 (9th Cir. 1987). The fee applicant may provide affidavits from the attorney who worked on the case, as well as affidavits from other area attorneys or examples of rates awarded to counsel in previous cases. *See Bellinghausen*, 306 F.R.D. at 262.

Plaintiffs' counsel provides examples of other cases in which Kawahito Westrick LLP served as class counsel within this district and in the Superior Court of California, County of Los Angeles where the court approved the requested hourly rates of \$650 per hour for partners and \$350 per hour for associates. (*See* Kawahito Decl. ¶ 26.) Plaintiffs' counsel provides no similar examples supporting Mr. Majarian's requested rate of \$700 per hour. Nonetheless, upon conducting its own review of similar awards, the Court finds that district courts within California have found similar rates reasonable. *See Chambers v. Whirlpool Corp.*, — F. Supp. 3d —, No. CV 11-1733 FMO (JCGx), 2016 WL 5922456, at \*14 (CD. Cal. Oct. 11, 2016) (approving hourly rates between \$485 and \$750 per hour); *Hightower v. JPMorgan Chase Bank, N.A.*, No. CV 11-1802 PSG (PLAx), 2015 WL 9664959, at \*11 (CD. Cal. Aug. 4, 2015) (reducing hourly rate of partner in class action litigation from \$750 to \$620 per hour); *Kearney v. Hyundai Motor America*, No. SACV 09-1298-JST (MLGx), 2013 WL 3287996, at \*8 (CD. Cal. June 28, 2013) (approving hourly rates between \$650 and \$800 for class counsel in a consumer class action); *Parkinson v. Hyundai Motor America*, 796 F. Supp. 2d 1160, 1172 (CD. Cal. 2010) (approving hourly rates between \$445 and \$675 for class counsel in a consumer class action); *POM Wonderful, LLC v. Purely Juice, Inc.*, No. CV 07-2633, 2008 WL 4351842, at \*4 (CD. Cal. Sept. 22, 2008) (finding rates of \$475 to \$750 for partners and \$275 to \$425 for associates reasonable in a consumer class action).

\*18 In any event, “[t]he lodestar ‘cross-check’ need not be as exhaustive as a pure lodestar calculation” because it only “serves as a point of comparison by which to assess the reasonableness of a percentage award.” *Fernandez v. Victoria*

*Secret Stores, LLC*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, at \*14 (CD. Cal. July 21, 2008). “As a result, the lodestar can be approximate and still serve its purpose.” *Id.* Thus, while Plaintiffs’ counsel does not provide adequate support for Mr. Majarian’s proposed hourly rate, the Court nonetheless finds that, based on its own review of awards of attorneys’ fees. Plaintiffs’ counsel’s proposed hourly rates are reasonable for the purposes of a lodestar cross-check.

Next, the Court examines whether the number of hours Plaintiffs’ counsel expended was reasonable. Plaintiffs’ counsel spent a total of approximately 243.5 hours on this case, which appears to include time spent investigating Plaintiffs’ claims, filing the Complaint, reviewing discovery materials, and preparing for and participating in mediation. (See *Kawahito Decl.* ¶ 26; *see also Fees Mot.* at 2–3.) The Court finds this amount of time is reasonable. Though Plaintiffs did not participate in any motion practice (other than filing the instant Motion), they have spent nearly two years pursuing this litigation and were required to spend significant time investigating Plaintiffs’ claims, reviewing “thousands of pages of documents” that Defendant produced, and preparing for mediation. (See *Fees Mot.* at 2.) Courts have found that more time spent in similar circumstances was reasonable. *See Barbosa*, 297 F.R.D. at 451–52 (finding nearly 500 hours was reasonable in a wage and hour class action where parties settled after approximately two years of litigation and participating in discovery but before extensive motion practice). Therefore, the Court finds that Plaintiffs’ counsel’s proposed lodestar calculation of \$159,847.50 is a reasonable estimate under the lodestar method.

Thus, Plaintiffs’ requested percentage fee award of \$112,500 results in a negative lodestar multiplier of approximately 0.7 (\$112,500/\$159,847.50). “An implied negative multiplier supports the reasonableness of the percentage fee request.” *Schiller v. David’s Bridal, Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at \*23 (E.D. Cal. June 11, 2012). But as the Court determined above, while the result achieved was favorable, it was not exceptional and the amount of skill required and the quality of the representation did not support an upward adjustment of the Ninth Circuit’s twenty-five percent benchmark. Thus, though the lodestar cross-check indicates that Plaintiffs’ counsel’s requested award of thirty-percent of the common fund or \$112,500 was not unreasonable, the Court finds that, for the reasons provided above, no upward adjustment from the twenty-five percent benchmark award of \$93,750 is appropriate in this case. Therefore, the Court **GRANTS** Plaintiffs’ counsel’s request

for attorneys’ fees, but amends the amount of the award to a benchmark twenty-five percent award for a total of \$93,750.<sup>6</sup>

### 3. Plaintiffs’ Counsel’s Request for Reimbursement of Costs and Expenses

\*19 In any certified class action, a district court may award reasonable nontaxable costs as authorized by law or the parties’ agreement. *Fed. R. Civ. P.* 23(h). “[I]t is important to scrutinize separately the application for an award covering nontaxable costs.” *Fed. R. Civ. P.* 23(h) advisory committee’s note to 2003 amendment. Plaintiffs’ counsel requests reimbursement of \$17,293.46 in costs and expenses incurred. (Fee Mot. at 10; *see also Kawahito Decl.* ¶ 27.) These expenses include: (1) \$10,750 in mediation fees; (2) \$1,560 in initial filing fees and service charges; (3) \$974.55 in printing, scanning, and copying fees; (4) \$1,100 in litigation consultant fees; (5) \$524.60 in attorney service and filing fees; (6) \$2,112.56 in travel, mileage, and parking fees; and, (7) \$271.75 in research, Pacer, conference call, and postage or courier fees. (Kawahito Decl. ¶ 27.) These expenses are recoverable. *See Rutti v. Lojack Corp.*, No. CV 06-00350-DOC, 2012 WL 3151077, at \*12 (CD. Cal. July 31, 2012) (“Expenses such as reimbursement for travel, ... lodging, photocopying, long-distance telephone calls, computer legal research, postage, courier service, mediation, exhibits, documents scanning, and visual equipment are typically recoverable.”); *see also Barbosa*, 297 F.R.D. at 454 (noting that frequently reimbursed costs include “travel, mediation fees, photocopying, private investigator ..., and delivery and mail charges”). Accordingly, the Court finds that Plaintiffs’ counsel’s request for costs is reasonable and **GRANTS** Plaintiffs’ counsel’s request for reimbursement in the amount of \$17,293.46.

### 4. Plaintiffs’ Request for Incentive Awards

Plaintiffs also request incentive awards of \$5,000 to be awarded to each of the Named Plaintiffs. (Final Approval Mot. at 16–17.) In the context of class action cases, incentive awards for the named representatives are discretionary but nevertheless “fairly typical.” *Rodriguez*, 563 F.3d at 958. Incentive awards are designed “to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Id.* at 958–59. Factors

to consider in determining whether to approve an incentive award include:

- (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

*Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). Generally, in the Ninth Circuit, a \$5,000 incentive award is presumed reasonable. *See Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2012 WL 381202, at \*7 (N.D. Cal. Feb. 6, 2012).

First, the Named Plaintiffs undertook significant risk as they may have been required to pay Defendant attorneys' fees and costs had Defendant prevailed on the merits. (*See* Final Approval Mot. at 17.) The Named Plaintiffs have also associated themselves with an employment class action, which subjects them "to a great deal of personal risk, including the potential of workplace retaliation." (Bravo Decl. ¶ 10; De La Rosa Decl. ¶ 10.) In addition, the Named Plaintiffs assisted Plaintiffs' counsel by reviewing multiple drafts of the Complaint, discussing the merits of the case and Defendant's asserted defenses, reviewing and explaining documents received during discovery, and examining possible settlement possibilities and structures. (Bravo Decl. ¶¶ 4–7; De La Rosa Decl. ¶¶ 4–7.) Over the course of the nearly two years of litigation, Ms. Bravo indicates that she spent approximately thirty-six hours and Mr. De La Rosa indicates that he spent approximately twenty-nine hours working on the case. (Bravo Decl. ¶ 9; De La Rosa Decl. ¶ 9.) Therefore, weighing the risk to the Named Plaintiffs, the notoriety they gained, and the amount of time they spent working on the case, the Court finds that incentive awards of \$5,000 is reasonable. *See Barbosa*, 297 F.R.D. at 454–55 (approving incentive award of \$5,000); *see also Vasquez*, 266 F.R.D. at 491 (approving \$5,000 incentive awards for class representatives); *Wright v. Linkus Enters., Inc.*, 259 F.R.D. 468, 477 (E.D. Cal. 2009) (same). Accordingly, the Court **GRANTS** Plaintiffs' request for a \$5,000 incentive award for each Named Plaintiff.<sup>7</sup>

## 5. CPT's Request for Payment

\*20 Finally, Plaintiffs request that the Court approve the settlement agreement provision awarding \$12,000 in fees

to CPT for its services as Claims Administrator. (*See* Final Approval Mot. at 15–16.) Plaintiffs explain that CPT has provided the Notice Packets to Class Members as required under the settlement agreement and will continue to handle communications with Class Members regarding any opt-out requests or objections, the calculation of payments, and the mailing of settlement checks. (*Id.*)

"Courts regularly award administrative costs associated with providing notice to the class." *Bellinghausen*, 306 F.R.D. at 266 (awarding \$16,500 in costs to Claims Administrator). Here, Plaintiffs' requested fees appear to be reasonable based on other Claims Administrator fees awards in similar cases and the amount of Class Members involved. *See Franco*, 2012 WL 5941801, at \*14 (approving \$30,000 fee award in case involving 2,055 class members); *Vasquez*, 266 F.R.D. at 484 (awarding \$25,000 to Claims Administrator in case involving 177 class members). Accordingly, the Court **GRANTS** Plaintiffs' request for a \$12,000 payment to CPT out of the settlement proceeds.

## V. CONCLUSION

For the reasons discussed above, the Court holds as follows:

1. The Court **GRANTS** Plaintiffs' Motion for Final Approval of the parties' settlement;
2. The Court **GRANTS** Plaintiffs' counsel's Motion for Attorneys' Fees, but in the modified amount of \$93,750;
3. The Court **GRANTS** Plaintiffs' counsel's request for reimbursement of costs in the amount of \$17,293.46;
4. The Court **GRANTS** Plaintiffs' request for incentive awards in the amount of \$5,000 each of the Named Plaintiffs;
5. The Court **GRANTS** Plaintiffs' request that \$ 10,000 of the settlement proceeds be designated as PAGA penalties; and,
6. The Court **GRANTS** Plaintiffs' request for payment to CPT in the amount of \$12,000 for serving as the Claims Administrator.

**IT IS SO ORDERED.**

## All Citations

Not Reported in Fed. Supp., 2017 WL 708766

Footnotes

- 1 Mr. Kawahito provided identical declarations in support of Plaintiffs' Motion for Final Approval and Motion for Attorneys' Fees and Costs. (*Compare* Dkt. No. 18-2 *with* Dkt. No. 19-2.) Because they are identical, the Court refers to only one declaration throughout this Order.
- 2 The Court preliminarily approved the settlement on October 26, 2016. (See Dkt. No. 17.)
- 3 Mr. Cunningham's declaration mistakenly uses paragraph eleven twice. (See Cunningham Decl. at 4.) Nonetheless, the Court has cited the paragraph numbers as represented.
- 4 The Notice Packet contains a copy of a document titled "Notice of Class Action Settlement" and an exclusion or opt-out form. (See Cunningham Decl. ¶ 2, Ex. A.)
- 5 Counsel also confirmed that, as of the date of the final fairness hearing, only six class members had opted out.
- 6 At the final fairness hearing, the Court questioned Plaintiffs' counsel as to, in its view, what supported an upward adjustment to the Ninth Circuit's twenty-five percent benchmark award. Counsel cited (1) the ingenuity and technical nature of the arguments regarding the time rounding issues. (2) the lodestar amount, and, (3) the amount of work Plaintiffs' counsel performed in general. As addressed above, the Court finds that none of Plaintiffs' counsel's cited reasons support an upward adjustment.
- 7 In addition, though Plaintiffs do not address it separately, the Court finds the parties' agreement that \$10,000 of the settlement proceeds be designated as PAGA penalties is reasonable. (See Final Approval Mot. at 1; Settlement Agreement § 11(C); see *also* Prelim. Approval Mot. at 8.) Courts have approved of settlements where the parties designated similar amounts as PAGA penalties. See [Vasquez](#), 266 F.R.D. at 490 (approving settlement where parties designated a \$10,000 PAGA penalty based on a \$300,000 gross settlement amount); see *also* [Torchia](#), 304 F.R.D. at 282 (approving \$10,000 PAGA penalty for \$2.75 million gross settlement in a wage and hour class action).

# **EXHIBIT 3**



2011 WL 672645

Only the Westlaw citation is currently available.

United States District Court,  
N.D. California.

Jerry CHU, Andrea Bulow, Thomas  
Calforda, Lebrone King, and Tamara  
Turkishser, individually and on behalf of  
all others similarly situated, Plaintiffs,

v.

WELLS FARGO INVESTMENTS, LLC, and  
Does 1 through 50, inclusive, Defendants.

Nos. C 05–4526 MHP, C 06–7924 MHP.

I

Feb. 16, 2011.

#### Attorneys and Law Firms

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#### MEMORANDUM & ORDER

MARILYN HALL PATEL, District Judge.

\*1 Plaintiffs Jerry Chu, Andrea Bulow, Thomas Calforda, Lebrone King and Tamara Turkishser filed these class actions alleging that defendant Wells Fargo Investments, LLC (“WFI”) violated state and federal wage and hour laws. On September 7, 2010, the court preliminarily approved a Class Action Settlement Agreement. Now before the court is the parties' joint motion for final approval of the settlement agreement and plaintiffs' unopposed motion for an award of attorneys' fees, costs and enhancement awards for the named plaintiffs. Having considered the parties' arguments

and submissions, and for the reasons discussed below, the court enters the following memorandum and order.

#### BACKGROUND

On September 26, 2005, Plaintiff Chu filed an initial class action complaint against WFI in Alameda County Superior Court alleging a number of state and federal wage and hour violations. On November 4, 2005, WFI removed to this court. Docket No. 1. On December 28, 2006, Plaintiff Bulow filed a similar action in this court. On October 29, 2007, the *Chu* and *Barlow* actions were consolidated, and the firm of Hoffman & Lazear (H & L) were appointed lead counsel. Docket No. 65. The law firm of Scott Cole & Associates (SCA) continued to represent Plaintiff Bulow. Plaintiffs Calforda, King and Turkishser were added as plaintiffs in October 2009 by a second amended complaint. Docket No. 92. The operative Third Amended Complaint was filed on June 22, 2010 and alleges eight causes of action: (1) restitution under the Fair Labor Standards Act for failure to pay overtime; (2) failure to pay overtime under California law; (3) impermissible wage deductions under California law; (4) failure to provide meal and rest breaks under California law; (5) failure to provide accurate wage statements under California law; (6) failure to reimburse business expenses under California law; (7) claims under the California Private Attorneys General Act (“PAGA”); and (8) waiting time penalties under California law. Docket No. 103.

The parties engaged in three full-day mediation sessions with three separate mediators. At the third mediation on January 20, 2010, the parties accepted the mediator's proposal of settlement and signed a Memorandum of Understanding. This Memorandum was expanded in a Joint Stipulation of Settlement (“Settlement Agreement”), Docket No. 105, Exh. 1, which was preliminarily approved by this court on September 7, 2010, Docket No. 112.

The settlement recognizes two subclasses of individuals: (1) a federal opt-in collective group of financial service representatives and (2) a state law opt-out class. The Settlement Agreement creates a settlement fund of \$6,900,000 to cover attorneys' fees and costs, class representative enhancements, settlement administration fees and expenses, payments to the California Labor and Workforce Development Agency (“LWDA”), and settlement awards to participating class members. The Settlement Agreement allocates \$10,000 to settle PAGA claims, with 75% of that amount to be paid to the LWDA, and 25% to be distributed as part of the settlement awards. The claims

administrator's costs have amounted to \$62, 210.32. Docket No. 120 (Roe Decl.) ¶ 20.

\*2 Plaintiffs have moved for \$1,725,000 in attorneys fees by way of separate motions by lead counsel H & L and Bulow's counsel SCA. This amount constitutes 25% of the settlement fund, the maximum amount WFI agreed not to oppose in the Settlement Agreement. Settlement Agreement § 6.9.1. In order to permit the court to “cross-check” the reasonableness of this fee request, H & L and SCA have each provided lodestar figures. H & L has submitted itemized billing records indicating that it spent over 2000 hours in attorney time, yielding billable fees equal to \$1,175,580.44. Docket No. 119 (Hoffman Decl.) ¶¶ 9–14. SCA has submitted a summary of billing records indicating a total of \$352,232. Docket No. 123 (Bainer Decl.) Exh. B. The parties apparently have come to an agreement that SCA will receive \$200,000 of the awarded fees if the full \$1,725,000 is awarded, subject to pro rata reduction if the court awards a lower amount. *Id.* ¶ 19. H & L also requests \$28,166.80 in costs, Hoffman Decl. ¶ 15 & Exh. B, and SCA requests \$12,361.28 in costs, Bainer Decl. ¶ 21 & Exh. C. The Settlement permits a maximum of \$60,000 for actual litigation expenses.

Plaintiffs have also moved for a \$10,000 enhancement award for each of the named plaintiffs in recognition of their contribution to the class. *See* Settlement Agreement § 6.9.2. Plaintiffs' counsels point out that plaintiffs provided invaluable assistance in explaining their job duties, WFI compensation policies, reviewing documents and assisting in settlement negotiations. They also point out that plaintiffs undertook significant risk in stepping forward to represent the class and that their association with this litigation, easily discoverable through the Internet, could impact future employment in the financial services industry.

The remaining amount in the settlement fund will be used to pay class members who submitted valid and timely claims and consent-to-join forms. Each participant will receive a share based on his or her total number of months worked during the class period in relation to the total number of months worked by all members of the class during the class period. Any unclaimed amounts will be divided proportionally among class members who submitted timely claims. Settlement Agreement § 6.2.1. The Settlement Agreement allocates a greater proportion of settlement funds to time worked in California than to time worked in other jurisdictions, given that the California claims likely would have consumed disproportionate resources. Months spent in California are

therefore paid at a rate approximately double the rate for months worked in other states. Settlement Agreement § 6.2.2.

After receiving preliminary approval, the parties effectuated the notice process approved by the court. Notice was sent to 2,752 class members. The claims administrator received claim forms from 1,343 class members, 1,320 of which were deemed valid. Only 16 class members requested exclusion from the settlement. No individual or entity has filed an objection. *See* Roe Decl. ¶¶ 9–19.

## LEGAL STANDARD

### I. Final Settlement Approval

\*3 In deciding whether to approve of a settlement, the court must determine if the settlement terms are “fair, reasonable, and adequate.” [Fed.R.Civ.P. 23\(e\)\(2\)](#). The court's inquiry into a consensual agreement negotiated by the parties should seek only to ensure that the settlement is fair, reasonable and adequate and not the result of fraud, over-reaching or collusion. *Officers for Justice v. Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 625 (9th Cir.1982).

### II. Attorneys' Fees

[Federal Rule of Civil Procedure 23\(h\)](#) allows the court to award reasonable attorneys' fees and costs according to the agreement of the parties. [Fed.R.Civ.P. 23\(h\)](#). “[W]hether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment ... are fair and proper.” *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir.1999). In common fund cases, the district court has the discretion to use either a percentage-of-the-recovery method or lodestar method to calculate reasonable attorneys' fees. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir.1994). When attorneys' fees are to be paid from a common settlement fund, “the relationship between plaintiffs and their attorneys turns adversarial” and “the district court must assume the role of fiduciary for the class plaintiffs.” *Id.* at 1302. It thus becomes crucial for the court to scrutinize the attorneys' request in light of their role in the litigation.

Under the percentage-of-the-recovery method, the attorneys' fees are calculated as a percentage of the common fund, with 25% established as the benchmark in the Ninth Circuit. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir.1998). Under the lodestar method, the lodestar amount is calculated



by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. *Id.* at 1029 (citing *Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). Even when the percentage method is used, the lodestar method should be used as a cross-check to determine the fairness of the award. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir.2002).

## DISCUSSION

### I. Final Settlement Approval.

The parties have adequately demonstrated that the Settlement Agreement is fair and reasonable. The Ninth Circuit has identified several factors in order to evaluate a class action settlement: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir.2009); accord *Staton*, 327 F.3d at 959. The list is not exhaustive, and the importance of the specific factors varies from case to case. See *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir.1982).

\*4 These factors weigh in favor of approving the settlement. Firstly, the outcome of plaintiffs' case was far from certain, particularly in light of several recent decertification orders and denials of certification in similar wage and hour class actions. See, e.g., *In re Wells Fargo Home Mtg. Overtime Pay Litig.*, 571 F.3d 953 (9th Cir.2009); *Drake v. Morgan Stanley & Co., Inc.*, No. CV 09-6467, 2010 WL 2175819 (C.D.Cal. Apr.30, 2010). Wells Fargo has demonstrated that it is willing to vigorously defend against these actions both at the certification stage and in its exemption arguments. Secondly, the size of the settlement awards to class members is substantial. Thirdly, by settling the litigation at this juncture, the class avoids having to wait potentially several years before receiving any compensation from WFI, notwithstanding the substantial risk that they would not ultimately prevail. Although four years and a substantial amount of discovery has already taken place, the respective factual and legal strengths of the parties' arguments are likely to have been sufficiently fleshed out upon agreeing to the terms of the settlement. See *In re Warner Commc'ns Sec. Litig.*, 618 F.Supp. 735, 745 (S.D.N.Y.1985), *aff'd* 798 F.2d 35 (2d Cir.1986). Fourthly,

class counsel has demonstrated that it is experienced and well-suited to represent the interests of the class. Lastly, it is strong testament to the fairness of the settlement that not a single objector has come forward and that only 16 out of 2,752 noticed class members opted out. See *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 837 (9th Cir.1976) (indicating that the number of objectors is "a factor be considered when approving a settlement").

### II. Attorneys' Fees

Courts in this Circuit usually apply the percentage method to determine attorneys' fees but then use the lodestar method to cross-check the reasonableness of the percentage to be awarded. See, e.g., *Vizcaino*, 290 F.3d at 1050. "[T]he 'benchmark' percentage for the fee award should be 25 percent." *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir.1989) (citation omitted). This percentage may be adjusted up or down as warranted by the circumstances of the case. *Id.* "Selection of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048. The Ninth Circuit has set forth a non-exhaustive list of factors which may be relevant to the district court's determination of the percentage ultimately awarded: (1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *Id.* at 1048-50.

The percentage-of-the-fund method seems appropriate in this case, particularly given that the total amount of the settlement is a fixed amount of \$6,900,000 without any reversionary payment to WFI. Compare with *Simon v. Toshiba Am., No. C 07-06202 MHP*, 2010 WL 1757956, at \*3 (N.D.Cal. Apr.30, 2010) (Patel, J.) (declining percentage-of-the-fund method where class members could elect \$35 voucher or a replacement motherboard, making it difficult to value the settlement as a whole). As to the exact percentage, plaintiffs request the "benchmark" award of 25% of the total \$6,900,000 fund, with the understanding that \$200,000 will be allocated to SCA and \$1,525,000 to H & L. The favorable settlement and satisfactory performance by counsel seem to indicate that the benchmark award is reasonable in this case. For many of the reasons stated above, the outcome of this litigation was far from certain, and counsel was able to nonetheless obtain a fairly large award for over one thousand class members. Moreover, both H & L and SCA took this litigation on a pure contingency basis, risking loss or nonpayment by pursuing plaintiffs' claims for approximately

five years. *See* Bainer Decl. ¶ 17–18. Lastly, plaintiffs have cited to numerous attorneys' fee awards equal to or exceeding the 25% benchmark, including in the context of wage and hour class actions against financial service companies. *See* Docket No. 118 at 11; Docket No. 122 at 11–12.

\*5 Moreover, a cross-check of the requested fee award with the lodestar figures provided by counsel indicate that the 25% benchmark is reasonable here. H & L's detailed, itemized statements yield a total of \$1,175,580.44 in billable fees. The 25% benchmark of \$1,725,000 would thus represent a 1.467 multiplier of the claimed lodestar. This amount is within the reasonable range of approved multipliers. *See Vizcaino*, 290 F.3d at 1051 (citing *In re Prudential Ins. Co. Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir.1998) (“[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.”)). Moreover, \$200,000 of the fee award apparently will be shared with SCA, reducing the effective multiplier as to H & L.

Accordingly, the court grants plaintiffs' motions for attorneys fees in the amount of \$1,725,000 plus \$40,528.08 in costs (representing \$28,166.80 in costs to H & L and \$12,361.28 in costs to SCA).

### III. Enhancement Awards to Named Plaintiffs

A court has the discretion to award enhancement awards, or incentive fees, to named class representatives in a class action suit. *Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995) (Williams, J). Plaintiffs request an award of \$10,000 to each named plaintiff, the maximum amount authorized under the Settlement Agreement. Plaintiffs have adequately demonstrated that named plaintiffs have assisted in the preparation and settlement of this litigation notwithstanding some risk of professional harm due to their public participation. Moreover, the amount requested appears in line with other incentive awards in this Circuit, although perhaps somewhat on the high end of the acceptable range for the size of the class and the amount of the settlement. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th

Cir.2000) (approving \$5,000 to two plaintiff representatives of 5,400 potential class members in \$1.75 million settlement); *Hopson v. Hanesbrands, Inc.*, No. No. CV–08–0844 EDL, 2009 WL 928133, at \*10 (N.D.Cal. Apr.3, 2009) (Laporte, M.J.) (approving \$5,000 award to one member of 217 member class from \$408,420 settlement amount); *Glass v. UBS Fin. Servs.*, No., 2007 WL 221862, at \*16–17 (N.D.Cal. Jan.26, 2007) (Chesney, J.) (approving \$25,000 award to each of four plaintiff representatives of 13,176 member class from \$45 million settlement amount); *Van Vranken*, 901 F.Supp. at 299 (approving \$50,000 award in \$76,723,213.26 settlement amount). Although \$10,000 seems reasonable for plaintiffs Chu and Bulow, who have been participating in this litigation since 2005 and 2006 respectively, plaintiffs Calforda, King and Turkisher were not added as named plaintiffs until the filing of the Second Amended Complaint in October 2009. It would appear to be a windfall to these individuals, and unfair to the class, for them to receive the same amount in incentive awards. Plaintiffs have set forth no argument as to why these later-added plaintiffs should be treated as if they were similarly situated to Chu and Bulow. The court therefore awards \$4,000 each to plaintiffs Calforda, King and Turkisher and \$10,000 each to plaintiffs Chu and Bulow in recognition of their service to the class.

### CONCLUSION

\*6 For the foregoing reasons, the joint motion for final settlement approval is granted. Plaintiffs' motion for attorneys' fees is granted in the amount of \$1,725,000 plus \$40,528.08 in costs, to be divided as agreed among counsel. Plaintiffs' motion for enhancement awards is granted in the amount of \$10,000 each to Chu and Bulow and \$4,000 each to Calforda, King and Turkisher.

IT IS SO ORDERED.

### All Citations

Not Reported in F.Supp.2d, 2011 WL 672645

# **EXHIBIT 4**

2017 WL 1496407

Only the Westlaw citation is currently available.

United States District Court, S.D. California.

Jimmie L. DAVIS, individually and on  
behalf of others similarly situated, Plaintiff,

v.

COX COMMUNICATIONS  
CALIFORNIA, LLC, Defendant.

Case No. 16-cv-989-BAS(BLM)

|

Signed 04/26/2017

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for Defendant.

#### ORDER:

#### (1) PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT;

#### (2) CONDITIONALLY APPROVING PROPOSED SETTLEMENT CLASS; AND

#### (3) SETTING HEARING OF FINAL APPROVAL OF SETTLEMENT

Hon. [Cynthia Bashant](#), United States District Judge

\*1 On September 21, 2015, Plaintiff Jimmie L. Davis filed a class-action complaint against Defendant Cox Communications California, LLC (“Cox”) in San Diego Superior Court. (ECF No. 1-2.) Cox removed the case to federal court. (ECF No. 1.) The operative Complaint alleges: (1) unfair competition in violation of [California Business & Professions Code §§ 17200 et seq.](#); (2) failure to pay overtime wages in violation of [California Labor Code § 510](#);

(3) failure to provide itemized wage and hour statements in violation of [California Labor Code § 226](#); (4) failure to pay wages when due in violation of [California Labor Code §§ 201-203](#); and (5) violations of the Private Attorney General's Act (“PAGA”) in violation of [California Labor Code § 2698](#). (ECF No. 24.) Now pending before this Court is the parties' joint motion for preliminary approval of class action settlement (ECF No. 29 (“Joint Motion”)), which seeks an order conditionally certifying a proposed settlement class, preliminarily approving class action settlement, and setting a hearing for final approval of the settlement.

#### I. PROPOSED SETTLEMENT

The proposed settlement agreement (ECF No. 29-2 (“Settlement” or “Settlement Agreement”)) applies to 287 class members (“Class” or “Class Members”) defined as, “all non-exempt, non-field technical employees who worked for Cox in California from August 23, 2012 until January 20, 2017.” (Settlement ¶¶ 5, 17.) The parties agree that the Class shall be provisionally certified, and that, subject to the Court's approval, Blumenthal, Nordrehaug and Bhowmik will be appointed as Class Counsel. (*Id.* ¶ 6e.) Jimmie Davis will be appointed Class Representative. (*Id.* ¶ 6f.)

Cox agrees to provide a non-reversionary fund (“gross value fund”) of \$275,000, from which will be deducted any Court-approved attorney's fees (counsel will request 25% of the fund or \$68,750), costs (not exceeding \$10,000), enhancement award for Davis (counsel will request \$5,000), and administrative costs (estimated to be \$10,000). (Settlement ¶¶ 11-13.) The parties further agree that the PAGA award shall be \$4,000 and \$3000 of the gross value fund shall be allocated to the state's 75% share for the payment to the Labor Workforce Development Agency (“LWDA”) to extinguish any PAGA Claims arising within the scope of the release. (Settlement ¶¶ 11, 13d.) Class members will receive a portion of the remaining net fund value (estimated to be at least \$178,250) based on the number of workweeks they worked during the class period. (*Id.* ¶¶ 14g, 15.)

Once their portion of the net class fund is calculated, class members will be mailed a check and will have 180 days to cash the check. (Settlement ¶ 14g.) The Class Administrator will send out a reminder to class members to cash the check 150 days after mailing. (*Id.*) Any uncashed check amounts will be paid to the California Department of Labor Standards Enforcement Unpaid Wage Fund with an identification of the Settlement class member who failed to cash the check. (*Id.* ¶ 15c.) The amounts received shall be considered wages

and are subject to legally required withholding. (*Id.* ¶ 15d.) Cox will pay employer-paid withholding, payroll taxes, and similar expenses outside the gross value fund. (*Id.*)

\*2 Plaintiff will dismiss without prejudice the meal and rest period derivative claims asserted in the original complaint and agree that this Settlement is not based upon any allegations underlying those meal and rest period claims. (Settlement ¶¶ 4, 23.) Class members will release any claims for failure to pay the proper amount of overtime or derivative claims for penalties. (*Id.* ¶ 23.)

The parties request that the Court appoint CPT Group as the Claims Administrator (“CPT”). Cox will provide CPT with the last known address of each Class Member, and CPT will mail notice to each Class Member. (Settlement ¶ 17.) Notice will include Cox’s calculation of each Class Member’s work weeks of employment (and will provide a mechanism for Class Members to challenge this calculation), as well as the resulting estimated settlement amount for each Class Member. (*Id.*)

Class Members will be given the opportunity to object and/or opt out of the Settlement. Cox reserves the right of rescission if 10% or more Class Members opt out of the Settlement. (Settlement ¶ 22.)

## II. ANALYSIS

### A. Class Certification (for Settlement Purposes Only)

Here, the Parties seek to certify a class for settlement purposes only. [Federal Rule of Civil Procedure 23\(a\)](#) provides that a class may be certified “only if (1) the class is so numerous that joinder of members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” [Fed. R. Civ. P. 23\(a\)](#). In addition to meeting the [Rule 23\(a\)](#) requirements, a class action must fall into one of the categories laid out in [Rule 23\(b\)](#). [Fed. R. Civ. P. 23\(b\)](#). The parties seek to certify the class under [Rule 23\(b\)\(3\)](#). Both [Rules 23\(a\) and 23\(b\)](#) are satisfied in this case.

#### 1. Rule 23(a)

#### a. Numerosity

The numerosity requirement is generally satisfied when the class contains 40 or more members, a threshold exceeded in this case. [Consolidated Rail Corp. v. Town of Hyde Park](#), 47 F.3d 473, 483 (2d Cir. 1995); [Cleano v. Marriott Int’l, Inc.](#), 242 F.R.D. 544, 549 (N.D. Cal. 2007). The parties represent that there are 287 Class Members. (Settlement ¶ 17.) That number is large enough that individual joinder of all class members would be impracticable. [Rule 23\(a\)\(1\)](#) is therefore satisfied.

#### b. Commonality

The commonality requirement requires that there be “questions of law or fact common to the class.” [Fed. R. Civ. P. 23\(a\)\(2\)](#). Here, the class claims all stem from Defendant’s alleged violation of California Labor Code overtime requirements. Because Class Members here have the same or similar allegations, there are common questions of law and fact and [Rule 23\(a\)\(2\)](#) is satisfied.

#### c. Typicality

In general, the claims of the representative parties “need not be substantially identical” to those of all absent class members and need only be “reasonably co-extensive” in order to qualify as typical. [Hanlon v. Chrysler Corp.](#), 150 F.3d 1011, 1020 (9th Cir. 1998). Here, the Named Plaintiff’s claims that Defendant failed to properly pay him overtime pay are identical or nearly identical to those of the other Class Members. [Rule 23\(a\)\(3\)](#) is therefore satisfied.

#### d. Adequacy of Representation

For the class representative to adequately and fairly protect the interests of the class, two criteria must be satisfied. “First, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class.” [Lerwill v. Inflight Motion Picture, Inc.](#), 582 F.2d 507, 512 (9th Cir. 1978). Here, the Named Plaintiff has vigorously pursued the action thus far and appears capable of continuing to do so. (*See* Bhowmit Decl. ¶ 28, ECF No. 29-2.) Counsel appear qualified, competent, and experienced in class-action



lawsuits. (Bhowmit Decl. ¶ 29, Ex. 2.) The Named Plaintiff also has no antagonistic or conflicting interests with the Class Members. Although he seeks an incentive award in addition to his award as a class member, this does not necessarily mean he has a conflicting interest with the remaining class members. See *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (“[I]ncentive awards that are intended to compensate class representatives for work undertaken on behalf of a class are fairly typical in class action cases” and “do not, by themselves, create an impermissible conflict between class members and their representatives[.]”). Rule 23(a)(4) thus appears to be satisfied.

## 2. Rule 23(b)

\*3 The parties seek to maintain their class action under Rule 23(b)(3). Under Rule 23(b)(3), “[p]laintiffs must also demonstrate that a class action is ‘superior to other available methods for fairly and efficiently adjudicating the controversy.’” *Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 448 (N.D. Cal. 2008) (citing Fed. R. Civ. P. 23(b)(3)). “Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation,” and it is superior “if no realistic alternative exists.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996). The following factors are pertinent to this analysis:

- (A) the class members' interest in individually controlling the prosecution or defense of separate actions;
  - (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
  - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
  - (D) the likely difficulties in managing a class action.
- Fed. R. Civ. P. 23(b)(3).

In this case, the alternative to a class action would be to have the individual Class Members file 287 separate lawsuits. That would be both impractical and inefficient. Such individual litigation would consume judicial resources, impose additional burdens and expenses on the litigants, and present a risk of inconsistent rulings. Thus, the Court finds class action is superior to other methods for fairly and efficiently adjudicating this controversy.

## B. Fairness, Reasonableness, and Adequacy of the Proposed Settlement

The Ninth Circuit maintains a “strong judicial policy” that favors the settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.3d 1268, 1276 (9th Cir. 1992). However, according to Federal Rule of Civil Procedure 23(e)(2), “the court may approve [a settlement that would bind class members] only after a hearing and on finding that [the settlement] is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2).

In determining whether the proposed settlement is fair, reasonable, and adequate, “a district court must consider a number of factors, including: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the amount offered in settlement; the extent of discovery completed, and the stage of proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). There is no governmental participant and it is premature at this point to judge the reaction of the class members to the proposed settlement. Therefore, the Court considers the first four of these factors below.

### 1. Strength of Plaintiff's Case, and Risk of Further Litigation

In this case, Cox does not admit liability, denies any wrongdoing and denies the Plaintiffs are entitled to any damages. (Bhowmik Decl. ¶ 11.) Cox maintains that it has complied at all times with the California Labor Code and all applicable California and federal laws. (*Id.*) Thus, Class Counsel faced the likelihood of protracted litigation including a contested class certification motion, motion for summary judgment, trial and appeal, each with its own risk and uncertainties. (Bhowmik Decl. ¶ 18.)

Furthermore, Class Counsel recognizes that there are legislative efforts underway which could make it more difficult to obtain class certification. (Bhowmik Decl. ¶ 20.) Even if the Class was certified, future motions to decertify were possible.

\*4 Finally, Class Counsel faced the risk of losing the penalty claims. Without these penalties, the amount

of the overtime underpayment claim standing alone is relatively small. (Bhowmik Decl. ¶ 20.) Thus, although Class Counsel believed they had meritorious claims and that class certification was appropriate on all of the claims asserted (Bhowmik Decl. ¶ 8), they faced risks in further litigation.

## 2. Consideration Offered

Class Counsel in this case retained an expert, DM&A, to prepare a damage valuation in advance of the mediation with Cox. (Bhowmik Decl. ¶ 18.) Counsel indicates that the \$275,000 gross value fund “represents roughly 100% of the alleged overtime damages and penalties estimate by Plaintiff, assuming these amounts could be proven in full at trial.” (Bhowmik Decl. ¶ 20.) The Settlement amount only settles the overtime claims, and any other claims may be pursued on an individual basis. (*Id.*) The Settlement requires no further participation from Class Members. As long as they don't opt out, they will receive a check in the mail. (Bhowmik Decl. ¶ 15.)

Even if Plaintiff and Class Members might have received greater compensation had they gone to trial, this does not mean that the settlement is inadequate. See *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). “[The] very essence of a settlement is a compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’ ” *Officers for Justice v. Civil Serv. Comm'n of the City & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982). Under the circumstances, the Court concludes that the consideration offered in the Settlement Agreement is sufficient for approval.

## 3. Extent of Discovery Completed and Stage of Proceedings

“[S]ettlement approval that takes place prior to formal class certification requires a higher standard of fairness.” *Hanlon*, 150 F.3d at 1026. In this case, Class Counsel represents that they have done a thorough investigation into the facts of the case, propounded discovery and engaged in mediation with a mediator well-qualified in wage and hour disputes. (Bhowmik Decl. ¶ 23.) Counsel reviewed thousands of time punch and payroll records related to Class Members. (*Id.*) And, as discussed above, Class Counsel retained a damages expert. (*Id.* ¶ 18.) Thus, the Court finds this factor also supports the settlement.

## 4. Experience and Views of Counsel

Generally, “[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.” *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979); *cf.* *Stull v. Baker*, 410 F. Supp. 1326, 1332 (S.D. N.Y. 1976) (holding that the court should consider the recommendation of counsel, and weight it according to counsel's caliber and experience). Here, due especially to the experience and knowledge of Class Counsel, their recommendations are presumed to be reasonable, and this factor accordingly favors approval.

## C. Fairness Hearing and Required Notice to Parties

### 1. Notice Requirements

Under [Rule 23\(c\)\(2\)\(B\)](#), “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#). The Rule directs:

The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under [Rule 23\(c\)\(3\)](#).

\*5 [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#). “[T]he mechanics of the notice process are left to the discretion of the court subject only to the broad ‘reasonableness’ standards imposed by due process.” *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 120 (8th Cir. 1975).

The proposed settlement agreement anticipates that the parties will retain the services of a third-party Claims Administrator, CPT Group (“CPT”). Cox will provide CPT with the last known address of each Class Member, and CPT will mail notice to each Class Member. (Settlement ¶ 17.) Notice will include Cox's calculation of each Class Member's work weeks of employment (and will provide a mechanism for Class



Members to challenge this calculation) as well as the resulting estimated settlement amount for each Class Member. (*Id.*)

The Court has reviewed the proposed Notice as well as the notice procedures and finds that it satisfies the requirements of [Rule 23\(c\)\(2\)\(b\)](#).

## 2. Fairness Hearing

[Rule 23\(e\)\(2\)](#) requires that “[i]f the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.” [Fed. R. Civ. P. 23\(e\)\(2\)](#). “The purpose of a fairness hearing is to provide the court with sufficient evidence for it to make an informed decision relating to the fairness of the proposed settlement.” *UAW v. General Motors Corp.*, 235 F.R.D. 383, 386 (E.D. Mich. 2006). A fairness hearing need not have all the procedures and protections of a full trial; it is a forum for intervenors to voice their objections and for the fairness of the settlement to be determined, and a court is within its discretion to limit the hearing as necessary to meet those objectives. *UAW*, 235 F.R.D. at 386; *Tenn. Ass’n of Health Maint. Org., Inc. v. Grier*, 262 F.3d 559, 567 (6th Cir. 2001).

Here, in their Settlement Agreement, the parties agree to a framework for Class Members who either wish to opt-out or to object to the proposed Settlement. (Settlement ¶ 13f.)

## III. CONCLUSION & ORDER

In light of the foregoing, the Court **GRANTS** the parties’ joint motion for preliminary approval of the class action settlement (ECF No. 29), and hereby **ORDERS** the following:

1. Pursuant to [Rule 23 of the Federal Rules of Civil Procedure](#), the Court hereby conditionally certifies a class for settlement purposes only.
2. The class shall consist of “all non-exempt, non-field technical employees who worked for Cox in California from August 23, 2012 until January 20, 2017.”
3. The Court hereby appoints Jimmie Davis as Class Representative.
4. The Court hereby appoints Blumenthal, Nordrehaug and Bhowmik as Class Counsel to represent the Class.
5. The Court appoints CPT Group as Claims Administrator.

6. Defendant is directed to provide the Claims Administrator the Class Data List as specified in the Settlement Agreement no later than 10 business days after this order.

7. The Class Administrator is directed to mail notice to the Class 10 business days after receiving the Class Data List.

8. The Court hereby preliminarily approves the Settlement Agreement and the terms and conditions of Settlement set forth therein, subject to further consideration at a Final Approval Hearing.

**\*6** 9. The Court will hold a Final Approval Hearing on **August 14, 2017 at 11:00 a.m.** in the Courtroom of the Honorable Cynthia Bashant, United States District Court for the Southern District of California, Courtroom 4B (4th Floor—Schwartz), 221 West Broadway, San Diego, CA 92101, for the following purposes:

- a. Finally determining whether the Class meets all applicable requirements of [Rule 23 of the Federal Rules of Civil Procedure](#) and whether the Class should be certified for the purposes of effectuating the Settlement;
- b. finally determining whether the proposed Settlement of the case on the terms and conditions provided for in the Settlement Agreement is fair, reasonable, and adequate and should be approved and ordered by the Court; and
- c. ruling upon such other matters as the Court may deem just and appropriate.

10. Before the Fairness Hearing, Defendant shall file with the Clerk of the Court proof of their compliance with the notice provisions of the Class Action Fairness Act of 2005 (“CAFA”), [28 U.S.C. § 1715](#).

11. In compliance with [Federal Rule of Civil Procedure 23\(b\)\(3\)](#), the Class Members will be permitted to exclude themselves from the class.

12. Briefs for the Final Approval Hearing must be filed with the Clerk of the Court no later than 28 days prior to the final approval hearing.

13. The Court may adjourn the Final Approval Hearing and later reconvene such hearing without further notice to the Class Members.
14. Class Members who desire to object to the fairness of the settlement must file written objections with the Clerk of the Court within 45 calendar days after the notices are mailed ("Objection Deadline").
15. Class Members must also provide a copy of the written objections to CPT Group at the address provided in the Notice.
16. All objections must include the objector's full name, address, and telephone number, along with a statement of the reasons for his or her objection, whether or not he or she intends to appear at the fairness hearing, and, if the objector intends to appear, whether he or she will appear on his or her own behalf or through counsel.
17. All objections must be filed with the Clerk of the Court and served on the parties' counsel no later than the Objection Deadline. Objections that do not contain all required information or that are received after the Objection Deadline will not be considered at the Final Approval Hearing.
18. Any Class Member who does not file a valid and timely objection to the settlement shall be barred from seeking review of the settlement by appeal or otherwise.
19. Any response by the Plaintiff to the objections of Class Members must be filed with the Clerk of the Court no later than 14 calendar days after the objection deadline.
20. Class Members who seek to opt out of the settlement must notify the Class Administrator (CPT Group) within 45 calendar days after notices are mailed that he or she seeks to be excluded from the class. The request for exclusion must include the Class Member's full name, signature, address, telephone number and last four digits of his or her social security number.
21. Class Counsel shall file with the Clerk of this Court their application for attorney's fees, costs, and expenses no later than 14 calendar days before the Objection Deadline, sufficiently in advance of the expiration of the objection period that any Class Member will have sufficient information to decide whether to object or opt out and, if applicable, to make an informed objection.
- \*7 22. The meal-and-rest-period claims and derivative claims asserted in the original complaint are dismissed without prejudice and the Settlement will not be based upon any allegations underlying those meal and rest period claims.
23. The Parties are ordered to carry out the Settlement Agreement in the manner provided in the Settlement Agreement.

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2017 WL 1496407

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# **EXHIBIT 5**

2019 WL 7208416

Only the Westlaw citation is currently available.

United States District Court, C.D. California.

**Carlos DELGADO**, individually and on behalf  
of all others similarly situated, Plaintiff,

v.

**LINCOLN TRANSPORTATION  
SERVICES INC.**, et al., Defendants.

Case No.: CV 19-09449-CJC(SKx)

|

Signed 12/27/2019

**Attorneys and Law Firms**

**Michael Anthony Jenkins**, **Stephen Glick**, Stephen Glick Law  
Offices, Los Angeles, CA, for Plaintiff.

**Albert Douglas Mastroianni**, Albert Mastroianni, Palos  
Verdes Peninsula, CA, **Edward T. Muramoto**, Edward  
Muramoto Law Offices, Los Angeles, CA, for Defendants.

**ORDER GRANTING PLAINTIFF'S MOTION TO  
REMAND AND FOR ATTORNEY FEES [Dkt. 9]**

**CORMAC J. CARNEY**, UNITED STATES DISTRICT  
JUDGE

**I. INTRODUCTION**

\*1 Plaintiff Carlos Delgado filed this putative wage-and-hour class action against Defendants Lincoln Transportation Services Inc. ("Lincoln"), Navigator Transport Inc. ("Navigator"), Jose Cardenas ("Jose"), Elizabeth Cardenas ("Elizabeth"), Octavio Beltran, and unnamed Does in Los Angeles County Superior Court. (Dkt. 1 [Notice of Removal, hereinafter "NOR"].) Defendants Lincoln, Jose, and Elizabeth ("Lincoln Defendants") removed to this Court. (*Id.*) Before the Court is Plaintiff's unopposed motion to remand and for attorney fees. (Dkt. 9 [hereinafter "Mot."].) For the following reasons, Plaintiff's motion is **GRANTED**.<sup>1</sup>

**II. BACKGROUND**

Plaintiff filed this action in Los Angeles County Superior Court on March 9, 2018. (Dkt. 9-3 Ex. 1 [Complaint, hereinafter "Compl."].)<sup>2</sup> In the operative Second Amended

Complaint ("SAC"), Plaintiff alleges that he was previously employed as a truck driver for Lincoln and Navigator and compensated on a piece-rate basis. (Dkt. 9-3 Ex. 3 [hereinafter "SAC"] ¶ 2.)<sup>3</sup> Defendants allegedly operate a pickup and delivery business with locations across California. (*Id.* ¶ 14.) Jose, Elizabeth, and Beltran are named as owners, directors, officers, managers, and/or agents of Lincoln and Navigator. (*Id.* ¶ 4.) Defendants allegedly committed numerous wage-and-hour violations during Plaintiff's employment. (*See generally id.*) Specifically, Defendants allegedly made unlawful wage deductions, failed to reimburse for business expenses, failed to pay minimum wage, failed to provide meal and rest periods, failed to compensate for meal and rest periods, failed to pay earned wages after separation, and failed to provide accurate itemized wage statements. (*Id.* ¶ 2.)

Based on these allegations, Plaintiff brought suit on behalf of himself and similarly situated current and former employees. In the SAC, Plaintiff asserts eleven causes of action for violations of the California Labor Code and California Industrial Welfare Commission wage orders, (*id.* ¶¶ 23–79 [Claims One through Eight]), for violations of California's Unfair Competition Law, (*id.* ¶¶ 80–89 [Claim Nine]), and for civil penalties under California's Private Attorneys General Act, (*id.* ¶¶ 90–118 [Claims Ten and Eleven]). In November 2018, Lincoln Defendants filed an Answer to the SAC. (Dkt. 9-3 Ex. 2.) The case was scheduled to proceed to a jury trial in state court in November 2019. (Dkt. 9-3 Ex. 4 [Superior Court Minute Order Vacating Jury Trial].) On November 1, 2019—three days before the state court trial—Lincoln Defendants filed their notice of removal. (*Id.*; NOR.) They assert that this Court has federal question jurisdiction over the case based on a December 2018 order from the Federal Motor Carrier Safety Administration ("FMCSA" and the "FMCSA Order"). (NOR at 3.) Plaintiff filed the instant motion to remand on December 4, 2019. Lincoln Defendants have failed to file an opposition or notice of non-opposition to Plaintiff's motion.

**III. DISCUSSION**

\*2 A plaintiff can move to remand to state court based on procedural or jurisdictional defects. *See* 28 U.S.C. § 1447(c). Plaintiff first challenges removal as untimely and then argues that the Court lacks subject matter jurisdiction over this case. The Court considers both arguments in turn to determine whether removal was proper. Concluding it was not, the Court considers whether to award Plaintiff attorney fees.

**A. Untimely Removal**

Generally, a defendant must file a notice of removal within thirty days of receiving the initial pleading or after the service of summons. 28 U.S.C. § 1446(b)(1). However, “if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” *Id.* § 1446(b)(3). Plaintiff argues that, even if the FMCSA Order is an “other paper” that made this case removable, Lincoln Defendants’ notice of removal was untimely filed nearly one year later. The Notice of Removal does not identify any other document that would make removal timely, and Lincoln Defendants have failed to oppose the instant motion. *See* Local Rule 7-12. The Court therefore agrees that Lincoln Defendants’ removal was untimely but cannot grant Plaintiff’s motion on this basis.

Untimely removal is a procedural defect. *Maniar v. F.D.I.C.*, 979 F.2d 782, 784 (9th Cir. 1992). Under 28 U.S.C. § 1447(c), procedural defects—unlike jurisdictional defects—can only be raised “within 30 days after the filing of the notice of removal.” A plaintiff’s failure to challenge a procedural defect before this deadline constitutes a waiver, and the deadline is strictly enforced. *N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995); *Ungureanu v. A. Teichert & Son, Inc.*, 2013 WL 1091279, at \*3 n.2 (E.D. Cal. Mar. 15, 2013), *report and recommendation adopted*, 2013 WL 2449557 (E.D. Cal. June 5, 2013), *aff’d*, 605 F. App’x 619 (9th Cir. 2015). Lincoln Defendants filed their notice of removal on November 1, 2019, and Plaintiff’s deadline to raise procedural defects was Monday, December 2, 2019. *See* 28 U.S.C. § 1447(c); *Fed. R. Civ. P. 6(a)*. By filing the instant motion to remand after this deadline—on December 4, 2019—Plaintiff waived his right to challenge the timeliness of removal. *N. Cal. Dist. Council*, 69 F.3d at 1038; *Ungureanu*, 2013 WL 1091279, at \*3 n.2.

Plaintiff likely assumed that his thirty-day window was extended because Lincoln Defendants’ notice of removal was served by mail. Under *Federal Rule of Civil Procedure 6(d)*, “[w]hen a party may or must act within a specified time after service and service is made under [federal rules providing for, inter alia, service by mail], 3 days are added after the period would otherwise expire under *Rule 6(a)*.” However, courts in the Ninth Circuit have consistently found that *Rule 6(d)* does not apply to the thirty-day window set out in 28 U.S.C. § 1447(c). *See Bell v. Arvin Meritor, Inc.*, 2012 WL 1110001, at \*1 (N.D. Cal. Apr. 2, 2012) (collecting cases

applying this rule in the Ninth Circuit). The motion to remand timeline is triggered when a defendant *files* the notice of removal, and “[b]y its own terms, *Rule 6(d)* applies only when a party is required to act within a prescribed period after service, not after filing.” *Ungureanu*, 2013 WL 1091279, at \*3 n.2 (quotations omitted). Accordingly, the Court must **DENY** Plaintiff’s motion to remand based on any procedural deficiencies.<sup>4</sup>

## B. Subject Matter Jurisdiction

\*3 Plaintiff next argues that the Court lacks subject matter jurisdiction over this case. Jurisdictional defects need not be raised within thirty dates of removal. *See* 28 U.S.C. § 1447(c).

### 1. Legal Standard

“Federal courts are courts of limited jurisdiction,” possessing “only that power authorized by Constitution and statute.” *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (internal quotations omitted). A civil action brought in state court may only be removed by the defendant to a federal district court if the action could have been brought there originally. 28 U.S.C. § 1441(a). Federal courts have subject matter jurisdiction over cases “arising under” federal law. 28 U.S.C. §§ 1331. Generally, under the “well-pleaded complaint rule,” cases arise under federal law only when “a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). An exception to the well-pleaded complaint rule occurs “when a federal statute wholly displaces the state-law cause of action through complete pre-emption.” *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003). In these instances, cases asserting state law claims that fall within the scope of the preemption are removable under 28 U.S.C. § 1441 even though no federal claim expressly appears on the face of the complaint. *See id.* When a case is removed, the burden of establishing subject matter jurisdiction falls on the defendant, and the removal statute is strictly construed against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). “Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.” *Id.*

### 2. Analysis

Lincoln Defendants assert that this Court has subject matter jurisdiction because Plaintiff’s claims are preempted by the



FMCSA Order. Under 49 U.S.C. § 31141(a), “[a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced.” Based on this authority, the FMCSA Order asserts that California’s meal-and rest-break rules (“MRB Rules”), Cal. Lab. Code §§ 226.7, 512, 516; 8 C.C.R. § 11090, are preempted and unenforceable “with respect to drivers of property-carrying [commercial motor vehicles] subject to FMCSA’s [Hours of Service (“HOS”)] rules.” California’s Meal and Rest Break Rules for Commercial Motor Vehicle Drivers, FMCSA Order on *Petition for Determination of Preemption*, 83 FR 67470-01 (Dec. 28, 2018) [hereinafter “FMCSA Order”] at \*67480.

Defendants’ federal preemption defense does not appear on the face of the SAC. Accordingly, the mere possibility that it precludes liability is insufficient to confer federal jurisdiction. See *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1075 (9th Cir. 2005) (“A federal law defense to a state-law claim does not confer jurisdiction on a federal court, even if the defense is that of federal preemption and is anticipated in the plaintiff’s complaint.”). Instead, the Court only has subject matter jurisdiction if some or all of Plaintiff’s claims are “completely preempted” and “wholly displaced” by federal law. *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003). “This is because the claim purportedly based on ... [a] preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law.” *Valles*, 410 F.3d at 1075 (quotations omitted).

\*4 Lincoln Defendants have not established complete preemption. In the notice of removal, they invoke this Court’s jurisdiction in vague terms, asserting that “drivers such as plaintiff are not subject to state wage and hour and other state laws and regulations which form the basis of plaintiff’s complaint” and that FMCSA “has determined that these laws are preempted by federal law.” (NOR at 3.) They have not specified which of Plaintiff’s claims are barred by the FMCSA Order or why these claims are *completely* preempted. Lincoln Defendants have also failed to address issues raised in Plaintiff’s motion to remand. Plaintiff argues that the FMCSA Order does not apply to his claims because it only covers carriers subject to FMCSA Hours of Service rules (“HOS rules”). See 49 C.F.R. 395.3. As relevant here, the HOS rules—and, therefore, the FMCSA Order—do not apply to local or “short-haul” motor carriers. 49 C.F.R. 395.1(e).<sup>5</sup> Lincoln Defendants have not addressed this limitation.

The test for “complete preemption” is demanding, and Lincoln Defendants have not shown that it is satisfied here. See *In re Miles*, 430 F.3d 1083, 1088 (9th Cir. 2005) (explaining that “[t]he Supreme Court has construed only three federal statutes to so preempt their respective fields as to authorize removal of actions seeking relief exclusively under state law”). Accordingly, the Court finds that they have not carried their burden of establishing federal jurisdiction. Moreover, under this Court’s Local Rules, Defendant’s failure to oppose Plaintiff’s motion to remand “may be deemed consent to the granting ... of the motion.” See Local Rules 7-9, 7-12. For both reasons, the Court **GRANTS** Plaintiff’s motion to remand.

### C. Attorney Fees

Plaintiff requests an award of attorney fees for filing this motion. Congress authorized courts remanding cases to state court to “require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c). The Supreme Court explained that courts should award fees under this section “only where the removing party lacked an objectively reasonable basis for seeking removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Plaintiff argues that the Lincoln Defendants had no “objectively reasonable basis” for filing their notice of removal after the statutory deadline. Because Plaintiff waived this procedural defect, the Court is hesitant to grant attorney fees on this basis.

However, the Court also has authority to impose attorney fees for a party’s failure to comply with Local Rules “if the Court finds that the conduct rises to the level of bad faith and/or a willful disobedience of a court order.” Local Rule 83-7; see also Local Rules 7-12–7-13. Lincoln Defendants violated Local Rule 7-9 by failing to file an opposition or notice of non-opposition to Plaintiff’s motion to remand, which was due on or before December 16, 2019. Based on their conduct, the Court is forced to conclude that they acted in bad faith. First, Lincoln Defendants removed this case on the eve of the state court trial and after the statutory deadline for removal. 28 U.S.C. § 1446(a). They subsequently violated the federal removal statute by failing to get timely consent from the other named Defendants and by failing to attach the relevant pleadings. See *id.* They also violated several Local Rules by failing to file a notice of interested parties or a civil cover sheet. (Dkt. 3 [Notice of Deficiencies in Attorney Case Opening]); see Local Rules 3-1, 7-1. Finally, by ignoring the instant motion, Lincoln Defendants have shown that they are unprepared to justify their invocation of federal jurisdiction.

As the Supreme Court explained, “[t]he process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources.” *Martin*, 546 U.S. at 140. The Lincoln Defendants' conduct suggests that they intended to cause such a delay and acted in bad faith. The Court does not take this conduct lightly. Indeed, “nothing is to be more jealously guarded by a court than its jurisdiction.” *United States v. Ceja-Prado*, 333 F.3d 1046, 1051 (9th Cir. 2003) (internal quotations omitted). Based on Lincoln Defendants' violations of Local Rules, the Court **GRANTS** Plaintiff's motion for attorney fees.

\*5 Plaintiff requests \$3,540 in fees, representing 7.05 hours of work at \$800 per hour for lead counsel Stephen Glick and

\$450 per hour for his associate attorney. The Court finds that the hourly rates and the time spent are reasonable, and will award the requested amount.

#### IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion to remand and for attorney fees is **GRANTED**. Plaintiff is **AWARDED** \$3,540 in attorney fees. This case is hereby **REMANDED** to Los Angeles County Superior Court.

#### All Citations

Not Reported in Fed. Supp., 2019 WL 7208416

#### Footnotes

- 1 Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. See *Fed. R. Civ. P. 78*; Local Rule 7-15. Accordingly, the hearing set for January 6, 2020, at 1:30 p.m. is hereby vacated and off calendar.
- 2 Plaintiff's request for judicial notice of the pleadings and minute order from the state court case is **GRANTED**. The complaint and order are “not subject to reasonable dispute because [they] ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” See *Fed. R. Evid. 201*. Lincoln Defendants failed to attach these pleadings to their notice of removal as required by *28 U.S.C. § 1446(a)*.
- 3 Defendant Navigator is named in the SAC and Plaintiff's motion to remand, but it is not listed as a party in the notice of removal. In the SAC, Plaintiff identifies Navigator as a “dissolved California corporation.” (SAC ¶ 12.) Counsel for Lincoln Defendants do not claim to represent Navigator.
- 4 The Court also cannot consider any procedural defects *sua sponte* more than thirty days after removal. *Maniar*, 979 F.2d at 784. Accordingly, the Court is likely barred from remanding based on other procedural defects, including Lincoln Defendant's failure to obtain timely consent for removal from the other named Defendants. See *id.*; *28 U.S.C. § 1446(b)(2) (A)* (unanimity rule); *Atl. Nat. Tr. LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 938 (9th Cir. 2010) (concluding that unanimity rule is procedural, rather than jurisdictional); *Miller v. Nat'l Brokerage Servs., Inc.*, 782 F. Supp. 1440, 1441 (D. Nev. 1991) (finding that plaintiff waived right to challenge removal based on unanimity rule).
- 5 The short-haul designation depends in part on the air-mile radius of the carrier's “normal work reporting location.” See *49 C.F.R. 395.1(e)*. The SAC does not indicate whether Plaintiff would qualify as a short-haul carrier.



# **EXHIBIT 6**

2013 WL 5437331

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

**David DENT**, Individually and on behalf of a  
class of all similarly situated persons, Plaintiffs,

v.

**ITC SERVICE GROUP, INC.**, Tim Sauer,  
Kevin Capps, and Patti Sanderson, Defendants.

No. 2:12-cv-00009-JCM-VCF.

|

Sept. 27, 2013.

**Attorneys and Law Firms**

**Leon Greenberg**, **Dana Sniegocki**, Leon Greenberg  
Professional Corporation Las Vegas, NV, for Plaintiffs.

**ORDER ADOPTING MAGISTRATE JUDGE'S  
REPORT AND RECOMMENDATION OF AUGUST 6,  
2013 AND GRANTING FINAL APPROVAL OF CLASS  
AND COLLECTIVE ACTION SETTLEMENT, CLASS  
REPRESENTATIVE'S ENHANCEMENT AWARD,  
ATTORNEYS' FEES AND COSTS, AND JUDGMENT**

**JAMES C. MAHAN**, District Judge.

**\*1 TO ALL PARTIES AND THEIR RESPECTIVE  
COUNSEL OF RECORD:**

Before the Court is Plaintiff's Motion for Final Approval of Class and Collective Action Settlement, and Plaintiff's Motion for Award of Attorneys' Fees and Costs. On August 6, 2013, Magistrate Judge Cam Ferenbach issued a Report and Recommendation that Recommended the Granting of such motion, Docket # 35. The Court hereby adopts such Report and Recommendation and incorporates all of the findings and conclusions made therein and makes the following findings and Orders the following relief.

The Parties' hybrid class and collective Settlement in this case was preliminarily approved by this Court on March 1, 2013. Pursuant to the Court's Amended Preliminary Approval Order of March 1, 2013 and the Notice provided to the Class, Magistrate Judge Cam Ferenbach of this Court conducted a final approval hearing on August 2, 2013 and issued a Report

and Recommendation that the requested final approval of the settlement be granted in accordance with its proposed terms. Consistent with the Court's Amended Preliminary Approval Order ("Preliminary Approval Order"), filed and entered March 4, 2013, and as set forth in the Joint Stipulation of Settlement and Release Between Plaintiffs and Defendants ("Stipulation" or "Settlement") in the Action, and due and adequate notice having been given to all Class Members as required in the Preliminary Approval Order, and the Court having considered all papers filed, objections submitted, arguments made, and proceedings had herein, and otherwise being fully informed and good cause appearing therefor, it is hereby ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. All terms used herein shall have the same meaning as defined in the Stipulation, and the Order shall be referred to herein as "the Final Order."

2. This Court has jurisdiction over the subject matter of this Action and over all Parties to this Action, including all Class Members.

3. Consistent with the definitions provided in the Stipulation, the "FLSA Plaintiffs" shall consist of all persons employed by Defendants in Arizona, California, Colorado, Florida, Idaho, Kentucky, Missouri, Nevada, North Carolina, Ohio, Texas, Virginia, and West Virginia who received TEC Pay and/or Taxable Vehicle Pay, and worked overtime, between January 4, 2009 and March 1, 2013, and who affirmatively opted into the FLSA Settlement by returning timely and valid claim forms electing to opt in as FLSA Plaintiffs and participate in the Settlement. The "Rule 23 Class" shall consist of all persons employed by Defendants in Arizona, California, Colorado, Florida, Idaho, Kentucky, Missouri, Nevada, North Carolina, Ohio, Texas, Virginia, and West Virginia who received TEC Pay and/or Taxable Vehicle Pay, and worked overtime, between January 4, 2009 and March 1, 2013 and who did not submit a valid Request for Exclusion (i.e., do not opt out of the Settlement) as provided for in the Settlement. The only such person to so exclude themselves from the Rule 23 Class is Allen Uran who shall not be part of the class and whose legal rights will continue unaffected by this Order. Also excluded from the Rule 23 Class are the 17 persons that have been mailed a Notice and Claim Form as provided for in the Preliminary Approval Order but are confirmed to have not received that Notice and Claim Form, such persons being listed on Ex. "1" of the Declaration of Neila Pourhashem of Settlement

Administrator Simpluris, Inc. (“Settlement Administrator”), filed at Docket # 29. The Settlement Administrator's records as to who opts in as FLSA Plaintiffs by returning a valid and timely Claim Form, and as to who opts out of the Rule 23 Class by submitting a valid Request for Exclusion, are final and binding. The FLSA Plaintiffs and the Rule 23 Class are referred to collectively in this Order as the “Settlement Classes” and “Class Member(s).” The Settlement Classes, however, shall not include any person who previously settled or released the claims covered by this Settlement, any person who previously was paid or received awards through civil or administrative actions for the claims covered by this Settlement, or any person who submits a timely and valid Request for Exclusion as provided in this Settlement.

**\*2** 4. Distribution of the Notice and Claim Form directed to the Class Members as set forth in the Stipulation and the other matters set forth therein have been completed in conformity with the Preliminary Approval Order, including individual notice to all Class Members who could be identified through reasonable effort, and the best notice practicable under the circumstances. The Notice provided due and adequate notice of the proceedings and of the matters set forth therein, including the proposed Settlement set forth in the Stipulation, to all persons entitled to such Notice, and the Notice fully satisfied the requirements of due process. All Class Members and all Released Claims are covered by and included within the Settlement and this Final Order as provided herein.

5. The Court finds the Settlement was entered into in good faith. The Court approves the Settlement set forth in the Stipulation and finds that the Settlement is, in all respects, fair, adequate and reasonable, and directs the Parties to effectuate the Settlement according to its terms. The Court finds that the Settlement has been reached as a result of intensive, serious and non-collusive arms-length negotiations. The Court further finds that the Parties have conducted extensive and costly investigation and research, and counsel for the Parties are able to reasonably evaluate their respective positions. The Court also finds that Settlement at this time will avoid additional substantial costs, as well as avoid the delay and risks that would be presented by the further prosecution of the Action. The Court has reviewed the benefits that are being granted as part of the Settlement and recognizes the significant value to the Class Members. The Court also finds that the Settlement Classes are properly and finally certified as a class pursuant to [Rule 23\(b\)\(3\) of the FRCP](#), and as a collective action under [29 U.S.C. 216\(b\)](#) of the

Fair Labor Standard Act, for settlement purposes only. The Settlement is hereby finally approved.

6. As of the date of entry of this Final Order, and except as to such rights or claims as may be created by this Stipulation of Settlement, each Class Member fully releases and discharges Defendants, and all past, present and future parent companies, subsidiaries, related or affiliated companies, shareholders, officers, directors, and employees of Defendants, and agents, attorneys, insurers, predecessors, successors and assigns of any of the foregoing, and any individual or entity which could be jointly liable with any of the foregoing (“Released Parties”), from any and all claims, debts, liabilities, demands, obligations, guarantees, costs, expenses, attorneys' fees, damages, action or causes of action of any nature under federal law, and state and local law in Arizona, California, Colorado, Florida, Idaho, Kentucky, Missouri, Nevada, North Carolina, Ohio, Texas, Virginia, and West Virginia, arising out of or related to the allegations made in the Action and that reasonably arise out of the facts alleged in the Action, including but not limited to claims for or related to hours worked, overtime or double time wages, wages, minimum wages, regular rate of pay, timely payment of wages at separation, wage statements, payroll records as required by law, methods of payment, additional 401(k) benefits and/or deferred compensation benefits and/or matching benefits for payments received under the Settlement, unfair competition, unfair business practices, unlawful business practices, fraudulent business practices, breach of contract, fraud, misrepresentation, injunctive relief, penalties, punitive damages, liquidated damages, treble damages, interest, fees, costs, punitive damages, liquidated damages, treble damages, and all other claims and allegations made in the Action and that arise out of the facts alleged in the Action from January 4, 2009, up to and through the date of entry of this Final Order (“Released Claims”). In addition, as of the date of entry of this Final Order, the Class Representative and the Class Members are forever barred and enjoined from instituting or accepting any additional damages, awards or relief for the Released Claims. Only FLSA Plaintiffs release FLSA claims; Class Members who do not opt out of the [Rule 23](#) Class and are not FLSA Plaintiffs do not release the FLSA claims, but do release all other Released Claims. By and through this Settlement, each Class Member forever agrees he/she shall not be entitled to pursue, accept or recover damages for any Released Claims against the Released Parties from January 4, 2009, through and including the date of this Final Order. The Court hereby finds and orders that the Settlement is and

constitutes a fair, reasonable and adequate compromise of the Released Claims against Defendants and the Released Parties.

**\*3** 7. Neither the Settlement nor any of the terms set forth in the Stipulation is an admission by Defendants, or any of the other Released Parties, nor is this Final Order a finding of the validity of any claims in the Action or of any wrongdoing by Defendants, or any of the other Released Parties. Neither this Final Order, the Stipulation, nor any document referred to herein, nor any action taken to carry out the Stipulation is, may be construed as, or may be used as, an admission by or against Defendants, or any of the other Released Parties, of any fault, wrongdoing or liability whatsoever. The entering into or carrying out of the Stipulation, and any negotiations or proceedings related thereto, shall not in any event be construed as, or deemed to be evidence of, an admission or concession with regard to the denials or defenses by Defendants, or any of the other Released Parties, and shall not be offered in evidence in any action or proceeding in any court, administrative agency or other tribunal for any purpose whatsoever other than to enforce the provisions of this Final Order, the Stipulation, the Released Claims, or any related agreement or release. Notwithstanding these restrictions, any of the Released Parties may file in the Action, or submit in any other proceeding, the Final Order, the Stipulation, and any other papers and records on file in the Action as evidence of the Settlement to support a defense of *res judicata*, *collateral estoppel*, release, or other theory of claim or issue preclusion or similar defense as to the Released Claims.

8. The Court hereby enters judgment, and dismissal of the entire Action with prejudice, as of the filing date of entry of this Final Order, pursuant to the terms set forth in the Settlement. Without affecting the finality of this Final Order in any way, the Court hereby retains continuing jurisdiction over the interpretation, implementation and enforcement of the Settlement and all orders entered in connection therewith to the fullest extent necessary or convenient to enforce and effectuate the terms of the Settlement and the matters provided for therein.

9. The Court hereby finds the settlement payments provided for under the Stipulation of Settlement to be fair and reasonable in light of all the circumstances. The Court, therefore, orders the calculations and the payments to be made and administered in accordance with the terms of the Settlement.

10. The Court hereby confirms Leon Greenberg of the Leon Greenberg Professional Corporation as Class Counsel.

11. Pursuant to the terms of the Settlement, and the authorities, evidence and argument submitted by Class Counsel, the Court hereby awards Class Counsel attorneys' fees and costs in the amount of \$37,500.00 from the Maximum Settlement Amount as final payment for and complete satisfaction of any and all attorneys' fees and costs incurred by and/or owed to Class Counsel and any other person or entity related to the Class Counsel. The Court further orders that the award of attorneys' fees and costs set forth in this Paragraph shall be administered pursuant to the terms of the Stipulation of Settlement and transferred and/or made payable to the Leon Greenberg Professional Corporation as Class Counsel in the Action.

**\*4** 12. Named Plaintiff, David Dent, has applied for compensation for his time and effort spent on behalf of Class Members, and in exchange for his general release of all potential legal claims against Defendants. The Court hereby approves and orders an Enhancement Award of \$15,000.00 to Plaintiff from the Gross Settlement Amount for acting as the Class Representative.

13. The Court also hereby approves and orders payment from the Maximum Settlement Amount for actual claims administration expenses incurred by Simpluris, Inc. in the amount of \$12,000.00.

14. The Settlement shall become effective upon the Effective Date as provided in the Stipulation.

15. The Court orders the payment schedule be administered as provided within the Implementation Schedule set forth within the Court's Preliminary Approval Order.

16. Provided the Settlement becomes effective under the terms of the Stipulation of Settlement, the Court also hereby orders the deadline for mailing the Court-approved settlement awards, attorneys' fees and costs, and service payment is as set forth in the Implementation Schedule within the Preliminary Approval Order, that the deadline for the Claims Administrator to file proof of payment of settlement awards, service payment, attorneys' fees and costs is as set forth in the Implementation Schedule within the Preliminary Approval Order, and that the deadline for Class Counsel to file a joint request to hold opt-in Class Members to be FLSA Plaintiffs covered by and bound to the Settlement as set forth in the

Implementation Schedule within the Preliminary Approval Order.

**IT IS SO ORDERED.**

## **REPORT & RECOMMENDATION**

### **MOTIONS FOR FINAL APPROVAL OF SETTLEMENT (# 26) AND ATTORNEY'S FEES AND ENHANCEMENT PAYMENT (# 27)**

**CAM FERENBACH**, United States Magistrate Judge.

Before the court are plaintiff David Dent's Motion for an Order Granting Final Approval of Proposed Class Action Settlement (# 26) and Motion for Order Granting Proposed Award of Attorney's Fees and Enhanced Payment to the Representative Plaintiff (# 27). Defendants filed a Non-Opposition to the motions (# 26 and # 27). (# 28). The court held a final fairness hearing on August 2, 2013.

Plaintiff asks this court to (1) "grant final approval of the proposed class action settlement of this case and to have a final order and judgment entered in the form previously contemplated by the parties and proposed to the Court," and (2) "grant approval of the proposed award of attorney's fees to class counsel and enhancement payment to the representative plaintiff, David Dent." (# 26 and # 27).

As discussed below, the undersigned Magistrate Judge finds that the settlement, including the award of attorney's fees and the enhancement payment, is reasonable, fair, and adequate, and recommends granting the relief sought in plaintiff's motions (# 26 and # 27) and signing the plaintiff's Proposed Order (# 31).

### **RELEVANT FACTS**

On January 4, 2012, plaintiff David Dent filed his complaint on behalf of himself and all persons similarly situated against several defendants, asserting claims for violations of the Fair Labor Standards Act. (# 1). Defendants ITC Service Group, Inc., Tim Sauer, Kevin Capps, and Patti Sanderson filed their answer on February 15, 2012. (# 8). The parties filed a stipulation on March 9, 2012, to stay the action for the parties to explore a resolution of plaintiff's claims. (# 9). On March 27, 2012, the court scheduled a hearing on the stipulation (# 9)

for April 2, 2012. (# 10). The court held a hearing on April 2, 2012, and ordered the parties to file an appropriate stipulation staying the action. (# 12). The parties filed a stipulation and proposed order to stay the action until July 31, 2012. (# 14). The court signed the stipulation on June 4, 2012. (# 15). On February 14, 2013, the parties filed a stipulation and order to amend plaintiff's complaint (# 1). (# 17). The court scheduled a hearing on the motion (# 17) for March 1, 2013. (# 18). On February 20, 2013, the court signed the stipulation (# 17). (# 19). The court vacated the March 1, 2013, hearing. (# 20).

\*5 On February 26, 2013, plaintiff filed an amended complaint (# 21) and an unopposed motion for order granting preliminary approval of proposed class (# 22). On February 27, 2013, defendants filed a non-opposition to the motion (# 22). (# 23). The court issued an order on March 1, 2013, granting preliminary approval of the proposed class (# 22). (# 24). On March 4, 2013, the court issued an amended order granting preliminary approval of the proposed class settlement and scheduling a final fairness hearing for June 26, 2013. (# 25).<sup>1</sup> On May 24, 2013, plaintiff filed an unopposed motion for an order granting final approval of proposed class and collective action settlement (# 26) and an unopposed motion for an order granting proposed award of attorneys fees and enhancement payment to the representative (# 27). On May 30, 2013, defendants filed a non-opposition to the unopposed motions (# 26 and # 27). (# 28).

On June 10, 2013, plaintiff filed the declaration of Neila Pourhashem of Settlement Administrator Simpluris, Inc., stating that, after multiple attempts and "skip traces to locate new mailing addresses," notice of the settlement was deemed "undeliverable" as to seventeen (17) class members. (# 29). The declaration also states that disputes with five (5) class members have been resolved and that they received one (1) valid Request for Exclusion from class member Allen Uran. *Id.* The declaration states that they have received no objections to the settlement. *Id.* The motion for an order granting final approval of proposed class and collective action settlement (# 26) and unopposed motion for an order granting proposed award of attorneys fees and enhancement payment to the representative (# 27) were referred to the undersigned Magistrate Judge to conduct a final fairness hearing and issue a report and recommendation.

On June 17, 2013, the court issued an order rescheduling the final fairness hearing for August 2, 2013, at 1:00 p.m. (# 30). On July 12, 2013, plaintiff filed a proposed order granting final approval of the class settlement. (# 31). On July 29,



2013, defendants filed a motion to appear telephonically at the hearing (# 32), and the court granted the motion (# 33). The court held the final fairness hearing on August 2, 2013. No class members appeared at the hearing. *Id.*

## DISCUSSION

### I. Proposed Class Settlement and Award of Attorney's Fees and Enhancement Payment

#### A. Approval of Class Settlement

The Manual for Complex Litigation (hereinafter “MANUAL”) describes a three-step procedure for approval of class action settlements: (1) preliminary approval of the proposed settlement at an informal hearing; (2) dissemination of mailed and/or published notice of the settlement to all affected class members; and (3) a “formal fairness hearing” or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented. MANUAL § 21.632.

#### 1. Preliminary Approval

\*6 As stated above, the District Judge entered an order granting preliminary approval of the class settlement. (# 25). The order provided the following relief: (1) granted “preliminary approval of the Settlement and the Settlement Class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure (“FRCP”), and conditional certification under 29 U.S.C. 216(b) of the Fair Labor Standard Act (“FLSA”), based upon the terms set forth in the Joint Stipulation of Settlement and Release, (2) held that the “Settlement appears to be fair, adequate and reasonable to the Class,” (3) approved “as to form and content, the Notice of Pendency of Class Action, Proposed Settlement and Hearing Date for Court Approval (“Notice of Pendency of Class Action”), in substantially the form attached to the Joint Stipulation of Settlement and Release Between Plaintiff and Defendants as Exhibit A, and the Opt In and Claim Form (“Claim Form”) in substantially the form attached thereto as Exhibit B,” (4) approved “the procedure for Class Members to participate in, to opt into, to exclude themselves from, and to object to, the Settlement as set forth in the Notice of Pendency of Class Action,” (5) directed “the mailing of the Notice of Pendency of Class Action and Proposed Settlement, and the Claim Form by first class mail to the Class Members in accordance with the Implementation Schedule,” (6) preliminarily certified the

settlement class for settlement purposes only, (7) confirmed plaintiff David Dent as Class Representative, and Leon Greenberg of the Leon Greenberg Professional Corporation as Class Counsel, (8) ordered an implementation schedule, and (9) scheduled a final fairness hearing. *Id.*

The first step of preliminary approval is satisfied. *See* MANUAL § 13.14 (stating that a formal hearing is not required at the preliminary approval stage, and the court may grant the parties' motion upon an informal request by the settling parties).

#### 2. Dissemination of Notices

In accordance with Rule 23(e)(1)(B), step two requires “the court to ‘direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise’ regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3).” MANUAL §§ 21.312 and 21.632. Rule 23(e)(1)(B) requires notice in a reasonable manner to “all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.” *Id.* “[I]ndividual notice is required, where practicable, in Rule 23(b)(3) actions.” *Id.* “In an order preliminarily approving the settlement under Rule 23(e), the judge sets the date for providing notice of the proposed settlement. This order, as well as the notice, should establish the time and place of a public hearing on the proposed settlement and specify the procedure and timetable for opting out, filing objections, and appearing at the settlement hearing.” *Id.*

\*7 The “notice should announce the terms of a proposed settlement and state that, if approved, it will bind all class members. If the class has been certified only for settlement purposes, that fact should be disclosed. Even though a settlement is proposed, the notice should outline the original claims, relief sought, and defenses so class members can make an informed decision about whether to opt out.” *Id.*

Exhibit A to the Settlement Agreement is the “Notice of Pendency of Class and Collective Action, Proposed Class Action Settlement and Hearing Date for Final Court Approval of Settlement” (# 22 Exhibit 1—Exhibit A), which complies with the requirements outlined above. The proposed form of notice was approved by the District Judge, and the court ordered the implementation schedule outlined on Pages 3–5 of the court's order preliminarily approving the class. *See* (# 25). Neila Pourshasheem of Settlement Administrator Simpluris, Inc. asserts in her declaration that:



(1) On March 13, 2013 Simpluris received from Class Counsel the Notice Packet prepared by the Parties. The Class Notice advised Class Members they could postmark Claim Forms, Requests for Exclusion, or objections to the settlement by May 13, 2013.

(2) On March 21, 2013, counsel for Defendant provided Simpluris with a mailing list ("Class List") which included each Class Member's full name, most recent mailing addresses and telephone numbers, Social Security Numbers, total overtime hours, and other relevant information needed to calculate settlement payments.

(3) The mailing addresses contained in the Class List were processed and updated utilizing the National Change of Address Database ("NCOA") maintained by the U.S. Postal Service.

(4) On March 29, 2013, Notice Packets were mailed to the five hundred thirty (530) Class Members identified in the Class List by First Class mail.

(5) As of this date, eighty (80) Notice Packets were returned by the post office. For those without forwarding addresses, Simpluris performed skip traces to locate new mailing addresses. A total of one hundred eight (108) Notice Packets were re-mailed, either to a newfound address, a forwarding address provided by the United States Postal Service or at the request of the Class Member. Ultimately, after additional searches, seventeen (17) Class Members who have been deemed undeliverable are set forth in Exhibit 1 to this declaration.

(6) As of this date, Simpluris has received a total of one hundred seventy eight (178) Claim Forms. The one hundred seventy four (174) valid claims received from the Participating Class Members represent 32.83% of the entire Settlement Class and have claimed \$40,134.82 of the Net Settlement Fund. As of June 10, 2013, four (4)<sup>2</sup> Claims are deficient. Simpluris is corresponding with the Class Members to cure the deficiencies. The parties have agreed that if those deficiencies are cured on or prior to the final approval hearing date in this case those claims shall also be paid. Those claims are for an additional \$584.98 of the Net Settlement Fund.

**\*8** (7) Five (5) class members challenged the number of overtime hours reported by them to have been worked. Simpluris worked with the ITC Service Group's attorneys

to resolve these disputes. These five (5) disputes have been resolved and Simpluris notified each Class Member of its resolution.

(8) As of this date, Simpluris has received one (1) valid Request for Exclusion from class member Allen Uran.

(9) As of this date, Simpluris has received no objections to the settlement.

(# 29).

The court finds that notice was provided to the class members in accordance with MANUAL §§ 21.312 and 21.632 and [Fed.R.Civ.P. 23\(e\)\(1\)\(B\)](#), as each individual class member received "direct notice in a reasonable manner" which set forth the terms of the proposed settlement, the date and time of the final fairness hearing, and the procedure and time frame to opt out, file objections, and/or appear at the hearing. MANUAL §§ 21.312 and 21.632; [Fed.R.Civ.P. 23\(e\)\(1\)\(B\)](#).

### 3. Final Fairness Hearing

The last step requires the court to conduct a "formal fairness hearing" or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented. MANUAL § 21.632. The court conducted the final fairness hearing in this action on August 2, 2013. No class members appeared at the hearing.

In accordance with § 21.635 of the MANUAL, upon considering the fact that no class members objected and the "diverse interests and the requisite factors [of] the settlement's fairness, reasonableness, and adequacy," the court finds that the proposed class settlement should be approved. Before making such a determination, the court must find that there is a sufficient record as to the basis and justification of the settlement. MANUAL § 21.635 (stating that "[e]ven if there are no or few objections or adverse appearances before or at the fairness hearing, the judge must ensure that there is a sufficient record as to the basis and justification for the settlement."). The court must also make "specific findings as to how the settlement meets or fails to meet the statutory requirements" under [Fed.R.Civ.P. 23](#). *Id.*

#### a. Sufficient Basis and Justification for Settlement

The court's ultimate determination that the settlement is "fair, reasonable, and adequate" involves a balancing of the *City of Seattle* factors: (1) the strength of plaintiffs' case; (2) the risk,

expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; and (7) the reaction of the class members to the proposed settlement. *City of Seattle*, 955 F.2d at 1291.

The court finds that these factors, as discussed in the court's order granting preliminary approval of the class settlement (# 25), plaintiff's motion for an order granting final approval (# 26), and during the hearing, support a finding that the settlement is "fair, reasonable, and adequate." *Id.* The undersigned recommends that the District Judge grant final approval of the settlement. *Id.*

#### **b. Statutory Requirements Are Satisfied**

\*9 Pursuant to MANUAL § 21.635, the court must also make "specific findings as to how the settlement meets or fails to meet the statutory requirements" under Fed.R.Civ.P. 23. For the court to certify a class under Fed.R.Civ.P. 23(a), the court must find that the requirements of numerosity, commonality, typicality, and adequacy of representation are met. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998). Rule 23(b)(3) allows certification of a class action if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). "Rule 23(e)(1)(B) requires the court to 'direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise' regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL § 21.312. Based on the court's findings in the order granting preliminary approval of the class settlement (# 25), plaintiff's representations in the motion for order granting final approval (# 26), and Neila Pourhashem's declaration regarding the notice provided to all potential class members (# 29), the court finds that the above requirements are satisfied.

#### **c. Requested Enhancement Award, Counsel's Attorneys' Fees, and Counsel's Expenses**

Plaintiff asks this court to award "Class Counsel, Leon Greenberg ... fees totaling \$37,500 which is equal to 25% of the \$150,000 total settlement fund commitment secured for the benefit of the class," and asserts that "Class Counsel

seeks no separate award for reimbursement of their expenses and will absorb all such expenses from the fee award." (# 27). Plaintiff also asks this court to find reasonable the "enhancement award of \$15,000 for the representative ... plaintiff David Dent." *Id.*

#### **I. Plaintiff Harris' Enhancement Award**

Enhancement "awards are fairly typical in class actions" and are intended to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action and, sometimes, to recognize their willingness to act as a private attorney general." *Hartless v. Clorox Co.*, 273 F.R.D. 630, 646 (S.D.Cal.2011) (citing *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir.2009)). As the District Court held in its order preliminarily approving the class settlement, plaintiff Dent is an appropriate class representative in this action and approving the enhancement award is justified. (# 25).

Under the settlement agreement, Plaintiff Dent will be paid an enhancement award of \$15,000.00. (# 22 Exhibit 1). Plaintiff argues that plaintiff "subjected himself to a substantial, and detrimental, level of notoriety by instituting this lawsuit," "assumed a significant financial risk by prosecuting this litigation," and "pledged to fully participate in discovery in this case and fully cooperated with Class Counsel in prosecuting this case." (# 27). The court finds that the enhancement award of \$15,000.00 is appropriate and should be awarded to plaintiff Dent. See *Hartless v. Clorox Co.*, 273 F.R.D. at 646; *Rodriguez*, 563 F.3d at 958–59.

#### **ii. Plaintiff's Counsel's Attorneys' Fees and Expenses**

\*10 The parties agree that plaintiff's counsel should receive attorneys' fees totaling 25% of the \$150,000 total settlement. (# 27). Plaintiff argues that "[s]uch requested fee award is reasonable and proper under both the percentage of common fund and lodestar analysis that are used to determine class counsel fee awards. Indeed, such fee is less than would be justified, and is typically awarded, under the circumstances in a class case." *Id.* Plaintiff also argues that "[c]lass counsels' request for an award of 25% of the fund created by their efforts, which award is \$37,500 and fund is \$150,000, is reasonable. The Court's Amended Order preliminarily approving the settlement provided, based upon its incorporation of the parties' stipulation, that no award of

attorney's fees in excess of \$37,500 would be paid to Class Counsel." *Id.*

The court has broad discretion in awarding attorneys' fees in class actions and must consider several factors before awarding such fees. *Lobatz v. U.S. W. Cellular of Calif., Inc.*, 222 F.3d 1142, 1148 (9th Cir.2000); *Fischel v. Equitable Life Assurance Soc'y of the United States*, 307 F.3d 997, 1007 n. 7 (9th Cir.2002). These factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Fischel*, 307 F.3d at 1007 n. 7.

After considering these factors, and the representations in both the motion for an order granting proposed award of attorney's fees and enhancement payment (# 27) and the non-opposition (# 28), the court finds that the District Judge should approve plaintiff's counsel's attorneys' fees and expenses. *See Id.*

### RECOMMENDATION

Based on the foregoing, it is the recommendation of the undersigned United States Magistrate Judge that plaintiff David Dent's Motion for an Order Granting Final Approval of Proposed Class Action Settlement (# 26) and Motion for Order Granting Proposed Award of Attorney's Fees and Enhanced Payment to the Representative Plaintiff (# 27) be GRANTED.

IT IS FURTHER RECOMMENDED that the District Judge sign the Proposed Order Granting Final Approval of the Class and Collective Settlement, Class Representative's Enhancement Award, and Attorney's Fees and Costs, and Entering Judgment (# 31).

IT IS FURTHER RECOMMENDED that the court:

- (1) Certify the class proposed by plaintiff;
- (2) Approve the Settlement Agreement (# 22 Exhibit 1);
- (3) Order defendants to pay Class Counsel the sum of \$37,500.00 for reasonable and necessary attorneys' fees and expenses, and that the award of attorneys' fees and expenses be administered pursuant to the terms of the Settlement Agreement (# 22 Exhibit 1);
- \*11 (4) Order defendants to pay Plaintiff Dent the enhancement award of \$15,000.00;
- (5) Approve and order payment from the Maximum Settlement Amount for actual claims administration expenses incurred by Simpluris, Inc. in the amount of \$12,000.00;
- (6) Order the payment schedule and other post-fairness hearing deadlines be administered as provided within the Implementation Schedule set forth within the Court's Preliminary Approval Order (# 25);
- (7) Enter final judgment and dismiss all claims asserted by plaintiff Dent and the Class *with prejudice*.

### NOTICE

Pursuant to Local Rule IB 3–2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir.1983).

### All Citations

Not Reported in F.Supp.2d, 2013 WL 5437331

### Footnotes

- 1 Any reference herein to the order granting preliminary approval will be to the amended order granting preliminary approval of the class settlement (# 25).
- 2 Counsel represented during the hearing that two (2) of the claims were resolved, and that they were working on a resolution for the remaining two (2). Counsel also stated that the resolution will be contained in the final report.

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# **EXHIBIT 7**



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Raines v. Coastal Pacific Food Distributors, Inc.](#),  
Cal.App. 3 Dist., May 22, 2018

2011 WL 7563047

United States District Court, C.D. California.

**GERALD FLEMING**, et al., Plaintiffs

v.

COVIDIEN, INC., et al., Defendants

No. ED CV 10-01487 RGK (OPx).

|

Aug. 12, 2011.

**Attorneys and Law Firms**

[Vincent Calderone](#) and [William S. Waldo](#) (Bononi Law Group  
LLP), Los Angeles, Calif., for plaintiffs.

[Robert A. Jones](#), [Erica K. Rocush](#), and [Carolyn Blecha  
Hall](#) (Ogletree Deakins Nash Smoak & Stewart P.C.), San  
Francisco, Calif., for defendants.

[KLAUSNER](#), District Judge.**I. INTRODUCTION**

**\*1** On August 5, 2010, Plaintiffs Gerald Fleming, Sergio Montenegro, Robert Morales, and Eddie Ramirez, individually and on behalf of all others similarly situated, filed a Complaint against Covidien, Inc. (“Covidien”), Tyco Healthcare Group, L.P. (“Tyco,” collectively “Defendants”), and other defendants subsequently dismissed from the suit. On May 9, 2011, the Court entered an order certifying Plaintiff’s proposed class on a single cause of action, for failure to provide itemized wage statements under [California Labor Code § 226](#). Certification was denied on Plaintiffs’ remaining claims and the individual claims were subsequently dismissed following settlement. Presently, Plaintiffs pursue their claims under [§ 226](#) as a representative action under the California Private Attorney General Act (“PAGA”). [Cal. Lab. Code § 2699](#).

A bench trial was held on July 28, 2011 and supplemental briefing was received by the parties on August 1, 2011.<sup>1</sup>

The Court has reviewed the record and considered all the arguments and evidence presented. Based on the credible evidence and the reasonable inferences drawn from that evidence, the Court finds Plaintiffs have established a violation of [§ 226](#) and penalties shall be awarded under PAGA. The Court, in its discretion, orders Defendants to pay \$500,000 in penalties, to be apportioned according to PAGA, as well as Plaintiffs’ reasonable attorney’s fees and costs.

**II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This opinion serves as the findings of fact and conclusions of law required by [Rule 52 of the Federal Rules of Civil Procedure](#). Any finding of fact that actually constitutes a conclusion of law is adopted as such, and the converse is true as well.

**A. Findings of Fact**

1. Plaintiffs Fleming and Morales were employed by Covidien/Tyco during the entire period from July 29, 2009 through and including September 1, 2010.

2. Plaintiffs Montenegro and Ramirez were employed by Covidien/Tyco during a portion of the Class Period from July 29, 2009 through and including September 1, 2010.

3. Defendants Tyco and Covidien employed approximately 956 persons in California for all or a portion of the Class Period from July 29, 2009 through and including September 1, 2010.<sup>2</sup>

**\*2**

4. Defendants furnished approximately 28,747 earnings statements from July 29, 2009 through and including September 1, 2010 to their California employees.

5. Each earnings statement furnished to Defendants’ California employees during the period possessed the following attributes: (a) the statements did not show either an employee identification number or the last four digits of the social security number of the employee; (b) the statements did not show the beginning date of the pay period for which the employee was paid; (c) the statements identified Covidien as the employee’s employer.



6. Tyco started operating under the business name Covidien in California in 2007. However, Tyco remains the legal entity that employs Plaintiffs and the aforementioned California employees.

7. Defendants were unaware that the earning statement attributes mentioned above violated California law.

8. There is no evidence that any California employee suffered injury as a result of the aforementioned earning statement attributes.

9. On July 29, 2010, Plaintiffs provided written notice to the California Labor & Workforce Development Agency ("LWDA") and to Defendants Tyco and Covidien of their position that the earning statements violated [California Labor Code § 226](#). This notice also identified facts and legal argument in support of Plaintiff's allegations. The LWDA did not notify Plaintiffs of an intent to investigate the allegations contained in the notice within thirty-three days.

10. After receiving Plaintiffs' written notice, Defendants made good faith efforts to remedy the identified violations of [California Labor Code § 226](#) for future earning statements.

## B. Conclusions of Law

1. The California Labor Code requires that "every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees . . . an accurate itemized statement in writing showing . . . (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement, (8) the name and address of the legal entity that is the employer . . ." [Cal. Lab. Code § 226](#).

2. Between July 29, 2009 and September 1, 2010, Defendants failed to provide their California employees with accurate, itemized wage statements that complied with [Labor Code § 226\(a\)](#). Specifically, each wage statement during the period violated the statute as follows: (a) the statements failed to include inclusive dates of the period for which the employee was paid, as the beginning date of the period was omitted; (b) the statements failed to include any employee identification number or the last four digits of the employee's social security

number; (c) the statements failed to include the name and address of the actual legal entity employing them.

**\*3** 3. PAGA allows an "aggrieved employee" to file a representative civil action "on behalf of himself or herself and other current and former employees" to recover civil penalties for violations of the Labor Code that could otherwise be assessed and collected by the LWDA. [Cal. Lab. Code § 2699\(a\)](#).

4. For purposes of PAGA, an aggrieved employee is any person "who was employed by the alleged violator and against whom one or more alleged violations was committed." [Cal. Lab. Code § 2699\(c\)](#). Here, Plaintiffs Fleming, Morales, Montenegro, and Ramirez are aggrieved employees entitled to bring a PAGA action.

5. Before bringing an action under PAGA, a plaintiff must provide "written notice by certified mail to the LWDA and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." [Cal. Lab. Code § 2699.3\(a\)\(1\)](#). If the LWDA does not communicate whether it intends to investigate the alleged violations to the plaintiff and the employer within 33 days after the notice was sent, plaintiff is free to bring a representative action under PAGA against the employer. [Cal. Lab. Code § 2699.3\(a\)\(2\)\(A\)](#). Plaintiffs followed the notice requirements, and having received no response from the LWDA within 33 days, properly filed a PAGA action against Defendants.

6. PAGA establishes penalties for violations of "all labor code provisions except those for which a civil penalty is specifically provided." [Cal. Lab. Code § 2699\(f\)](#). The PAGA penalty provision is applicable in this action. Defendants argue that the provision does not apply here because the labor code elsewhere specifies a penalty for violation of [§ 226\(a\)](#). [Cal. Lab. Code § 226.3](#) specifies a penalty for a violation of [§ 226\(a\)](#) "for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in [subdivision \(a\) of Section 226](#)." Here, there is no allegation Defendants failed to provide earnings statements or keep required records. Rather, Plaintiffs' action is predicated on Defendants' failure to include information required by the statute in their earnings statements. The Labor Code does not specify a penalty to be applied for this violation. Thus, the general PAGA penalty provision applies.

7. Under PAGA, the general penalty to be applied for Defendants' wage statement violations is "one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation . . . ." [Cal. Lab. Code § 2699\(f\)\(2\)](#). As Defendants provided 28,000 erroneous wage statements to California employees during the relevant period, [§ 2699\(f\)\(2\)](#) thus provides for a \$2.8 million penalty to be assessed against Defendants.

\*4 8. However, the statute further provides that a penalty amount calculated under [§ 2699\(f\)](#) may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." [Cal. Lab. Code § 2699\(e\)\(2\)](#).

9. Here, the aggrieved employees suffered no injury due to the erroneous wage statements, and made no complaint of the errors or omissions contained therein prior to filing suit. Also, Defendants were not aware that the wage statements violated the law and took prompt steps to correct all violations once notified. Given these circumstances, the Court finds a \$2.8 million penalty unjust according to [§ 2699\(e\)\(2\)](#). Accordingly, in its discretion, the Court reduces the penalty to \$500,000.<sup>3</sup>

10. Pursuant to [§ 2699\(g\)\(1\)](#), Plaintiffs are entitled to reasonable attorneys fees and costs. A request for fees may be made on application to the Court within 20 days after this order is issued.

### III. CONCLUSION

For the foregoing reasons, the Court grants judgment for Plaintiffs. Plaintiffs are directed to submit a proposed judgment consistent with these Findings of Fact and Conclusions of Law within 14 days from the entry of this order.

IT IS SO ORDERED.

### All Citations

Not Reported in F.Supp.2d, 2011 WL 7563047, 18 Wage & Hour Cas.2d (BNA) 1530

### Footnotes

- 1 Additionally, Defendants moved at the close of trial for judgment on partial findings pursuant to [Federal Rule of Civil Procedure 52\(c\)](#). The Court's factual findings and legal conclusions set out below apply equally to this motion, which is accordingly **denied**.
- 2 Covidien and Tyco are each corporate subsidiaries of Tyco International. For the purpose of this action, to the extent these corporate entities exist separately, the Covidien and Tyco are jointly and severally liable for all penalties assessed.
- 3 The Court notes that this amount is consistent with an overall penalty of approximately \$500 per California employee who received at least one erroneous earnings statement.

# **EXHIBIT 8**



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Distinguished by [Beltran v. Olam Spices and Vegetables, Inc.](#), E.D.Cal., March 23, 2021

2012 WL 5941801

Only the Westlaw citation is currently available.

United States District Court,  
E.D. California.

Patricia FRANCO, et al., Plaintiffs,

v.

RUIZ FOOD PRODUCTS, INC., Defendant.

No. 1:10-cv-02354-SKO.

|

Docket No. 38.

|

Nov. 27, 2012.

#### Attorneys and Law Firms

Karen Marie Leser Grenon, [Rosemary Farrales Luzon](#), Shepherd Finkelman Miller & Shah, LLP, San Diego, CA, [Eric L. Young](#), Phv, Egan Young, Attorneys at Law, Blue Bell, PA, [Philip A. Downey](#), The Downey Law Firm, LLC, Unionville, PA, for Plaintiffs.

[Mitchell F. Boomer](#), Jackson Lewis LLP, San Francisco, CA, [Cynthia Sandoval-Dardis](#), [Hazel U. Poei](#), Jackson Lewis, LLP, Newport Beach, CA, for Defendant.

#### ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

[SHEILA K. OBERTO](#), United States Magistrate Judge.

#### I. INTRODUCTION

\*1 On July 5, 2012, Plaintiffs Patricia Franco (“Franco”) and Lilia Castro (“Castro,” collectively “Plaintiffs”) filed a motion requesting final approval of a class action settlement, including an award of attorneys’ fees and costs and enhancement awards for the named Plaintiffs as Class Representatives. (Doc. 38.) No opposition to the motion was filed, and no objection was submitted by any member of the class (“Class Member”). The matter was initially heard by the Court on August 1, 2012. Mr. Philip Downey, Esq., of The Downey Law Firm, LLC, and Ms. Rose Luzon, Esq., of

Shepherd Finkelman Miller & Shah, LLP, appeared on behalf of Plaintiffs, and Mr. Mitchell Boomer, Esq., and Ms. Cynthia Sandoval, Esq., of Jackson Lewis LLP appeared on behalf of Defendant Ruiz Food Products, Inc. (“Defendant”). No Class Member appeared at the hearing. The Court ordered Plaintiffs to provide supplemental information, which was filed on October 15, 2012. (Docs.41, 51.) A second hearing concerning Plaintiffs’ motion was held on November 14, 2012, during which Ms. Luzon and Mr. Boomer appeared; no Class Member was present.

For the reasons set forth below, the Court GRANTS FINAL APPROVAL of the parties’ class action settlement, (2) GRANTS an award of attorneys’ fees and costs, and (3) GRANTS enhancement awards to Plaintiffs as Class Representatives.<sup>1</sup>

#### II. BACKGROUND

On December 15, 2010, Plaintiffs filed a putative collective class action complaint against Defendant pursuant to the federal Fair Labor Standards Act (“FLSA”), [29 U.S.C. § 216\(b\)](#), and [Rule 23 of the Federal Rules of Civil Procedure](#) for violations of California Labor Code and Wage Orders and [California Business and Professions Code § 17200, et seq.](#) Plaintiffs’ operative pleading, the First Amended Complaint, was filed on May 4, 2011, and alleges claims for (1) violation of the FLSA; (2) violation of the California Labor Code—failure to compensate for all hours worked; (3) violation of the California Labor Code—failure to pay overtime; (4) violation of the California Labor Code—failure to provide meal and rest periods; (5) unpaid wages and waiting time penalties; (6) failure to properly itemize pay stubs; and (7) violation of [California Business & Professions Code § 17200, et seq.](#)

On September 28, 2011, the parties mediated their dispute with Michael J. Loeb, Esq., and after an all-day mediation, the parties reached a class-wide settlement. (Doc. 29, Young Decl. in Support of Preliminary Approval, ¶ 7.) The parties memorialized the terms of their proposed settlement in a “Joint Stipulation of Settlement and Release Between Plaintiffs and Defendant” (“Settlement Agreement”) (Doc. 29–1), and on December 22, 2011, filed a request for preliminary approval of the class settlement. (Docs.27–30.) On February 10, 2012, the Court granted preliminary approval of the settlement, authorized the notice process, and scheduled a hearing to consider final approval of the settlement. (Doc. 35.)

\*2 On July 5, 2012, Plaintiffs filed a Motion for Final Approval of Class Action Settlement, including a request for attorneys' fees and costs and a request for an enhancement award for the named Plaintiffs. (Doc. 38.) No opposition was filed. A hearing was held on August 1, 2012, and the Court issued an order requiring Plaintiffs to submit supplemental information in support of the motion. (Doc. 41.) Additionally, the Court was notified by Defendant that, on August 7, 2012, Defendant served notice of the proposed settlement on the appropriate Offices of the Attorney General pursuant to [28 U.S.C. § 1715](#). (See Docs. 42–44.) On October 15, 2012, Plaintiffs filed a Supplemental Submission Regarding Plaintiffs' Motion for Final Approval of Class Action Settlement pursuant to the Court's August 1, 2012, Order. (Doc. 51.) A second hearing was held on November 14, 2012, and Plaintiffs' motion was submitted for decision. (Doc. 52.)

### III. THE PARTIES' SETTLEMENT

On October 19, 2011, Plaintiffs filed a Notice of Settlement and on December 22, 2011, filed a request for preliminary approval of the class-action settlement, indicating that the parties had negotiated a resolution of their dispute. (Docs.25, 27–30.) The terms of the parties' Settlement Agreement is summarized below.

#### A. The Composition of the Settlement Class

The Settlement Agreement provides for the certification, for settlement purposes only, of a class comprised of all persons currently or formerly employed as non-exempt production line employees at the Ruiz Food processing facility in Dinuba, California, between December 15, 2006, and the date of the preliminary approval of the Settlement Agreement (approved by the Court on February 10, 2012 (Doc. 35)) (the "Settlement Class"). (Doc.29–1, Settlement Agreement, ¶¶ 6–7.)

#### B. The Material Terms of the Settlement Agreement

##### 1. The Class Settlement Amount

Plaintiffs and Defendant have agreed to settle the underlying class claims in exchange for a Class Settlement (the "Settlement") in the maximum amount of \$2,500,000 (the "Settlement Amount"). All amounts paid to the Class Members, all attorneys' fees, costs, enhancement awards for the Class Representatives, fees and expenses for the

Settlement Administrator, and any other payments provided by the Settlement Agreement shall be paid out of the Settlement Amount. The net settlement amount shall be calculated by deducting from the Settlement Amount all attorneys' fees and costs, the enhancement awards for the Class Representatives, a payment to the State of California pursuant to the California Private General Attorney Act ("PAGA"), codified at [California Labor Code § 2699, et seq.](#), in the amount of \$10,000, and the actual fees and expenses of the Settlement Administrator (the "Net Settlement Amount"). The entire Net Settlement Amount shall be paid to the Class Members as Settlement Awards ("Settlement Awards"). To the extent any funds remain after satisfying all payments to Class Members, such funds will be paid to the *cypres* beneficiaries: Ruiz 4 Kids (50%) and Chicana Latina Foundation (50%). No portion of the Net Settlement Amount will revert to Defendant or be refunded. Defendant shall be responsible to pay separately the employer payroll taxes related to the Settlement Agreement. (Doc. 29–1, Settlement Agreement, ¶ 14(c).)

##### 2. Settlement Awards

\*3 Settlement Awards will be distributed as follows: (1) Class Members whose Notice of Settlement ("Notice") is returned as undeliverable with no forwarding address will be excluded from the Settlement Class, will not be bound by the Settlement, will be deemed to have "opted out" from Class membership, and will not receive any Settlement Awards; (2) Settlement Awards will be calculated according to the number of weeks worked by a Class Member, each to receive a share of the Net Settlement Amount in proportion to the number of weeks he or she worked during the class period compared to the number of weeks worked by other Class Members. (Doc. 29–1, Settlement Agreement, ¶ 14(d).)

##### 3. The Labor Workforce and Development Agency Payment

In satisfaction of the claims arising under the PAGA, the parties have agreed that Defendant will pay \$10,000–75% (\$7,500) of which will be paid to the California Labor and Workforce Development Agency and the balance (\$2,500) will become part of the Net Settlement Amount. (Doc. 29–1, Settlement Agreement, ¶ 14(e).)

##### 4. Claims Administration Costs

The parties have agreed that the Heffler, Radetich & Saitta LLP, the Settlement Administrator, will be paid costs not to



exceed \$30,000 associated with the administration of this Settlement. (Doc. 29–1, Settlement Agreement, ¶ 14(j), ¶ 15; *see also* Doc. 38–1, 7:24–26; Doc. 38–3 (Hamer Decl.), ¶ 14.)

### 5. Class Counsel Award of Attorneys' Fees and Costs<sup>2</sup>

The parties have agreed that Class Counsel shall be awarded \$825,000 in attorneys' fees and \$30,000 in costs. (Doc. 29–1, Settlement Agreement, ¶ 16.)

### 6. Class Representative Enhancement Awards

The parties have agreed that Class Representatives Franco and Castro will each be paid \$7,000 as Class Representative Enhancement Awards. (Doc. 29–1, Settlement Agreement, ¶ 14(I), ¶ 15, *see also* Doc. 38–1, 7:19–21.)

### C. The Scope of the Release in the Settlement Agreement

The parties' Settlement Agreement sets forth the following release by the Class Members:

19. Upon final approval by the Court of this Stipulation of Settlement, and except as to such rights or claims as may be created by this Stipulation of Settlement, each Class Member fully releases and discharges Defendant, its present and former parent companies, subsidiaries, related or affiliated companies, shareholders, owners, officers, directors, employees, agents, attorneys, insurers, successors and assigns, and any individual or entity which could be jointly liable with Defendant (“Released Parties”), from any and all claims, debts, liabilities, demand, obligations, guarantees, costs, expenses, attorneys' fees, damages, action or causes of action, known or unknown, of any nature under state, federal or local law arising out of Plaintiffs' causes of action for alleged: (1) Violation of the Fair Labor Standards Act, [29 USC § 201, et seq.](#); (2) Violation of the California Labor Code Failure to Compensate For All Hours Worked, [California Labor Code §§ 201–204, et seq.](#); (3) Violation of the California Labor Code Failure to Pay Over Time Wages; (4) Violation of the California Labor Code Failure to Provide Meal and Rest Breaks ([Cal. Lab.Code § 226.7 et seq.](#), [Cal Lab.Code § 512](#) and California Industrial Welfare Commission Wage Order(s)); (5) Unpaid Wages and Waiting Time Penalties; (6) Failure to Properly Itemize Pay Stubs ([Cal. Lab.Code §§ 226\(a\) and 226\(e\)](#)); and, (7) Violation of California's [Business and Professions Code § 17200, et seq.](#), and any other claims whatsoever alleged in this Action, including, without limitation, all claims for unpaid

wages and overtime, unpaid minimum wages, failure to pay wages timely, during employment and at the termination of employment, failure to maintain payroll records as required by law, class claims, collective claims, representative claims, restitution, injunctive relief, declaratory relief and other equitable relief, liquidated damages, waiting-time penalties, penalties of any nature, unfair competition, unlawful business practices, unfair business practices, fraudulent business practices, other compensation or benefits including 401K benefits or matching benefits, retirement or deferred compensation benefits claimed on account of alleged unpaid wages, interest, attorneys' fees and costs, from December 15, 2006, through and including the date of final approval of the Settlement, along with Plaintiffs' prayer for damages including unpaid wages and overtime wages, prejudgment interest on unpaid wages and overtime wages, penalties (including, but not limited to penalties under the California Private Attorney's General Act), liquidated damages, restitution, injunctive relief, post judgment interest, attorneys' fees and costs (“Released Claims”). The Released Claims do not include workers' compensation claims or any claims arising out of the employment relationship that are not enumerated as Released Claims, such as wrongful termination, discrimination, harassment, or retaliation. By and through this Settlement, each Class Member forever agrees he/she shall not be entitled to pursue, accept or recover damages for any Released Claims against the Released Parties from December 15, 2006 through and including the date of final approval of the Settlement.

\*4 (Doc. 29–1, Settlement Agreement, ¶ 19.)

### D. Notice to the Class Members

The procedures for giving notice to the Class Members, as set forth in the parties' Settlement Agreement (*see* Doc. 29–1, Settlement Agreement, ¶ 17) and ordered in the Court's Preliminary Approval Order (Doc. 35), have been carried out by the Settlement Administrator, Heffler Claims Administration, a division of Heffler, Radetich & Saitta, LLP, Certified Public Accountants (“Heffler”). (Doc. 38–3, Hamer Decl.) On March 7, 2012, Heffler received the Notice, which was approved by the parties prior to mailing. (Doc. 38–3, Hamer Decl., ¶¶ 6–7.) The Notice summarized the Settlement Agreement's principal terms, provided Class Members with an estimate of how much they would be paid if the Settlement Agreement received final approval, and advised Class Members how to submit claims for payment, opt out of the Settlement, or object to the Settlement. (*See*



Doc. 29–2.) The Notice was approved by the Court in its February 10, 2012, Preliminary Approval Order. (Doc. 35.)

On March 7, 2012, counsel for Defendant provided Heffler with a list (“Class List”) of all Class Members’ names, their last known mailing addresses and telephone numbers, Social Security Numbers, and other information necessary to calculate estimated Settlement payments. (Doc. 3 8–3, Hamer Decl., ¶ 7.) The Class List contained data for 2,055 potential Class Members. (Doc. 38–3, Hamer Decl., ¶ 7.)

On March 28, 2012, Notices were mailed to 2,055 Class Members contained in the Class List via first class mail. (Doc. 38–3, Hamer Decl., ¶ 9.) The Notice advised Class Members that they could submit a Request for Exclusion or a Dispute to be post-marked by May 14, 2012. (Doc. 38–3, Hamer Decl., ¶ 9.) Heffler received 119 undeliverable Notices, five of which were returned with forwarding addresses and were promptly re-mailed. (Doc. 38–3, Hamer Decl., ¶ 10.) Of the remaining 114 Notices, Heffler performed address traces on each of them and the Notices were re-mailed. (Doc. 38–3, Hamer Decl., ¶ 10.) Of the total 114 Notices mailed to the traced addresses, a total of 17 were returned as undeliverable a second time and no further processing was performed. (Doc. 38–3, Hamer Decl., ¶ 10.)

No Class Members wrote to dispute the number of weeks he or she worked or the approximate total Settlement Award. (Doc. 38–3, Hamer Decl., ¶ 11.) Heffler received two Opt-Out requests, and no Objections to the Settlement were received. (Doc. 38–3, Hamer Decl., ¶¶ 12–13.) At the August 1, 2012, and November 14, 2012, hearings on this motion, counsel for both parties stated that the information provided by Heffler was current and had not changed.

## IV. DISCUSSION

### A. Final Approval of the Class–Action Settlement is Granted

#### 1. The [Rule 23\(a\)](#) Class–Certification Requirements Are Satisfied

[Federal Rule of Civil Procedure 23\(e\)](#) requires court approval of class action settlements. “[I]n the context of a case in which the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th

[Cir.2003](#)). In confirming the propriety of class certification, courts assess the following prerequisites pursuant to [Rule 23\(a\)](#): “(1) numerosity of plaintiffs; (2) common questions of law or fact predominate; (3) the named plaintiff’s claims and defenses are typical; and (4) the named plaintiff can adequately protect the interests of the class.” *Hanlon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992) (citing [Fed.R.Civ.P. 23\(a\)](#)).

#### a. Numerosity

\*5 Numerosity requires that the class be so numerous that the joinder of individual class members would be impracticable. [Fed.R.Civ.P. 23\(a\)\(1\)](#). Across the Settlement Class, 2,055 Class Members were ultimately identified. The number of Class Members in this case indicates that the numerosity factor has been satisfied. *See, e.g., Jordan v. L.A. Cnty.*, 669 F.2d 1311, 1319 (9th Cir.1982) (indicating that class sizes of 39, 64, and 74 are sufficient to satisfy the numerosity requirement), *vacated on other grounds*, 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982).

#### b. Commonality

[Rule 23\(a\)](#) also requires “questions of law or fact common to the class.” Commonality exists when there is either a common legal issue stemming from divergent factual predicates or a common nucleus of facts resulting in divergent legal theories. *Hanlon v. Chrysler Corp.* (“*Chrysler Corp.*”), 150 F.3d 1011, 1019 (9th Cir.1998). In other words, commonality is generally satisfied where, as in this case, “the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.” *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir.2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504–05, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005). As clarified in *Wal-Mart Stores, Inc. v. Dukes* (“*Dukes*”), a plaintiff must demonstrate that the class members “have suffered the same injury” and that their claims “depend upon a common contention ... of such a nature that is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” —U.S. —, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (internal citation omitted).

The Class Members’ claims arising from Defendant’s alleged uniform employment policies asserted here differ from those found insufficient to establish commonality in *Dukes*, 131 S.Ct. at 2554. In *Dukes*, the purported commonality was a lack of common control over a business practice. *Id.* at

2554–55. The Supreme Court determined that the “only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s ‘policy’ of *allowing discretion* by local supervisors over employment matters.” *Id.* at 2554. The Court noted that, “[o]n its face, of course that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.” *Id.* The Court concluded that there was no specific employment practice that tied all of the putative class members together and that “[m]erely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.” *Id.* at 2556.

Here, there is no evidence before the Court that the pay practices alleged to violate the FLSA and the California Labor Code were applied inconsistently, such that the complained-of employment practices do not “touch and concern all members of the class.” *Id.* at 2557 n. 10 (internal citations omitted).

\*6 The parties have agreed for purposes of settlement only that the Class Members share common questions of law and fact as to whether Defendant violated the FLSA and multiple California Labor Code provisions, including, but not limited to, the requirement to pay overtime and to provide meal and rest periods, proper wage statements, and payment of all wages upon termination. These common questions of law or fact are sufficient to satisfy the commonality requirement.

### c. Typicality

Typicality exists when “the claims or defenses of the representative are typical of the claims or defenses of the class.” *Fed.R.Civ.P. 23(a)(3)*. “Typicality ... is said ... to be satisfied when each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.” *Armstrong*, 275 F.3d at 868. Under the Rule’s “permissive standards,” representative claims are typical if they are “reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Chrysler Corp.*, 150 F.3d at 1020.

Plaintiffs’ claims are “co-extensive” with the other Class Members, as Plaintiffs and the absent Class Members were all Defendant’s employees who were paid under the same pay practices and worked under the same company-wide employment policies. The typicality requirement is satisfied.

### d. Adequacy of Representation

The final *Rule 23(a)* prerequisite, adequacy of representation, is satisfied if “the representative parties will fairly and adequately protect the interests of the class.” *Fed.R.Civ.P. 23(a)(4)*. The satisfaction of constitutional due process concerns requires that absent class members be afforded adequate representation prior to an entry of judgment, which binds them. *Chrysler Corp.*, 150 F.3d at 1020. Determining the adequacy of representation requires consideration of two questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Id.*

The adequacy-of-representation requirement is met here because Plaintiffs have the same interests as the absent Class Members, e.g., obtaining payment for wages unlawfully withheld. Further, there is no apparent conflict of interest between the named Plaintiffs’ claims and those of the other Class Members, particularly because the named Plaintiffs have no separate and individual claims apart from the Class.

Moreover, here there are no allocation dilemmas among the Settlement Class similar to those observed as issues in *Amchen Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). In *Amchen*, the settlement agreement eliminated all present and future claims against asbestos manufacturers, and the class counsel was attempting to represent both groups of plaintiffs, i.e., those who had present claims and those who had future claims. The conflict between the two groups of plaintiffs was that “the present plaintiffs had a clear interest in a settlement that maximized current funds, while future plaintiffs had a strong interest in preserving funds for their future needs and protecting the total fund against inflation.” *Chrysler Corp.*, 150 F.3d at 1020–21 (discussing *Amchen*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)). Here, the case does not involve subclasses or classes with diverging interests with respect to allocation of the settlement funds in the same manner as *Amchen*. The Court does not perceive any conflicts of interest between Plaintiffs, Class Counsel, and other Class Members.

\*7 In considering the adequacy requirement, the Court also evaluates whether Plaintiffs and Class Counsel will pursue the Class’ claims with vigor. The Ninth Circuit has held that, “[a]lthough there are no fixed standards by which ‘vigor’ can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation.” *Chrysler Corp.*, 150 F.3d at 1021. There is no challenge to

the competency of the Class Counsel, and the Court finds that Plaintiffs are represented by experienced and competent counsel who have litigated numerous class action cases, including 24 wage and hour and other employment law class actions. (Supp.Submission., Doc. 51, 3:22–5:18.) Further, this is not a case where the Class Members receive no monetary distribution while the Class Counsel are rewarded amply. *Chrysler Corp.*, 150 F.3d at 1021.

The apparent rationale to settle this case was supported, in part, by the impossibility of predicting any litigation result with certainty and by the pendency of *Brinker Restaurant Corp. v. Superior Court*, 165 Cal.App.4th 25, 80 Cal.Rptr.3d 781 (2008), *aff'd in part*, 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513 (2012) (“*Brinker*”) before the California Supreme Court at the time the matter was settled. (Doc. 38–1, 20:2–19.) California law, as it related to certain Class' claims, was in potential flux, and settlement, rather than continued litigation, was perceived as more beneficial to the Class Members. *Brinker* was pending during most of the instant litigation and during the time the parties entered into their Settlement Agreement; the parties mediated the issues in this action and reached a settlement on September 28, 2011, whereas *Brinker* was decided on April 12, 2012. (See Doc. 29, Young Decl. in Support of Preliminary Approval, ¶ 7; *Brinker*, 53 Cal.4th at 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513.) In other words, it appears that the settlement was reached for strategic reasons that benefitted the Class, rather than Class Counsel's inability or unwillingness to pursue further litigation. See *Chrysler Corp.*, 150 F.3d at 1021 (class counsel inadequate by definition where counsel demonstrates an inability or unwillingness to try the case). In sum, the Court finds that the adequacy factor is satisfied.

#### e. Conclusion

As initially determined in the Court's preliminary approval order (Doc. 35) and as set forth above, the Rule 23(a) requirements for class certification have been satisfied.

### 2. The Rule 23(b)(3) Requirements are Satisfied

In addition to meeting the requirements of Rule 23(a), to be certified, a class must also meet at least one of the requirements of Rule 23(b). Plaintiffs assert that class resolution is superior to other available methods for the fair and efficient adjudication of the controversy and the requirements of Rule 23(b) are met. (Doc. 38–1, 16:15–17:24.) Pursuant to Rule 23(b)(3), a class action may be maintained if:

\*8 (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods of fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

Certification under Rule 23(b)(3) is appropriate whenever the interests of the parties can be served best by settling their differences in a single action. Courts refer to the requirements of Rule 23(b)(3) as its “predominance” and “superiority” requirements. *Amchen*, 521 U.S. at 615.

#### a. Predominance

As the Rule 23(a)(3) analysis already considers the issue of commonality, the focus of the Rule 23(b)(3) predominance inquiry is on the balance between individual and common issues. *Chrysler Corp.*, 150 F.3d at 1022. In other words, “[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchen*, 521 U.S. at 623. The “main concern in the predominance inquiry ... [is] the balance between individual and common issues.” *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir.2009). “Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir.2001) (citation omitted), *amended*, 273 F.3d 1266 (9th Cir.2001).

The parties' Settlement Agreement sufficiently demonstrates that “[a] common nucleus of facts and potential legal remedies dominates this litigation.” *Chrysler Corp.*, 150 F.3d at 1022. If individual Class Members were to sue individually, members of the same proposed settlement class would bring essentially the same claims against Defendant. The central issues raised by the complaint concern policies and practices of Defendant which apply broadly to all the employees in the proposed

settlement class. *Similar to Wright v. Linkus Enterp., Inc.*, 259 F.R.D. 468 (E.D.Cal.2009), this case derives from policies that allegedly required Class Members to work, for example, without compensation for meal and rest periods. The alleged company-wide and uniform employment policies comprise a common nucleus of facts for employees in the settlement class. *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 399 (C.D.Cal.2008) (class certification is usually appropriate where “liability turns on an employer’s uniform policy that is uniformly implemented, since in that situation predominance is easily established”); *see also Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508, 520 (N.D.Cal.2008) (common issues predominate meal break claims and claims for failure to provide itemized wage statements because these were class-wide policies, and litigation of these claims involve class-wide proof rather than individualized inquiry). Moreover, the alleged violations of state law entitle the Class Members to the same legal remedies.

\*9 “When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” *Chrysler Corp.*, 150 F.3d at 1022 (citations omitted). Thus, despite minor factual differences among Class Members, such as the number of hours or weeks worked, common issues predominate.

#### b. Superiority

In addition to the predominance requirement, Rule 23(b)(3) provides a non-exhaustive list of matters relevant to the Court’s determination that class action treatment is superior to other methods of adjudication. Rule 23(b)(3)(A)-(D). The first factor considers the interest of each member in “individually controlling the prosecution or defense of separate actions.” Rule 23(b)(3)(A). This factor weighs against class certification where each class member has suffered sizeable damages or has an emotional stake in the litigation. *See, e.g., In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 856 (9th Cir.1982), *abrogated on other grounds in Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir.1996). In this case, where monetary damages that each Class Member suffered individually are relatively modest, certifying a class action is favored. *Id.*

The second factor to consider is “the extent and nature of any litigation concerning the controversy already begun by or against members of the class.” Fed.R.Civ.P. 23(b)(3)(B).

The only known litigation concerning the controversy is the instant case, and thus this factor favors certification.

The third Rule 23(b)(3) factor is “the desirability or undesirability of concentrating the litigation of the claims in the particular forum” (Fed.R.Civ.P. 23(b)(3)(C)), and the fourth factor is “the likely difficulties in managing a class action” (Fed.R.Civ.P. 23(b)(3)(D)). The fourth factor “encompasses the whole range of practical problems that may render the class format inappropriate for a particular suit.” *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 164, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). In the context of settlement, however, the third and fourth factors are rendered moot and are irrelevant. *See Amchem*, 521 U.S. at 620 (where a district court is confronted with a settlement-only class certification, the court need not inquire whether the case, if tried, would present manageability problems because the point is that there will be no trial).

“Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be the superior method for managing litigation if no realistic alternative exists.” *Valentino*, 97 F.3d at 1234. The potential recovery by any individual plaintiff is relatively small and thus individual members of the class would likely be unwilling or unable to institute separate suits. Further, the filing of individual suits by 2,055 separate plaintiffs would create an unnecessary burden on judicial resources.

\*10 In sum, the Rule 23(b)(3) predominance and superiority requirements are satisfied.

#### c. Conclusion

For the reasons set forth above, the Settlement Class meets the class-certification requirements of Rules 23(a) and 23(b)(3).

#### 3. The Proposed Settlement is Fair, Reasonable, and Adequate

Settlements are afforded a presumption of fairness if (1) the negotiations occurred at arm’s length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected. 4 William B. Rubenstein, Alba Conte, & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed. West 2012). Here, the parties’ settlement was reached through the efforts of experienced counsel following mediation with a mediator who has experience handling wage and hour class action disputes. Further, there was sufficient



discovery conducted by experienced Class Counsel, and there were no objections and only two requests for exclusion to the settlement. The settlement is thus entitled to a presumption of fairness.

A settlement may be approved only after a hearing and on finding that it is fair, reasonable, and adequate. [Fed.R.Civ.P. 23\(e\) \(1\)\(c\)](#). Such approval is required to ensure that any settlement reached is consistent with the plaintiff's fiduciary obligations to the class. *See Ficalora v. Lockheed Cal. Co.*, 751 F.2d 995, 996 (9th Cir.1985). The court also serves as guardian for the absent class members who will be bound by the settlement, and therefore must independently determine the fairness of any settlement. *Id.* However, the court's role in intruding upon what is otherwise a private consensual agreement is limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or collusion between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned. *FDIC v. Alshuler (In re Imperial Corp. of Am.)*, 92 F.3d 1503, 1506 n. 5 (9th Cir.1996). Therefore, the settlement hearing is not meant to be conducted as a trial or rehearsal for trial on the merits. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir.1982).

In determining whether a proposed settlement is “fair, reasonable, and adequate” pursuant to [Rule 23\(e\)](#), courts may consider factors including (1) the strength of the case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the settlement amount; (5) the extent of discovery completed and the stage of the proceedings; (6) whether the class has been fairly and adequately represented during the settlement negotiations; and (7) the reaction of the class to the proposed settlement. *See Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 575–76 (9th Cir.2004) (citing *Chrysler Corp.*, 150 F.3d at 1026).

#### a. The Strength of Plaintiffs' Case

**\*11** The initial fairness factor addresses Plaintiffs' likelihood of success on the merits and the range of possible recovery. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 964–65 (9th Cir.2009). In determining the probability of the plaintiff's success on the merits, there is no “particular formula by which that outcome must be tested.” *Id.* at 965. Instead, the court's assessment is based on “nothing more than an amalgam of delicate balancing, gross approximations and rough justice.” *Officers for Justice*, 688 F.2d at 625 (citation and quotation marks omitted). The court is not required to

“reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of the outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Id.* Rather, the court may presume that, through negotiation, the parties, their counsel, and the mediator arrived at a reasonable range of settlement by considering Plaintiffs' likelihood of recovery. *See Rodriguez*, 563 F.3d at 965 (“We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution ...”).

Plaintiffs acknowledge that there may have been “significant legal and factual hurdles that otherwise may have prevented the Class from obtaining any recovery at all. The outcome of class certification, trial and any attendant appeals, were inherently uncertain.” (*See* Doc. 38–1, 20:1–3; *see also* Doc. 29, Young Decl. in Support of Preliminary Approval, ¶ 9.) This uncertainty potentially increased in light of the California Supreme Court's decision in *Brinker* which states that while it is the employer's obligation to provide a meal break for the employee, “the employee thereafter [is] at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done.” *Brinker*, 53 Cal.4th at 1017, 139 Cal.Rptr.3d 315, 273 P.3d 513. As noted above, *Brinker* was pending during a substantial portion of the instant litigation and during the time the parties entered into their Settlement Agreement. (*See* Doc. 29, Young Decl. in Support of Preliminary Approval, ¶ 7 (establishing that the parties mediated the issue on reached a settlement on September 28, 2011 (*Brinker* was decided on April 12, 2012)).) The fact that the law was uncertain was a factor in Plaintiffs' assessing the risk and determining that settlement conferred a substantial benefit on the Class.

Plaintiffs also considered the costs and risks associated with class certification and trial. The high risk, expense, and nature of a lengthy class action trial supported settlement at this stage of the litigation.

Therefore, although Plaintiffs maintain their strong belief in the underlying merits of the case, Class Counsel has acknowledged the weaknesses in the meal and rest break claims and has considered the uncertainties surrounding proving the claims in a lengthy and complex jury trial in negotiating the settlement amount. As a result, Plaintiffs' likelihood of success appears to have been properly accounted for in the settlement amount. Accordingly, this factor weighs in favor of approval.

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

\*12 The risk, expense, complexity, and likely duration of further litigation are factors that consider “the probable costs, in both time and money, of continued litigation.” *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D.Del.2002). Generally, “unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D.Cal.2004) (citation omitted). Moreover, settlement is encouraged in class actions where possible. See *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir.1976) (“It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which present serious problems of management and expense.”).

In this case, there remained significant procedural hurdles for the putative class to confront, including certification of the class. Avoiding such unnecessary expenditures of resources and time benefits all the parties and the Court. Moreover, there were significant risks in continued litigation and no guarantee of recovery given the current state of the law due to the pendency of *Brinker*; particularly as it related to the meal break claims. The settlement, therefore, provides Class Members with another significant benefit that they would not receive if the case proceeded—certain and prompt relief. See *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D.Colo.1974) (“It has been held proper to take the bird in hand instead of a prospective flock in the bush.”). This factor weighs in favor of approval.

### c. The Risk of Maintaining Class Action Status Throughout the Trial

A settlement in this case was reached prior to the Supreme Court’s recent decision in *Brinker*. Given the recent decision by the California Supreme Court in that case, class certification for Plaintiffs’ claim regarding missed meal breaks would be more difficult. See *Brinker*, 53 Cal.4th at 1040, 139 Cal.Rptr.3d 315, 273 P.3d 513 (holding employer is required to provide a meal period to employees, but “is not obligated to police meal breaks and ensure no work thereafter is performed”). On the other hand, the fact that one claim may not be amenable to class treatment does not necessarily affect the propriety of class certification with respect to other claims of the class or necessarily impact the

ability to maintain class-action status throughout trial. See generally *Norris–Wilson v. Delta–T Grp., Inc.*, 270 F.R.D. 596, 612 (S.D.Cal.2010) (granting class certification and finding that “[t]he overtime, wage statement, and waiting time claims are suitable for class-wide treatment, but the meal and rest break and reimbursement claims aren’t”). Because the Court is not aware of any risks to maintaining class-action status throughout trial, this factor is neutral. See *In re Veritas Software Corp. Sec. Litig.*, No. 03–0283, 2005 WL 3096079, at \*5 (N.D.Cal. Nov.15, 2005) (vacated in part on other grounds, 496 F.3d 962 (9th Cir.2007)) (favoring neither approval nor disapproval of settlement where the court was “unaware of any risk involved in maintaining class action status”); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D.Cal.2010) (finding that there were no facts that would defeat class treatment, the factor was considered “neutral” for purposes of final approval of class settlement).

### d. The Settlement Amount

\*13 “[S]ettlement is about compromise, a yielding of the highest hopes in exchange for certainty and resolution.” *In re Warfarin*, 212 F.R.D. at 257–58. Class counsel negotiated a Settlement Amount of \$2,500,000 payable to the class, without any reversion to Defendant. The Settlement also provides for (1) Class Representative Enhancement Awards of \$7,000 each to the two named Plaintiffs; (2) a \$10,000 payment to the California Labor and Workforce Development Agency (“LWDA”) for PAGA penalties, of which \$7,500 will be paid to the State of California and the remainder benefitting the Class; (3) an amount not to exceed \$30,000 payable to the Claims Administrator; (4) a Class Counsel award of \$825,000 (representing 33% of the Settlement Amount); and (5) legal costs in the amount of \$30,000.

Although a larger award was theoretically possible, “the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes.” *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir.1998) (internal citations and quotation marks omitted). Moreover, the response of the Class has been positive. No objections have been filed and less than one percent of the Class opted out. (Doc. 38–3, Hamer Decl., ¶¶ 12–13.) In light of the claims at issue in this case and the size of the proposed settlement class, the Settlement Amount appears fair and reasonable and this factor weighs in favor of final approval.

### e. The Extent of Discovery Completed and the Stage of the Proceedings



“A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair.” *DIRECTV*, 221 F.R.D. at 528. What is required is that “sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently.” Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed.2012). Here, Plaintiffs' counsel expended significant time and resources conducting formal discovery, including pre-complaint factual investigation, formal and informal written discovery, and the taking and defense of numerous depositions. (Doc. 29, Young Decl. in Support of Preliminary Approval, ¶ 5.) Class counsel exchanged preliminary disclosures, declaration, and thousands of pages of documents, including company policies, compensation and time-keeping records, and conducted a day-long inspection of Defendant's Dinuba, California production facility. (Doc. 29, Young Decl. in Support of Preliminary Approval, ¶ 5.) Additionally, Plaintiffs' counsel conducted dozens of in-person interviews with Class Members and obtained 27 declarations. (Doc. 29, Young Decl. in Support of Preliminary Approval, ¶ 6.) The Court finds that sufficient discovery has been conducted, and this factor weighs in favor of approval.

#### **f. Whether the Class has been Fairly and Adequately Represented During the Settlement Negotiations**

In considering the adequacy of the terms of a settlement, the trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties. See *DIRECTV, Inc.*, 221 F.R.D. at 528 (“Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation”) (internal quotation marks and citations omitted). This reliance is predicated on the fact that “[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.” *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.1995).

\*14 Here, the experience and view of Class Counsel weighs in favor of approving the Settlement. Class Counsel understood the complex risks and benefits of any settlement and concluded that the proposed Settlement was a reasonable recovery that confers a substantial benefit on the Class Members. (Doc. 29, Young Decl. in Support of Preliminary Approval, ¶ 6.) Moreover, Class Counsel is experienced in this area of law and the settlement was reached after mediation conducted by an experienced wage-and-hour mediator. This factor weighs in favor of approval.

#### **g. The Reaction of the Class to the Proposed Settlement**

Where a settlement agreement enjoys overwhelming support from the class, this lends weight to a finding that the settlement agreement is fair, adequate, and reasonable. *DIRECTV, Inc.*, 221 F.R.D. at 529 (“It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.”); see also *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 624 (N.D.Cal.1979) (finding that objections from only 16 percent of the class was persuasive that the settlement was adequate).

Here, Class Notice was mailed to 2,055 Class Members and only 2 Class Members have opted out (less than one percent). (Doc. 38–3, Hamer Decl., ¶¶ 12–13.) Further, no objection to the Settlement Agreement was received, and no Class Member appeared at either final approval hearing to state any objection. The response of the class was positive, and this weighs in favor of finding that the settlement is favorable to the Class Members.

#### **4. The Proposed Payment to the Claims Administrator is Reasonable**

The \$30,000 that Plaintiffs request be approved as payment to the Claims Administrator appears fair and reasonable. The fee requested here comports with other Claims Administration fees in similar class-action settlements, particularly in light of the number of Notice Packets that the Claims Administrator was required to process. See, e.g., *Garcia v. Gordon Trucking*, No. 1:10–CV–0324–AWI–SKO, 2012 WL 5364575, at \*3 (E.D.Cal. Oct.31, 2012) (approving \$25,000 administrator fee awarded in wage and hour case involving 1,868 potential class members); *Harris v. Vector Marketing Corp.*, No. C–08–5198 EMC, 2012 WL 381202, at \*6 (N.D.Cal. Feb.6, 2012) (awarding \$250,000 in administration costs where claims administrator sent out 68,487 notices); *Vasquez*, 266 F.R.D. at 484 (approving \$25,000 administrator fee awarded in wage and hour case involving 177 potential class members). The Court finds the requested Claims Administration fee is reasonable, and it shall be awarded.

#### **5. The Proposed PAGA Payment is Reasonable**

A settlement reached between the parties on a PAGA claim is subject to court review and approval. Cal. Lab.Code § 2699(l). Pursuant to the Settlement Agreement, Defendant has agreed to pay \$10,000 as civil penalties pursuant to

the PAGA, codified at [California Labor Code §§ 2699, et seq.](#) Of the \$10,000, 75 percent (\$7,500) will be paid to the State of California, and the remainder (\$2,500) will benefit the class. *See Cal. Lab.Code § 2699(I)* (mandating 75/25 division of recovered PAGA civil penalties between to the California Labor and Workforce Development Agency (“LWDA”) and aggrieved employees). This total amount comports with settlement approval of PAGA awards in other cases. *See, e.g., Garcia, 2012 WL 5364575, at \*3* (approving PAGA settlement payment of \$10,000 out of the \$3.7 million common-fund settlement); *Chu v. Wells Fargo Investments, LLC*, No. C 05-4526 MHP, C 06-7924 MHP, 2011 WL 672645, at \*1 (N.D.Cal. Feb.16, 2011) (approving PAGA settlement payment of \$7,500 to the LWDA out of \$6.9 million common-fund settlement). The Court finds that the PAGA payment is set at a reasonable amount, and it shall be approved.

## 6. Conclusion

**\*15** In sum, as set forth above, the relevant factors weigh in favor of approving the parties' Settlement Agreement. It represents a substantial recovery that avoids the risks associated with protracted litigation in a document-intensive wage-and-hour case. The parties' Settlement Agreement is found to be fair and reasonable and is hereby APPROVED.

## B. Plaintiffs' Request for Attorneys' Fees is Approved

The parties' Settlement Agreement provides “Defendant agrees to pay Class Counsel's attorneys' fees in the amount of \$825,000 (33% of the Maximum Settlement Amount) and costs of not more than \$30,000 from the Maximum Settlement Amount as approved by the Court.” (Doc. 29-1, ¶ 16.)

[Federal Rule of Civil Procedure 23\(h\)](#) provides that, “[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.” [Fed.R.Civ.P. 23\(h\)](#). Courts have recognized the “common fund” or “common benefit” doctrine, under which attorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs to be paid out of the fund. *See Chrysler Corp.*, 150 F.3d at 1029. “[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.” *Staton*, 327 F.3d at 972 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980)). Awarding a percentage of the common fund is particularly appropriate “when each member of a certified class has an undisputed

and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf.” *Id.* (quoting *Van Gemert*, 444 U.S. at 478-79) (internal quotation marks omitted).

Here, where the Settlement applies a distribution formula pursuant to which each Class Member whose Notice is not returned as undeliverable will receive a mathematically ascertainable payment, application of the percentage of common fund doctrine is appropriate. The typical range of acceptable attorneys' fees in the Ninth Circuit is 20 percent to 33.3 percent of the total settlement value, with 25 percent considered a benchmark percentage. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir.2000). The exact percentage awarded, however, varies depending on the facts of the case, and “in most common fund cases, the award exceeds the benchmark” percentage. *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at \*3 (N.D.Cal.2009); *see also In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1377 (N.D.Cal.1989) (“nearly all common fund awards range around 30%”).

The attorneys' fees here will be awarded pursuant to federal law since the case is based on federal question under the FLSA. Federal courts utilize the percentage-of-the-fund approach, and use the lodestar as a “cross-check” on reasonableness of the percentage. As such, calculation of the lodestar amount may be used as a cross-check to assess the reasonableness of the percentage award. *See Garcia, 2012 WL 5364575, at \*8; Bond v. Ferguson Enterprises, Inc.*, No. 1:09-CV-1662 OWW MJS, No. CV 06-04149 MMM (Shx), 2011 WL 2648879 (E.D. Cal. June 30, 2011)<sup>3</sup>; *Fernandez v. Victoria Secret Stores*, No. CV 06-04149 MMM (Shx), 2008 WL 8150856 (C.D.Cal. July 21, 2008); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 (9th Cir.2002).

## 1. The Percentage Requested in Fair and Reasonable

**\*16** In assessing whether the percentage requested is fair and reasonable, courts generally consider the following factors: (1) the results achieved; (2) the risk of litigation; (3) the skill required; (4) the quality of work performed; (5) the contingent nature of the fee and the financial burden; and (6) the awards made in similar cases. *Vizcaino*, 290 F.3d at 1047; *Six Mexican Workers v. Az. Citrus Growers*, 904 F.2d 1301 (9th Cir.1990).

### a. The Results Achieved

The individual claims in this case concern Defendant's alleged failure to pay overtime and to pay class members for meal and rest breaks. These types of claims would not generally

produce substantial individual damage awards. As such, the recovery of \$2,500,000 is a favorable result, particularly in light of *Brinker* and the uncertainty as to the viability of the meal and rest break claims. Overall, the Court finds that the results achieved are good, which is highlighted by the fact that there was no objection to the settlement amount or to the attorneys' fees requested. See *DIRECTV*, 221 F.R.D. at 529.

#### **b. The Risks Involved**

There were significant risks involved in this litigation. Specifically, some of the central claims involved the timely provision of rest and meal periods, an issue that was pending before the California Supreme Court during the time the parties were litigating the case and negotiating a settlement. At the time of settlement, it was possible that any resulting decision could significantly lower the potential recovery in this case. Further, the action was taken on a contingency fee basis and, as such, Class Counsel invested time, effort, and money with no guarantee of recovery. There were also legal and factual hurdles that may have prevented the Class from obtaining any recovery. In cases where recovery is uncertain, an award of one-third of the common fund as attorneys' fees has been found to be appropriate. See *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir.2000); *In re Heritage Bond Litig.*, No. 02–ML–1475 DT, 2005 WL 1594403, at \*19, n. 14 (C.D.Cal. June 10, 2005) (discussing Ninth Circuit cases awarded attorney fees of one-third of the total recovery).

#### **c. Skill Required and Quality of the Work Performed**

The case required specialist skills to litigate the legal theories relating to wage and hour law and labor law at issue in the case. Class Counsel are experienced class litigators, including in the area of employment class litigation.

Moreover, this case was actively litigated and significant time was spent on discovery. See generally *Navarro v. Servisair*, No. C 08–02716 MHP, 2010 WL 1729538, at \*3 (N.D.Cal. Apr.27, 2010) (finding proposed award of 30 percent of settlement fund unjustifiably departed from benchmark due in part to speed with which parties reached a settlement). Overall, the specialized skill of Class Counsel in this area of the law was generally an asset to the Class Members and the quality of work performed was good.

#### **d. The Contingent Nature of the Representation**

\*17 Class Counsel litigated the case on a contingency fee basis, which necessarily presented considerable risk.

See *In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 396–98 (S.D.N.Y.1999) (“No one expects a lawyer whose compensation is contingent on the success of his services to charge, when successful, as little as he would charge a client who in advance of the litigation has agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee dependent solely on the reasonable amount of time expended.”). Class Counsel contends that they assumed a very real risk in taking this case on a contingency basis, investing time, effort, and money in the action with no guarantee of recovery. (Doc. 38–1, 28:13–16.)

In considering both the contingent nature of the work performed by Class Counsel as well as the risk involved in the costs advanced, these factors support the fee award requested. See *Graham v. Daimler Chrysler Corp.*, 34 Cal.4th 553, 580, 21 Cal.Rptr.3d 331, 101 P.3d 140 (2004) (“A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services.”) (internal citations omitted).

#### **e. Awards Made in Similar Cases**

Finally, the percentage award requested in this case is commensurate to percentage-of-the-benefit awards made in other wage-and-hour actions in this district:

- (1) *Garcia v. Gordon Trucking, Inc.*, No. 1:10–CV–0324 AWI SKO, 2012 WL 5364575 (E.D.Cal. Oct.31, 2012) (court approving attorneys' fees in the amount of 33 percent of the common fund);
- (2) *Bond v. Ferguson Enterprises, Inc.*, No. 1:09–cv–01662–OWW–MJS, Docket No. 59 (E.D. Cal. June 30, 2011) (court approved attorneys' fees in the amount of 30 percent of the common fund);
- (3) *Vasquez v. Coast Valley Roofing*, 266 F.R.D. 482 (E.D.Cal.2010) (wage-and-hour action putative class-action settlement where court approved award of attorneys' fees in the amount of 33.3 percent of the common fund);
- (4) *Benitez v. Wilbur*, No. 1:08–cv–01122 LJO GSA, Doc. No. 52 (E.D.Cal., Dec. 15, 2009) (awarding 33.3 percent of the benefit to the class in attorneys' fees);
- (5) *Chavez v. Petrissans*, (Case No. 1:08–cv–00122 LJO GSA, Doc. No. 89 (E.D.Cal. Dec. 15, 2009) (court

approved awards of attorneys' fees of 33.3 percent of the common fund);

- (6) *Romero v. Producers Dairy Foods, Inc.*, No. 1:05-cv-0484-DLB, 2007 WL 3492841, at \* 4 (E.D.Cal. Nov.14, 2007) (class-action settlement where court approved attorneys' fees in the amount of 33 percent of common fund);
- (7) *Vasquez v. Jim Aartman, Inc.*, No. 1:02-cv-05624-AWI-LJO, Doc. No. 130 (class-action settlement where court approved attorneys' fees in the amount of 30 percent of the settlement amount);
- (8) *Baganha v. Cal. Milk Transport*, No. 1:01-cv-05729-AWI-LJO, Doc. No. 147 (class-action settlement where court approved attorneys' fees in the amount of 31.25 percent of settlement amount); and
- \*18 (9) *Randall Willis et al. v. Cal. Western Transport and Earl Baron et al. v. Cal Western Transport* (consolidated cases), No. 1:00-cv-05695-AWI-LJO (court approved attorneys' fees in the amount of 33.3 percent of the settlement amount).

The Settlement Agreement's provision of \$825,000 in attorneys' fees (33 percent of the total settlement amount), is fair and reasonable in light of the awards of attorneys' fees in similar wage-and-hour cases in this district.

#### f. Conclusion

Further, although Class Counsel's requested fees exceed the 25 percent benchmark under federal law, the Court finds sufficient reasons to exceed that marker considering the risk of the litigation, the contingent nature of the work, the favorable reaction of the class, and the fee awards in other wage-and-hour cases. As such, the requested 33 percent of the class recovery represents a reasonable fee award and is approved. See *Ozga v. U.S. Remodelers, Inc.*, No. C 09-05112 JSW, 2010 WL 3186971, at \* 3 (N.D.Cal. Aug.9, 2010) (departure from benchmark warranted due to excellent results, reaction of the class, the risks faced due to the uncertainty of California law in similar wage-and-hour cases).

#### 2. Lodestar Cross-Check

Courts frequently cross-check a percentage fee request with the lodestar analysis. See, e.g., *Vizcaino*, 290 F.3d at 1050 (finding that "the lodestar may provide a useful perspective on the reasonableness of a given percentage award"); *Bond*,

2011 WL 2648879, at \*11 (finding that "[c]alculation of the lodestar amount may be used as a cross-check to assess the reasonableness of the percentage award").

"In conducting a lodestar cross-check, the court must first determine the dollar value of the proposed percentage-based fee award." *In re Portal Software, Inc. Sec. Litig.* ("*Portal Software*"), No. C-03-5138-VRW, 2007 WL 4171201, at \*14 (N.D.Cal. Nov.26, 2007). The requested award here is \$825,000.00, which represents a requested fee of 33 percent of the \$2,500,000 Settlement Amount. The next step is to cross-check the proposed percentage fee against the lodestar. *Id.* "Three figures are salient in a lodestar calculation: (1) counsel's reasonable hours, (2) counsel's reasonable hourly rate and (3) a multiplier thought to compensate for various factors (including unusual skill or experience of counsel, or the ex ante risk of nonrecovery in the litigation)." *In re HPL Tech., Inc. Sec. Litig.*, 366 F.Supp.2d 912, 919 (N.D.Cal.2005). The multiplier is calculated from the ratio of the proposed percentage fee to the computed lodestar fee and is assessed for reasonableness. *Portal Software*, 2007 WL 4171201, at \*14. Where the lodestar method is used as a cross-check to the percentage method, it can be performed with a less exhaustive cataloguing and review of counsel's hours. See *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir.2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting."); *In re Immune Response Sec. Litig.*, 497 F.Supp.2d 1166, 1176 (S.D.Cal.2007) ("Although counsel have not provided a detailed cataloging of hours spent, the Court finds the information provided to be sufficient for purposes of lodestar cross-check.").

#### a. Plaintiffs' Asserted Lodestar

\*19 The fees requested by Plaintiffs under the percentage of the common fund exceed Class Counsel's asserted lodestar of \$704,568.50. (Doc. 51, 6:18-14:25.) However, the fact that the lodestar amount is less than the requested fee amount of \$825,000 does not necessarily indicate that Class Counsel's request for attorneys' fees should be reduced. "[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases." *Vizcaino*, 290 F.3d at 1051; see also *Bond*, 2011 WL 2648879, at \*16 (applying a risk modifier of 1.82 to the lodestar amount for the lodestar cross check). Based on the information provided in Plaintiffs' supplemental submission, Plaintiffs are requesting a lodestar multiplier of approximately 1.17. (See Doc. 38-1, 29:18-22 for total amount of attorneys' fees and hours worked.)



By declaration, Class Counsel indicates the following rates, hours, and fees of each attorney who performed work on the litigation:

**Schedule of Fees**

| Attorney             | Title                     | Hourly Rate | Hours Worked | Total Fees          |
|----------------------|---------------------------|-------------|--------------|---------------------|
| Jennifer Crewz       | Legal Assistant           | \$175       | 6.7          | \$1,172.50          |
| Elena M. DiBattista  | Legal Assistant           | \$185       | 3.4          | \$629.00            |
| Philip A. Downey     | Principal/Owner           | \$550       | 501.9        | \$276,045.00        |
| Betsy Ferling–Hitriz | Legal Assistant           | \$185       | 15.1         | \$2,793.50          |
| Brandon Lauria       | Associate                 | \$450       | 21.9         | \$9,855.00          |
| Karen Leser–Grenon   | Associate                 | \$450       | 94.1         | \$42,345.00         |
| Rose F. Luzon        | Associate                 | \$450       | 195.1        | \$87,795.00         |
| James E. Miller      | Principal/Partner         | \$725       | 93.1         | \$67,497.5          |
| Sue Moss             | Legal Assistant           | \$185       | 4.9          | \$906.50            |
| Chiharu Sekino       | Legal Assistant/Law Clerk | \$185       | 13.2         | \$2,442.00          |
| James C. Shah        | Principal/Partner         | \$700       | 3.6          | \$2,520.00          |
| Debbie Tutler        | Legal Assistant           | \$175       | 21.8         | \$3,815.00          |
| Itza Vilaboy         | Legal Assistant           | \$175       | 45.8         | \$8,015.00          |
| Lesley Weaver        | Director                  | \$600       | 141.7        | \$85,020.00         |
| Eric L. Young        | Principal/Partner         | \$625       | 171.3        | \$107,062.50        |
| Nathan Zipperian     | Partner                   | \$550       | 12.1         | \$6,655.00          |
| Total                |                           |             | 1,345.7      | <b>\$704,568.50</b> |

(Doc. 51, 6:18–14:25; Docs. 51–3, 51–4, 51–5.)<sup>4</sup>

**b. Hours Reasonably Expended**

The Court finds the 1,345.7 hours expended on the litigation to be reasonable in light of the legal issues and the amount of discovery conducted, the number of Defendant’s employees included in the Settlement Classes, the mediation preparation required, and motion practice with respect to the Settlement

Agreement. The total number of hours expended in this action is commensurate with similar wage and hour class actions in this district. *See Garcia*, 2012 WL 5364575, at \*8 (approving 2,384.73 hours expended in reaching a settlement for 1,869 class members after “extensive” law and motion work, including dispositive motions); *Bond*, 2011 WL 2648879, at \*12–\*13 (reducing the number of hours requested from 1,929.94 by a 30 percent “haircut” (to 1,350.96) for a settlement of 553 class members after finding that the initial amount sought was not justified). While the

law and motion work in this action was not as extensive as in *Garcia*, the amount of hours billed is significantly less than the amount approved in *Garcia* and instead matches the amount ultimately approved in *Bond*, which included discovery involving significantly fewer class members than in this action. The Court thus finds no reason to reduce the number of hours set forth in counsel's lodestar calculations.

### c. Reasonable Hourly Rates

\*20 Class counsel has submitted documentation of the hourly rates billed in this matter. The rates range from \$175 to \$185 for legal assistants, \$450 for associates, and \$550 to \$725 for principals and partners. (Doc. 51, 6:18–14:25.) As recent cases have indicated, prevailing rates in the Eastern District of California are in the \$400 range, with rates of up to \$650 to \$675 approved for partners and senior associates with significant years of experience. *See Garcia*, 2012 WL 5364575, at \*9, *Bond*, 2011 WL 2648879, at \*11–13. Although Plaintiffs contend that the requested rates are “within the range” and “consistent” with those approved in *Bond*, they concede that some of the rates are “greater than the hourly rate approved in *Bond*.” (Doc. 51, 14–22.)

In *Bond*, the court noted that “[b]ecause the lodestar is being used here as a cross-check, the court may use a ‘rough calculation of the lodestar.’” *Bond*, 2011 WL 2648879, at \*12 (citing *Fernandez*, 2008 WL 8150856, at \*9). The court in *Bond* determined that it was “appropriate to roughly haircut the lodestar” by 10 percent to bring the requested hourly rates to within those prevalent within the Eastern District. Thus, for example, a requested hourly rate of \$750 for a partner with more than 20 years of experience was adjusted to \$675 per hour. A requested hourly rate of \$290 for an associate with two years of experience was adjusted to \$261 per hour. Additionally, the court found that the appropriate rate for legal assistants was \$100 per hour. Similarly, in *Garcia*, while the court did not reduce the requested rates, the maximum rate approved was \$650 per hour, and many of the rates were billed at \$125 to \$400 per hour. *See Garcia*, 2012 WL 5364575, at \*9.

Here, the hourly rates requested by Class Counsel are similar to those requested in *Bond* and are subject to a 10 percent “haircut” to account for the rates in the relevant community. Further, based upon the rate approved in *Bond*, the rate for legal assistants will be reduced to \$100 per hour. This adjustment is as follows:

### Adjusted Schedule of Fees

| Attorney             | Title           | Hourly Rate | Adjusted Hourly Rate | Hours Worked | Total Fees   |
|----------------------|-----------------|-------------|----------------------|--------------|--------------|
| Jennifer Crewz       | Legal Assistant | \$175       | \$100                | 6.7          | \$670.00     |
| Elena M. DiBattista  | Legal Assistant | \$185       | \$100                | 3.4          | \$340.00     |
| Philip A. Downey     | Principal/Owner | \$550       | \$495                | 501.9        | \$248,440.50 |
| Betsy Ferling–Hitriz | Legal Assistant | \$185       | \$100                | 15.1         | \$1,510.00   |
| Brandon Lauria       | Associate       | \$450       | \$405                | 21.9         | \$8,869.50   |
| Karen Leser–Grenon   | Associate       | \$450       | \$405                | 94.1         | \$38,110.50  |
| Rose F. Luzon        | Associate       | \$450       | \$405                | 195.1        | \$79,015.50  |



|                  |                               |             |           |             |                     |
|------------------|-------------------------------|-------------|-----------|-------------|---------------------|
| James E. Miller  | Principal/<br>Partner         | \$725       | \$652.50  | 93.1        | \$60,747.75         |
| Sue Moss         | Legal Assistant               | \$185       | \$100     | 4.9         | \$490.00            |
| Chiharu Sekino   | Legal Assistant/<br>Law Clerk | 185         | \$166.506 | 13.2        | \$2,197.80          |
| James C. Shah    | Principal/<br>Partner         | \$700       | \$630     | 3.6         | \$2,268.00          |
| Debbie Tutler    | Legal Assistant               | \$175       | \$100     | 21.8        | \$2,180.00          |
| Itza Vilaboy     | Legal Assistant               | \$1756\$100 | 45.8      | \$4,580     |                     |
| Lesley Weaver    | Director6\$600                | \$540       | 141.7     | \$76,518.00 |                     |
| Eric L. Young    | Principal/<br>Partner         | \$625       | \$562.50  | 171.3       | \$96,356.25         |
| Nathan Zipperian | Partner                       | \$550       | \$495     | 12.1        | \$5,989.50          |
| Total            |                               |             |           | 1,345.7     | <b>\$628,283.30</b> |

\*21 The adjusted attorney hourly rates range from \$405 to 652.50 per hour and account for the respective attorney's experience and position within Class Counsel firms. This comports generally with the range of rates awarded in *Bond* and *Garcia*. The lodestar, after adjustments, is \$628,283.30.

#### d. Lodestar Multiplier

The amount of \$825,000 requested by Class Counsel is greater than the amount of \$628,283.30. However, adjustments to increase or decrease the lodestar amount are sometimes appropriate and justify the use of a “lodestar multiplier.” *Clark v. City of Los Angeles*, 803 F.2d 987, 991 (9th Cir.1986); see also *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir.2002). “It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases.” *Fischel*, 307 F.3d at 1008 (citing *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir.1994)). Generally, a district court has discretion to apply a multiplier to the attorney's fees calculation to compensate for the risk of nonpayment. *Fischel*, 307 F.3d

at 1008; see also *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig. v. Exxon Corp.*, 109 F.3d 602, 609 (9th Cir.1997); *Bond*, 2011 WL 2648879, at \*13.

The “lodestar multiplier” is calculated by dividing the percentage fee award by the lodestar calculation. *Fischel*, 307 F.3d at 1008. Here, a multiplier of 1.31 is calculated by dividing \$825,000.00 by \$628,283.30. To determine whether the lodestar multiplier is reasonable the following factors may be considered: (1) the amount involved and the results obtained, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Id.* at 1007, n. 7 (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975)); see also *Bond*, 2011 WL 2648879, at \*13.<sup>5</sup>

Here, Class Counsel undertook considerable financial risks in this litigation by accepting this case on a contingency basis. There was no guarantee they would recoup their fees or the substantial costs advanced. The contingent nature of the representation has also resulted in Class Counsel litigating this matter approximately two years at this point without any compensation. As a consequence, Class Counsel was unable to take on cases they would have otherwise taken.

**\*22** Additionally, the percentage award requested in this case is commensurate with the percentage-of-the-benefit awards made in other wage and hour actions in this District, many of which included a lodestar multiplier. *See, e.g., Garcia*, 2012 WL 5364575, at \*8–\* 10(33%); *Bond*, 2011 WL 2648879, at \*9–\*14 (30%); *see also Schiller v. David's Bridal, Inc.*, No. 1:10-CV-00616-AWI-SKO, 2012 WL 2117001, at \*16–\*23 (E.D. Cal. June 11, 2012) (33.3%); *Benitez*, 1:08-CV-1122 LJO GSA (E.D.Cal. Dec. 15, 2009) (33.3%); *Chavez*, 1:08-CV-00122 LJO-GSA (E.D.Cal. Dec. 15, 2009) (33.3%).

Based on the overall success, the absence of opposition, and Class Counsel's well-documented hours worked in this action, Plaintiffs' request for a multiplier of 1.31 of its lodestar is reasonable. *See, e.g. Vizcaino.*, 290 F.3d 1043, 1051 (finding no abuse of discretion in awarding a multiplier of 3.65); *see also Garcia*, 2012 WL 5364575, at \*9 (approving a multiplier of 1.28); *Bond*, 2011 WL 2648879, at \*13–\*14 (approving a multiplier of 1.75). According, the Court approves the request for attorneys' fees in the total amount of \$825,000.

### C. Plaintiffs' Request for Costs is Granted

The Court further finds that Plaintiffs' request for \$30,000 in costs is reasonable. The declarations of Class Counsel detail the costs incurred (*See* Docs. 51–3, 51–4, 51–5), which include travel costs, mediation fees, expert fees, copy and scanning costs, filing fees, and electronic research fees. These types of fees are routinely reimbursed. *See, e.g., Vasquez*, 266 F.R.D. at 493. Here, the actual costs incurred are greater than the agreed-upon amount of \$30,000. As such, Plaintiffs' request of costs in the amount of \$30,000 is reasonable and is approved.

### D. Plaintiffs' Motion for Enhancement Awards to the Class Representatives is Granted

Pursuant to the Settlement Agreement, Plaintiffs seek an enhancement in the amount of \$7,000 to the named Plaintiffs

Franco and Castro. This payment is intended to recognize the time and efforts that the named Plaintiffs spent on behalf of the Class Members.

“Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation.” *Ingram v. The Coca-Cola Company*, 200 F.R.D. 685, 694 (N.D.Ga.2001) (internal quotations and citations omitted). In *Ingram*, the Court approved service awards of \$300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process, and taking the risk of stepping forward on behalf of the class. *Id.*; *see also Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995) (approving \$50,000 participation award to plaintiffs); *Glass v. UBS Financial Services, Inc.*, No. C-06-4068-MMC, 2007 WL 221862, at \*17 (N.D.Cal. Jan.26, 2007) (approving \$25,000 enhancement to each named plaintiff).

**\*23** Here, the named Plaintiffs assisted Class Counsel by (1) bringing this case to Class Counsel's attention; (2) searching for key documents; (3) meeting regularly with Class Counsel to provide information and answer questions about their work experience and documents; (4) assisting with the preparation of the original and amended complaints; (5) preparing for and attending a lengthy deposition; (6) reviewing the settlement terms; and (7) reviewing and executing a general release of claims. (Doc. 51, 3:1–6; *see also* Docs. 51–1 (Franco Decl.), 51–2 (Castro Decl.)). Further, Plaintiff Franco organized meetings between Class Counsel and current and former employees of Defendant, resulting in multiple declarations that assisted Class Counsel in litigating and resolving the case. (Doc. 51, 3:7–9, Doc. 51–1 (Franco Decl.), ¶ 9.) Plaintiffs also bore significant personal risk, as Defendant is located in a small community and Plaintiffs are recent migrants with limited education and job prospects, who believed that serving as named Plaintiffs may cause future employers to be reluctant to hire them. (Doc. 51–1 (Franco Decl.), ¶ 13; Doc. 51–2 (Castro Decl.), ¶ 13.) The Court therefore finds that incentive awards requested in the amount of \$7,000 are reasonable.

## V. CONCLUSION AND ORDER

Based on consideration of the memorandums, declarations, and exhibits filed in support of the present motions, IT IS HEREBY ORDERED that:

1. The Motion for Final Approval of the Class Action Settlement is GRANTED, subject to the following findings and orders:

a. Unless defined herein, all defined terms in this Order shall have the respective meanings as the same terms in the Stipulation of Settlement;

b. Pursuant to [Federal Rule of Civil Procedure 23\(b\)\(3\)](#) and the Fair Labor Standards Act, and for settlement purposes only, the Court certifies the proposed Settlement Class, consisting of all persons currently or formerly employed as non-exempt production line employees at the Ruiz Foods processing facility in Dinuba, California, between December 15, 2006, and February 10, 2012, the date of the Court's Order granting preliminary approval of the Settlement;

c. For settlement purposes only, Settlement Class Counsel are:

Eric L. Young, Esq.

Egan Young, Attorneys at Law

526 Township Line Road, Suite 100

Blue Bell, PA 19422

Rose F. Luzon, Esq.

Shepherd, Finkelman, Miller & Shah, LLP

401 West A Street, Suite 2350

San Diego, CA 92101

Philip A. Downey, Esq.

The Downey Law Firm, LLC

P.O. Box 1021

Unionville, PA 19375;

d. Heffler, Radetich & Saitta, LLP, is approved as the Settlement Administrator;

e. The Court has conducted a preliminary and final evaluation of the Settlement as set forth in the Parties' Stipulation of Settlement to assess its fairness, adequacy, and reasonableness. Based on these evaluations, the

Court finds that the Settlement, negotiated at arms' length by the Parties, is fair, reasonable, and adequate;

\***24** f. On March 28, 2012, in accordance with the Court's Order granting preliminary approval of the Settlement, the Court-approved Class Notice, in both the English and Spanish language, was provided via U.S. first-class mail to 2,055 Class Members. Class Notices returned as undeliverable with forwarding addresses were promptly re-mailed to Class Members, while Class Notices that were returned as undeliverable without a forwarding address were further researched and address traces were performed. For updated addresses obtained by way of the address traces, Class Notices were promptly mailed to the new addresses. Consistent with the Stipulation of Settlement, no further processing was performed for those Class Notices that were returned as undeliverable. The Court finds that the plan for giving notice, in form, method, and content, as well as the execution of giving such notice by the Parties and Settlement Administrator, has fully complied with the requirements of [Rule 23](#), due process, and this Court's Order granting preliminary approval. In response to the Class Notice, only two Class Members excluded themselves from the Settlement, no Class Members objected to the Settlement terms, and no Class Members disputed the number of weeks worked or the approximate Settlement Award noted in the Class Notice;

g. Based upon the Court's preliminary and final evaluations, the Court hereby GRANTS final approval of the Settlement;

h. Settlement Award checks will be mailed to Class Members within 45 days after the Settlement becomes final and effective under the Stipulation of Settlement, or in the event an appeal is filed, on the day after the appeal is dismissed or withdrawn, or the appeal is decided upholding propriety of the Settlement (unless Defendant requests and Class Counsel agrees to additional time, which agreement will not be unreasonably withheld). The two individuals who opted out of the Settlement, identified as Nancy O. Zapata and Guadalupe R. Carbajal, are hereby excluded from the Class and shall not be bound by the terms of this Settlement;

I. All Settlement Award checks issued to Class Members shall contain, on the back of the check, the following language, which shall be the opt-in consent required by the FLA: "By endorsing this check, I consent to join the

Class in *Franco, et. al. v. Ruiz Food Products, Inc.*, elect to participate in the Settlement, and agree to release all of my claims that are covered by the Settlement.” Class Members must only cash one Settlement Award check to opt-in to the Class. Any checks that are not cashed will be paid by Defendant to Ruiz-4-Kids and the Chicana Latina Foundation. Declarations from the Settlement Administrator of proof of payments, and a list of all persons who have cashed a Settlement Award check, will be filed with the Court 120 calendar days after Settlement Award checks are issued. Such declarations shall be provided to Class Counsel and Defendant's Counsel;

- j. As provided in the “RELEASED CLAIMS” section of the Stipulation of Settlement, each member of the Settlement Class, except for the two individuals who opted out of the Settlement, fully releases and discharges Defendant as set forth *infra* in Section III(C) and in the Settlement Agreement at Doc. 29-1. Each such Settlement Class member shall not be entitled to pursue, accept or recover damages for any Released Claims against the Released Parties arising between December 15, 2006, and the date of this Order. Notwithstanding this Release of Claims, waivers of claims expressly under the FLSA shall only be binding on Settlement Class members who opted-in as provided above;

\*25 k. The Court approves the selection of Ruiz-4-Kids and the Chicana Latina Foundation as the *cy pres* beneficiaries. The Claims Administrator shall donate to these beneficiaries according to the conditions set out in the Settlement Agreement;

- l. The Court approves an award of \$10,000 pursuant to the [California Labor Code sections 2698, et seq.](#), the California Labor Code Private Attorneys General Act of 2004 (“PAGA”), with payment of \$7,500 to the California Labor and Workforce Development Agency (“LWDA”) for the release of Class Members' PAGA

claims, and the balance of \$2,500 to be applied to the benefit of the Class;

- m. The Court awards Class Representative Enhancements of \$7,000 each to Patricia Franco and Lilia Castro. The Court finds that this amount is fair and reasonable in light of Plaintiffs' contributions to the litigation, for the notoriety and risk of serving as representatives for the class, and for providing Defendant a general release of claims;
- n. The Court hereby awards attorneys' fees in the amount \$825,000 and costs in the amount of \$30,000 to Class Counsel;
- o. The Court approves claims administration expenses in the amount of \$30,000 payable to the Settlement Administrator, Heffler, Radetich & Saitta, LLP;
2. The Court retains jurisdiction over the parties to enforce the terms of the Order and Judgment, and shall have continuing jurisdiction over the construction, interpretation, implementation, and enforcement of the Settlement Agreement in accordance with its terms;
3. As indicated above, within one hundred and twenty (120) days of the date of the order, the Settlement Administrator shall provide declarations to the Court, Class Counsel, and Defendant's Counsel of proof of payments and a list of all persons who have cashed a Settlement Award check; and
4. After the declarations from the Settlement Administrator have been filed and within one hundred and eighty (180) days of the date of this Order, the parties shall file a proposed Final Judgment and Dismissal with Prejudice for entry by the Court.

IT IS SO ORDERED.

#### All Citations

Not Reported in F.Supp.2d, 2012 WL 5941801

#### Footnotes

- 1 The parties have consented to the jurisdiction of the United States Magistrate Judge assigned to the case. (Docs.47, 48.)
- 2 On February 10, 2012, the Court appointed Egan Young, Attorneys at Law; Shepherd, Finkelman, Miller & Shah, LLP; and The Downey Law Firm as Class Counsel (“Class Counsel”) and appointed the named Plaintiffs as Class Representatives. (Doc. 35.)

- 3 The version of the court's order in *Bond* that is published electronically on Westlaw contains a formatting error such that the entire text of the order does not appear on the electronic Westlaw publication. The complete order is located on the court's electronic docket at number 59 in case 1:09-cv-01662-OWW-MSJ.
- 4 The total hours and amount indicated in the Schedule of Fees table includes all work performed, including additional hours incurred in connection with the Supplemental Submission. (See Doc. 51.)
- 5 Only the *Kerr* factors that are not already subsumed within the lodestar are considered. See [Van Gerwen v. Guarantee Mut. Life Co.](#), 214 F.3d 1041, 1046–47 (9th Cir.2000).

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# **EXHIBIT 9**





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2012 WL 5364575

Only the Westlaw citation is currently available.  
United States District Court,  
E.D. California.

Simon V. GARCIA, Roy Van Kempen,  
Christopher Yanez, and Emma Yanez,  
on behalf of themselves and all  
others similarly situated, Plaintiffs,  
v.

GORDON TRUCKING, INC., a California  
corporation; Steve Gordon, an individual,  
Bob Goldberg, an individual; and Does  
1 through 20 inclusive, Defendants.

No. 1:10-CV-0324 AWI SKO.

|  
Oct. 31, 2012.

#### Attorneys and Law Firms

[Allison Goddard](#), [James Richard Patterson](#), Patterson Law Group, APC, San Diego, CA, [Jared Hague](#), [S. Brett Sutton](#), [Susan K. Hatmaker](#), Sutton Hatmaker Law Corporation, Peter Aaron Schaffert, Atkinson, Andelson, Loya, Ruud & Romo, Fresno, CA, for Plaintiffs.

[Adam C. Smedstad](#), Scopelitis Garvin Light Hanson & Feary, P.C., Chicago, IL, [Andrew J. Butcher](#), [Angela S. Cash](#), [James H. Hanson](#), Scopelitis Garvin Light Hanson & Feary, Indianapolis, IN, [Daniel R. Barney](#), Scopelitis Garvin Light Hanson & Feary, PC, Washington, DC, [Bradley Allen Silva](#), Law Offices of Bradley A. Silva, Fresno, CA, for Defendants.

#### ORDER APPROVING CLASS SETTLEMENT AND ENTRY OF FINAL JUDGMENT

[ANTHONY W. ISHII](#), Chief Judge.

\*1 Plaintiffs move for a final approval of class action settlement and attorneys' fees. Pursuant to this Court's June 8, 2012 Order Granting Preliminary Approval of Class Action Settlement, this Court conducted a final approval and

fairness hearing on October 29, 2012 in Courtroom 2(AWI). Plaintiffs appeared by S. Brett Sutton and Jared Hague, Sutton Hatmaker Law Corporation, and James Patterson, Patterson Law Group, APC. Defendants appeared by Defendants appeared by Adam Smedstad, Scopelitis Garvin Light Hanson & Feary, P.C. No one appeared to object to the proposed settlement, and no objections were received before or after the August 31, 2012<sup>1</sup> deadline.

To determine whether this class settlement fundamentally is fair, adequate and reasonable, this Court considered the proposed Joint Stipulation of Settlement<sup>2</sup> between the parties, the relative strengths of Plaintiffs' claims, the risks and expense involved in continuing litigation, the proposed expense for settlement administration, and attorneys' fees, among other things. This Court further considered the unopposed motion and supporting declarations. For the reasons stated on the record and set forth below, this Court will approve the settlement, as ordered below.

#### BACKGROUND

Representative Plaintiffs, Simon V. Garcia, Roy Van Kempen,<sup>3</sup> Christopher Yanez, and Emma Yanez, are former employees of Defendant Gordon Trucking, Inc. ("GTI") whose job duties consisted of driving commercial trucks to transport freight for GTI's customers. GTI compensated drivers on a mileage-based piece-rate compensation system whereby they were paid on a cents-per-mile basis, plus accessorial pay. Plaintiffs challenged GTI's compensation system, alleging that it did not compensate drivers with at least the California minimum wage for all hours worked during both driving and non-driving activities. Plaintiffs further claimed that GTI did not provide drivers with required meal periods and rest periods, that GTI did not pay all compensation due and owing to drivers as of the time of their separation of employment, that GTI did not maintain proper employment records, and that the paystubs provided to drivers did not comport with the requirements of California law. Plaintiffs alleged eight causes of action: (1) minimum wage as under [29 U.S.C. § 206](#); (2) minimum wage under [Cal. Labor Code § 1194](#); (3) meal periods under [Cal. Labor Code § 226.7](#); (4) rest periods under [Cal. Labor Code § 226.7](#); (5) itemized wage statements under [Cal. Labor Code § 226](#); (6) timely wages at termination under [Cal. Labor Code § 201](#); (7) unfair business practice under [Cal. Bus. & Prof.Code §](#)

17200; and (8) recovery under the Private Attorney General Act, Cal. Labor Code § 2699. Doc. 72, Complaint.

In a June 8, 2012 order, this Court granted class certification for the purposes of settlement only. The Settlement Class was certified as follows: “All current and former employee drivers of GTI who resided in California at any time within the Class Period, as defined below, whose job duties include, among other things, driving commercial motor vehicles and who are/were paid, in part, on a cents-per-mile basis, and whose names appear on the list attached as Exhibit 1 to the Settlement.”

**\*2** The Court's June 8, 2012 order approved a notice to be issued to the class members and included a time period in which class members had to submit a timely and valid claim form in order to receive a settlement share. The class notice further included a time period in which class members had to comment on or object to the settlement, or elect not to participate. The class administrator mailed the class notice to 1,868 individuals. A total of 17 class members submitted opt-out forms. Of the opt-out forms received, 15 were considered valid and timely. The opt-outs constitute less than 1% of the class. As of the filing of the instant motion, the settlement administrator received 886 Claim Forms. Of the 886 claim forms received, four were untimely. Of the 882 class members who submitted timely claim forms, 91 submitted claim forms with incomplete information and were sent a letter and asked to supply the missing information. Of those 91, 80 resolved the deficiencies and 11 remain deficient. Therefore, the settlement administrator received 871 claim forms that are considered valid and timely.

## PROCEDURAL HISTORY

Plaintiff Simon Garcia filed this action in this Court on February 23, 2010. GTI filed an answer to the complaint on April 19, 2010.

Plaintiff Garcia filed a Motion for Partial Summary Judgment on his PAGA claim. Plaintiffs also moved for class certification. These motions were pending at the time the parties reached a settlement.

The parties engaged in extensive formal and informal discovery efforts. They exchanged numerous sets of written discovery, thousands of pages of documentary evidence, and took and defended 16 depositions, including those of the class representatives, several of GTI's executives, and

putative members of the settlement class. Class counsel also interviewed dozens of putative class members and obtained written statements from those persons.

On March 23, 2012, Plaintiffs filed a Notice of Settlement. Plaintiffs moved for preliminary approval of the class action settlement. The Court granted the motion, certified the class, and set a final approval and fairness hearing.

Plaintiffs filed the instant motion for final approval of the class action settlement. The motion is unopposed. This Court conducted a fairness hearing on October 29, 2012.

## SETTLEMENT AGREEMENT

### *Terms*

Under the Settlement, GTI agreed to pay a maximum of \$3.7 million. This figure is defined by the Settlement as the Gross Settlement Amount. The Net Settlement Amount consists of the Gross Settlement Amount less: (1) court-approved attorneys' fees not to exceed 33% of the Gross Settlement Amount; (2) reasonable litigation expenses; (3) incentive awards to the Plaintiffs; (4) costs of administration; and (5) PAGA penalties payable to the California Labor Workforce and Development Agency (“LWDA”). Under the terms of the Settlement, GTI agreed to pay the Class at least 60% of the Net Settlement Amount without reversion. The parties agreed that if the aggregate of the individual amounts claimed by the class members represented less than 60% of the Net Settlement Amount, the difference would be paid to a court-approved Cy Pres recipient. As of the filing of the instant motion, the class members have claimed approximately 65% of the Net Settlement Amount. Therefore, the parties have not designated a Cy Pres recipient.

**\*3** Each member of the Settlement Class is eligible to receive his or her individual share of the Net Settlement Amount based on the number of pay periods worked by each member of the Settlement Class during the class period. The primary benefit of this formula is that it relies upon objective evidence of the term of employment, which class members can easily review and confirm for themselves.

GTI provided the settlement administrator with an electronic file which included the names of the class members, their last known mailing address, and the number of weeks worked by each class member falling within the scope of the class

definition. Each Settlement Class member's individual share of the Net Settlement Amount is net of any taxes and required withholdings, as defined by the Settlement.

#### *Labor Workforce and Development Agency Payment*

In satisfaction of the claims arising under Plaintiff Garcia's PAGA claims, the parties have agreed that GTI will allocate \$10,000 to PAGA claims, with \$7,500 paid to the California Labor and Workforce Development Agency and \$2,500 distributed to the participating members of the Settlement Class on a pro-rata basis.

#### *Claims Administration*

The parties agreed that the Gross Settlement Amount includes \$25,000 for the costs associated with the administration of this Settlement by Rust Consulting, Inc. Rust's total costs of administration totaled \$35,155.27, less a discount of \$5,155.27. The parties have agreed to satisfy the remaining administration costs from the Net Settlement Amount on a pro-rata basis from those Class Members who timely submitted Claim Forms.

#### *Attorneys' Fees and Expenses*

The parties have agreed that an award of attorneys' fees not to exceed thirty three percent (33%) of the Gross Settlement Amount, or \$1,221,000 should be awarded. The parties further agree to an award of costs and expenses not to exceed \$100,000.

#### *Class Representative Incentive Awards*

The parties agreed that Plaintiffs shall receive an incentive award of \$15,000 each, in addition to their individual shares of the Settlement, in compensation for their services as Class Representatives.

#### *Scope of the Release*

The scope of the release by the Class Members (other than those who elect not to participate in the Settlement), defined

in the Settlement as the "Released Claims," tracks the scope of Plaintiffs' allegations. The release for Class Representatives is broader and encompasses all claims, whether known or unknown.

### STANDARD OF REVIEW

"The court must approve any settlement ... of the claims ... of a certified class." [Fed.R.Civ.P. 23\(e\)\(1\)\(A\)](#). A settlement may be approved only after a hearing and on finding that it is fair, reasonable, and adequate. [Fed.R.Civ.P. 23\(e\)\(1\)\(C\)](#). This approval is required to ensure that the settlement is consistent with plaintiffs' fiduciary obligations to the class. See *Ficalora v. Lockheed Cal. Co.*, 751 F.2d 995, 996 (9th Cir.1985).

**\*4** The determination of whether a class settlement is fundamentally fair, adequate and reasonable requires:

a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

*Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (quoting *Torrise v. Tuscon Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.1993)). This list is non-exhaustive, and the Court may weight different factors depending on the circumstances of the case. *Id.* When parties reach a settlement prior to class certification, the Court has an obligation to "peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.2003).

Under [Federal Rule of Civil Procedure 23\(a\)](#), a district court may certify a class only if the class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims of the representative parties are typical of the claims of the class, and the representatives will fairly and adequately represent the interests of the class. [Fed.R.Civ.P. 23\(a\)](#). Under [Rule 23\(b\)\(3\)](#), the district court must also find that questions of law or fact common to the class predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for resolving the

controversy. [Fed.R.Civ.P. 23\(b\)\(3\)](#). The party seeking class certification “bears the burden of showing that each of the four requirements of [Rule 23\(a\)](#) and at least one requirement of [Rule 23\(b\)](#) have been met.” *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1176 (9th Cir.2007) *rev'd on other grounds by* — U.S. —, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011).

## DISCUSSION

The Court shall consider the fairness, adequacy, and reasonableness of the proposed settlement pursuant to the aforementioned factors.

### *Requirements of Rule 23(a) and (b)*

In this case, there are approximately 1,869 individuals who fall within the class definition as set forth in the Settlement. The Court therefore finds that the numerosity requirement of [Rule 23\(a\) \(1\)](#) is met. Because the parties have resolved their disputes, they will not need to prove any individualized issues relating to liability. As a result, the fact that defines the class—their employment with GTI as drivers—satisfies the commonality requirement of [Rule 23\(a\)\(2\)](#). Plaintiffs allege they were employed by Defendants during the Class Period. The parties agree that the Plaintiffs were paid under the same pay practices as every other class member. Thus, Plaintiffs allege they suffered injuries similar to those of the rest of the class, and the typicality requirement under [Rule 23\(a\)\(3\)](#) is satisfied. As discussed in the Court's June 8, 2012 order granting preliminary approval of the class action settlement, Plaintiffs Simon V. Garcia, Roy Van Kempen, Christopher Yanez and Emma Yanez have been appointed Class Representatives. The Court finds that the four named plaintiffs acted vigorously to prosecute this action on behalf of the class members by providing information and documentation, responding to written discovery requests from Defendants, and by providing deposition testimony. The Court therefore finds that the adequacy of representation requirement of [Rule 23\(a\)\(4\)](#) has been met.

\*5 Common issues predominate over individual issues because Plaintiffs contend GTI's mileage-based piece-rate compensation system, which was uniformly applied to the class members, resulted in the injuries alleged in the complaint. Moreover, the parties have agreed for purposes of settlement only that certification of the class is appropriate under [Rule 23\(b\)\(3\)](#) because the settlement obviates the

need for litigation of individual liability and damage issues. Finally, it appears that a class action is the superior method for resolution of this matter. There is no evidence that the class members have an interest in pursuing individual litigation. As noted above, there have been no objections to the proposed settlement, and less than 1% of the class members who received notice elected to opt out. Further, although the aggregate of the payments to class members is substantial, the monetary damages each class member will receive are relatively modest. It appears there is no other pending litigation against GTI relating to the claims at issue in this case. Pursuant to [Rule 23\(b\)\(3\)](#), the Court finds that the foregoing factors weigh in favor of certification, and the Court will certify the Settlement Class for purposes of final approval of the Settlement.

### *Strength of Plaintiffs' Case*

This Court has not addressed the strengths of Plaintiffs' case by way of motion, as Plaintiff Garcia's motion for summary judgment and the motion for class certification were pending when settlement was reached. The record demonstrates that the parties have engaged in extensive discovery that produced documentary evidence and testimony that supported Plaintiffs' claims that GTI uniformly applied a mileage-based pay system to the class members which resulted in, among other things, class members performing non-driving tasks for which they were not compensated, violation of California's meal and rest break requirements, and failure to maintain adequate employment records. However, certain areas of uncertainty and risk strongly favor final approval of the class action settlement.

### *Risk, Expense, Complexity, and Likely Duration of Further Litigation*

Further litigation would involve certifying the class and, if approved, engaging in discovery on damages issues. Analysis of the damages of the each class member would have been time consuming and expensive, and the uncertainty of such an analysis would pose an increased risk to class members. The time and expense of continued litigation, including any appeals that could be filed on motions that were pending before this Court when settlement was reached could potentially outweigh any additional recovery obtained through successful litigation. Settlement at this stage in



the proceedings saves substantial attorneys' fees, costs, and expenses for all parties.

#### *Risk of Maintaining Class Action Status Throughout the Trial*

Plaintiffs acknowledge the risks in continued litigation. Even if they demonstrated wage and hour violations by GTI, there was risk that the Court may not have certified some or all of Plaintiffs' claims for class treatment. Moreover, the California Supreme Court's recent ruling in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513 (Cal.2012), could pose obstacles to certification of a significant part of Plaintiffs' claims. The *Brinker* ruling that meal breaks need only be provided, and the nature of Plaintiff's work, also creates uncertainty as to whether Plaintiffs could certify and prevail on their meal and rest break claims. There was also the risk of a ruling that would have required Plaintiffs to certify their claims under PAGA, which would have introduced another obstacle to recovery for the class members. Against all these uncertainties, an immediate and certain payout amounting to an average gross award of \$1,626 per class member favors approval.

#### *The Amount Offered in Settlement*

\*6 Here, the Gross Settlement Amount is \$3.7 million. Plaintiffs negotiated a minimum payout to the class of 60% of the Net Settlement Amount. However, the amounts claimed by the class members exceeded that floor, and as of the filing of the instant motion, the class members have claimed a total of over \$1,416,662.88, resulting in an average pre-tax recovery to each class member of \$1,626. This represents a very favorable result in a wage and hour case involving truck drivers who are typically at the lower end of the earnings spectrum. The adequacy of the amount offered in settlement is also reinforced by the absence of any objection to the Settlement, as well as the low opt-out rate of less than 1% of the class.

#### *Extent of Discovery Completed*

This matter was initiated in February of 2010 and has been actively litigated from the outset. Combined, the parties participated in a total of 16 depositions. Class Counsel also thoroughly reviewed thousands of pages of GTI records, including daily time records and payroll records of

Class Members, numerous employee handbooks and policy manuals, GPS location records and various emails of GTI representatives.

Beyond formal discovery efforts, Class Counsel also undertook to conduct informal interviews of dozens of Class Members to further investigate Plaintiffs' claims. Class Counsel also obtained 20 signed statements by current and former class members that supported Plaintiffs' claims. Based on their extensive discovery efforts, Class Counsel were able to reach an informed decision with respect to the offer that ultimately resulted in the instant Settlement. The discovery efforts and motions practice in this case proceeded to a point in which both Plaintiffs and Defendants "ha[d] a clear view of the strengths and weaknesses of their cases." *In re Warner Communications Sec Litig.*, 618 F.Supp. 735, 745 (S.D.N.Y.1985) *aff'd* 798 F.2d 35 (2d Cir.1986).

#### *Experience and Views of Counsel*

Class counsel submit a declaration to support this motion for final approval of class action settlement. Class counsel are experienced attorneys, and they believe the instant settlement is in the best interests of the class members for a number of reasons, including the risks of continuing the litigation. This factor supports approval of the settlement agreement.

#### *Reaction to the Class of the Proposed Settlement*

The reaction of the Class to the Settlement weighs in favor of approval. The absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members. *See Nat'l Rural Telecomms. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D.Cal.2004). There were no objections to the Settlement, and less than 1% of the Class opted out of the Settlement. The Class Representatives also support and approve of the Settlement.

Approximately 47% of the total Class Members participated in the Settlement. The class members in this case are transitory, evidenced by fact that 225 of the class members were no longer domiciled at their last known address. A transitory class can affect the response rate and make providing notice difficult. *Tarlecki v. bebe Stores, Inc.*, No. C 05-1777 MHP, 2009 WL 3720872 at \*2 (N.D.Cal. Nov.3, 2009) (finally approving settlement with 18% response rate).

The longer the delay in resolving the claims on behalf of the Class, the greater the chance that a class member would not receive notice, not be able to make a claim, and not receive any compensation under the Settlement.

#### *Absence of any Collusion between Negotiating Parties*

\*7 In addition to the participation of an impartial mediator, Mr. Mark S. Rudy, Esq., the scope and extent of the motions filed by both sides of this matter are evidence of an informed, arm's length negotiation between the parties and the absence of any collusion.

An initial day-long mediation session between the parties took place on July 22, 2011. Although the mediation was unsuccessful, the parties continued to engage in phone negotiations through Mr. Rudy over an extended period of time, while simultaneously preparing and filing motions for certification and partial summary judgment. In late September 2011, Class Counsel again engaged in settlement discussions through phone and email communications with Mr. Rudy, again whilst simultaneously preparing and opposing motions and conducting additional discovery. Settlement discussions continued on a regular basis through the end of October 2011. Another round of settlement discussions through Mr. Rudy occurred again in late November 2011 through early December 2011, although such discussions did not yield a resolution of the matter.

Settlement discussions through Mr. Rudy began again in February 2012 and continued through March 2012. Mr. Rudy made a mediator's proposal on or about March 21, 2012, which was accepted by both sides and was the genesis of the Settlement offered here for final approval. The Court finds that the foregoing supports the conclusion that the Settlement was the product of arms-length negotiations, and is free of collusion.

#### *The Proposed Payment to the Claims Administrator*

The Court finds that the \$30,000 amount requested for payment to the Claims Administrator is fair, reasonable and consistent with other claims administration fees in similar class action settlements, particularly in light of the number of Class Notices that the Claims Administrator was required to process.

#### *The Proposed PAGA Allocation is Reasonable and Should be Approved*

Pursuant to the Settlement Agreement, GTI agrees to allocate \$10,000 to Plaintiffs' PAGA claims, and will pay \$7,500 to the LWDA, and \$2,500 to participating Class Members on a pro-rata basis. This comports with settlement approval of PAGA awards in other cases. *See, e.g., Chu v. Wells Fargo Investments, LLC*, No. C 05-4526 MHP, C 06-7924 MHP, 2011 WL 672645 at \*1 (N.D.Cal. Feb.16, 2011) (approving PAGA settlement payment of \$7,500 to the LWDA out of \$6.9 million common-fund settlement). Therefore, the Court will approve the allocation of the Settlement to Plaintiffs' PAGA claim.

#### *Attorneys' Fees*

In class actions, the district court has broad discretion in assessing the reasonableness of attorneys' fees. *In re FPI/Agretech Securities Liti.*, 105 F.3d 469, 472 (9th Cir.1997). This discretion permits the court to award fees based on either the lodestar calculation or common fund method. *Id.*; *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 105 F.3d 602, 607 (9th Cir.1997). In using either method of attorneys' fees calculation, "[r]easonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Id.*

\*8 Class counsel request attorneys' fees in an amount of \$1,221,000, or 33% of the Gross Settlement Amount. Plaintiffs also request costs and expenses in the amount of \$99,273.92. The parties ask this Court to apply the common fund method to award the attorneys fees rather than the lodestar method. As set forth above, this Court has discretion to apply either the lodestar method or common fund method. The "choice between lodestar and percentage calculation depends on the circumstances[.]" *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990). Either "method may ... have its place in determining what would be reasonable compensation for creating a common fund." *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir.1989). Although 25% is the benchmark in common fund calculations, the "benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of



the hours devoted to the case or other relevant factors.” *Six Mexican Workers*, 904 F.2d at 1311. The amount of attorneys fees sought equals 33% of the settlement fund. The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the benchmark. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir.2000).

Courts frequently cross-check a percentage fee request with the lodestar analysis. See, e.g., *Sutter Health Uninsured Pricing Cases*, 171 Cal.App.4th 495, 512, 89 Cal.Rptr.3d 615 (Cal.App.2009). In conducting a lodestar cross-check, the court must first determine the dollar value of the proposed percentage-based fee award. *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201 at \*14 (N.D.Cal. Nov.26, 2007). Here the dollar value of the requested award is \$1,221,000.

The next step is to cross-check the proposed percentage fee against the lodestar. *Id.* Three figures are salient in a lodestar calculation: (1) counsel's reasonable hours; (2) counsel's reasonably hourly rate and (3) a multiplier thought to compensate for various factors (including unusual skill or experience of counsel, or the ex ante risk of nonrecovery in the litigation). *In re HPL Tech., Inc. Sec. Litig.*, 366 F.Supp.2d 912, 919 (N.D.Cal.2005).

Class counsel has submitted detailed documentation of the hours worked in this action. The attorneys and staff of the Sutton Hatmaker expended a total of 2,384.73 hours on this matter. The attorneys and staff of Patterson Law Group expended a total of 685.5 hours on this matter. The Court finds that the total number of hours expended on this case is reasonable in light of several factors, including: (1) the extensive amount of law and motion practice that was expended on this case, including filing a Motion for Partial Summary Judgment, opposing a Motion to Dismiss, and filing a Motion for Class Certification, and the complexity of the legal issues accompanying such motions; (2) the advanced stage of discovery in this matter, which included the taking of 16 depositions (many of which required extensive out-of-state travel), both propounding and responding to several sets of written discovery requests and meeting and conferring thereon; (3) the complicated nature of reconstructing and analyzing GTI's data and records pertaining to the hours worked of class members; and (4) the extensive efforts expended to locate and interview class members to support Plaintiffs' claims.

\*9 Class counsel has also submitted documentation of the hourly rates billed in this matter. Attorneys at Sutton Hatmaker, located in Fresno, California, billed at rates ranging from \$125 to \$400 per hour. Attorneys at the Patterson Law Group, located in San Diego, California, billed at rates of \$650 per hour. Prevailing hourly rates in the Eastern District of California are in the \$400/hour range. *Bond v. Ferguson Enterprises, Inc.*, No. 1:09-cv-1662 OWW MJS, 2011 WL 2648879 at \*11-13 (E.D.Cal. June 30, 2011). Plaintiffs contend the higher hourly rate for the attorneys from the Patterson Law Group is reasonable because they fall within the range set forth for attorneys of their respective experience and qualifications in the Laffey Matrix, a widely recognized compilation of attorney and paralegal rate data frequently used in fee awards cases. Plaintiffs further note that they originally filed the lawsuit against GTI on behalf of Plaintiffs Christopher and Emma Yanez in San Diego, California. That case was consolidated with the case filed by Plaintiff Garcia in the Eastern District.

The resulting lodestar amount based on the reasonable number of hours expended and the reasonable rates of class counsel is \$951,000. Comparing the lodestar against the requested fee amount of \$1,221,000 would result in a multiplier of 1.28. To determine whether the lodestar multiplier is reasonable the following factors may be considered: (1) the amount involved and the results obtained, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained (9) the experience, reputation, and ability of the attorneys, (10) the ‘undesirability’ of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir.2002) (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 6 (9th Cir.1975)).

First, Class Counsel achieved a good result and generated a significant benefit for the class amounting to the Net Settlement Amount of approximately \$2,309,726 for the benefit of a class of approximately 1,869 members. Based on the claims rate, the 871 class members who submitted valid and timely claims will receive \$1,416,662.88 in the aggregate, with an average award of \$1,626.47 each, or 65% of the maximum potential value of the payout to class members.

Second, Plaintiff's meal break claims presented arguable questions for Class Counsel due to the California Supreme Court's recent decision in *Brinker*, which was pending at the time this case was settled. There was also a risk that even if Plaintiffs were able to certify a claim for illegal wage statements, they would have difficulty establishing that class members suffered the requisite injury. Plaintiffs also faced uncertainty over whether they would be required to comply with Federal Rule of Procedure 23 as to their claims under PAGA.

**\*10** Third, this case required substantial skill in litigating complex legal issues, particularly in light of the uncertainty in California law as it related to Plaintiffs' meal break claims. As discussed above, Plaintiffs were required to contest and brief complicated questions such as whether Plaintiffs would be required to certify their PAGA claims according to [Rule 23](#) requirements. GTI's per mile piece-rate payment system also presented counsel with logistical challenges in reconstructing an accurate record of time worked by class members, and required expert analysis.

Fourth, Class Counsel undertook considerable financial risks in this litigation by accepting this case on a contingency basis. There was no guarantee they would recoup their fees or the substantial costs advanced. The contingent nature of the representation has also resulted in Class Counsel litigating this matter for over two-and-a-half years without any compensation. As a consequence, Class Counsel was unable to take on cases they would have otherwise taken.

Lastly, the percentage award requested in this case is commensurate with the percentage-of-the-benefit awards made in other wage and hour actions in this District. *See, e.g., Benitez et al. v. Wilbur*, 1:08-CV-1122 LJO GSA (E.D.Cal. Dec. 15, 2009) (33.3%); *Chavez et al. v. Petrisans et al.*, 1:08-CV-00122 LJO-GSA (E.D.Cal. Dec. 15, 2009) (33.3%); *Schiller v. David's Bridal, Inc.*, 1:10-cv-00616-AWI-SKO (E.D. Cal. June 28, 2012) (32.1%); *Vasquez v. Aartman*, 1:02-CV05624 AWI LJO (E.D.Cal. Sep. 19, 2005) (30%); *Baganha v. California Milk Trans.*, 1:01-CV-05729 AWI LJO (E.D.Cal. July 23, 2009) (31.25%); *Randall Willis et al. v. Cal Western Transport, and Earl Baron et al. v. Cal Western Transport*, Coordinated Case No. 1:00-cv-05695 AWI LJO (E.D.Cal. Aug. 20, 2003)(33%).

Based on the overall success, the skill with which the case was prosecuted, the substantial legal risks associated with

Plaintiffs' claims, and the financial risks borne by Class Counsel, Plaintiff's request for a multiplier of 1.28 of its lodestar is reasonable. *See, e.g. Steiner v. Am. Broadcasting Co., Inc.*, 248 Fed. Appx. 780, 783 (9th Cir.2007) (approving multiplier of 6.85 and citing cases with comparable or higher multipliers); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (finding no abuse of discretion in awarding a multiplier of 3.65). Based on the absence of opposition, and Class Counsel's well-documented hours worked in this action, this Court approves the attorneys' fees in the total amount of \$1,221,000.

#### Costs

The Court further finds that Plaintiffs' request for costs is reasonable. The declarations of Class Counsel detail the costs incurred, which include travel costs, mediation fees, expert fees, copy and scanning costs, filing fees, and electronic research fees. These types of fees are routinely reimbursed. *See, e.g., Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 493 (E.D.Cal.2010). Here, the actual costs incurred are less than the estimated \$100,000, which was included in the Class Notice and to which no class member objected. Plaintiffs' request of costs in the amount of \$99,273.92 is reasonable.

#### Class Representative Enhancement

**\*11** Pursuant to the Settlement, Plaintiffs seek an enhancement in the amount of \$15,000 to the each named Plaintiff. This payment is intended to recognize the time and efforts that the named Plaintiffs spent on behalf of the Class Members.

"Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola Company*, 200 F.R.D. 685, 694 (N.D.Ga.2001) (internal quotations and citations omitted). In *Coca-Cola*, the Court approved service awards of \$300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process, and taking the risk of stepping forward on behalf of the class. *Id.*, 200 F.R.D. at 694; *see also, Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995) (approving \$50,000 participation award to plaintiffs); *Glass v. UBS Financial Services, Inc.*, 2007 WL

221862, at \*17 (N.D.Cal. Jan.26, 2007) (approving \$25,000 enhancement to each named plaintiff).

In this case, among other things, the named Plaintiffs: (1) assisted Class Counsel in investigating and substantiating the claims alleged in this action, including directing Class Counsel to other employees of GTI who could substantiate their claims; (2) assisted in the preparation of the Complaint in this action; (3) produced evidentiary documents to Counsel; (4) appeared for a full day of deposition testimony; (5) responded to numerous written discovery requests; and (6) assisted in the settlement of this litigation. The Court therefore finds that the incentive awards in the amount of \$15,000 requested in this case are reasonable.

## CONCLUSION AND ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. The Settlement Class is CERTIFIED for the purposes of settlement, and Plaintiffs Simon V. Garcia, Roy Van Kempen, Christopher Yanez, and Emma Yanez are APPOINTED as Class Representatives;
2. The parties' proposed Joint Stipulation of Settlement ("Settlement Agreement") is APPROVED;
3. The Gross Settlement Amount of \$3,700,000 is fair and reasonable;
4. The payment of \$1,221,000.00 in attorneys' fees (33% of the Gross Settlement Amount) and \$99,273.92 in costs and expenses is APPROVED;

5. The enhancement payment of \$15,000.00 to each of the named Plaintiffs, Simon V. Garcia, Roy Van Kempen, Christopher Yanez, and Emma Yanez, is APPROVED;

6. The payment of \$7,500.00 to the Labor Workforce and Development Agency, and \$2,500.00 to participating Class Members on a pro-rata basis, in satisfaction of Plaintiffs' PAGA claims, is APPROVED;

7. The payment of \$30,000.00 to the Settlement Administrator, Rust Consulting, Inc., is APPROVED;

8. Under the terms of the Settlement Agreement, within fourteen (14) days after the Effective Date of Settlement, GTI shall deposit with the Settlement Administrator funds as directed by Section V, Part 2 of the Settlement Agreement;

\*12 9. The Court retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation, and enforcement of this Order and Settlement;

10. Nothing in this Order shall preclude any action to enforce the parties' obligations under the Settlement or under this Order;

11. The Clerk of the Court is directed to enter judgment in this action.

IT IS SO ORDERED.

## All Citations

Not Reported in F.Supp.2d, 2012 WL 5364575

## Footnotes

- 1 The Court set the deadline for Class Members to file comments and/or objections not later than sixty days from the date the Class Notice was mailed. See Court's Docket, Doc. No. 156 at ¶ 13. Plaintiffs' counsel indicates the Settlement Administrator mailed 1,868 Class Notices on July 2, 2012. See *id.* Doc. No. 158 at 9.
- 2 Decl. of S. Brett Sutton, Ex. 1.
- 3 Plaintiff Roy Van Kempen was a current employee of GTI at the time of the Consolidated Complaint.

# **EXHIBIT 10**

2012 WL 1119534

Only the Westlaw citation is currently available.

United States District Court,  
S.D. California.

Brooke GARDNER, individually,  
and on behalf of a class of others  
similarly situated, Plaintiff,

v.

GC SERVICES, LP, Defendant.

No. 10cv0997-IEG (CAB).

I

April 2, 2012.

#### Attorneys and Law Firms

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ORDER:

(1) CERTIFYING CLASS;

(2) GRANTING FINAL APPROVAL OF CLASS SETTLEMENT; AND

(3) GRANTING MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARD

IRMA E. GONZALEZ, Chief Judge.

\*1 Presently before the Court is Plaintiff Brooke Gardner ("Plaintiff")'s unopposed motion for final approval of class settlement and Plaintiff's motion for attorneys' fees, costs, and

service award. [Doc. Nos. 62–63.] For the reasons set forth below, the Court **GRANTS** both motions.

#### BACKGROUND

##### I. Facts

This is a wage and hour class action case. Defendant GC Services, LP ("GC Services") provides telephone-based customer services and collections services to various companies throughout the United States. [Doc. No. 15, *Answer* ¶ 1.] GC Services operates three call centers in California, including one in San Diego. [*Id.*] GC Services' telephone workers are generally referred to as account representatives, although their job titles vary. [Doc. No. 26–3, *Deposition of Sharon Webb* ("Webb Depo.") Exs. 5–9.] GC Services pays its account representatives by the hour and classifies them as "non-exempt" employees who are entitled to overtime compensation. [*Id.*; Doc. No. 1, *Compl.* ¶ 8.] The account representatives are typically scheduled to work at least 40 hours per week. [Doc. No. 26–2, *Declaration of Brooke Gardner* ("Gardner Decl.") ¶ 2.]

Named Plaintiff Brooke Gardner previously worked as an account representative at GC Services' call center in San Diego. [*Id.*] Plaintiff alleges that account representatives were required to perform certain "pre-shift" work on a daily basis (logging into the computer system, various software programs, and the telephone system); that the account representatives were uncompensated for the "pre-shift" work; and that if they failed to complete it, they were subject to discipline. [*Compl.* ¶¶ 10–11, 15–16.] Plaintiff also alleges that account representatives were required to work off the clock during meal periods and during "post-shift" periods. [*Id.* ¶¶ 13–16.]

##### II. Procedural History

On March 24, 2010, Plaintiff filed a putative class action against GC Services in state superior court alleging causes of action for (1) failure to pay straight-time wages in violation of California Labor Code § 218; (2) failure to pay overtime wages in violation of 8 C.C.R. § 11040 and California Labor Code §§ 510 and 1198; (3) failure to pay compensation due at termination in violation of California Labor Code §§ 201–03; (4) violation of California Business and Professions Code §§ 17200, *et seq.*; and (5) *quantum meruit*. [Doc. No. 1, *Compl.*] On May 10, 2010, GC Services removed the action to this



Court pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2). [Doc. No. 1, *Notice of Removal*.]

Because of a related action in the Eastern District of Missouri, GC Services filed a motion to dismiss, transfer, or stay the case pending resolution of the related action. [Doc. No. 2.] Shortly thereafter, Plaintiff filed a motion to remand the action back to state court. [Doc. No. 4.] On July 6, 2010, the Court denied GC Services' motion to dismiss and also denied Plaintiff's motion to remand to state court. Thereafter, GC Services filed an answer. [Doc. No. 15.] On December 3, 2010, Plaintiff filed a motion for class certification. [Doc. No. 26.] GC Services opposed the motion. [Doc. No. 32.]

\*2 After significant discovery, on February 1, 2011 and February 2, 2011, the parties engaged in a mediation session with experienced mediator Joan S. Morrow. [Doc. No. 54–2, *Declaration of Jason M. Lindner* (“*Lindner Decl.*”) ] ¶ 2.] Although the parties did not reach an agreement at the mediation, the parties continued to have settlement discussions and conducted data analysis that eventually resulted in an agreement to settle the action on May 19, 2011. [*Id.* ¶ 3.] The Court dismissed Plaintiff's motion for class certification without prejudice after the parties notified the Court that the case had settled. [Doc. Nos. 49, 51.] The parties drafted a Joint Stipulation of Settlement, [Doc. No. 54–2, *Linder Decl. Ex. A* (“*Class Settlement*”) ], and submitted that agreement to this Court for preliminary approval. [Doc. No. 54.]

### III. The Settlement

Pursuant to the proposed settlement, CG Services agreed to pay \$975,000 as the total settlement fund, without admitting liability, and to deposit the funds with a settlement administrator following final approval. [*Class Settlement* §§ 2.22, 6.2.1, 7.4.1.] The settlement fund equals the entire amount to be paid to the class, including attorneys' fees (not to exceed \$292,500–30% of the total settlement fund), expert fees, costs of administration of settlement, litigation costs (not to exceed \$20,000), and an incentive award to the named Plaintiff Brooke Gardner (not to exceed \$3,000), but excluding employment taxes. [*Id.* § 2.22, 6.3, 6.4.]

The class consists of all current and former “non-exempt” (i.e., overtime eligible) telephone-dedicated call center representatives who work or worked for GC Services at locations in California at any time between March 24, 2006 and June 15, 2011. [*Id.* § 2.5.] The parties estimated the size of the putative class at approximately 1,524 individuals. [*Id.*]

Class members who wanted to opt-out had the obligation to notify the settlement administrator within 45 days after the initial mailing of the class notice. [*Class Settlement* § 7.2.7.] Every class member that did not opt-out from this settlement and submitted a claim form within sixty days will receive a cash payment from the settlement fund. [*Id.* § 7.4.2.] The amount of payment received will be calculated by determining the pro rata share of the funds based on each class member's amount of weeks worked within the relevant time period, but the amount for each class member will be no less than \$50. [*Id.* § 6.7.2.] In addition, the settlement agreement provides that if the amount claimed does not equal at least 50% of the settlement pool, the payments to qualified class members will be reapportioned so that at least 50% of the settlement pool is paid to the class members. [*Id.* § 6.7.2(d).] Unclaimed funds above the 50% minimum will revert back to GC Services. [*Id.*]

In exchange, GC Services will receive a release from the class members of all wage and hour claims asserted in this action along with any wage and hour claims that could have been asserted. [*Id.* §§ 2.28, 6.8.1–6.8.4.] This release extends only to class members who do not opt-out of the class. [*Id.* §§ 2.32, 6.8.1–6.8.4.]

### IV. Preliminary Approval of the Settlement and Reaction of the Class Members

\*3 On November 1, 2011, the Court preliminarily certified the class for settlement purposes, appointed class counsel, granted preliminary approval of the settlement, and ordered Plaintiff to disseminate notice of the settlement to the class members. [Doc. No. 59.] Notice was mailed to all 1,470 class members on December 9, 2011. [Doc. No. 62–3, *Declaration of Michael Bui* (“*Bui Decl.*”) ] ¶ 5.] The notice provided class members with an opportunity to file a claim for monetary relief, opt out of the settlement, or object to the settlement. [Doc. No. 63–2, *Declaration of Jason M. Lindner* (“*Lindner Decl.*”) ] Ex. A.] Out of the 1,470 notice packets mailed, 349 were returned by the post office as undeliverable. [Doc. No. 62–3, *Bui Decl.* ¶ 6.] After conducting an additional search for updated addresses, 280 of those notice packets were re-mailed. [*Id.*] Ultimately, 182 notice packets were undeliverable because the Claim Administrator was unable to find a deliverable address. [*Id.*]

The Claims Administrator received a total of 489 completed claims forms, with 10 untimely claims and 2 deficient forms. [*Id.* ¶ 7.] The claim forms filed consisted of 33.26% of the



class and 54.45% of the total class weeks worked. [*Id.*] The Claim Administrator has not received any requests to opt out of the class or objections to the settlement. [*Id.* ¶ 8.]

## DISCUSSION

When the parties reach a settlement agreement prior to class certification, the court is under an obligation to “peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.2003). Thus, the court must first assess whether a class exists, and second, determine whether the proposed settlement is “‘fundamentally fair, adequate, and reasonable.’” *Id.* (citations omitted). Accordingly, in the present case, the Court will first examine the propriety of class certification, followed by the fairness of the settlement agreement, and then the request for attorneys' fees, costs, and an enhancement award.

### I. Class certification

A plaintiff seeking a Rule 23(b)(3) class certification must first satisfy the prerequisites of Rule 23(a). Once subsection (a) is satisfied, the purported class must then fulfill the requirements of Rule 23(b)(3). In the present case, the Court had previously preliminarily certified a class consisting of:

[A]ll current and former non-exempt (i.e., overtime eligible) telephone-dedicated representatives who work or worked for Defendant, its parents, subsidiaries, affiliates, predecessors or assigns at locations in California at any time between March 24, 2006 and June 15, 2011 (“Class Period”), estimated at approximately 1524 but to include up to 1600 individuals.

[Doc. No. 59 at 4, 8.] At that time, the Court concluded that the proposed classes satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). [*Id.* at 5–6.] The Court also found that the proposed classes satisfied the predominance and superiority requirements of Rule 23(b)(3). [*Id.* at 7–8.] Having reviewed those elements again, the Court adopts its prior analysis in this regard. Accordingly, because Plaintiff has satisfied the requirements of both Rule 23(a) and Rule 23(b)(3), the Court **GRANTS** certification of the class for the purposes of settlement.

### II. The Settlement

\*4 [Federal Rule of Civil Procedure 23\(e\)](#) requires the court to determine whether a proposed settlement is “

‘fundamentally fair, adequate, and reasonable.’” *Staton*, 327 F.3d at 959 (quoting *Hanlon*, 150 F.3d at 1026). To make this determination, the court must consider a number of factors, including: (1) the strength of plaintiff's case; (2) “‘the risk, expense, complexity, and likely duration of further litigation;’” (3) “‘the risk of maintaining class action status throughout the trial;’” (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *See id.* (quoting *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir.2003)). In addition, the settlement may not be the product of collusion among the negotiating parties. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir.2000) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir.1992)).

*A. The strength of Plaintiff's case, the risk, expense, and likely duration of further litigation, and the risk of maintaining class action status throughout the trial*

Plaintiff may have a meritorious case, but Defendant has represented that it will vigorously contest Plaintiff's claims. [Doc. No. 54 at 8.] The disputed factual and legal issues would be complex and costly to resolve at trial. In addition, settlement at this time would be beneficial because a case pending before the California Supreme Court has the potential to change the analysis of the class's meal and rest break claims. [*Id.*] *See Brinker Restaurant Corp. v. Sup.Ct.*, 85 Cal.Rptr.3d 688, 196 P.3d 216 (Cal.2008).

The action was only at the class certification stage when settlement was achieved. Therefore, a significant amount of the case remained to be litigated, including additional discovery, summary judgment motions, expert reports, trial and subsequent appeals. The settlement prevents the likely expense, complexity, and long duration of the remaining litigation from impairing or delaying relief to the class members. In addition, because settlement was reached prior to a hearing on Plaintiff's motion for class certification, settlement was reached at a time when there was still a risk that the class would not be certified by the Court. Accordingly, the Court agrees that the actual recovery through settlement confers substantial benefits on the class that outweighs the potential recovery that could have been obtained through full adjudication.

*B. The amount offered in settlement*

In the present case, the proposed settlement provides class members with immediate monetary relief, with an average award of around several hundred dollars and a minimum award of \$50. [Doc. No. 62–1 at 2–3.] This settlement is a good result for the class and eliminates the risks, expenses, and delay associated with continued litigation. Accordingly, the Court finds the amount offered in settlement weighs in favor of granting final approval of the settlement.

*C. The extent of discovery completed and the stage of the proceedings*

\*5 In the context of class action settlements, as long as the parties have sufficient information to make an informed decision about settlement, “ ‘formal discovery is not a necessary ticket to the bargaining table.’ ” *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir.1998) (quoting *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241 (5th Cir.1982)).

In the present case, the parties appear to have engaged in substantial and exhaustive informal and formal discovery. The settlement represents the culmination of over seven months of negotiation, including negotiations at a mediation session. [Class Settlement § 3.4.] Counsel for both parties have conducted significant discovery and analysis of data in arriving at the settlement, including reviewing and analyzing the time entry data for the class members in order to estimate a fair and reasonable recovery for them. [Doc. No. 54–2, *Lindner Decl.* ¶¶ 2–3.] Class counsel was therefore able to negotiate the settlement based on a full evidentiary record and a thorough understanding of the strengths and weaknesses of the claims. Accordingly, the parties' extensive investigation, discovery, and subsequent settlement discussions weigh heavily in favor of granting final approval.

*D. The experience and views of counsel*

Plaintiff's counsel has extensive experience acting as class counsel in complex class action cases including wage and house class actions. [See Doc. No. 26–3, *Declaration of Eric Lindner* (“*Lindner Decl.*”) Ex. J; Doc. No. 26–5, *Declaration of Mark Potashnick* (“*Potashnick Decl.*”) ¶¶ 4–8, Ex. A; Doc. No. 57, *Declaration of J. Farrest Taylor* (“*Taylor Decl.*”) ¶¶ 2–4, Exs. A–B; Doc. No. 58, *Declaration of G. Patrick Jacobs* (“*Jacobs Decl.*”) ¶¶ 1–11.] Accordingly, because counsel believes the present settlement is both fair and adequate, this also weighs in favor of granting final approval.

*E. The reaction of the class members to the proposed settlement*

After dissemination of the class notice to the 1,470 members, which provided each class member with the terms of the settlement and with an option to opt-out or file an objection, not one class member has filed an objection or a request for exclusion. [Doc. No. 62–3, *Bui Decl.* ¶ 8.] The absence of any objector strongly supports the fairness, reasonableness, and adequacy of the settlement. See *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 175 (S.D.N.Y.2000) (“If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.” (citations omitted)); *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 624 (N.D.Cal.1979) (finding “persuasive” the fact that 84% of the class has filed no opposition).

Moreover, there was a total of 489 claim forms returned, which amounts to 54.45% of the total class weeks worked. This is a significant return rate that also strongly supports the fairness, reasonableness, and adequacy of the settlement. Accordingly, the overall reaction of the class members weighs in favor of granting final approval.

*F. Collusion between the parties*

\*6 The collusion inquiry addresses the possibility the agreement is the result of either overt misconduct by the negotiators or improper incentives of certain class members at the expense of other members of the class. *Stanton*, 327 F.3d at 960. In the present case, because there is no evidence of overt misconduct, the Court's inquiry focuses on the aspects of the settlement that lend themselves to self-interested action.

The \$3,000 incentive award for Plaintiff Gardner does not to appear to be the result of collusion. The Court evaluates incentive awards using “ ‘relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, ... the amount of time and effort the plaintiff expended in pursuing the litigation ... and reasonable fears of workplace retaliation.’ ” *Stanton*, 327 F.3d at 977 (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.1998)). In the present case, Plaintiff has protected the interests of the class by engaging in investigation and discovery, attending a deposition, and assisting counsel with other aspects of the case. [Doc. No. 54–2, *Lindner Decl.* ¶ 5.] Therefore, the \$3,000 enhancement award to Plaintiff appears to be reasonable in light of her efforts in this litigation.

Finally, the attorneys' fees also do not appear to be the result of collusion. Plaintiff's counsel may simultaneously negotiate the merits of the action and their attorneys' fees. *Stanton*, 327 F.3d at 971. As discussed in more detail below, the Court finds reasonable the recovery of attorneys' fees, litigation costs, and administration costs sought by Plaintiff's counsel.

For the foregoing reasons, the Court finds that the settlement in this case is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Stanton*, 327 F.3d at 959. Accordingly, the Court **GRANTS** Plaintiff's motion for final approval of the settlement.

### III. Attorneys' fees and costs for class counsel

The settlement agreement provides that Class Counsel may recover an award of costs in administering the settlement, litigation costs up to \$20,000, and attorneys' fees up to \$292,500. [*Class Settlement* §§ 2.22, 6.6.1.] Parties to a class action may appropriately negotiate the payment of attorneys' fees and costs in conjunction with the settlement of the action itself. See *Evans v. Jeff D.*, 475 U.S. 717, 734–35, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986).

In the present case, the settlement agreement provides that Plaintiff's counsel could recover an award of litigation costs up to \$20,000. [*Class Settlement* § 2.22.] Because Plaintiff's counsel has already incurred litigation costs in the amount of \$22,649.61, [Doc. No. 63–2, *Lindner Decl.* ¶ 4], the Court finds the award of \$20,000 to be reasonable. Similarly, the request of \$17,000 in costs for administering the settlement is reasonable in light of the fact that it is less than the \$25,000 that was set aside by the settlement agreement for administration costs. [*Class Settlement* § 6.6.1.]

\*7 With respect to the attorneys' fees, the Ninth Circuit has established a 25% "benchmark" for common fund cases. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir.1993). This "benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six (6) Mexican Workers v. Az. Citrus Growers*, 904 F.2d 1301, 1311 (1990).

Regardless of whether the court uses the percentage approach or the lodestar method, the main inquiry is whether the end result is reasonable. *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir.2000). The Ninth Circuit has identified a number of factors that may be relevant in determining if the

award is reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee; (5) the burdens carried by class counsel; and (6) the awards made in similar cases. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir.2002). Nonetheless, an explanation is necessary when the district court departs from the "benchmark" of 25% of recovery. *Powers*, 229 F.3d at 1256–57. The Court turns to each of these factors in turn.

First, the results achieved in this case were very favorable. Class members are provided with immediate monetary relief, with an average award of around several hundred dollars and a minimum award of \$50. [Doc. No. 62–1 at 2–3.] Second, as detailed above, the risks of litigation were real and substantial. Third, the complexity and potential duration of the case, coupled with the intensity of settlement negotiations, weighs in favor of departing from the 25% "benchmark." Fourth, class counsel took this case on a contingent fee basis and had to forego other financial opportunities to litigate it. [Doc. No. 63–1 at 5–6.] Fifth, the request for attorneys' fees in the amount of 30% of the common fund falls within the range of acceptable attorneys' fees in Ninth Circuit cases. See *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D.Cal.2010) (noting that "[t]he typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the benchmark"); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, at \*22–23, 2010 WL 2196104 (S.D.Cal. Jun. 1, 2010) (noting that the amount of 33.33% of the common fund for a wage and hour class action settlement "falls within the typical range of 20% to 50% awarded in similar cases"). Finally, class counsel has represented that the 30% figure is less than the amount that would have been calculated using the lodestar method. [Doc. No. 63–2, *Lindner Decl.* ¶ 3.] Cf. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944–45 (9th Cir.2011) (encouraging district courts to cross-check their calculations under the percentage-of-recovery method against the lodestar method).

\*8 For all of the foregoing reasons, the Court believes that a departure from the 25% "benchmark" is warranted in this case. This is especially so in light of the fact that not a single class member objected to Plaintiff's counsel's intent to seek up to \$292,500 in attorneys' fees. Accordingly, the Court finds that the attorneys' fees and costs requested are reasonable and **GRANTS** Plaintiff's motion for attorneys' fees and costs.

### IV. Enhancement award for class representative

Finally, the \$3,000 incentive award for Plaintiff Brooke Gardner also appears to be reasonable. “The criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.” *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995) (citations omitted).

In the present case, the above factors weigh in favor of approving the enhancement award requested. Plaintiff has protected the interests of the class by engaging in investigation and discovery, attending a deposition, and assisting counsel with other aspects of the case. [Doc. No. 54–2, *Lindner Decl.* ¶ 5.] Plaintiff has undergone the personal risk of stepping forward as a named plaintiff and testifying against former friends and colleagues. [*Id.*] Further, Plaintiff is directly responsible for the monetary benefits conferred on the class by the settlement. Finally, no class members have objected to Plaintiff’s intent to seek an enhancement award of \$3,000.

The \$3,000 incentive award is also well within the acceptable range awarded in similar cases. *See, e.g., Fulford v. Logitech, Inc.*, 2010 WL 807448, at \*3 n. 1 (N.D.Cal.2010) (collecting cases awarding service payments ranging from \$5,000 to \$40,000). Accordingly, the Court finds the enhancement award requested to be reasonable and **GRANTS** Plaintiff’s motion for an enhancement award.

### **CONCLUSION**

For the foregoing reasons, the Court: (1) **CERTIFIES** the proposed class; (2) **GRANTS** final approval of the settlement; (3) **GRANTS** the request for award of attorneys’ fees and costs and **AWARDS** Class Counsel litigation costs in the amount of \$20,000, settlement administrative costs in the amount of \$17,000, and attorneys’ fees in the amount of \$292,500; and (4) **GRANTS** the request for an enhancement award and **AWARDS** Plaintiff Brooke Gardner a class representative enhancement award in the amount of \$3,000.

### **IT IS SO ORDERED.**

### **All Citations**

Not Reported in F.Supp.2d, 2012 WL 1119534

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# **EXHIBIT 11**



2020 WL 4355513

Only the Westlaw citation is currently available.

United States District Court, C.D. California.

Steven GUTIERREZ et al.

v.

J.M. DISTRIBUTING, INC.

Case No. SA CV 20-00617-DOC-JEM

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Filed 06/03/2020

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**PROCEEDINGS (IN CHAMBERS): GRANTING MOTION TO DISMISS CLASS ALLEGATIONS WITHOUT PREJUDICE [8]**

THE HONORABLE DAVID O. CARTER, JUDGE

\*1 Plaintiffs Steven Gutierrez and America Gutierrez (“Plaintiffs”) originally filed this putative class action in the Superior Court of California, County of Orange. Notice of Removal (“Notice”) (Dkt. 1) ¶ 1. Defendant J.M. Distributing (“Defendant”) removed the case to this Court on March 27, 2020. *See generally id.* In the Motion (Dkt. 8) now before the Court, Plaintiffs request that the class claims be dismissed without prejudice. *See generally* Mot. Defendant does not oppose the Motion. *Id.* at 2.

Under [Federal Rule of Civil Procedure 23\(e\)](#), “[t]he claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court’s approval.” [Fed. R. Civ. P. 23\(e\)](#). The Ninth Circuit has interpreted this requirement to apply before certification as well. [Diaz v. Tr. Territory of Pac. Islands](#), 876 F.2d 1401, 1408 (9th Cir. 1989) (“We therefore adopt the majority approach and hold that [Rule 23\(e\)](#) applies before certification.”). In deciding whether to approve dismissal of class claims,

“[t]he district court must ... inquire into the terms and circumstances of any dismissal or compromise to ensure that it is not collusive or prejudicial.” *Id.* (citations omitted). In this inquiry, the district court should consider three ways dismissal could harm the interests of absent class members—i.e., possible prejudice from (1) class members’ reliance on the action, if they are likely to know of it; (2) lack of time for class members to file other actions due to an approaching statute of limitations; and (3) any settlement or concession made by the class representative or counsel to further their own interests. *Id.*

Here, the Court finds that putative class members are not likely to be prejudiced by dismissal of the class claims. First, this case is in its infancy, and it does not appear that it has attracted any significant media attention or public interest in the short time since its filing. Reliance on this action is therefore unlikely. Second, because the filing of this action has tolled the statute of limitations for all class members, *see Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974), the putative class members are equally able to file other actions as they were when this action began less than three months ago, and Plaintiffs’ counsel represents that no statute of limitations will be fast approaching once the tolling ceases, Decl. of Brian D. Cronin (Dkt. 8) ¶ 8. Third, Plaintiffs and Defendant have not settled and no consideration has been exchanged for dismissal of the class action claims. Mot. at 2. The Court therefore finds it highly unlikely that the parties have colluded in dismissing the class claims.

In these circumstances, absent class members are not likely to be prejudiced by dismissal of the class claims, and the dismissal is without prejudice, so potential class members will not be impaired by the dismissal should they choose to bring their own action(s). Consistent with [Rule 23\(e\)\(1\)](#), then, the Court finds that the parties need not give notice of the dismissal to putative class members.

\*2 Plaintiffs’ Motion is hereby GRANTED, and the class allegations are DISMISSED WITHOUT PREJUDICE. Plaintiffs shall file an amended complaint on or before June 12, 2020. On or before June 12, 2020, the parties shall also submit simultaneous briefing, not to exceed five pages, explaining their respective positions on whether this Court still has jurisdiction over this action.

**All Citations**

Not Reported in Fed. Supp., 2020 WL 4355513



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# **EXHIBIT 12**

2021 WL 5331451

Only the Westlaw citation is currently available.

United States District Court, N.D. California.

Marcie HAMILTON, Plaintiff,

v.

JUUL LABS, INC., Defendant.

Case No. 20-cv-03710-EMC

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Signed 11/16/2021

#### Attorneys and Law Firms

[Christopher David Baker](#), [Deborah R. Schwartz](#), Baker Curtis & Schwartz, P.C., San Francisco, CA, for Plaintiff.

[Brian Lee Johnsrud](#), [Jennifer Ann Lotz](#), Curley, Hurtgen & Johnsrud LLP, Menlo Park, CA, for Defendant.

### ORDER GRANTING PLAINTIFF'S MOTIONS FOR PAGA SETTLEMENT APPROVAL AND ATTORNEYS' FEES

Docket Nos. 80-81

[EDWARD M. CHEN](#), United States District Judge

#### I. INTRODUCTION

\*1 Plaintiff Marcie Hamilton and Private Attorneys General Act ("PAGA") Representative Jim Isaacson ("Plaintiff" for simplicity) filed this lawsuit against Hamilton's former employer, Defendant Juul Labs, Inc. ("Juul"), seeking civil penalties and injunctive relief related to alleged policies, separation agreements and suppression of the whistleblowing and political activities of its employees in violation of California law. Docket No. 32 ("FAC").

The parties indicate that they have agreed to resolve Plaintiff's PAGA claims through monetary penalties and programmatic relief. Docket No. 80. Now pending are Plaintiff's unopposed motions for approval of the PAGA settlement, Docket No. 80 ("Settlement Motion"), and for attorneys' fees, Docket No. 81 ("Fees Motion").

For the following reasons, the Court **GRANTS** Plaintiff's motion to approve settlement, and Plaintiff's motion for fees and awards, subject to the modifications explained below.

#### II. BACKGROUND

##### A. Legal Basis for Plaintiff's PAGA Claims

Several provisions of California law, taken together, "establish as a minimum employment standard an employee anti-gag rule." [Doe v. Google Inc.](#), 54 Cal.App.5th 948, 961 (2020).

For example, California law protects whistleblowers. [Labor Code § 1102.5\(a\)](#) makes it unlawful for an employer to adopt or enforce a policy or rule that prevents employees from disclosing information about reasonably suspected violations of the law to persons with the power to address the problem, e.g., government agencies or another employee who has the authority to investigate, discover, or correct the legal violation. [Doe](#), 54 Cal.App.5th at 958. [Government Code § 12964.5\(a\)](#) prohibits employers from requiring employees to sign certain non-disparagement agreements or other documents that purport to deny them the right to disclose information to *anyone*, including the press, about any "unlawful or potentially unlawful conduct."

California law also protects a broad array of employee speech and activity unrelated to whistleblowing. [Labor Code § 96\(k\)](#) prohibits employer retaliation for " 'lawful conduct occurring during nonworking hours away from the employer's premises,' so employers do not seek to control the non-work aspects of their employees' lives." [Doe](#), 54 Cal.App.5th at 958 (citations omitted). [Labor Code §§ 232, 232.5, and 1197.5\(k\)](#) generally outlaw employer prohibitions on the disclosure or discussion of wages and working conditions.

As the Court previously stated in this litigation, "[Labor Code §§ 1101 and 1102](#) are 'designed to protect the fundamental right of employees in general to engage in political activity without interference by their employers.' " Docket No. 42 at 21). And [California Business & Professions Code § 16600](#) outlaws contracts in restraint of trade, rendering overbroad or oppressive non-disclosure agreements illegal. [Brown v. TGS Management Co., LLC](#), 57 Cal.App.5th 303, 318-319 (2020).

California's anti-gag rule for employees is not absolute. [Labor Code § 232.5\(d\)](#) states that the rule prohibiting employers from requiring employees to refrain from

disclosing information about their working conditions “is not intended to permit an employee to disclose proprietary information, trade secret information, or information that is otherwise subject to a legal privilege without the consent of his or her employer.”

## B. Plaintiff's PAGA Claims

\*2 Plaintiff alleges that certain of Juul's policies and practices restrict speech, protected activity, and the disclosure of information beyond the limited categories of information protected by law, and, therefore, violate California's anti-gag rule. Plaintiff brought five PAGA claims (four of which survived Juul's motions to dismiss, *see* Docket No. 42) on behalf of Juul employees and former employees challenging the following aspects of Juul's policies and practices:

### 1. Non-Disclosure and Non-Disparagement Agreements

As an express condition of their employment at Juul, Ms. Hamilton and Mr. Isaacson were required to sign the “Proprietary Information and Invention Assignment Agreement” (“NDA”). FAC ¶ 28. Their offer letters stated the following: “this offer, and employment pursuant to this offer, is conditioned upon ... [y]our signed agreement to, and ongoing compliance with, the terms of the enclosed [NDA],” and included a disclaimer that the offer letter is governed by California law. *Id.* Plaintiff alleges that Juul has a policy of requiring all of its employees to sign this offer letter (or one that is substantially similar). *Id.* The NDA specifically states that its employees “shall at all times during the term of [their] employment with the Company and thereafter, hold in strictest confidence, and not use ... or disclose to any person, firm, or corporation, without written authorization from the Company's Board of Directors (the ‘Board’), any Confidential Information of the Company.” FAC ¶ 29 (citing NDA, Docket No. 32, Ex. A, § 4.1 (“Company Information”)). Plaintiffs alleges that “Confidential Information” is defined by the NDA to mean essentially everything related to Juul (*e.g.*, information about Juul's customers, products, and markets, as well as catch-all terms such as “other business information of the Company” and “information disclosed by the Company to Employee and information developed or learned by Employee during the course of employment with Company”). *Id.* (citing NDA, Docket No. 32, Ex. A, § 4.1 (“Company Information”)).

The NDA also contains a non-disparagement provision, which prohibits employees from disclosing “all information of which the unauthorized disclosure could be detrimental

to the interests of the Company, whether or not such information is identified as Confidential Information.” FAC ¶ 30 (emphasis in original). Further, the NDA creates a presumption of confidentiality, stating “Employee agrees that Employee bears the burden of proving that given information or materials are not confidential.” FAC ¶ 31 (emphasis in original).

The NDA contains a direct nexus to the Termination Certificate discussed below because it states that “[i]n the event of the termination of the Employee's employment, Employee hereby covenants and agrees to sign and deliver the ‘Termination Certificate’ attached hereto as Exhibit C.” FAC ¶ 32. Plaintiff alleges it has no temporal or geographic limitation (*i.e.*, it lasts forever and applies whether an employee is on or off Juul's premises), and it contains a provision subjecting it to California law. FAC ¶¶ 34, 35.

### 2. Termination Certificate

On March 15, 2019, Ms. Hamilton was informed that her employment at Juul had been terminated, and Juul required her to sign the “Termination Certificate” that all employees must sign as a condition of employment. FAC ¶ 38. The Certificate requires employees to verify that they have complied with the terms of the NDA, and further states:

\*3 [i]n compliance with the [NDA], I will preserve as confidential all trade secrets, confidential knowledge, data, or other proprietary information, relating to products, processes, know-how, designs, formula, developmental or experimental work, computer programs, data bases, other original works of authorship, customer lists, business plans, financial information or other subject matter pertaining to any business of the Company or any of its employees, clients, consultants, or licensees.

FAC ¶ 38 (emphasis in original). Ms. Hamilton signed the Termination Certificate in compliance with her contractual obligations, and she alleges that other Juul employees have also been required to sign a standard Termination Certificate when leaving employment at Juul. FAC ¶ 39.

### 3. Severance Agreement

The third document at issue is the Severance Agreement (referred to in the FAC as the “Standard Release Agreement”). When Ms. Hamilton's employment was terminated on March 15, 2019, Juul informed her that it would continue to employ her and pay her wages through April 2, 2019 (as well as pay her a bonus), if she signed a Juul Severance Agreement.

FAC ¶ 69. This date (April 2, 2019) was significant because it would allow Ms. Hamilton's first tranche of equity to vest. *Id.* Similarly, when Mr. Isaacson was notified of Juul's intent to terminate his employment in September and early October 2019, Juul offered him continued employment through November 1, 2019 if he signed a release agreement. FAC ¶ 70. Plaintiff alleges that Juul requires its employees to sign Severance Agreements that are the same (or similar to) those offered to Ms. Hamilton and Mr. Isaacson (*i.e.*, conditioning continued employment and the payment of wages, bonuses, or other employment benefits on signing the Agreement). FAC ¶ 72.

Juul's Severance Agreements include a general release of claims (including those arising under the Fair Employment & Housing Act, or "FEHA"), and contain another non-disparagement clause, which applies to Juul and "its current and former parents, subsidiaries, related entities and affiliates, and their respective employee benefit plans or funds, officers, directors, shareholders [including Altria, its largest shareholder], partners, employees, agents, trustees, administrators, predecessors, successors, and assigns." FAC ¶ 74. Juul's Severance Agreement also requires that employees keep its existence and terms confidential. FAC ¶ 75.

#### 4. Employment Practices

Plaintiff further alleges that, in all-hands meetings and other company-wide communications, Juul's senior executives and lawyers instructed employees both to not speak to the press and to not put anything in writing that could be communicated in person. FAC ¶ 64. In addition, Plaintiff alleges that in anticipation of government inspections, Juul Labs trained employees to conceal information from regulators. FAC ¶ 61. Employees were allegedly were instructed to not disclose information to inspectors, but rather to direct them to specifically identified individuals. *Id.* ¶ 62. These individuals, in turn, were taught to be technically truthful while concealing information from government regulators. *Id.* Moreover, Hamilton and Isaacson also allege they were retaliated against for violating the Gag Rules and engaging in internal whistleblowing. FAC ¶¶ 65-67.

#### C. Factual Developments Since the Commencement of Proceedings

According to Plaintiff (and unopposed by Juul), about a month after Plaintiff filed her complaint, Juul began to use a new NDA for new hires. Baker Decl. ¶ 2.h, Exh. 8. The new NDA contains a narrowed definition of "confidential

information," a narrowed non-solicitation clause, an express notice of immunity under the Defend Trade Secrets Act, and express carve-outs for "protected activity." *Id.* The new NDA also does not require a termination certification. *Id.*, Exh. 8.

\*4 Approximately five weeks after the Court's January 27, 2021 order on Juul's second motion to dismiss, Juul published a 75-page document entitled "Code of Conduct and Global Compliance Policies." Baker Decl. ¶ 2.i, Exh. 9. The new Policies expressly mention the right of Juul employees to engage in "protected activity," which the Code and Policies define as including: (1) "discussing or disclosing terms, wages, or other working conditions (except when the working conditions themselves constitute a trade secret)" and "disclosing information when Juul Labs Personnel have reasonable cause to believe that a violation of or noncompliance with a local, state, or federal rule or regulation has occurred." *Id.*, Exh. 9. The Code and Policies also state: "You are not required to obtain authorization from Juul Labs or to inform Juul Labs prior to engaging in any Protected Activity." *Id.*

#### D. Procedural History

Plaintiff filed this action on June 4, 2020. Docket No. 1. The Court granted Juul's motion to dismiss claims 1-4 without prejudice, and denied the motion to dismiss claims 5-6 in September 2020. Docket No. 23. Plaintiff filed an amended complaint, including a seventh cause of action on October 29, 2020. Docket No. 32. The Court granted Juul's motion to dismiss claim 3 and a portion of claim 5 of the FAC with prejudice, but denied the motion to dismiss the remaining claims. Docket Nos. 42, 54. The parties have engaged in extensive discovery, which has included several discovery disputes requiring Court intervention. To date, Juul has produced more than 28,000 pages of documents in response to discovery requests and engaged in several round of written discovery. *See* Docket No. 80-1 ("Baker Decl.") ¶ 6.

On August 30, 2021, the parties executed a PAGA settlement, assisted by mediator Mark Ruby. Settlement Motion at 10. Plaintiff's unopposed motions for approval of the PAGA settlement and attorneys' fees are now pending. *Id.*; Docket No. 81.

### III. SUMMARY OF PROPOSED SETTLEMENT AGREEMENT

### A. PAGA Group Members

The settlement resolves Plaintiff's PAGA claims arising from the alleged "Gag Rules" as they relate to Juul's non-Executive, California-based, employees for the Covered Period. Docket No. 80-1, Exh. A ("Settlement") § I.L-M. At the time of the settlement, there were 1,654 such employees (*i.e.* "PAGA Group Members"): 1145 former employees and 509 current employees. *Id.* § II.C.

In determining whether an employee is California-based, the settlement looks to their residential address during the Covered Period. (*Id.* at § I.P). Because at least some employees – like PAGA Representative Isaacson—reside outside of California but worked pay periods within the State's geographic boundaries, the settlement also creates a 2% reserve fund and a challenge procedure, *id.* § III.F.3-4, for employees who contend they were not properly included as a PAGA Group Member, or that the number of pay periods they worked in California is inaccurate.

The Covered Period is from August 10, 2018 through the date of settlement approval. *Id.* § I.E. If the final number of PAGA Group Members or pay periods is 10% or more than the numbers provided by Juul at the time of settlement, then the settlement payment will be increased by the amount of the discrepancy. *Id.* § II.C.

### B. Settlement Payment and Plan of Allocation

The settlement amount is equal to \$34.03 multiplied by the total number of employee pay periods. Juul represents, and Plaintiff has confirmed, that there are 65,236 total pay periods through August 27, 2021. *Id.* § III.A. This means the total settlement amount is \$2,219,981.08. That total is also based on a settlement award of \$1,000 per employee to redress the PAGA claims under [Labor Code §§ 98.6](#) and [1102.5\(a\)](#) and a remainder based on per-employee-pay-periods to redress the other PAGA claims. *Id.* § III.B.2.

After any court-approved deductions from the common fund, and consistent with [Labor Code § 2699\(i\)](#), 75% of the settlement amount goes to the California Labor and Workforce Development Agency ("LWDA"), and 25% of the settlement amount goes to the PAGA Group Members. Settlement § III.B.1-2. However, the penalty amount attributable to current employees—\$956,140.91—will be suspended and forgiven over a two-year period provided Juul Labs substantially complies with the required programmatic relief. *Id.* § III.B.4.

\*5 CAC Services, a third-party settlement administrator, will calculate each PAGA Group Member's settlement share, mail the settlement checks, and otherwise administer the settlement. *Id.* at §§ III.E.3, III.F.1; Baker Decl. ¶ 2.m, Exh. 13. Any deductions from the common fund for attorney and administrator fees and costs, as well as for service payments to the PAGA Representatives, are subject to court approval. *Id.* at §§ III.B.3, E.2. CAC has provided a "not-to-exceed bid" of \$8,000 to administer the settlement. Baker Decl. ¶ 2.m.

### C. Programmatic Relief

The settlement requires that former employees receive a court-ordered notice with their settlement checks. Settlement § III.C.1. The notice states that, notwithstanding any Juul agreement or policy to the contrary, the employee has the right to engage in specified conduct, including: (1) the right to whistle blow consistent with [Labor Code § 1102.5](#), [Government Code § 12964.5](#), and the Federal Defend Trade Secrets Act; (2) the right to speak about wages, working conditions, and political issues consistent with [Labor Code §§ 232, 232.5, 1101-02, and 1197.5](#); and (3) the right to compete consistent with [Business & Professions Code § 16600](#). *Id.* at Exh. A. The notice also states: "JUUL LABS WILL NOT RETALIATE AGAINST YOU FOR, NOR INTERFERE WITH, YOUR EXERCISE OF THESE RIGHTS." *Id.* The notice also explains each employee's settlement payment and notifies them of the challenge procedure if they believe their California pay period information is inaccurate. *Id.*

The settlement also requires Juul Labs to modify the agreements, policies and other written instruments that formerly contained the Gag Rules (to the extent not previously modified) so that they unambiguously inform Juul's current employees of nine protected activity principles. *See generally id.* § III.C.2. The express language articulating those principles is as follows:

- a. These instruments do not prohibit or prevent the disclosure of information about reasonably suspected violations of the law to government agencies or public bodies (as permitted by [Labor Code § 1102.5](#)) or other third parties (to the extent permitted by [Government Code § 12964.5](#)), except when the employee's knowledge of the information arises solely from communications protected from disclosure by Defendant's attorney-client privilege.
- b. These instruments do not prohibit or prevent the disclosure of information about reasonably suspected



violations of the law, internally and in written form, to persons within Defendant's organization who have the authority to address the violation.

c. These instruments do not prohibit or prevent political speech or activities, as provided by [Labor Code §§ 1101-1102](#), by employees acting in their personal capacities.

d. These instruments do not prohibit or prevent the disclosure or discussion of their own wages, or the wages of others as permitted by [Labor Code §§ 232 and 1197.5\(k\)](#), but only in a manner consistent with each employee's constitutional right of privacy.

e. These instruments do not prohibit or prevent the disclosure of information about working conditions, except when that information constitutes a bona fide trade secret or proprietary information of Defendant or is otherwise subject to a legal privilege, consistent with [Labor Code § 232.5](#).

f. These instruments do not prohibit or prevent the disclosure or use of the employee's general skills, knowledge, or acquaintances learned during the course of their employment, nor disclosure or use of information that is readily available to a competitor through lawful competition means. However, the instruments can and do prevent the unlawful use or disclosure of trade secrets and information protected from disclosure by California or federal law.

\*6 g. Employees have the rights identified in the notice of immunity set forth in the Defend Trade Secrets Act, [18 U.S.C. § 1833\(b\)](#).

h. Employees are not required to give Defendant notice or seek its approval prior to engaging in the protected disclosures or uses permitted in Section III.C.2.a-g.

i. Employees will not release any claims under the California Fair Employment Housing Act in exchange for a raise, a bonus, or initial or continued employment provided, however, that this does not apply to agreements that fall within an exception to [Government Code § 12964.5](#).

*Id.*

In addition to modifying the instruments, the settlement also requires Juul to: (a) affirmatively announce the nine principles to its workforce, (b) create and maintain a dedicated webpage setting forth the principles, and (c) not

act contrary to the principles. *Id.* § III.C.3.a. If Juul Labs communicates with its departed or departing employees about their confidentiality obligations, Juul Labs “shall at the same time provide the employee with a copy of the [nine principles] announcement.” *Id.* § III.C.3.b.

At six-month intervals during the two-year suspension-and-forgiveness period, Juul must certify under penalty of perjury its ongoing compliance with the nine principles. *Id.* § III.C.4. Any party to the settlement, as well as the LWDA, may bring a motion to enforce the settlement terms. *Id.* at § III.G.6. There is no time limit or sunset to the modification requirements.

#### D. Suspension, Forgiveness and Cure Provisions

If Juul complies with the required programmatic relief, its obligation to pay the penalty amount attributable to *current* employees will be immediately suspended and then forgiven on a monthly basis over a two-year period. *Id.* at § III.B.4. However, if, after being given an opportunity to cure, a party moves to enforce the settlement and the Court concludes that Juul Labs has breached its obligations, then the Court may order an appropriate remedy.

Depending on the circumstances, and in the Court's discretion, this remedy may include the payment of some or all of the suspended penalty amount, specific performance, a curative notice to the aggrieved employees, and attorneys' fees. *Id.* §§ III.C.5, III.G.6.

#### E. Settlement Release

In exchange for the settlement benefits, Hamilton and Isaacson, on behalf of themselves, the LWDA, and “to the maximum extent permitted by law, the PAGA Group Members,” agree to release the specified PAGA claims that “were or could have been asserted in the Action based upon the factual allegations asserted in the Complaint and/or any PAGA Notice submitted to the LWDA by the PAGA Representatives.” *Id.* § III.D.1. That release does not extend to non-PAGA claims. The PAGA Representatives (Hamilton and Isaacson), but not the LWDA or any other PAGA Group Member, also waive their individual rights under [Civil Code § 1542](#) with respect to the released PAGA claims. *Id.* § III.D.2. The settlement also states that Hamilton releases her non-PAGA claim for a public injunction under the unfair competition law. *Id.* § III.D.1.

#### F. Notification of Proposed Settlement to LWDA and Public

\*7 Plaintiff's counsel provided notice to the Labor Workforce and Development Agency through its online filing system of the proposed settlement in this case on September 30, 2021, as well as notice of the moving parties' motion for fees, costs and service payments. Docket No. 84 ¶ 1, 3. The proposed settlement and motion for settlement approval was reported in the legal press and made publicly available on counsel's website. *Id.* ¶¶ 2, 5. To date, the parties have not received any objections or concerns about the settlement or motions for fees or service awards. *Id.* ¶ 6.

#### IV. LEGAL STANDARDS

##### A. PAGA Settlement Approval

"An employee bringing a PAGA action does so as the proxy or agent of the state's labor law enforcement agencies, ... who are the real parties in interest." *Sakkab v. Luxottica Retail N. Am. Inc.*, 803 F.3d 425, 435 (9th Cir. 2015) (internal citations omitted). Thus, "[a]n action brought under the PAGA is a type of qui tam action." *Id.* at 429. Because a settlement of PAGA claims compromises a claim that could otherwise be brought by the state, the PAGA provides that "court[s] shall review and approve any settlement of any civil action filed pursuant to [PAGA]." Cal. Labor Code § 2699(1)(2).

A party seeking approval of a PAGA settlement must simultaneously submit the proposed settlement to the California Labor and Workforce Development Agency (LWDA) to allow the LWDA to comment on the settlement if the LWDA so desires. The PAGA also states that courts may exercise their discretion to lower the amount of civil penalties awarded "if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Cal. Labor Code § 2699(e)(2). Because state law enforcement agencies are the "real parties in interest" for PAGA claims, the Court's task in reviewing the settlement is to ensure that the state's interest in enforcing the law is upheld. *Sakkab*, 803 F.3d at 435.

Other than the provisions discussed above, however, the PAGA does not establish a standard for evaluating PAGA settlements. Indeed, the LWDA has stated that "[t]he LWDA is not aware of any existing case law establishing a specific benchmark for PAGA settlements, either on their own terms or in relation to the recovery on other claims in the action." LWDA Response at 3, *O'Connor v. Uber Techns.*, No. 13-CV-03826-EMC, Docket No. 736 (N.D. Cal. July 29, 2016).

Some courts approve PAGA settlements only if "(1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals." See *Basilial v. Allegiant Air, LLC*, 2019 WL 8107885, at \*3 (C.D. Cal. July 1, 2019) (citations omitted).

Animated by those principles, this Court has previously analyzed the following purposes of the statute and factors when assessing whether to approve a PAGA settlement:

- (1) Protecting workers and law-abiding employers by ensuring compliance with the State's labor standards and deterring future Labor Code violations;
- (2) Collecting civil penalties to augment the State's labor enforcement capabilities and educating workers;
- (3) The settlement has a rational basis in view of the strength and full value of the PAGA claims; and
- (4) The settlement is neither collusive nor unfair to those affected.

*O'Connor*, 201 F. Supp. 3d at 1132–35.

##### B. Attorneys' Fee Awards

In common fund cases, the Court may award reasonable fees using either a percentage-of-recovery or a lodestar multiplier method. *In re Bluetooth Headset Products Liability Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *Staton v. Boeing Co.*, 327 F.3d 938, 967-68 (9th Cir. 2003).

\*8 Under the percentage-of-recovery method, where there are only state law claims, as there are here, state law also governs the fee award. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The benchmark percentage under California law is in the 33% range. See *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66 n. 11 (2008); *Stuart v. RadioShack Corp.*, 2010 WL 3155645, \* 6 (N.D. Cal. Aug. 9, 2010). The value of injunctive relief is to be included in determining the size of the common fund when the value of that relief can be "accurately ascertained." *Staton*, 327 F.3d at 974. Even when the value cannot be accurately ascertained, the injunctive relief is still a "relevant circumstance" in determining the fee award. *Id.*

Under both the percentage-of-recovery and lodestar multiplier methods, the fee can be adjusted either up or down based on factors including: (1) the results achieved; (2) the

risks involved in litigation; (3) the skill required and the quality of the work; (4) the contingent nature of the fee; and (5) awards made in similar cases. *Lazarin v. Pro Unlimited, Inc.*, 2013 WL 3541217, \*8 (N.D. Cal. July 11, 2013); see also *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 489 (2016) (explaining that the lodestar multiplier method allows a court to increase or decrease the lodestar “by applying a positive or negative ‘multiplier’ to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented”).

### C. Service Awards

Service payments to plaintiffs are appropriate in representative litigation, including class cases, derivative cases (where an individual sues on behalf of a legal entity), and PAGA cases (where an individual sues on behalf of the State). *In re Cellphone Termination Fee Cases*, 186 Cal.App.4th 1380, 1383 (2010) (class case); *Barovic v. Ballmer*, 2016 WL 199674, \*5 (W.D. Wash. Jan. 13, 2016) (derivative case); *Meza-Morales*, 2020 WL 9718888 \*7 (PAGA-only case). Service payments may also be extended to PAGA Representatives who provide material aid to the litigation, execute the settlement, but are not included as a named plaintiff. See *Guang Tian v. Ma Laboratories, Inc.*, 2015 WL 4878980, at \*3 (Cal.Super. Aug. 07, 2015) (awarding an incentive payment to a non-party PAGA Representative and explaining “there is authority for providing for incentive payments to non-class representatives”). Service awards are “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009).

Criteria considered when deciding an incentive award include: (1) the risk to the representative; (2) the notoriety and difficulties encountered by the representative; (3) the duration of the litigation; and (4) the personal benefit (or lack thereof). *Cellphone Termination Fee Cases*, 186 Cal.App.4th at 1394-95.

## V. ANALYSIS

### A. PAGA Settlement Approval

In view of the factors relevant to consideration of a PAGA settlement, the Court approves the parties' proposed settlement.

#### 1. Ensuring Compliance with Labor Standards and Deterring Future Violations

The programmatic relief established by the settlement addresses and remediates of Plaintiff's surviving claims alleging Juul's present violations of California's anti-gag rule for employees. *Doe v. Google Inc.*, *supra*, 54 Cal.App.5th at 961. The issues underlying Plaintiff's PAGA claims were provisions in Juul's NDA, Severance Agreement, Termination Agreement and employment practices that prohibited or discouraged whistleblowing, impeded discussion of working conditions, and unlawfully limited former employees' right to compete. The programmatic changes, including required notices about employees' relevant rights under California law and changes to the NDA, Severance Agreement and Termination Agreement that ensure conformity with California law address these alleged labor code violations.

\*9 Furthermore, Juul must certify its ongoing settlement compliance under penalty of perjury over a two-year period. If Juul fails to comply with its settlement obligations, it risks being required to pay the suspended penalty amount and further court intervention. Moreover, the settlement provides a financial incentive for Juul to ensure that it continues to comply with the nine principles set forth in the settlement. If the Court determines that Juul has failed to comply, the aggrieved employees may receive 25% of the suspended settlement amount. The settlement thus provides current employees with a financial incentive to ensure Juul complies with its settlement obligations. And because the settlement only releases claims through the date of settlement approval, Settlement §§ I.E, III.D.1, any subsequent PAGA violation could subject Juul to an entirely new PAGA claim for additional civil penalties. Finally, if a party to the agreement seeks to enforce the settlement and is the prevailing or successful party in connection with such motion, they can seek fees independent and on top of any potential fee award from the common fund. *Id.* § III.G.6.

#### 2. Collecting Civil Penalties to Augment LWDA Enforcement and Education Capacities

Assuming Juul complies with the programmatic relief, the gross penalty amount immediately due is \$1,263,840.17, inclusive of not-yet-determined fees, costs, and service payments. According to Plaintiff's analysis of settlement

and penalty data from the LWDA, this amount is in the 98th percentile of gross PAGA penalties recovered by court approved settlements. Baker Decl. ¶ 2.j, Exh. 10. If the settlement amount is calculated on a per employee basis (as opposed to a gross or per-pay-period basis), then the recovery is in the 91st percentile. *Id.*

This Court has approved a \$20,000 civil penalty payment (amounting to .15% of the value of the PAGA claims) in light of the other benefits of the settlement. *See Vicerai*, 2016 WL 5907869, \*9. The gross penalty amount provided by this settlement—even with the suspension and forgiveness provisions—enhances the State's labor enforcement and education capabilities. LWDA was informed about this proposed settlement on September 30, 2021 and informed about the currently pending motion for approval of the settlement. Docket No. 84. To date, the agency has not registered an objection to the proposal. *Id.*

### 3. Rational Basis in Light of the Full Value of the PAGA Claims

Plaintiff explains that the “undiscounted, fully stacked, value of Plaintiff's surviving PAGA claims assumes: (1) Liability; (2) \$20,000 in civil penalties per employee for the two PAGA claims under Labor Code §§ 98.6 and 1102.5; (3) \$500 per employee pay period for the initial violation of the five PAGA claims under Labor Code §§ 96(k), 232.5, 432.5, 1101 and 1102; (4) \$1,000 per employee pay period for each subsequent violation of these five Labor Code sections; and (5) no discretionary reduction in penalties.” Motion for Approval at 21. Based on these assumptions, Juul's maximum exposure is this:

Former Employees \$59,466,500

Current Employees \$38,022,500

**Total \$97,489,000**

Baker Decl. ¶ 8.

Thus, the settlement, for \$2.22M, results in a recovery of about 2.2% of the maximum exposure if Juul Labs does not comply with the programmatic relief, and about 1.3% of the maximum exposure if Juul does comply.

Plaintiff acknowledges “that many of the assumptions [of the full value of the case] rest on unresolved legal and factual issues” and, “as a result, the actual case value is less than the

maximum exposure.” Motion for Approval at 22; Baker Decl. ¶ 9.

For example, Plaintiff's maximum exposure analysis assumes the stacking of penalties by Labor Code section. *See O'Conner v. Uber Technologies*, 2016 WL 3548370, \*7 (N.D. Cal. June 30, 2016) (stating that the parties should not ignore stacking when calculating PAGA penalties). However, this assumption is subject to challenge. *E.g.*, *Snow v. United Parcel Services, Inc.*, 2020 WL 1638250, \*3 (C.D. Cal. April 1, 2020) (“plaintiffs may only recover a set of civil penalties for each type of violation.”); *Salazar v. PODS Enterprise, LLC*, 2019 WL 2023726, \*6 (C.D. Cal. May 8, 2019) (“it is possible (although highly unlikely) that [plaintiff] could recover PAGA penalties for each separate type of Labor Code violation”); *Smith v. Lux Retail North America*, 2013 WL 2932243, \*4 (N.D. Cal. June 13, 2013) (questioning whether it was “really plausible that we would pile one penalty on another for a single substantive wrong”). Plaintiff explains that “if PAGA penalties are stacked by cause of action (and not by Labor Code section), then the maximum exposure drops to \$71,725,400” and if, as Juul Labs contends, “the PAGA penalties cannot be stacked at all, then the exposure drops” to \$12,881,800. Motion for Approval at 22.

\*10 Juul also argues that it cannot face a “subsequent” violation under PAGA's default penalty provision – resulting in a \$200 per pay period penalty -- without first being found liable for an “initial” violation. *See Steenhuyse v. UBS Financial Services, Inc.*, 317 F.Supp.3d 1062, 1067-68 (N.D. Cal. 2018). If Juul Labs is correct that: (1) the penalties in this case cannot be stacked, and (2) it cannot be held liable for “subsequent” violations under the default penalty provision, then the exposure drops to \$6,523,600. Motion for Approval at 22.

Moreover, the mandatory award of civil penalties may be appropriately reduced as “unjust” when the employer, upon learning of the legal violations, acts to correct them. *E.g.*, *Magadia v. Wal-Mart Associates, Inc.*, 384 F.Supp.3d 1058, 1104 (N.D. Cal. 2019) (80% reduction in PAGA penalties where the amount requested by the plaintiffs “would be unjust and oppressive, and ... a significant reduction is appropriate [because] California courts have held that a defendant's attempt to comply with the law is a basis for reduction in a PAGA penalties award”). Here, the evidence suggests that Juul Labs began using a new NDA after Plaintiff filed suit, and implemented a new Code and Policies after the Court ruled on Juul's second motion to dismiss. Motion for



Approval at 23; Baker Decl. ¶¶ 2.h-i, 9. These may be further grounds upon which a finding of liability in this case, may, nonetheless, have resulted in a reduced amount of damages as compared to the potential maximum value of the case.

Finally, a primary component of this settlement is programmatic relief, akin to injunctive relief that could have been ordered by the Court. The parties do not place a monetary value on the programmatic relief here. But the programming is significant and are directly responsive to addressing the allegations of unlawful conduct that were central to the claims in the case. The settlement provides immediate relief to the aggrieved employees and former employees, and potentially benefits the public. It remedies the alleged present violations and provides notice to current and former employees of important rights. The settlement notifies more than a thousand employees that their NDAs do not prevent them from exercising the rights provided by California's anti-gag rule, including the right to whistle blow and speak. And, the programmatic relief requires Juul to provide updates on its compliance with the terms of the settlement in six-month intervals over the course of two years. There is no time limit or sunset on the terms of the settlement agreement and the Court retains jurisdiction over the agreement, which means that beyond the two year compliance period, JUUL employees may bring actions against the company to enforcement the settlement agreement.

This Court is skeptical of deeply discounted PAGA settlements. It has rejected a proposed resolution of PAGA claims for 0.1% of the maximum PAGA exposure. *O'Connor*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016). But, it has approved the settlement of PAGA claims for as low as 0.15% of their maximum value where, among other things, the settlement taken as a whole vindicates employee rights and may have a deterrent effect on the defendant employer and others. *Viceral v. Mistras Group, Inc.*, 2016 WL 5907869, \* 9 (N.D. Cal. Oct. 11, 2016). In light of the robust programmatic

relief provided by this settlement, the Court can reasonably conclude that the purposes of PAGA are likewise advanced here.

\*11 Moreover, this case, where all but one of the claims is a PAGA claim, does *not* present the risk of cases where PAGA claims are brought in conjunction with class claims, such that “there may be a temptation to include a PAGA claim in a lawsuit to be used *merely* as a bargaining chip, wherein the rights of individuals who may not even be members of the class and the public may be waived for little additional consideration in order to induce the employer to agree to a settlement with the class.” *O'Connor*, 201 F. Supp. 3d at 1134 (emphasis added). Rather, by contrast, the PAGA claims here are not bargaining chips, but are the case itself; resolution of the PAGA claims in this case dissolves the entire case, because the settlement agreement requires Plaintiff Hamilton to release the only other claim in the case – a claim for public injunctive relief under California's unfair competition law.

It is worth observing, as well, that the PAGA claims in this case do not involve ordinary wage-and-hour violations – the traditional subject of PAGA claims – but rather relate to alleged violations of working conditions that are harder to quantify and less commonly litigated. Indeed, the surviving claims in this case are based on a theoretical chilling effect on employee or former employee speech rather than tangible monetary harms like lost wages. In fact, to date in the litigation, Plaintiffs have not shown that anyone was actually harmed or stopped from speaking by Juul's policies which they challenge. The programmatic relief in the settlement redresses the theoretical harm that is central to Plaintiff's case, and the monetary award goes even further to penalize Juul for theoretical past harms. Plaintiff identifies four settlements of PAGA claims concerning allegedly unlawful gag rules, three of which were negotiated in by Plaintiff's counsel. Motion for Approval at 23. Plaintiff summarizes those settlements in the following chart:

| Case                                                                 | Amount Per Pay Period                             | Programmatic Relief                                                     | Status              |
|----------------------------------------------------------------------|---------------------------------------------------|-------------------------------------------------------------------------|---------------------|
| <i>Lai v. Binary Capital Management</i> , Case No. 17-CIV-02882 (San | @ \$500 per pay period (nine PAGA Group Members). | Injunctive relief preventing enforcement of NDAs and notice to the PAGA | Settlement approved |

| Mateo Superior Court, 2020).                                                                      |                                                                                                     | group members.                                                                                                                                                                                                |                                                                                                |
|---------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|
| <i>Rosetta v. Paycom</i> , Case No. 2:19-cv-8994-AS (C.D. Cal. 2021).                             | @ \$80 per pay period (about 225 PAGA Group Members)                                                | Programmatic relief including revisions to agreements and policies so that they comply with the law, an agreement to not enforce NDAs in a manner contrary to California law, and notice to the PAGA members. | Settlement (which includes class claims) granted preliminary approval.                         |
| Case                                                                                              | Amount Per Pay Period                                                                               | Programmatic Relief                                                                                                                                                                                           | Status                                                                                         |
| <b><i>Hamilton v. Juul Labs</i> (the present case)</b>                                            | <b>@ \$34.00 per pay period (1654 PAGA Group Members)</b>                                           | <b>Extensive programmatic relief obligations, including notice to PAGA group members</b>                                                                                                                      | <b>Settlement before this Court</b>                                                            |
| <i>Moniz v. Adecco</i> , Case No. 17-CIV-01736 (San Mateo Superior Court, 2020) (appeal pending). | No pay period data, but per employee penalty is either \$630 (for permanent employees) or \$41 (for | Notice to PAGA group members and agreement to revise gag rules in undetermined way at an                                                                                                                      | Settlement approved over the objections of the LWDA and an aggrieved employee. Appeal pending. |



temporary  
employees).undetermined  
time.

The chart demonstrates that the settlement here affects a significantly larger number of employees than in similar cases. As a result, the programmatic relief here is more extensive in terms of the scope of its reach than the programmatic relief in those cases. However, the per employee settlement payment amount is less than those obtained in at least two cases—although, in at least one of those cases, the PAGA claims were settled as part of a global settlement which included settlement of class claims and PAGA related to worker misclassification, as well as PAGA claims related to unlawful restrictions on speech, *see Rosetta v. Paycom*, Case No. 2:19-cv- 8994-AS, Docket No. 62 (C.D. Cal. July 8, 2021). Nonetheless, the gross penalty amount places this case above the 90th percentile for PAGA settlements. Baker Decl. ¶ 2.j, Exh. 10.

**\*12** In light of the unique circumstances present here, the Court should find that the settlement proposal has a rational basis when examining the amount of penalties measured against the litigation risk in the case, as well as the programmatic relief directly responsive to the claims in the case and in furtherance of the protection of the rights of workers.

#### 4. Settlement is Neither Collusive Nor Unfair

This Court has noted that when reviewing a class settlement for preliminary approval, “the Court must be especially sensitive to the risk of collusion or a less than full adversarial process where claims pending in other lawsuits are released for minimal value, in order to induce the defendant to settle *this* case.” *O'Connor*, 201 F. Supp. 3d at 1121. Here, there is no indication that any other cases are affected by the settlement here, and the settlement does not preclude employees from enforcing the terms of the programmatic relief here or bringing PAGA claims in a suit for future violations by Juul. Moreover, this settlement was reached after the parties litigated two motions to dismiss and conducted extensive discovery.

Finally, the settlement provides benefits to former employees—in the form of notices in the form notices informing them of their rights to whistleblow and a share of civil penalties—as well as to current employees—Juul's adherence to California law regarding anti-gag rules, and, if Juul fails to live up to that commitment, the opportunity to seek monetary penalties.

In summary, the Court approves the PAGA settlement, Docket No. 80, because it remediates Juul's alleged violations of the California labor code of PAGA, supports the LDWA in its enforcement work, is rationally grounded in the valuation of the case, and is neither collusive nor unfair.

#### B. Attorneys' Fee Award

The settlement sum in this case is at least \$2,219,981.08. Of this amount, \$1,263,840.17 will be paid immediately and the remainder, or \$956,140.91, will be paid if Juul does not comply with its injunctive relief obligations to current employees. Because the minimum value of the injunctive relief can be accurately ascertained (it is at least \$956,140.91), that sum is included in determining the size of the common fund for fee purposes. *Staton*, 327 F.3d at 974.<sup>1</sup> Under federal law, the 25% benchmark under the percentage-of-recovery method results in a fee award of \$554,995.30. Accordingly, Plaintiff's counsel requests \$555,000 in attorneys' fees. Docket No. 81 (“Fees Motion”) at 20.

Additionally, Plaintiff's counsel explains that a \$555,000 fee award is consistent with a lodestar calculation of fees increased by a 1.25239 multiplier (approximately 1.25). Counsel documented 540.30 hours of work in this case at an hourly attorney rate ranging from \$495 to \$875, amounting to a lodestar amount of \$443,152.50. Docket No. 81-3 ¶ 4, 8-13, 22. Plaintiff's counsel rates are reasonable, in light of the finding affirmed in *Lafitte v. Robert Half Internat, Inc.*, that in 2009 hourly rates ranged from \$775 to \$950 an hour with respect to complex employment matters in California. 180 Cal. Rptr. 3d 136, 152 (Ct. App. 2014), *aff'd*, 1 Cal. 5th 480, 376 P.3d 672 (2016).

**\*13** In light of the strong results achieved in this case which benefit PAGA members and advance the goals of PAGA, the risks of litigation, the contingent nature of the case (in which Plaintiff's counsel advanced all cost), the novel legal claims, and the fact that counsel's fee request is consistent with the 25% federal benchmark and the 1.25 multiplier for the lodestar method is reasonable, *see Lazarin v. Pro Unlimited, Inc.*, No. C11-03609 HRL, 2013 WL 3541217, at \*8 (N.D. Cal. July 11, 2013) (“Multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied.”) (quoting 4 *Newberg on Class*

[Actions § 14:6 \(4th ed.\)](#), the Court approves Plaintiff's request for attorneys' fees).

#### 1. Costs

Plaintiff's counsel incurred litigation costs in the amount of \$22,721.00. These costs are mostly related to ESI storage and experts. Docket No. 81-3, Exh. 2. It is appropriate for the State and the PAGA Group Members to collectively share the cost of litigating this matter. *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036 (N.D. Cal. 2008) ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters."); *In re Media Vision Tech. Sec. Litig.*, 913 F.Supp. 1362, 1366 (N.D. Cal. 1996) ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionally by those class members who benefit by the settlement."). The Court should grant Plaintiff's request for costs.

#### C. Service Awards

Plaintiff Hamilton and PAGA Representative Isaacson each request service awards keyed at 1% of the settlement amount, or \$22,000 per person. In assessing whether to award the requested service fees, the Court may consider (1) the risk to the representative; (2) the notoriety and difficulties encountered by the representative; (3) the duration of the litigation; and (4) the personal benefit (or lack thereof). *Cellphone Termination Fee Cases*, 186 Cal.App.4th at 1394-95.

Plaintiff Hamilton explains that she resolved in individual claims against Juul shortly after her termination, but did not release her right to bring a PAGA case or claim in order to ensure that whistleblowers at the company and formerly employed by the company were protected. Docket 83-1 ¶¶ 3-4. She discussed the challenges of the choice to take on a wealthy tobacco company, in violation of the Release NDA, and to litigate these claims for two years. *Id.* ¶ 4. She spent over 60 hours working on the case and participated in reviewing the settlement and filings. *Id.* ¶ 7. PAGA Representative Isaacson violated his NDA to support Plaintiff Hamilton and participate in this case after his termination from Juul and spent 20 hours working on the case. Docket No. 81-2 ¶¶ 4-7. As a former employee, Hamilton and Isaacson stand to obtain the same share as all other 1,144 former employee who will receive a portion of the 25% of the penalties that are allocated to them. Docket No. 80-2 at 46.

In support of Plaintiff's request for services awards, Plaintiff explains that PAGA was enacted because "the lack of government resources to enforce the Labor Code led to a legislative choice to deputize and incentivize employees uniquely positioned to detect and prosecute such violations through PAGA." *Iskanian v. CLS Transportation Los Angeles*, 59 Cal.4th 348, 390 (2016). Plaintiff argues that although a 25% share of civil penalties would clearly be sufficient incentive if the PAGA representatives collected the entire 25%, that is not how PAGA has been construed. *Id.* at 382 (stating that, under PAGA "a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation."). Thus, Plaintiff contends that absent the possibility of a substantial incentive payment, few employees would be willing to step forward and a small service payment would not serve to "incentivize employees uniquely positioned to detect and prosecute such violations through PAGA." Fee Motion at 13.

\*14 Plaintiff's arguments for \$22,000 services awards ignores decisions that such a request is inappropriate because it is more than "four times the amount that is deemed presumptively reasonable in this District." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015); *id.* at 266-67 ("A class representative must justify an incentive award through evidence demonstrating the quality of plaintiff's representative service such as substantial efforts taken as class representative to justify the discrepancy between [his] award and those of the unnamed plaintiffs. Incentive awards typically range from \$2,000 to \$10,000.") (quotation and citation marks omitted). Additionally, Plaintiff's framing of modesty by seeking 1% of the settlement is not supported by the decisions of other courts. See *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, No. EDCV 08-482-VAP (OPx), 2010 WL 248346, at \*10 (C.D. Cal. June 15, 2010) (collecting cases and concluding that plaintiff's request for an incentive award representing one percent of the settlement fund was excessive).

Courts may grant service awards beyond the presumptively reasonable amount of \$5,000 if the circumstances so warrant. In *Bellinghausen*, the court rejected Plaintiff's request for a \$15,000 incentive award but approved a \$10,000 incentive award based on Plaintiff's decisions to put the claims of the class above his, participating in 1 year and 9 months of litigation, and working 73 hours in the case which involved travel and participation in mediation and settlement. 306 F.R.D. at 267.

Applying these principles here, the Court grants Plaintiff Hamilton and Representative Isaacson service awards of \$10,000 each. The Court finds that this amount, which is more than the presumptively reasonable amount, is warranted for Plaintiff Hamilton because she pursued PAGA claims rather than bargaining them away when settling her individual claims and because she committed 60 hours of work in the case over nearly two years, including attending mediation and settlement conferences, and participation in discovery. Docket No. 81-1 ¶¶ 4-7. Hamilton exposed herself to significant stress by suing a well-heeled tobacco company. And PAGA Representative Isaacson exposed himself to the risk of being sued or subjected to a counterclaim by Juul because he violated the terms of the NDA in his termination agreement by participating in this case. Docket No. 81-2 ¶¶ 4-7. Moreover, employees and former employees face potential risks in the labor market when they bring suit against their employer or former employer. Thus, the Court approves

service awards for Hamilton and Isaacson in the amount of \$10,000 each.

## **VI. CONCLUSION**

For the foregoing reasons, the Court **GRANTS** Plaintiff's motion to approve settlement, Docket No. 80, and Plaintiff's motion for fees and awards, Docket No. 81.

This order disposes of Docket Nos. 80 and 81. The Clerk is directed to enter the accompanying judgment and close this case.

## **IT IS SO ORDERED.**

### **All Citations**

Not Reported in Fed. Supp., 2021 WL 5331451

### **Footnotes**

- 1** The full value of the injunctive relief is likely significantly greater than \$956,000 because, as previously discussed, the programmatic relief is directly responsive and wide-ranging in redressing the theoretical harms to speech that Plaintiff's alleged.

# **EXHIBIT 13**



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Huebner v. Mantech International Corp.](#), C.D.Cal., July 29, 2017

2009 WL 928133

Only the Westlaw citation is currently available.

United States District Court,  
N.D. California.

Tina HOPSON, individually and on behalf  
of all others similarly situated, Plaintiffs,

v.

HANESBRANDS INC.; Sara Lee Corporation  
and Does 1 through 50, inclusive, Defendants.

No. CV-08-0844 EDL.

I

April 3, 2009.

#### Attorneys and Law Firms

[John Eastman B. Pickett](#), [Edward Joseph Wynne](#), Wynne Law Firm, Greenbrae, CA, for Plaintiffs.

[Anne Wells Nergaard](#), [Jeffrey David Wohl](#), [Maurice Kirby Collette Wilcox](#), [Molly A. Harcos](#), Paul Hastings Janofsky & Walker LLP, San Francisco, CA, for Defendants.

#### ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND GRANTING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

[ELIZABETH D. LAPORTE](#), United States Magistrate Judge.

\*1 Plaintiff Tina Hopson brought this putative class action lawsuit against Defendants Hanesbrands, Inc. and Sara Lee Corporation alleging that Defendants misclassified Plaintiff and other Hanesbrands Service Representatives as exempt under federal and state wage-and-hour laws, thus not paying proper overtime wages, and failed to comply with California labor laws such as providing meal and rest periods for California employees. Defendants maintain that Plaintiff and the proposed Class were properly classified. On April 8, 2008, the parties engaged in negotiations, represented by counsel, and agreed to settle this action and all other matters covered by the June 16, 2008 proposed settlement, as corrected in the July 30, 2008 stipulation. On August 8, 2008, the Court preliminarily approved the parties' settlement, and ordered

that Class Notices be sent by the Settlement Administrator, Rust Consulting, Inc., to the potential Class Members.

Now before the Court is the parties' Joint Motion for Final Approval of Class Action Settlement and Plaintiff's Motion for Attorneys' Fees. The Court held a hearing on these motions on March 10, 2009. For the reasons stated at the hearing and in this order, the Joint Motion for Final Approval and Plaintiff's Motion for Attorneys' Fees are granted.

#### The Settlement Class

The Class consists of: (i) all persons who worked as full-time Service Associates for Defendants anywhere in the United States other than the State of California at any time from (a) May 22, 2001, to September 1, 2007, if the person worked in the State of New York or the Commonwealth of Massachusetts; (b) May 22, 2002 to September 1, 2007, if the person worked in the Commonwealth of Kentucky; (c) May 22, 2003 to September 1, 2007, if the person worked in the State of Florida or the State of Texas; or (d) May 22, 2004 to September 1, 2007, if the person worked in any state other than California; (ii) all persons who worked as full-time Service Associates for Defendants in the State of California at any time during the period from May 22, 2004 to September 1, 2007; and (iii) all persons who worked as part-time Service Associates for defendants in the State of California at any time during the period from May 22, 2004 to September 1, 2007. *See* Declaration of Anne Nergaard Ex. 1 at § 1.C; Stip. to Correction of Settlement Agreement (docket # 22).

#### The Settlement Amount

The Settlement provides that Defendants will pay a Maximum Settlement Amount of \$408,420.32, which represents approximately 39% of the maximum potential recovery of damages and penalties by the Class of \$1,026,000.00 (but without taking into account any statutory award of attorneys' fees). *See* Joint Supp. Brief in Support of Joint Mot. for Prel. Approval of Class Action Settlement at II; Stipulation and Order re: Discovery of New Class Members, Postponement of Final Approval Hearing at ¶ 5. The Settlement Agreement provides that the following amounts are deducted from the Maximum Settlement Amount: (1) Class Representative Payment of \$5,000; (2) attorney's fees of \$102,105.08 and costs of \$7,658.86; (3) payment of \$1,500 to the California Labor and Workforce Development Agency; and (4) Settlement Administrator's fees of \$11,807.00. The Net Settlement Amount is approximately \$280,350.00.



\*2 The Net Settlement Amount will be distributed to claimants based on the number of work weeks during the class period compared to the total work weeks for the Settlement Class as a whole. *See* Nergaard Decl. Ex. 1 at §§ I.B, III.A.2. Full-time Class Members employed in California will have their work weeks increased by a factor of 1.5 to compensate for the additional remedies available under California law to misclassified employees compared to the remedies available under the FLSA to misclassified employees. *See id.* § III.B.1. Part-time Class Members will have their work weeks decreased by a factor of 0.5 to account for: (i) the fewer hours on average they worked compared to the hours that full-time Class Members on average worked; and (ii) the fact that while they worked for defendants, they were paid on an hourly basis and were paid overtime compensation for overtime hours worked. *See id.* § III.B.2.

### Discussion

Final approval of a case where settlement is reached prior to class certification requires two inquiries. First, the district court must assess whether a class exists. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (“But other specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.”). Second, the district court must consider whether a proposed settlement is “fair, reasonable and adequate.” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998) (recognizing that “[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness....”).

#### 1. Class certification

Class certification requires that: (1) the class be so numerous that joinder of all members individually is ‘impracticable;’ (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representative must be typical of the claims or defenses of the class; and (4) the person representing the class must be able fairly and adequately to protect the interests of all members of the class. *See Fed.R.Civ.P. 23(a); Staton v. Boeing*, 327 F.3d 938, 953 (9th Cir.2003). In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class certification must also show that the action is maintainable under Federal Rule of

Civil Procedure 23(b). Here, the parties assert that the action is maintainable under Rule 23(b) (3) because questions of law or fact common to Class Members predominate over any question affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed.R.Civ.P. 23(b); Hanlon v. Chrysler*, 150 F.3d 1011, 1022 (9th Cir.1998).

#### A. Rule 23(a)

##### i. Numerosity

\*3 The class must be so numerous that joinder of all members individually is “impracticable.” *See Fed.R.Civ.P. 23(a) (1)*. When evaluating numerosity, courts should consider the number of class members, whether their identities are known, the geographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive relief is sought. *See* William Schwarzer, *Federal Civil Procedure Before Trial*, §§ 10:260–10:264 (Rutter Group). Numerosity is generally found when a class comprises forty or more members, and not if the class comprises twenty-one or fewer members. *See Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995); *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y.1998); *see also Wamboldt v. Safety-Kleen Sys., Inc.*, 2007 WL 2409200, \*11 (N.D.Cal. Aug.21, 2007).

Here, the potential number of Class Members (217) as well as the actual number of Class Members who have responded (176) satisfies the numerosity element. The identities of the Class Members are known to the parties here and they have already made claims. The Class is geographically diverse, comprising employees from across the country. Further, the recovery in this case on an individual level would be low, thereby making individual claims less likely. Specifically, the parties agree that full-time Class Members' yearly average wages were just over \$33,000 and that the number of overtime hours worked during the class periods was at most less than one hour of overtime per week.

##### ii. Commonality

Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” The Ninth Circuit stated:

Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of



salient facts coupled with disparate legal remedies within the class.

*Hanlon*, 150 F.3d at 1019; see also *Staton v. Boeing*, 327 F.3d 938, 953 (9th Cir.2003).

Here, all Class Members were employed in the same job, Service Associate. With respect to the full-time Class Members who had common duties and whose claims include overtime wages, issues of law and fact are common to the Class. Similarly, the facts and law are common to the California Class Members, who have additional claims for violations of California Labor Code provisions regarding meal and rest periods and wages.

### iii. Typicality

**Rule 23(a)(3)** requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” “Under the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably coextensive with those of absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020; see also *Staton*, 327 F.3d at 957. Further, the claims of the purported class representative need not be identical to the claims of other class members, but the class representative “must be part of the class and possess the same interest and suffer the same injury as the class members.” *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). That injuries may differ in amount does not defeat typicality. See Schwarzer, *Federal Civil Procedure Before Trial*, § 10:293.

\*4 Here, Plaintiff’s claims are coextensive with those of other Class Members in that each nationwide Class Member seeks relief for unpaid overtime under the Fair Labor Standards Act, and the California Class Members seek additional relief under California Labor Law. Defendants’ defenses to Plaintiff’s claims are typical of Defendants’ defenses to Class Members’ claims. The typicality requirement is met because the legal theories pursued by the named Plaintiff are identical to those of the absent Class Members, and they suffered the same type of injury (e.g., denial of overtime pay), even though the amount of damages suffered are not exactly identical.

### iv. Adequacy of Representation

**Rule 23(a)(4)** permits the certification of a class action only if “the representative parties will fairly and adequately protect the interests of the class.” Representation is adequate if:

(1) the class representative and counsel do not have any conflicts of interest with other class members; and (2) the representative plaintiff and counsel will prosecute the action vigorously on behalf of the class. *Staton*, 327 F.3d at 957.

Here, it does not appear that there are any conflicts between Ms. Hopson, the named representative, and her counsel, and the other Class Members. Ms. Hopson has been a strong advocate for the Class. See, e.g., Declaration of Tina Hopson ¶ 4. Therefore, the adequacy of representation element has been satisfied.

### B. Rule 23(b)(3)

**Rule 23(b)(3)** states:

A class action may be maintained if **Rule 23(a)** is satisfied and if: ... (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Certification under **Rule 23(b)(3)** is appropriate “whenever the actual interests of the parties can be served best by settling their differences in a single action.” *Hanlon*, 150 F.3d at 1022 (quoting 7A Wright & Miller, *Federal Practice and Procedure*, § 1777 (2d ed.1986)).

The test for predominance is “whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Hanlon*, 150 F.3d at 1022 (quoting *Amchem*, 117 S.Ct. at 2249). In contrast to the commonality requirement of **Rule 23(a)**, **Rule 23(b)(3)** “focuses on the relationship between the common and individual issues.” *Hanlon*, 150 F.3d at 1022. Specifically, “when common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022 (quoting Wright & Miller, § 1778). Here, because all Class Members seek recovery under the

same federal and state laws, common questions of liability predominate.

\*5 The test for superiority of the class action vehicle requires “determination of whether the objectives of the particular class action procedure will be achieved in the particular case,” which “necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution.” *Hanlon*, 150 F.3d at 1023 (citing *Wright & Miller*, § 1779). Here, as in *Hanlon*, the alternative mechanism would be individual claims for small amounts of damages. Not only would this mechanism burden the court system that would be deciding the same legal issues in a number of small cases, but it would also make little economic sense for litigants or lawyers. See *Hanlon*, 150 F.3d at 1023 (noting possibility that in individual cases, “litigation costs would dwarf potential recovery”); see also *Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1154, 1163 (9th Cir.2001) (“If plaintiffs cannot proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover.”). The fact that fourteen Class Members (less than 7% of the total) have opted out of this Class does not demonstrate that individual actions are a more appropriate method for prosecuting this case. Therefore, in this case, a class action is the superior mechanism.

Accordingly, the Court concludes that this Class should be certified pursuant to [Federal Rules of Civil Procedure 23\(a\)](#) and [23\(b\)\(3\)](#).

## 2. Notice

[Rule 23\(e\)](#) requires that adequate notice be provided to all class members. Here, the notice procedure satisfied [Rule 23\(e\)](#).

The court-approved Class Notice was provided through Rust Consulting, Inc. (“Rust”), a company that has extensive experience in class action matters, having provided services in more than 1,200 class action cases including over 450 labor and employment cases. See Declaration of Caryn Donly ¶ 2. On August 22, 2008, Defendants' counsel gave Rust a mailing list for 209 Class Members. See *id.* ¶ 5. Before the Notice Packets were mailed, Rust verified and updated the Class Members' addresses by using the National Change of Address Database maintained by the U.S. Postal Service. See *id.* ¶ 8. Rust obtained a mailing address to receive Claim Forms, Exclusion Forms and undeliverable mail. See *id.* ¶ 9. Rust also

established a toll free number for the purpose of providing information to the Class Members. See *id.*

On September 5, 2008, Rust mailed the Notice Packet via first-class mail to the 209 Class Members. See *id.* ¶ 6. After the Notice Packets were mailed, two individuals inadvertently omitted from the list identified themselves, and on November 24, 2008, Defendants' counsel provided Rust with a supplemental mailing list containing the names of eight additional Class Members who had been inadvertently excluded from the original list. See *id.* ¶ 7. On December 10, 2008, Rust sent out Notice Packets to the additional eight Class Members, for a total of 217 potential Class Members. See *id.* ¶ 10.

\*6 Rust has received five undeliverable Notice Packets returned in the mail. See *id.* ¶ 11. Rust performed address traces on all undeliverable Notice Packets and was able to obtain updated mailing information for all five. See *id.* Five new Notice Packets were mailed, and only one was returned a second time. See *id.* One Notice Packet was returned with a forwarding address, and Rust re-mailed the Notice Packet to that forwarding address. See *id.* ¶ 12. Rust has received twenty-nine calls on its toll free number, fourteen of which were seeking re-mailings of the Notice Packet, which was promptly done. See *id.* ¶ 13.

Rust received 177 Claim Forms, including four untimely claims that the parties agreed to honor, which represents 81.57% of the total Class. See Donly Decl. ¶ 14; Supp. Declaration of Caryn Donly ¶¶ 6–8. Four Class Members disputed their employment history as shown on the Claim Form. See Donly Decl. ¶ 15; Supp. Donly Decl. ¶ 3. Three of the four Class Members did not provide any documentation supporting their disputes, and after Defendants rechecked their records and confirmed the accuracy of the Claim Forms, these three disputes were deemed not valid. See Supp. Donly Decl. ¶ 4. Defendants determined that the number of work weeks for the fourth Class Member was misstated, and therefore the dispute was determined to be valid and Rust credited the Class Member with additional work weeks. See Supp. Donly Decl. ¶ 5. Rust determined that one Claim Form was deficient, but the deficiency was resolved. See Donly Decl. ¶ 16. Fourteen Class Members, or 6.45% of the total Class, have opted out. See *id.* ¶ 17. No Class Members objected to the settlement. See *id.* ¶ 18.

Further, the parties gave notice of the Settlement to the Attorney General of the United States and the appropriate

state officials of each state in which a Class Member resides. *See* Supp. Decl. of Compliance with the Class Action Fairness Act of 2005. Therefore, the requirements of the Class Action Fairness Act, 28 U.S.C. § 1715, have been satisfied.

### 3. Fairness of Settlement

“Fed.R.Civ.P. 23(e) requires the district court to determine whether a proposed settlement is fundamentally fair, adequate and reasonable.” *Hanlon*, 150 F.3d at 1026. To determine whether a settlement agreement meets this standard, a district court must consider a number of factors, including:

the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

*Hanlon*, 150 F.3d at 1027; *see also* *Staton*, 327 F.3d at 959. Settlement approval that takes place prior to formal class certification requires a higher standard of fairness: “The dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court-designated class representative, weigh in favor of a more probing inquiry than may normally be required under Rule 23(e).” *Hanlon*, 150 F.3d at 1026. District court review of class action settlements “includes not only consideration of whether there was actual fraud, overreaching or collusion but, as well, substantive consideration of whether the terms of the decree are ‘fair, reasonable and adequate to all concerned.’” *Staton*, 327 F.3d at 960 (quoting *Officers for Justice v. CCSF*, 688 F.2d 615, 625 (9th Cir.1982)). The appellate court will rarely overturn approval of a class action settlement unless “the terms of the agreement contain convincing indications that the incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of the negotiations and that the district court was wrong in concluding otherwise.” *Staton*, 327 F.3d at 960. In *Staton*, therefore, the court focused on whether the aspects of the settlement that lend themselves to pursuit of self-interest, namely attorneys' fees and distribution of monetary relief among class members, “strictly comported with substantive and procedural standards designed to protect the interests of the class members.” *Staton*, 327 F.3d at 960.

\*7 Here, the parties argue that they reached a non-collusive settlement after receiving sufficient discovery to enable

counsel to make educated decisions about the strengths and weaknesses of this case. *See, e.g., Linney v. Cellular Alaska P'ship*, 1997 WL 450064, at \*5 (N.D.Cal. Jul.18, 1997) (“The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair.”). The parties state that because obtaining class certification, overcoming Defendants' defenses and establishing liability posed difficult hurdles for the Class that justified compromise of their claims, the settlement agreement is within the range of reasonable outcomes.

As described in the Court's August 8, 2008 Order, the *Hanlon* factors weigh in favor of finding that the Settlement Agreement is fair. First, Plaintiffs may have a strong case, but the risks inherent in continued litigation are great. Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service Associates were misclassified as exempt. In addition to the uncertainties raised by Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case, Defendants notes that the question of an employer's duty to provide rest and meal periods is an open one, signaling even less certainty for Plaintiffs. After preliminary approval of the settlement, the California Supreme Court granted review of the question of whether the duty to “provide” employees with meal and rest breaks means only to make those breaks available, or rather to ensure that employees take those breaks regardless of their personal preferences. *See Brinker Rest. Corp. v. Superior Court*, 165 Cal.App.4th 25, 80 Cal.Rptr.3d 781 (2008), review granted and opinion superseded, 85 Cal.Rptr.3d 688, 196 P.3d 216 (Oct. 22, 2008). Defendant argues that Plaintiff and the Class Members had the opportunity to take meal and rest periods because they structured their own schedules (*see* Declaration of Kathy Gugino in Support of Joint Mot. for Prel. Approval of Class Action Settlement ¶ 4), so the Supreme Court's decision in *Brinker* may well impact this case.

Second, as described in the Court's August 8, 2008 Order, the gross 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. Class Members are estimated to receive an average of \$1,568.44 each. The gross settlement amount represents 39% of the maximum expected recovery of lost wages and penalties should Plaintiffs prevail. *See* Joint Supp. Brief in Support of Mot. for Prel. Approval of Class Action Settlement at II. If the gross settlement amount is reduced by the amount

of fees sought, it still represents approximately 30% of the maximum expected lost wages and penalties should Plaintiffs prevail.

\*8 The Court noted at the March 10, 2009 hearing, however, that the gross settlement amount set forth by the parties did not include any provision for the statutory attorneys' fees that the Class would be entitled to in addition to the lost wages and penalties recovered if the Class were to prevail. *See, e.g., Cal. Labor Code § 226; Staton, 327 F.3d at 972* ("In the course of judicial review, the amount of such attorneys' fees can be approved if they meet the reasonableness standard when measured against statutory fee principles. Alternatively, the parties may negotiate and agree to the value of a common fund (which will ordinarily include an amount representing an estimated hypothetical award of statutory fees) and provide that, subsequently, class counsel will apply to the court for an award from the fund, using common fund fee principles.") (emphasis added). According to the common fund approach set forth in *Staton*, conservatively adding only the fees sought here of \$102,105.08 to the total maximum expected recovery of wages and penalties raises the total projected recovery to \$1,128,105.00, of which the gross settlement amount represents 36%. The potential fee recovery would, of course, increase if the case were litigated longer, reducing the percentage somewhat further. For example, including a relatively modest estimated potential recovery of \$300,000 in fees in the calculation would lower the percentage to 31%. Nonetheless, all of these calculations lead to the conclusion that the settlement amount falls within a reasonable range. *See, e.g., In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir.2000)* (stating in shareholder derivative action: "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." [citation omitted]. Even assuming that Nadler's methodology was more sound, the Settlement amount of almost \$2 million was roughly one-sixth of the potential recovery, which, given the difficulties in proving the case, is fair and adequate.") (quoting *Officers for Justice v. CCSF, 688 F.2d 615 (9th Cir.1982)*); *Shlensky v. Dorsey, 574 F.2d 131, 147-48 (3d Cir.1978)* (stating in shareholder derivative action: "This figure, which is approximately 15% of the maximum amount of unlawfully disbursed corporate funds alleged to be involved in the suit, can hardly be said to provide a grossly inadequate benefit to Gulf in view of the uncertainties of this litigation."); *In re Cendant Corp. Derivative Action Litig., 232 F.Supp.2d 327, 336 (D.N.J.2002)* ("The settlement of \$54 million represents less than two percent of that amount, a small percentage. This

amount may be justifiable, however, given the fact that the Settling Defendants appear to have significant defenses that increase the risks of litigation.").

Third, as stated in the August 8, 2008 Order, "the parties engaged in informal discovery prior to reaching a settlement, during which Defendants produced payroll records that informed the parties' decision to settle." Aug. 8, 2008 Order at 5. Fourth, the plan for distributing the settlement amount is reasonable and fair. The amount of Plaintiff's attorneys' fees and costs is fair, as discussed below in detail in connection with Plaintiff's Motion for Attorneys' Fees. Further, the other aspects of the settlement distribution are fair.

\*9 Under the California Private Attorneys General Act of 2004 ("PAGA"), *California Labor Code § 2698, et seq.*, the Labor Workforce and Development Agency ("LWDA") is entitled to 75% of any settlement of civil penalties awardable under the Labor Code. *See Cal. Labor Code. § 2699(i)* ("Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees."). The parties state that in this case, the crux of Plaintiff's complaint was the failure to pay overtime, and the parties' settlement did not allocate sums among the categories of non-civil penalties and instead negotiated a good faith amount of \$1,500 for LWDA. This is a reasonable amount, and there is no indication that this amount was the result of self-interest at the expense of other Class Members.

With respect to the costs of administration, the amount sought on behalf of Rust, \$11,807.00, or 3% of the total settlement amount, is reasonable. Ms. Donly explains in detail the activities conducted by Rust, and Rust appears to have done a thorough job to date in administering this settlement.

The parties propose that if the residual settlement amount (the amount of settlement checks not cashed after 120 days) is more than \$15,000, then that amount will be distributed to all claimants on a pro rata basis according to the value of their settlement shares. If the amount is less than \$15,000, the settlement administration fees that would be incurred in a second distribution to the claimants would exceed the amount redistributed. *See Joint Supp. Brief in Support of*



Joint Mot. for Prel. Approval of Class Action Settlement at IV. Therefore, if the amount is less than \$15,000, the parties propose dividing the amount equally between the United Way of Forsyth County, North Carolina, and the Marin County Family and Children's Law Center in San Rafael, California. *See* Nergaard Decl. Ex. 1. While the law generally favors distributing unclaimed funds for a purpose as near as possible to the legitimate objectives underlying the lawsuit, a direct nexus between the injured plaintiffs and the *cy pres* recipients is neither always feasible nor required. *Compare In re Airline Ticket Commission Antitrust Litigation*, 307 F.3d 679, 680 (8th Cir.2002) (holding that the trial court had abused its discretion with respect to *cy pres* distribution because there was no nexus between the injured class and the local organizations receiving unclaimed funds) (citing *Powell v. Georgia-Pacific Corporation*, 119 F.3d 703, 706–07 (8th Cir.1997) (approving the district court's order that nearly \$1 million in remainder settlement funds be distributed as scholarships to African American high school students because the scholarship program carried out the plaintiffs' desire and addressed the subject matter of the lawsuit: employment opportunities available to African Americans in the region), with *Superior Beverage Co. v. Owens-Ill., Inc.* 827 F.Supp. 477, 479 (N.D.Ill.1993) (holding that unclaimed funds remaining after settlement of an antitrust case may be distributed to other public interests not closely related to the origins of the case).

**\*10** Here, Defendants chose the United Way in Forsyth County because Defendants are headquartered in Forsyth County and have worked with that United Way for ten years. *See* Declaration of Christopher Fox ¶¶ 2–3. Defendants and their employees have donated approximately \$2 million per year to that organization. *See id.* ¶ 3. The Family and Children's Law Center represents low—and middle-income clients, primarily women, with family law cases in Marin County courts. Plaintiff chose the Family and Children's Law Center because she filed this lawsuit in Marin County and she was employed by Hanesbrand in Marin County, and because most of the Class Members are women. Although the nexus between the charities and the injured Class is somewhat attenuated, the Court recognizes that the amounts that may be distributed would be so small that expending any further effort over this contingency (which may not materialize) could lead to incurring a disproportionate amount of attorneys' fees, without yielding any benefit to the Class, and the parties have shown at least some connection between the Class Members and the charities. Therefore, the Court concludes that the

proposal for this very modest potential *cy pres* distribution is fair.

Named plaintiffs are entitled to reasonable incentive payments, but the court must evaluate the award individually to detect excessive payments reached through collusion. *Staton*, 327 F.3d at 952. To assess whether an incentive payment is excessive, district courts balance “the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment.” *Staton*, 327 F.3d at 977. In general, courts have found that \$5,000 incentive payments are reasonable. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir., 2000) (approving incentive award of \$5,000 to two plaintiff representatives of 5,400 potential class members in \$1.75 million settlement, but constituting only 0.56% of the settlement); *In re SmithKline Beckman Corp.*, 751 F.Supp. 525, 535 (E.D.Pa.1990) (approving incentive payments of \$5,000 for one named representative of each of nine plaintiff classes involving more than 22,000 claimants and a settlement of \$22 million, constituting 0.18% of the settlement amount); *Alberto v. GMRI, Inc.*, 2008 WL 2561106, 11–13 (E.D.Cal. June 24, 2008) (requiring the parties to present evidence showing the named plaintiff's substantial efforts taken as class representative to justify the discrepancy between her \$5,000 award, constituting 0.71% of the settlement, and the \$24.17 that each class member was expected to receive). Here, only one named Plaintiff is to receive an incentive award of \$5,000, which is approximately 1.25 percent of the settlement amount, while the estimated payout to Class Members is an average of \$1,568.44. While this payment represents a higher percentage than other cases approving \$5,000, Plaintiff argues persuasively that the incentive award is justified. She provided documents from her employment that were instrumental in counsel's understanding of this case, provided contact information for potential Class Members, contacted employees about this case, responded to telephone inquiries from counsel, responded to multiple requests for information, reviewed many documents produced by Defendants, authenticated documents, and was a general source of valuable information which assisted the parties in reaching a settlement of this action. *See* Hopson Decl. ¶ 4. Thus, this payment is not excessive under the circumstances of this case.

**\*11** Fifth, the last *Hanlon* factor, the reaction of Class Members, is now known. There were no objections to the settlement from Class Members. *See* Donly Decl. ¶ 18. Accordingly, the Court concludes that the Settlement

Agreement is fair and grants the Joint Motion for Final Approval of Class Action Settlement.

#### 4. Plaintiff's Motion for Attorneys' Fees

Counsel seeks \$102,105.08 in fees, which counsel argues represents 25% of the Settlement Amount, and \$7,658.86 in costs, which represents approximately 2% of the Settlement Amount. As contemplated in the Settlement Agreement, there is no opposition to Plaintiff's Motion for Attorneys' Fees.

There are two separate methods for determining attorneys' fees: (1) common fund doctrine; and (2) lodestar calculation. As stated in *Hanlon*:

In "common-fund" cases where the settlement or award creates a large fund for distribution to the class, the district court has discretion to use either a percentage or lodestar method. *Id.* at 1295. The percentage method means that the court simply awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee. *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir.1989). This circuit has established 25% of the common fund as a benchmark award for attorney fees. *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990)....

In employment, civil rights and other injunctive relief class actions, courts often use a lodestar calculation because there is no way to gauge the net value of the settlement or any percentage thereof. The lodestar calculation begins with the multiplication of the number of hours reasonably expended by a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The hours expended and the rate should be supported by adequate documentation and other evidence; thus, attorneys working on cases where a lodestar may be employed should keep records and time sheets documenting their work and time spent. The resulting figure may be adjusted upward or downward to account for several factors including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975).

*Hanlon*, 150 F.3d at 1029. The common fund doctrine applies only if: "(1) the class of beneficiaries is sufficiently identifiable; (2) the benefits can be accurately traced; and (3) the fee can be shifted with some exactitude to those benefitting." *Paul, Johnson, Alston & Hunt v. Gaulty*, 886

F.2d 268, 271 (9th Cir.1989) (quoting *In re Hill*, 775 F.2d 1037, 1040 (9th Cir.1985)); see also *Staton*, 327 F.3d at 973. These criteria are met where "each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum [settlement] recovered on his behalf." *Paul, Johnson*, 886 F.2d at 271 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 749, 62 L.Ed.2d 676 (1980)); *Staton*, 327 F.3d at 973; see also, e.g., *Blum v. Stenson*, 465 U.S. 886, 900, n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (noting that percentage of the fund is appropriate method to award attorney's fees in common fund cases); *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir.1990) ("Despite the recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases, however, we require only that fee awards in common fund cases be reasonable under the circumstances. Accordingly, either the lodestar or the percentage-of-the-fund approach "may, depending upon the circumstances, have its place in determining what would be reasonable compensation for creating a common fund.") (internal citation omitted). The appropriate measure of the fee amount is against the potential amount available to the class, not a lesser amount reflecting the amount actually claimed by the members. See *Van Gemert*, 444 U.S. at 477–82; *Williams v. MGM–Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir.1997). Here, the three *Paul, Johnson* factors are met: (1) the Class is identified; (2) the benefits can be accurately traced because they are monetary payments directly to Class Members; (3) and the fee can be shifted with exactitude because counsel is claiming a specific percentage of the fund.

\*12 Although a benchmark of 25% of the common fund generally applies to awards of attorneys' fees in common fund cases (*Hanlon*, 150 F.3d at 1029), the Ninth Circuit has also stated that "the 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases. Selection of the benchmark or any other rate must be supported by findings that take into account all the circumstances of the case." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.2002); see also *Alberto v. GMRI, Inc.*, 2008 WL 2561106, 11–13 (E.D.Cal. June 24, 2008) (finding that counsel had not provided sufficient information to justify an award of fees constituting 25% of the expected recovery and determining that the percentage of the fund method to calculate fees was not appropriate, instead looking to the lodestar method, requiring counsel to file a declaration thoroughly explaining the fees). Further, as stated above, the Ninth Circuit has also explained that when parties negotiate a common fund settlement of a case brought under a fee-



shifting statute, the value of the common fund will “ordinarily include an amount representing an estimated hypothetical award of statutory fees.” *Staton*, 327 F.3d at 972.

In this case, the 25% benchmark relied on by the parties did not take into account an estimated hypothetical attorneys' fees award as contemplated by *Staton*. Therefore, the amount of attorneys' fees does not necessarily represent a true 25% of the common fund. Under the alternative lodestar approach, however, the amount of attorneys' fees sought is reasonable. See *Staton*, 327 F.3d at 967. As noted at the hearing, class counsel did not initially provide the Court with sufficient information to determine the lodestar amount, because it did not set forth the billing rates expended by each of the attorney who worked on the case. After the March 10, 2009 hearing, however, counsel provided a supplemental declaration attesting to the hourly rates of other timekeepers in this case. See Declaration of J.E.B. Pickett in Support of Joint Mot. for Final Approval of Class Action Settlement at ¶ 3; Ex. A. Specifically, Mr. Wynne spent 64.40 hours on this case at an hourly rate of \$675.00 for a lodestar calculation of \$43,470.00. *Id.* at Ex. A. Mr. Pickett's hourly rate is \$525.00 for a lodestar calculation of \$53,445.00 and Ms. Phillips's hourly rate is \$135.00<sup>1</sup> for a lodestar calculation of \$2,693.25. *Id.* The hourly rates and hours expended are reasonable, resulting in a total lodestar of \$99,608.25. *Id.* Therefore, only \$2,496.83, or a multiplier of 1.02, separates the lodestar amount from the amount sought under the common fund doctrine. “In common fund cases ... the court can apply a risk multiplier when using the lodestar approach.... A ‘multiplier’ is a number, such as 1.5 or 2, by which the base lodestar figure is multiplied in order to increase (or decrease) the award of attorneys' fees on the basis of such factors as the risk involved and the length of the proceedings.” *Staton*, 327 F.3d at 968.

\*13 This very modest multiplier is warranted. *Vizcaino*, 290 F.3d at 1051, n. 6 (Appendix listing range of multipliers, from 0.6–19.6 with most from 1.0–4.0 and a bare majority in the 1.5–3.0 range) (citing *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3rd Cir.1998) (“ ‘[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.’ ” (quoting 3 Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, § 14.03 at 14–5 (3d ed.1992))). This litigation has spanned almost two years in state and federal courts. The parties engaged in informal discovery and mediation. Victory for the Plaintiffs was not guaranteed, and they faced legal hurdles to prevailing. All

Class Members have been given notice of the attorneys' fees in this case and none have objected. See Nergaard Decl. Ex. A (Notice of Settlement); Donly Decl. ¶ 18.

The cost award of \$7,658.86 is also reasonable. See *Vincent v. Brand*, 557 F.2d 759, 769 (9th Cir.1977) (“The common fund doctrine provides that a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees.”); *In re Media Vision Tech. Sec. Litig.*, 913 F.Supp. 1362, 1368 (N.D.Cal.1996) (award of costs subject to reasonableness test). Here, the costs consist of the filing fee, Westlaw charges, Pacer charges, courier charges, mediation costs, travel costs, class investigation costs, and transcript fees (see Wynne Decl. ¶ 10), all of which are reasonable.

### Conclusion

The Joint Motion for Final Approval of the Class Action Settlement is granted. In addition, Plaintiff's Motion for Attorneys' Fees is granted in the amount of \$102,105.08 in fees and \$7,658.86 in costs.

The Court retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation and enforcement of this Order and the Settlement. Upon completion of administration of the Settlement, the Settlement Administrator will provide written certification of such completion to the Court and counsel for the parties. Pursuant to the Settlement, all participating Class Members are permanently barred from prosecuting against Defendants, and their parents, subsidiaries, affiliates, and trusts, and all of their employees, officers, agents, attorneys, stockholders, fiduciaries, other service providers, successors, and assigns, and their parents, subsidiaries, affiliates, and trusts, and all of their employees, any individual or class claims that were released as set forth in the Settlement.

This action is hereby ordered dismissed with prejudice, each side to bear its own costs and attorneys' fees except as provided by the Settlement.

### IT IS SO ORDERED.

### All Citations

Not Reported in F.Supp.2d, 2009 WL 928133

Footnotes

- 1 The declaration of J.E.B. Pickett appears to have a typographical error in paragraph 3, which lists Ms. Phillips hourly rate as \$115.00. According to the billing records attached as Exhibit A to the Pickett declaration, Mr. Phillips's hourly rate is \$135.00. The Court relied on the billing records in calculating the lodestar.

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# **EXHIBIT 14**



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Vu v. I Care Credit, LLC](#), C.D.Cal., November 4, 2022  
2005 WL 1594403

Only the Westlaw citation is currently available.  
United States District Court,  
C.D. California.

## In re HERITAGE BOND LITIGATION

No. 02–ML–1475 DT, CV 01–5752 DT  
(RCX), CV 02–382 DT(RCX), CV 02–993  
DT(RCX), CV 02–2745 DT(RCX), CV 02–  
6484 DT(RCX), CV 02–6841 DT(RCX), CV  
02–9221 DT(RCX), CV 02–6512 DT(RCX).

|  
June 10, 2005.

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### AMENDED ORDER AND OPINION

[TEVRIZIAN](#), J.

### ORDER AND OPINION GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

### ORDER AND OPINION GRANTING IN PART PLAINTIFFS' MOTION FOR AN AWARD OF COSTS AND EXPENSES TO NAMED PLAINTIFFS

### ORDER AND OPINION GRANTING LEAD PLAINTIFFS' APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

### ORDER AND OPINION DENYING APPLICATION BY MILLER, MILOVE & KOB FOR AWARD OF FEES, COSTS AND EXPENSES AS REQUESTED

### I. BACKGROUND

#### A. Factual Summary

**\*1** Because the parties are generally familiar with the factual  
and procedural history of this case, the Court does not recount  
them here in full except as necessary to explain its decision  
in response to the issues raised herein. This action arose as  
a result of eleven different bond offerings that were issued  
between December 1996 and March 1999. Each bond offering  
was issued to the public pursuant to an official statement  
specific to that offering. The money raised in the offerings  
was to be used to acquire, renovate, and operate hospitals  
designed to assist the elderly, particularly those chronically ill  
and suffering from [Alzheimer's disease](#). However, due to the  
alleged wrongdoing of numerous parties, the hospitals went  
into bankruptcy or receivership within five years after the first  
bond offering, rendering the bonds worthless.

This class action began over three years ago when plaintiff  
Gilbert Kivenson filed a complaint in the Superior Court

of the state of California for the county of Los Angeles on November 30, 2001. After Kivenson's action was removed to federal court, two other class action complaints were filed, one in Los Angeles Superior Court and one in the United States District Court for the Central District of California.<sup>1</sup> The second state action was subsequently removed to federal court. Then, a fourth action was filed. Ultimately, the actions were consolidated and, on January 13, 2003, this Court appointed lead plaintiffs and lead counsel. Thereafter, on February 3, 2003, plaintiffs filed their Third Amended Consolidated Class Action Complaint, which stated claims against over forty defendants under various theories of federal and state law (all defendants collectively known as "Defendants"). After this Court ruled on seventeen motions to dismiss, the plaintiffs filed their Fourth Amended Consolidated Complaint on September 17, 2003.

As the litigation continued, it was marked by constant and varied motion practice. For example, in December 2003, Kasirer defendants filed a motion to stay action pending resolution of a criminal investigation, which was denied. On July 12, 2004, upon motion by Plaintiffs, the Court certified the class, Plaintiffs also filed motions for summary judgment, obtaining a \$28 million judgment against Virgil Lim.<sup>2</sup> On December 6, 2004, the Court granted Class Plaintiffs' Motion for Leave to Amend Fourth Amended Complaint And to File A Fifth Amended Complaint. Some settlements were then reached

Shortly after this Court permitted the plaintiffs to file their Fifth Amended Consolidated Complaint on December 6, 2004, and a week before the expert reports were due, settlements were reached with the remaining defendants. The parties then entered into a full and final global settlement, requiring this Court's approval.

Presently before the Court are the following four motions: (1) Plaintiffs' unopposed Motion for Final Approval of Class Action Settlement;<sup>3</sup> (2) Plaintiffs' Motion for An Award of Costs and Expenses to Named Plaintiffs; (3) Lead Plaintiffs' Application for an Award of Attorneys' Fees and Reimbursement of Expenses; and (4) Motion and Application by Milove & Kob for Award of Fees, Costs and Expenses.

#### B. Procedural History

\*2 On May 10, 2005, Plaintiffs filed a Motion for Final Approval of Class Action Settlement, which is before the Court.

On this same date, Plaintiffs filed a Motion for An Award of Costs and Expenses to Named Plaintiffs, which is presently before the Court

Also on May 10, 2005, Lead Plaintiffs filed an Application for an Award of Attorneys' Fees and Reimbursement of Expenses, which is also before the Court.

On the same day, Miller Milove & Kob filed an Application for Award of Fees, Costs and Expenses, which is before the Court.

## II. DISCUSSION

### A. Standards

#### I. Final Approval of Settlement And Determination of Good Faith

[Federal Rule of Civil Procedure 23\(e\)\(1\)\(A\)](#) provides: "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." [Fed.R.Civ.P. 23\(e\)\(1\)\(A\)](#). In deciding whether to approve a proposed settlement, the Ninth Circuit has a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." [Class Plaintiffs v. Seattle](#), 955 F.2d 1268, 1276 (9th Cir.1992) (quoting [Linny v. Cellular Alaska P'ship](#), 151 F.3d 1234, 1238 (9th Cir.1998)). "There is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." [Van Bronkhorst v. Safeco Corp.](#), 529 F.2d 943, 950 (9th Cir.1976). Settlement spares the parties the costs of protracted litigation and eases the congestion of judicial calendars. *See id.* at 943. Consequently, in making its assessment pursuant to [Rule 23\(e\)](#), the Court's:

intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

[Officers for Justice v. Civil Serv. Comm'n, etc.](#), 688 F.2d 615, 625 (9th Cir.1982); *see also* [Hanlon v. Chrysler Corp.](#), 150 F.3d 1011, 1027 (9th Cir.1998).

Therefore, "[a] settlement should be approved if it is fundamentally fair, adequate and reasonable." [Torrisi v.](#)

*Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.1993) (citation omitted). This ultimate decision is in the “sound discretion of the district courts [which] appraise[s] the reasonableness of particular class-action settlements on a case-by-case basis.” *Evans v. Jeff D.*, 475 U.S. 717, 742, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986). However, a settlement hearing is “not to be turned into a trial or rehearsal for trial on the merits,” nor should the proposed settlement “be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.” *Officers for Justice v. Civil Serv. Comm’n, etc.*, 688 F.2d 615, 625 (9th Cir.1982). To the contrary, a presumption of fairness arises where: (1) counsel is experienced in similar litigation; (2) settlement was reached through arm’s length negotiations; (3) investigation and discovery are sufficient to allow counsel and the court to act intelligently. *Linney v. Alaska Cellular P’ship*, 1997 WL 450064, at \*5 (N.D.Cal. July 18, 1997) (“The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm’s length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair.”), *aff’d*, 151 F.3d 1234 (9th Cir.1998); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D.Cal.1980), *aff’d*, 661 F.2d 939 (9th Cir.1981).

\*3 To determine whether a proposed settlement is fair, adequate and reasonable, a court may consider “some or all” of the following factors: (1) the strength of plaintiffs’ case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.” *Officers for Justice v. Civil Serv. Comm’n, etc.*, 688 F.2d 615, 625 (9th Cir.1982); *Linney*, 151 F.3d at 1242; *Torrissi*, 8 F.3d at 1375. “This list is not exclusive and different factors may predominate in different factual contexts.” *Torrissi*, 8 F.3d 1376 (citation omitted). One factor alone may prove determinative. *See id.* However, “the settlement may not be the product of collusion among the negotiating parties.” *In re Mego Fin., Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir.2000) (citations omitted).

Additionally, where the settlement involves the resolution of state law claims, the district court will apply the following criteria set forth by the California Supreme Court for determining whether a particular settlement is made in good

faith: “a rough approximation of plaintiffs’ total recovery, the settlor’s proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial.” *Tech-Bilt, Inc. v. Woodward-Cyde & Assoc.*, 38 Cal.3d 488, 499, 213 Cal.Rptr. 256, 698 P.2d 159 (1985) (citations omitted). The California Civil Procedure Section 877.6 is known as a settlement bar statute. As provided in subsection (d) of Section 877.6, any party challenging the good faith of the proposed settlement bears the burden of proving the settlement was entered into in bad faith.

## 2. Awarding Named Plaintiffs Costs And Expenses In A Securities Action

The Private Securities Litigation Reform Act (“PSLRA”) provides in pertinent part that, although class representatives must share the recovery in the same proportion as all other members of the class, “[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class.” 15 U.S.C. § 78u-4(a)(4). Congress acknowledges that class representatives should be reimbursed. H.R. Conf. Rep. No. 369, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1995) (“The Conference Committee recognized that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the courts discretion to award fees accordingly.”).

\*4 The reasoning behind permitting lead plaintiffs’ reimbursement for service rendered was made clear in the congressional record: “There provisions are intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiffs’ counsel. H.R. Conf. Rep. No. 369, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 32 (1995). Accordingly, with Congress’ approval, and the discretion given to them by the PSLRA, courts have availed themselves of the power to grant remuneration to class representatives. *See In re Xcel Energy, Inc., Sec., Derivative & “Erisa” Litig.*, 2005 WL 840370 (D.Minn. April 8, 2005) (awarding \$100,000.00 collectively to lead plaintiff group to be distributed among eight lead plaintiffs, who communicated with counsel throughout litigation, reviewed submissions, indicated a willingness to appear at trial, kept informed of settlement negotiations, and effectuated the



policies underlying the federal securities laws) (citing *In re Dunn & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366 (S.D.Ohio 1990) (awarding two class representatives \$55,000.00 each and three class representatives \$35,000.000 each)); *In re Infospace, Inc. Sec. Litig.*, 330 F.Supp.2d 1203, 1216 (W.D.Wash.2004) (awarding \$5,000.00 to one lead plaintiff and \$6,600 to another as reimbursement for the costs and expenses they incurred as lead plaintiffs). These awards are generally in keeping with the public policy concerns cited in class actions. See *Denney v. Jenkins & Gilchrist*, 2005 WL 388562 (S.D.N.Y. Feb.18, 2005) (finding a “reasonable” fee to lead plaintiffs of \$10,000.00 each, estimated to equal no more than 15% of the likely average recovery per class member for having taken seriously their role in arriving at a settlement that would be in the best interest of the entire class).

### 3. Attorneys' Fees

Generally, every litigant is required to bear his own attorney's fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257–58, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). However, the United States Supreme Court has consistently recognized that an attorney who recovers a common fund may receive attorney's fee from the fund as a whole. *Boeing Co. v. Van Gemert et al.*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); see also *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir.1977) (holding that “a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees[ ]”); *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 271 (9th Cir.1989) (explaining the equitable principal underlying granting attorney fees in common fund cases: “Since the Supreme Court's 1885 decision in *Central Railroad & Banking Co. of Ga. v. Pettus*, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885), it is well settled that the lawyer who creates a common fund is allowed an *extra* reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit. The amount of such a reward is that which is deemed “reasonable” under the circumstances.”) (emphasis in original). This exception is justified because “persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.” *Van Gemert*, 444 U.S. at 478; see *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *In re Wash., Pub. Power and Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir.1994) (“WPPSS”) (stating that the purpose of the “common fund” doctrine is to avoid unjust enrichment by allowing “those who benefit from the creation

of the fund [to] share the wealth with the lawyers whose skill and effort helped create it”). By maintaining jurisdiction over the common fund, the court can assess attorney's fees against the entire award, ensuring that the fees are evenly distributed among those benefitted by the suit. *Id.*

\*5 Fee shifting is appropriate in common-fund cases because the benefitting class is readily identifiable, the benefits are easily traceable, and the costs can be confidently shifted on those who benefit. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 265. Though these criteria are not present where a litigant vindicates a general social grievance, they are satisfied “when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf.” *Boeing Co.*, 444 U.S. 472 at 479, 100 S.Ct. 745, 62 L.Ed.2d 676.

Reasonable fees under the common-fund doctrine may be calculated either through the lodestar method or as a percentage of the recovery. *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (1990). The circumstances of the case dictate the method adopted by the court. *Id.*

Lodestar calculations are determined by multiplying the number of hours reasonably expended during the litigation by a reasonable hourly rate. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (1998). Typically, this method is applied with injunctive relief class actions because the determination of the settlement's net value is too difficult. *Id.*

When applying the percentage method, courts award the attorneys a percentage from the fund as a whole. *Id.* This amount provides class counsel with a reasonable fee. *Id.* The Ninth Circuit has established twenty-five percent of the fund as the “benchmark” award that should be granted in common fund cases. *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir.1989). The percentage may be adjusted upward or downward by applying the lodestar method on account of “unusual circumstances” found within the case. *Id.*

### A. Analysis

#### 1. Motion for Final Approval of Settlement And Determination of Good Faith

After three years of litigation, and with the active assistance of this Court, the parties have arrived at a full and final settlement (the “Settlement”). This Settlement follows significant discovery, careful investigation into the merits

of this action, extensive consultation with experts and third parties, substantive rulings by this Court, and considerable negotiation and mediation. Through this process, the parties maintain that they were able to make a competent and informed decision regarding the benefits and burdens of continued litigation versus negotiated settlement. For the reasons discussed below, the Court approves the parties' Settlement, as it is fair, adequate and made in good faith.

*a. The Settlement Is Fair and Adequate Under Rule 23(e)*

*1. The Settlement was the result of arms-length, informed, and court-assisted negotiations*

The settlements reached in this action are the result of extensive arms-length negotiations and formal meditations by competent counsel experienced in securities law and state causes of action. The parties and their respective counsel have devoted a considerable amount of time, effort and resources to secure the current Settlement. The first group of defendants did not settle this action until March 2004, over two years after the litigation commenced, and over one year into the discovery process. The last major defendants to settle, the CBIZ defendants,<sup>4</sup> did so in January 2005, more than three years into the litigation. After the CBIZ settlement was reached, the remaining individual defendants agreed to settle the action and the settlement became global.

\*6 In addition, the settlements were achieved after active litigation. For instance, only after plaintiffs moved for class certification did U.S. Trust, who opposed the class certification, settle. Similarly, the CBIZ defendants, who also opposed class certification, settled only after this Court certified the class. The Kasirer defendants sought to stay this action in December 2003, pending the outcome of related criminal investigations. Settlement with Kasirer defendants occurred only after the Court refused to stay the action against them, and after the two day deposition of Debra Kasirer. Moreover, settlement with defendants Stephen Goodman and Geri Ostlund occurred only after motions for summary judgment were filed against those defendants.

The Court finds no evidence to suggest that the settlements reached were the product of fraud or collusion, but of fair dealing among the parties. The length of time necessary to achieve the settlements and the active litigation of this case evidences that the settlements were reached in good faith. As the parties represented, and this Court acknowledged, "Throughout the settlement process, Class Plaintiffs proceeded slowly, and with careful consideration of

the class in rejecting several of Defendants' settlement offers and counteroffers, notwithstanding the fact that amount of such offers were not insubstantial." Court Order Granting Settling Defendants' Joint Motion for Approval of the Stipulation and Amending Stipulation of Settlement ("Order Granting Stipulation of Settlement"), at 7:14-17 (C.D.Cal. Jan. 31, 2005).

Furthermore, certain settlements were reached through settlement conferences conducted by this Court, giving the Court firsthand knowledge of the good-faith nature of the negotiations. The mediation process was also supervised by four different mediators including Ret. Justice Elwood Lui, providing further indicia of the absence of collusion or fraud.

*2. The strength of Plaintiffs' case and the risk, expense, complexity and likely duration of further litigation favor approval of the Settlement*

" 'In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.' " *Nat'l Rural Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D.Cal.2004) (quoting 4 A. Conte & H. Newberg, *Newberg on Class Actions*, § 11:50 at 155 (4th ed.2002)). This is especially true of class actions, and particularly for securities class actions because of their typical complexity. *Maley v. Del Global Tech. Corp.*, 186 F.Supp.2d 358, 364 (S.D.N.Y.2002); *In re Sumitomo Cooper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y.1999) ("class action suits in general have a well-deserved reputation as being most complex ....") (quotation omitted).

This action involved eleven different bond offerings that took place over the course of several years. Each offering had its own financial statement and facts and circumstances that were unique to it. The parties do not dispute that Plaintiffs' case has been, and would continue to be, exceptionally complex and risky to prosecute if litigation ensued. Plaintiffs brought this action against dozens of defendants under varied theories of liability of federal and state statutory law, including tort law, contract law, and theories of secondary liability and control person liability. Moreover, the wrongdoing alleged included both intentional wrongdoing and negligence.

\*7 The complexity of this action would likely increase as it moved forward. According to Plaintiffs, they have reviewed approximately 1.1. million pages of documents produced by various defendants and have taken thirty-four depositions totaling forty deposition days. (Declaration of

Brian Barry (“Barry Decl.”), at ¶ 6). As summary judgment and trial approach, the relevant evidence would need to be extracted, sifted through, understood, processed, synthesized and ultimately presented to the Court and the jury in a reasonably cogent manner. Plaintiffs submit, and this Court agrees, that such a task would most likely increase the complexity of this action considerably.

Furthermore, the Court notes that several stages of litigation were not completed. For instance, expert discovery had not been finished. Moreover, given the large number of defendants, there is a likely chance that this case would go to trial, requiring pre-trial and post-trial motion practice. Furthermore, the fact that appellate practice would likely follow after completion of proceedings in this Court further militates in favor of final approval of this global settlement. See *Nat’l Rural*, 221 F.R.D. at 527.

Also favoring approval of the Settlement is the knowledge that, while Plaintiffs are confident of the strength of their case, it is imprudent to presume ultimate success at trial and thereafter. “It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced.” *State of West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710, 743–44 (S.D.N.Y.1970), *aff’d* 440 F.2d 1079 (2d Cir.), *cert. denied*, *Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971); see also *In re Sumitomo Cooper Litig.*, 189 F.R.D. at 282 (discussing several instances where settlement was rejected by a court only to have the plaintiff’s ultimate recovery be less than the proposed settlement).<sup>5</sup>

In the present matter, it is undisputed that all the settling defendants have explicitly denied wrongdoing and liability, and that all defendants have credible defenses to plaintiffs’ claims. In addition, as to the majority of the settling defendants, the Court has not made any findings with respect to whether they were engaged in wrongful conduct or violated any law, regulation or duty. Therefore, continued litigation appears highly contentious, as both sides—Plaintiffs and Defendant—are diametrically opposed with respect to liability, and each party, especially plaintiffs, are subjected to significant obstacles, in that Plaintiffs bear the heavy burden of proving their case.

Settlement of this case has distinct advantages over the speculative nature of litigating this case to a verdict. As the court in *Strougo v. Bassini*, 258 F.Supp.2d 254, 260–61 (S.D.N.Y.2003) noted:

Even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation and trial, the passage of time would introduce yet more risks in terms of appeals and possible changes in the law and would in light of the time value of money, make future recoveries less valuable than this current recovery.

\*8 *Strougo*, 258 F.Supp.2d at 260–61 (citing, among other cases, *In re Agent Orange Prod. Liab. Litig.*, 611 F.Supp. 1396, 1405 (E.D.N.Y.1985) (“[M]uch of the value of a settlement lies in the ability to make funds available promptly.”))

As discussed above, despite the perceived strength of Plaintiffs’ case, further litigation would likely be protracted and complex, and pose great risk to Plaintiffs’ possible recovery. These factors weigh heavily in favor of approving the Settlement.

### 3. The amount of the Settlement favors approval of the Settlement

The Settlement in this action requires the establishment of a fund with a total of \$27,783,000.00, plus accumulated interest (“Settlement Fund”). The Settlement Fund is entirely comprised on cash, and is subject to potential increases depending upon the outcome of the M & S defendants’<sup>6</sup> actions against their insurers, and the outcome of the appeal in the Heritage insurance coverage action. The Settlement fund comprises approximately 36% of the class’ net loss<sup>7</sup> of \$78 million, which is established as the likely total amount that class members paid for the Heritage bonds less amounts received upon the sale of the Heritage bonds or distribution payments made on the bonds subsequent to their default. Although this Settlement results in Plaintiffs arguably receiving only a portion of the potential recovery, “[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.” See *Officers for Justice*, 688 F.2d at 628 (citations omitted).

The Settlement was achieved despite substantial resistance from the Defendants’ insurers. For example, the insurers for M & S and CBIZ defendants denied coverage causing both those defendants to initiate lawsuits against their insurers. Similarly, the insurers for the Heritage officers and directors completely denied coverage, which prompted the filing of the state action plaintiffs are currently litigating. The insurers of the Kasirer defendants filed an action seeking declaratory

relief voiding their respective policies, and did not provide any insurance coverage for defendants Robert Kasirer and Debra Kasirer. Moreover, the insurers for the various Boehm defendants<sup>8</sup> threatened to file an action seeking declaratory relief. These are only a few of the hurdles that the parties effectively overcame to arrive at the Settlement.

Given the difficulty of bringing this Settlement to fruition, the diligent efforts of counsel, and relevant case law, the Court finds that the amount of settlement is fair, adequate and reasonable.

4. *The large amount of discovery conducted and the advanced stage of this case favor approval of the Settlement*  
 “ ‘The extent of discovery may be relevant in determining the adequacy of the parties' knowledge of the case.’ ” *Nat'l Rural*, 221 F.R.D. 527 (quoting *Manual for Complex Litigation*, (Third) § 30.42 (1995)). “ ‘A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.’ ” *Id.* (quoting 5 Moore's Federal Practice, § 23.85[2] [e] (Matthew Bender 3d ed.)).

\*9 As indicated above, this litigation has involved extensive motion practice as well as substantial formal and informal discovery. Plaintiffs assert that they have reviewed 1.1 million documents and produced several thousand documents to the Defendants'. Plaintiffs took thirty-four depositions, which includes all of the representative plaintiffs, and reviewed twenty-one deposition transcripts taken by the Securities and Exchange Commission. Merits discovery in this action was completed by September 2004, before all the parties had settled, and at the time the first settlement was reached, Plaintiffs had been litigating this action for over two years. When the final settlement was reached, Plaintiff assert that they had fully prepared their expert reports, as the deadline for exchanging such reports was one week away. It is sensible to believe that Plaintiffs and the various defendants had a reasonable understanding of both the strengths and weaknesses of their respective cases, as well as a rational idea of the potential amounts of recoverable damages.

This factor strongly favors approving the Settlement.

5. *Experienced counsel's involvement in this action weights in favor of approving the Settlement*

“ ‘Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.’ ” *Nat'l Rural*, 221 F.R.D. at 528 (quoting *In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.1997)). A presumption of correctness is said to “attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery.” *Manual for Complex Litigation* (Third) § 30.42 (1995); see also *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 671 F.Supp. 819, 822 (D.Mass.1987) (“Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair.”); *In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig. v. Baumer*, 1989 WL 73211 at \*1, \*2 (C.D.Cal. June 12, 1989) (“The recommendation of experienced counsel carries significant weight in the court's determination of the reasonableness of the settlement.”). “Thus, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.” *Nat'l Rural*, 221 F.R.D. at 528 (citations omitted).

In the present case, this Court has already determined that the parties are experienced by capable counsel. Order Granting Stipulation of Settlement at 7:17–19 (“[T]here is no dispute that the settlement reflects the determination of competent counsel experienced in securities and class action litigation.”). There is no need to recount the Court's findings here.

This factor weighs in favor of finding the Settlement fair, adequate and made in good faith.

6. *Lack of objection to the Settlement favors approval*

\*10 “It is established that the absence of a large number of objectors to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.” *Nat'l Rural*, 221 F.R.D. at 529.

In the present case, the Court approved a “Notice” that was sent to thousands of possible class members and published nationally in the USA Today and Investors Business Daily newspapers. The Notice set forth the nature of the case, the terms of the proposed settlement, apprised class members of their ability to object to the settlement and the procedure to do so. The Notice further informed class members of their ability to opt-out of the class and individually pursue their own claims. To date, the Court has not been notified of one



objection to the Settlement,<sup>9</sup> and only one person opted-out of the class. The Court finds the lack of class members that have manifested any disapproval of the Settlement further demonstrates the fairness, adequacy and reasonableness of the Settlement.

This factor weighs in favor of approving the Settlement.

*7. The risk that class certification could not be maintained throughout litigation does not prevent approval of Settlement*

On July 12, 2004, this Court granted Plaintiffs' motion for class certification in this action. *In re Heritage Bond Litig.*, 2004 WL 1638201 (C.D.Cal. July 12, 2004). However, under Rule 23, the Court may revisit its prior grant of certification at any time before final judgment. Fed.R.Civ.P. 23(c)(1)© (“An order under Rule 23©)(1) may be altered or amended before final judgment.”). Thus, it is conceivable that the class could be decertified or modified if the litigation were to continue. See Fed.R.Civ.P. 23(d) (“In the conduct of actions to which this rule applies, the court may make appropriate orders ... (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly.”); see also *Armstrong v. Davis*, 275 F.3d 849, 872 n. 28 (9th Cir.2001). Given the complexity of this class action litigation, problems could arise which may justify decertification. As such, the Court acknowledges that some risk exists with respect to Plaintiffs not being able to maintain class action status throughout trial. However, the Court notes that to date, no defendant sought to decertify the class or has raised any concern as to maintenance of this action as a class action. Moreover, this Court views the possible risk of decertification does not prevent the Court from granting final approval to the Settlement. It is within the Court's discretion what weight, if any, is to be given to the nonexclusive factors used to determine whether final approval of a settlement should be granted. See *Linney*, 151 F.3d at 1242.

In exercising this Court's discretion, and based on the absence of any quantifiable threat or indication of decertification, the Court finds that this factor weighs in favor of approving the settlement

*8. The presence of a government participant*

\*11 Although, as Plaintiffs state, federal prosecutors and the SEC conducted investigations of the Heritage scheme, there

is no government participant in this class action. As a result, this factor does not apply to the Court's analysis.

*a. The plan of allocation is fair and adequate*

Approval of a settlement, including a plan of allocation, rests in the sound discretion of the court. *Class Plaintiffs*, 955 F.2d at 1284 (citing *Officers for Justice*, 688 F.2d at 625–26). “To warrant approval, the plan of allocation must also meet the standards by which the ... settlement was scrutinized—namely, it must be fair and adequate.” *In re MicroStrategy, Inc. Sec. Litig.*, 148 F.Supp.2d 654, 668 (E.D.Va.2001) (citing *Class Plaintiffs*, 955 F.2d at 1284–85; *In re Oracle Sec. Litig.*, 1994 WL 502054, at \*1 (N.D.Cal. June 18, 1994). However, “[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel.” *Maley*, 186 F.Supp.2d at 367 (citation omitted).

“A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable. It is also reasonable to allocate more of the settlement to class members with stronger claims on the merits.” *Oracle*, 1994 WL 502054, at \*1 (citing *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y.1992)). Therefore, as noted in *MicroStrategy*, 148 F.Supp.2d at 669, “[a] plan of allocation ... fairly treats class members by awarding a pro rata share to every Authorized Claimant, [even as it] sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue.”

As Plaintiffs point out, the Settlement Fund, assuming it is insufficient to satisfy all claims, will be distributed on a *pro rata* basis, with the exception of \$6 million, contributed to the Settlement Fund by Boehm defendants Sabo & Green and Atkinson Andelson. Of the \$6 million, \$1 million, which was contributed by Sabo & Green, will be apportioned to the first seven bond offerings relevant to this litigation, with the remaining \$5 million contributed by Atkinson Andelson, apportioned to the final four offerings.

The fact that there has been no objection to this plan of allocation favors approval of the Settlement. See *Maley*, 186 F.Supp.2d at 367 (reaction of the class supported approval of the plan of allocation as there was no objections despite more than 2,000 notices being distributed). The fact that the plan of allocation is recommended by experienced and competent counsel further cuts in favor of approving the Settlement.

*Id.*; see also *In re Exxon Valdez*, 1996 WL 384623, at \*5 (D.Alaska June 11, 1996) (“In light of the experience and views of counsel and the zeal with which they represent their clients, the court is satisfied that the Plan of Allocation is in the best interests of plaintiffs.”).

**\*12** In light of the lack of objectors to the plan of allocation at issue, and the competence, expertise, and zeal of counsel in bringing and defending this action, the Court finds the plan of allocation as fair and adequate. This factor supports approving the Settlement.

*c. The Settlement was the product of fair, arms-length, and good-faith, negotiations and therefore, under California Law, resolves the state causes of action in this case*

As the Settlement disposes of state law claims, an analysis under California's “good faith settlement” provision, as viewed under [California Code of Civil Procedure Section 877.6](#), is necessary. “A good faith settlement is one within ‘the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries.’” *Alvarez v. Bridgestone/Firestone, Inc.*, 2003 WL 715905, at \*1, \*3 (N.D.Cal. Feb.24, 2003) (quoting *Tech-Bilt, Inc. v. Woodward-Cyde & Assoc.*, 38 Cal.3d 488, 499, 213 Cal.Rptr. 256, 698 P.2d 159 (1985)). Because the standard for finding a good faith settlement as contemplated in [Section 877.6](#) is substantially similar to the standard as set forth under [Rule 23\(e\)](#) as discussed above, the Court need not restate its analysis here in concluding that the Settlement is fair, reasonable and made in good faith. However, the Court notes the following additional factors which the California Supreme Court has crafted for consideration: “a rough approximation of plaintiffs' total recovery, the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial.” *Tech-Bilt, Inc.*, 38 Cal.3d at 499, 213 Cal.Rptr. 256, 698 P.2d 159 (1985) (citations omitted).

“Ultimately, a defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be.” *Alvarez*, 2003 WL 715905, at \*3 (citation omitted). “If the court finds evidence that would wholly or substantially negate a settling defendant's liability, the fact that the settlement was disproportionate to the claims made by plaintiffs' complaint is not in itself evidence of the lack of good faith.” *Id.* (citation omitted). “The court should approve even a contested settlement, unless there is a showing ‘that

the settlement is so far out of the ballpark in relation to these factors to be inconsistent with the equitable objectives of the statute.” *Id.* (quoting *Tech-Bilt*, 38 Cal.3d at 499–500, 213 Cal.Rptr. 256, 698 P.2d 159).

By applying the *Tech-Bilt* factors, the Court finds that approving the Settlement is warranted. As stated above, no party disputes the fact that the total Settlement Fund of \$27,783,000.00, which accounts for approximately 36% of the class' net losses, is a significant settlement. Moreover, there is no dispute that the allocation of the Settlement Fund among plaintiffs is fair and reasonable. Furthermore, no party challenges Plaintiffs' assertion that the settlement comports with the various defendants' proportionate liability. Plaintiffs allege that the collapse of Heritage was caused by the wrongdoing of dozens of parties ranging from law firms, appraisers, the bonds' trustee, accountants, the officers and directors of Heritage, and various other entities and individuals that profited from the Heritage scheme. The alleged malfeasance spans about three years and concerns eleven different bond offerings. The Settlement Fund, therefore, is comprised of settlements reached with many different parties. As Plaintiffs point out, over forty defendants contributed to this settlement, with no defendant contributing more than 44% to the Settlement Fund. Although the Court cannot determine, with any certainty, each settlor's proportionate liability, the Court is satisfied that counsel for Plaintiffs and the various defendants have decided on settlements that reasonable reflect proportionate liability. As noted above, the parties' counsel is shown to be experienced, competent and knowledgeable in securities and class action litigation.

**\*13** In addition, the Court “recogn[izes] that a settlor ... [will likely] pay less in settlement than he would if he were found liable after a trial.” *Tech-Bilt, Inc.*, 38 Cal.3d at 499, 213 Cal.Rptr. 256, 698 P.2d 159. In doing so, this Court:

[R]eiterates the parties' concern that if litigation were to continue, the majority of the bond offerings would be subject to credible statute of limitations defenses. Therefore, given the substantial procedural hurdles that the Class Plaintiffs face, the settlement amount appears reasonable, especially when considering that the potential amount of recovery would likely be reduced to a mere fraction of that amount if certain claims were determined to be time-barred.

Order Granting Stipulation of Settlement, at 8:26–9:6. In full view of Plaintiffs' allegations of widespread wrongdoing, the credible defenses that Defendants' have, and no opposition to



this motion, the Court finds that the settlements at issue are reasonably proportionate to each defendant's alleged liability, and not "grossly disproportionate" so as to prevent approval of the Settlement. *See e.g. Alvarez*, 2003 WL 715905, at \*4–\*5 (finding that credible defenses in litigation concerning multiple parties militated in favor of finding settlement to be reasonably proportionate to liability).

An analysis of the *Tech-Bilt* factors persuasively demonstrates that Settlement is fair, adequate and made in good faith. As such, approval of the Settlement is warranted on these grounds.

Upon careful review of the Settlement, the substantial proposed benefit to the class, the complexity of the case, the risks associated with pursuing the case to judgment, the absence of any objection, and based on the foregoing discussion, this Court concludes that the Settlement satisfies the criteria for Rule 23(e) and California Code of Civil Procedure Section 877.6, as it is fair, reasonable, and adequate. As such, the Court approves the Settlement.

## 2. Motion for Reimbursement of Lead Plaintiffs' Costs And Expenses

Class Representatives David Sinow ("Sinow"), Howard Preston ("Preston"), Langdon Parrill ("Parrill"), Barrett Anderson ("Anderson"), Laurence Pilgeram ("Pilgeram"), Scott McKenry ("McKenry"), Gilbert Kivenson ("Kivenson") and Ralph Allman ("Allman") (collectively, "Class Representatives" or "Lead Plaintiffs") move pursuant to Rule 23(e) and 15 U.S.C. § 78u–4(a)(4) for an order awarding costs and reimbursement of expenses. Lead Plaintiffs assert that they have incurred costs and expenses as follows: Sinow, \$60,000.00; Preston, \$10,000.00; Parrill, \$10,000.00; Anderson, \$10,000.00; Pilgeram, \$30,000.00; McKenry, \$10,000.00; Kivenson, \$10,000.00; and Allman, \$10,000.00. (Signed Declarations by Lead Plaintiffs setting forth these amounts and the rationale behind them are attached to the Declaration of Jill Levine ("Levine Decl."), Exhs A—H).

As a preliminary matter, the Court notes that although Lead Plaintiffs couch their request as a motion for "costs and expenses," upon careful consideration and review of the motion, the Court finds that Lead Plaintiffs also request reasonable incentive awards. As such, the Court determines whether "costs and expenses" and/or incentive awards are appropriate in this matter. The Court first turns to whether an award of "costs and expenses" is appropriate.

\*14 The PSLRA provides in pertinent part that, although class representatives must share the recovery in the same proportion as all other members of the class, "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class." 15 U.S.C. § 78u–4(a)(4). However, the Court is mindful as to distinguish between "reasonable costs and expenses," and what appears to be a "compensation" or "incentive" award.

Typically, when an individual joins his claims with a class, they "disclaim any right to a preferred position in the settlement [of those claims]." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 632 (9th Cir.1982), *cert. denied*, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983); Some courts have recognized that class representatives are entitled to some compensation for the risk and inconvenience incurred on behalf of the class. *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir.1992). This practice is not universally endorsed, but many courts will grant incentives if they are reasonable. *In re Chambers Dev. Sec. Litig.*, 912 F.Supp. 852, 863 (1995).

The court has discretion to decide whether enhancements fees should be awarded to class representatives and the appropriate amount of these fees. *Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995). When determining incentive awards, courts may consider the following: "1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *Id.*; *see also Denney v. Jenkins & Gilchrist*, 2005 WL 388562, at \*31 (S.D.N.Y. Feb.18, 2005) ("In granting compensatory awards to the representative plaintiff in PSLRA class actions, courts consider the circumstances, including the personal risks incurred by the plaintiff in becoming a lead plaintiff, the time and effort expended by that plaintiff in prosecuting the litigation, any other burdens sustained by that plaintiff in lending himself or herself to prosecuting the claim, and the ultimate recovery.").

According to Plaintiffs, Class Representatives have been actively involved in every aspect of this litigation, either reviewing documents before filing, responding to discovery, preparing for, traveling to and attending their depositions

and maintaining contact with Plaintiffs' counsel to monitor the litigation. In doing so, Plaintiffs maintain that Class Representatives have provided significant labor and spent time that would otherwise been dedicated to regular employment and business activities in an effort to ensure that the claims of the Class were effectively prosecuted.

**\*15** For the prosecution of this action, Lead Plaintiffs gathered documents from their own files to respond to Defendants' document requests, and reviewed, edited and signed verified responses to Defendants' interrogatories. (Levine Decl., ¶ 4). During the course of litigation, Class Representatives reviewed, among other things, various draft complaints, amended complaints, motion papers, interrogatories and document requests. *Id.* For these reasons, Lead Plaintiffs maintain that the amounts requested are reasonable. The following provides, in more detail, the reasons behind each class representative's request for an additional sum of money.

Class Representative Sinow declares that he has invested over 300 hours of time in participating in this litigation, which has reduced his time available to pursue his normal professions of teaching at the University of Illinois and his financial advisory business. (Levine Decl., Exh. F (Declaration of Plaintiff David Sinow ("Sinow Decl.")) at ¶¶ 1, 6, 8–9). Plaintiffs' request that Sinow receive reimbursement of \$60,000.00, representing \$200 per hour for 300 hours for diligently: (1) participating in Plaintiffs' motions; (2) reviewing all pleadings in this matter; and (3) regularly engaging in numerous conference calls with counsel throughout the three years of litigation on all matters, including hours spent on the proposed settlement. (Levine Decl., Exh. F at ¶¶ 2–6, 10).

Class Representative Preston, a physicist who received his doctorate degree from the University of California, Irvine, declares that he has invested approximately 65 hours for the benefit of the Class, which has interfered with his ability to concentrate fully on his business and usual employment. (Levine Decl., Exh. E (Declaration of Plaintiff Howard Preston ("Preston Decl.")) at ¶¶ 1, 6, 8–9). Preston states that he, among other things, actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. E at ¶¶ 2–6). Levine requests reimbursement in the amount of \$10,000.00, representing a rate of \$150 per hour for approximately 65 hours.<sup>10</sup> (Levine Decl., Exh. E at ¶ 10).

Class Representative Parrill, who has an associate degree in industrial engineering and is retired, declares that he invested approximately 65 hours for the benefit of the Class. (Levine Decl., Exh. B (Declaration of Plaintiff Langdon Parrill ("Parrill Decl.")) at ¶¶ 1, 8, 6). Parrill states that he, *inter alia*, actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. B at ¶¶ 3–5). Parrill requests reimbursement in the amount of \$10,000.00, representing a rate of \$150 per hour for approximately 65 hours. (Levine Decl., Exh. B at ¶ 9).

**\*16** Class Representative Anderson, a retired orthodontist, declares that he has invested approximately 65 hours for the benefit of the Class. (Levine Decl., Exh. A (Declaration of Barrett Anderson ("Anderson Decl.")) at ¶¶ 1, 6, 8). Anderson states that he, among other things, actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. A at ¶¶ 3–5). Anderson requests reimbursement in the amount of \$10,000.00, representing a rate of \$150 per hour for approximately 65 hours. (Levine Decl., Exh. A at ¶ 9).

Class Representative Pilgeram, a molecular biologist/chemist with a Ph.D. from the University of California Berkeley, declares that he has invested over 200 hours of his time in rigorously and actively participating in the litigation, which has prevented him from obtaining his usual compensation of \$350 per hour. (Levine Decl., Exh. D, (Declaration of Plaintiff Laurence Pilgeram ("Pilgeram Decl.")) at ¶¶ 1, 6, 8–9). Plaintiffs contend that reimbursement to Pilgeram of \$30,000.00, representing \$150 per hour for 200 hours, represents an hourly rate which is reasonable to the class and a fair compromise on the part of Pilgeram, who allegedly forfeited work opportunities which would have compensated him for an hourly rate of more than double that requested here.

Class Representative McKenry, a retired farmer, declares that he has invested approximately 65 hours for the benefit of the Class. (Levine Decl., Exh. C (Declaration of Scott McKenry ("McKenry Decl.")) at ¶¶ 1, 6, 8). McKenry states that he, among other things, actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. C at ¶¶ 3–5). McKenry requests reimbursement in the amount

of \$10,000.00, representing a rate of \$150 per hour for approximately 65 hours. (Levine Decl., Exh. C at ¶ 9).

Class Representative Allman, an orthodontist, declares that he has expended approximately 65 hours for the benefit of the Class, which has taken him away from his business and usual employment. (Levine Decl., Exh. G (Declaration of Plaintiff Ralph Allman (“Allman Decl.”)) at ¶¶ 1, 8–9). Allman states that he, *inter alia*, actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. G at ¶¶ 3–5). Allman requests reimbursement in the amount of \$10,000.00, representing a rate of \$150 per hour for approximately 65 hours. (Levine Decl., Exh. G at ¶ 9).

Class Representative Gilbert Kivenson (“Kivenson”), a retired patent agent, declares that he has expended approximately 65 hours for the benefit of the Class. (Levine Decl., Exh. H (Declaration of Plaintiff Gilbert Kivenson (“Kivenson Decl.”)) at ¶¶ 1, 8–9). Kivenson states that he, among other things, actively monitored this case, worked with counsel during the discovery phase, reviewed pleadings at every stage of litigation, and responded to numerous document requests. (Levine Decl., Exh. H at ¶¶ 3–5). Allman requests reimbursement in the amount of \$10,000.00, representing a rate of \$150 per hour for approximately 65 hours. (Levine Decl., Exh. H at ¶ 9).

**\*17** The Court finds that Lead Plaintiffs are not in fact requesting “reasonable costs and expenses,” but asking to be paid for their estimated time spent on the litigation at unjustified hourly rates. This is especially true of the \$10,000.00 awards requested by Preston, Parrill, Anderson, McKenry, Allman and Kivenson. All of these plaintiffs chiefly base their request for \$10,000.00 on hours spent on litigation, and do not demonstrate how such hours can be considered “reasonable costs and expenses.” The aforementioned plaintiffs’ assertions that they incurred “out-of-pocket expenses directly related to the prosecution of this litigation, including “photocopying documents, telephone charges, and travel[ ]” is inadequate for the Court to find that an award of \$10,000.00 is warranted. (Levine Decl., Exhs. A–C, E, F–G). The Court is especially concerned of Anderson, Parrill, McKenry, and Kivenson’s requests for \$10,000.00 in compensation for hours spent on litigation because these plaintiffs are admittedly retired from employment. (Levine Decl., Exh. A–C, H at ¶ 8).

With respect to Sinow and Pilgeram, who seek compensation of \$60,000.00 for 300 hours and \$30,000.00 for 200 hours respectively, the Court also finds an inadequate basis to justify such amounts. These two plaintiffs’ assertions that their “performance of ... duties as lead plaintiff has caused [them] to forgo business opportunities and has taken [them] away from [their] usual business” is insufficient to establish lost wages. (Levine Decl., Exhs. D & F). The Court is only presented with the lead plaintiffs’ self-serving declarations. There is no proof that a disinterested party would have paid Sinow and Pilgeram at \$200 per hour and \$350 per hour respectively, the hourly rate they currently request the Court to accept. To the extent that Lead Plaintiffs request “reasonable costs and expenses” under the PLSRA, no such award is shown to be appropriate.

However, as discussed above, a close examination of the present motion reveals that Lead Plaintiffs’ request is also one for reasonable incentive awards, or what is also known as a compensation award. It is within this Court’s discretion to award incentive fees to named class representatives in a class action suit. *Van Vranken v. Alt. Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995) (holding that an incentive award of \$50,000 proper where the named plaintiff helped litigation that lasted for many years, testified as a key witness at trial, and personally benefitted little from the litigation).

Here, several factors support Lead Plaintiffs’ request for an incentive award. Litigation of this class action lasted for over three years before the case settled. Moreover, Lead Plaintiffs assisted Class Counsel throughout this lengthy and complicated case. However, in exchange for their participation, the Court is uncertain whether Lead Plaintiffs will receive great personal benefit. Lead Plaintiffs fail to state the amount of money each class representative will receive. Furthermore, no declaration submitted accurately quantifies how Lead Plaintiffs spent their time during this litigation. The Court is only presented with blanket statements as to how Class Representatives participated in this action. In addition, there is no showing that Lead Plaintiffs’ participation placed them at risk of damaged reputation or retaliation.

**\*18** After evaluating the relevant factors, this Court finds that Lead Plaintiffs’ initial request for incentive awards are excessive, and therefore reduces the amounts, and finds the following incentive awards just and reasonable under the circumstances: Sinow, \$15,000.00; Preston, \$5,000.00; Parrill, \$5,000.00; Anderson, \$5,000.00; Pilgeram, \$12,500.00; McKenry, \$5,000.00; Kivenson,

\$5,000.00; and Allman, \$5,000.00. Lead Plaintiffs are entitled to such compensation for their efforts during this litigation.

### 3. Lead Counsel's Application for An Award Of Attorneys' Fees And Reimbursement of Expenses<sup>11</sup>

Class counsel members the Law Offices of Brian Barry ("Lead Counsel") and the law firm of Glancy Binkow & Goldberg ("Co-Lead Counsel") (collectively, "Class Counsel") request attorneys' fees equal to one-third (33 ⅓ %) of the common fund (\$27,783,000.00), which totals \$9,60,073.90. For the reasons discussed below, this Court finds Class Counsels' fee request is reasonable and appropriate.

It is well settled in the Ninth Circuit that: "In a common fund case, the district court has discretion to apply either the loadstar method or the percentage-of-the-fund method in calculating a fee award." *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th Cir.2002). "Reasonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Id.* at 1007. Thus, although the Ninth Circuit has "established 25% of the common fund as the 'benchmark' award for attorney fees [.]'" *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir.1993), "that rate may be unreasonable in some cases." *Fischel*, 307 F.3d at 1007 (citations omitted).<sup>12</sup>

Ultimately, the "benchmark percentage should be adjusted, or replaced by a loadstar calculation, when special circumstances indicate that the percentage recovery would be either too small or large in light of the hours devoted to the case or other relevant factors." *Torrisi*, 8 F.3d at 1376 (citing *Six Mexican Workers v. Ariz., Citrus Growers*, 904 F.2d 1301, 1131 (9th Cir.1990)). Courts may observe the following factors when determining whether the benchmark percentage should be adjusted: (1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's loadstar. See *In re Quintus Sec. Litig.*, 148 F.Supp.2d 967, 973–74 (N.D.Cal.2001); *In re Medical X-Ray Film Antitrust Litig.*, 1998 WL 661515, at \*7 (E.D.N.Y. Aug.7, 1998); *In re Crazy Eddie Sec. Litig.*, 824 F.Supp. 320, 326 (E.D.N.Y.1993); see also *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 147 (E.D.Pa.2000).

a. *Class counsels' fee request of one-third of the common fund is reasonable under the circumstances*<sup>13</sup>

\*19 As a preliminary matter, the Court notes that courts in this circuit, as well as other circuits, have awarded attorneys' fees of 30% or more in complex class actions.<sup>14</sup> In applying the above factors, permitting Class Counsel a fee award of 33 ⅓% of the common fund is warranted.

(1) *The settlement fund established for the class through the efforts of Class Counsel is an exceptional result*

The result achieved is a significant factor to be considered in making a fee award. *Hensley v. Echerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (holding that the "most critical factor is the degree of success obtained"). Here, no party disputes that the Settlement Fund of \$27,783,000.00, which represents 36% of the class' total net loss (38% if the \$2 million contributed by the Bank of New York is considered)<sup>15</sup> of approximately \$78 million, is an exceptional result in this case. When the requested fee and expense award is deducted, the net amount of the settlement represented approximately 23% of the class' claimed loss. As Lead Counsel maintains, such a recovery percentage is considerable, and is greater than those obtained in cases where class counsel was awarded one-third of a common fund. See *Med. X-Ray* 1998 WL661515, at \*7–\*8 (increasing 25% benchmark to 33.3% where counsel recovered 17% of damages); *Crazy Eddie*, 824 F.Supp. at 326 (increasing 25% benchmark to 33.8% where counsel recovered 10% of damages); *In re Gen. Instruments Sec. Litig.*, 209 F.Supp.2d 423, 431, 434 (E.D.Pa.2001) (awarding one-third fee from \$48 million settlement fund that was approximately 11% of the plaintiffs' estimated damages); *Corel*, 293 F.Supp.2d at 489–90, 498 (permitting one-third fee award from \$48 million settlement fund which represented approximately 15% of class' total net damages); *Cullen*, 197 F.R.D. at 148 (awarding one-third in fees from settlement of class consisting of defrauded vocational students that was 17% of the tuition that class members paid).

Based on the significant results achieved through the efforts of Class Counsel in creating the Settlement Fund, and in light of relevant case law, this Court finds that this factor weighs strongly in favor of granting Lead Counsel's fee request of 33 ⅓% of the common fund.

(2) *The effort, experience and skill of Class Counsel*



The “prosecution and management of a complex national class action requires unique legal skills and abilities.” *Edmonds v. U.S.*, 658 F.Supp. 1126, 1137 (D.S.C.1987). Here, the quality of Class Counsel's effort, experience and skill is demonstrated in the exceptional result achieved. See *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547–48 (S.D.Fla.1988). Based on this Court's intimate knowledge of this case, and the results obtained, the Court finds that Class Counsel performed at a high level of skill in litigating this action over three years. During the course of this action, counsel investigated and drafted several lengthy versions of the complaint, and engaged in varying and extensive motion practice. Lead Counsel states that it reviewed, analyzed and coded approximately 1.1 million documents, took 34 depositions and defended depositions of all of the representative plaintiffs throughout California, was engrossed in multiple settlement discussions, filed an appeal to the Ninth Circuit Court of Appeals, and is currently litigating the Heritage insurance appeal. According to Lead Counsel, this case alone accounted for over 73% of the Law Office of Brian Barry's total billable hours for the past three years, which precluded the law firm from participating in other cases. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047–48 (9th Cir.) (according significant weight to the fact that the class counsel had to forgo “significant other work”), *cert. denied sub nom.*, *Vizcaino v. Waite*, 537 U.S. 1018, 123 S.Ct. 536, 154 L.Ed.2d 425 (2002); *In re Public Serv. Co. of New Mexico*, 1992 WL 278452, at \*1, \*9 (S.D.Cal. July 28, 1992) (finding the fact that counsel was “precluded ... from accepting many other cases” weighed in favor of an award of one-third of the common fund).

\*20 The experience of Class Counsel also justifies the fee award requested. *Gen. Instruments*, 209 F.Supp.2d at 432–33 (awarding a fee award of one-third of a common fund based in part on the experience of counsel in litigating securities class actions); see also *Public Serv. Co. of New Mexico*, 1992 WL 278452, at 8 (finding that the experience of counsel in complex litigation cases cut in favor of a one-third fee award of the common fund). Similarly, it is not disputed that Co–Lead Counsel specialize in representing plaintiffs in securities class actions. (See Firm Resumes attached to Barry Decl., Exh. 3, 4). The Court also notes that the quality of opposing counsel is important in evaluating the quality of Plaintiff's counsel's work. See e.g., *In re Equity Funding Corp. Sec. Litig.*, 438 F.Supp. 1303, 1337 (C.D.Cal.1977). There is also no dispute that the plaintiffs in this litigation were opposed by highly skilled and respected counsel with well-deserved

local and nationwide reputations for vigorous advocacy in the defense of their clients.

This factor cuts in favor of approving Lead Counsel's fee request.

(3) *The highly complex issues of this securities class action*  
Courts have recognized that the novelty, difficulty and complexity of the issues involved are significant factors in determining a fee award. See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir.1974) (“Cases of first impression generally require more time and effort on the attorney's part ... [counsel] should not be penalized for undertaking a case which may ‘make new law,’ [but] appropriately compensated for accepting the challenge.”). As Lead Counsel points out, and this Court agrees, a number of reasons exist as to why this case cannot be considered a garden variety securities class action.

Various issues litigated in this case concerned relatively uncharted territory. After the initial complaint was filed, the Sarbanes–Oxley Act (the “Act”), which extended the statute of limitations period for certain federal securities claims, was passed. Plaintiffs filed a new complaint naming additional defendants in an attempt to take advantage of the new limitations period. Various defendants moved to dismiss, and in opposing dismissal, Plaintiffs argued (1) the newly filed complaint against new defendants satisfied the Act's requirement that a new statute of limitations would apply only to proceedings after the Act's passage, and (2) that the Act applied retroactively. The Court notes the extensive legal research and analysis involved, as these issues were of first impression for district courts within the Ninth Circuit. Similarly, the Court agrees that the case was factually complex as it involved numerous bonds offered over a course of several years, each with its own official statement and unique set of facts. This case also involved a multitude of plaintiffs and over forty defendants. In addition, the action was based on theories of tort law, contract law, and federal and state statutory laws, and marked by extensive motion practice discovery (including numerous discovery motions, a motion for class certification, nineteen motions to dismiss, a motion for stay, and filing three motions for summary judgment), oral argument, and settlement negotiations. *Cullen*, 197 F.R.D. at 142 (granting attorneys' fees equal to one-third of the common fund due in part to the complexity of the litigation, acknowledging that the “litigation consisted of motions to dismiss, class certification motions, a multitude of discovery motions, many oral arguments and settlement conferences”).



**\*21** The complexity of this case justifies the requested fees. This factor strongly weighs in favor permitting class plaintiffs to recover 33 ⅓% of the settlement fund.

*(4) The risks of non-payment assumed by counsel*

Courts consistently recognize that the risk of non-payment or reimbursement of expenses is a factor in determining the appropriateness of counsel's fee award. *See, e.g., Medical X-Ray*, 1998 WL 661515, at \*7 (justifying fee award in part due to the fact that counsel spent several years engaged in litigation without certainty of compensation); *Crazy Eddie*, 824 F.Supp. at 326 (same).

Here, the Court notes that Plaintiffs' counsel proceeded entirely on contingency basis, while paying for all expenses incurred. There was no guarantee of any recovery, and thus, counsel was subjected to considerable risk of no compensation for time or no reimbursement for expenses. The Court again acknowledges Lead Counsel's representation, which was not challenged by any party, that it devoted over 73% of its total billable hours for the past three years to this case, indicating that the case was undeniably a heavy financial risk.

The risk of non-payment was also greater here, as most of the insurance carriers either disclaimed coverage or provided coverage under expansive reservations of rights. *See Safety Components*, 166 F.Supp.2d at 100 (finding that the threat of non-payment from "D & O" insurance carrier "weigh[ed] overwhelmingly" in favor of approval of the fee request of one-third of the common fund); *Cullen*, 197 F.R.D. at 149 (same). Specifically, as Lead Counsel points out, (1) the insurers for the M & S and CBIZ defendants denied coverage causing both those defendants to initiate lawsuits against their insurers, (2) the insurers for Heritage officers and directors denied coverage, prompting the state action that plaintiffs continue to litigate, (3) the insurers for the Kasirer defendants filed an action seeking to void the policy, and never provided coverage for Robert Kasirer and Debra Kasirer, and (4) the insurers for the *Boehm* defendants threatened to file an action seeking to void the policy as well.

Given the above discussion, Lead Counsel's requested fee award is justified by the significant risk assumed in litigating this case on contingency fee without any guarantee of compensation.

*(5) The reaction of the class to the requested attorneys' fee*

The existence or absence of objectors to the requested attorneys' fee is a factor in determining the appropriate fee award. *See Cullen*, 197 F.R.D. at 148–49. Here, the Court approved a Notice that was sent to possible class members that specifically stated that counsel would seek upwards of one-third of the Settlement Fund in attorneys' fees. The Notice also informed class members of their ability to object to the counsel's fee request or to opt-out of the class and pursue their claims individually. As discussed *supra*, to date, no class member has objected to the attorneys' fee request and only one person opted-out of the class. The absence of objections or disapproval by class members to Class Counsel's fee request further supports finding the fee request reasonable.

*(6) Loadstar comparison*

**\*22** Courts often compare an attorney's loadstar with a fee request made under the percentage of the fund method as a "cross-check" on the reasonableness of the requested fee. *See, e.g., Vizcaino*, 290 F.3d at 1050; *Fischel*, 307 F.3d at 1007. "[T]he loadstar calculation can be helpful in suggesting a higher percentage when litigation has been protracted [and] may provide a useful perspective on the reasonableness of a given percentage award." *Vizcaino*, 290 F.3d at 1050. In securities class actions, it is common for a counsel's loadstar figure to be adjusted upward by some multiplier reflecting a variety of factors such as the effort expended by counsel, the complexity of the case, and the risks assumed by counsel. *See Ravisent*, 2005 WL 906361, at \*12 (fee represented a multiplier of 3.1 of the loadstar); *Linerboard*, 2004 WL 1221350, at \*16 (recognizing that from 2001 to 2003, the average multiplier approved in common fund cases was 4.35); *Cullen*, 197 F.R.D. at 150–51 (loadstar of \$1.2 million would require a multiplier of 2.01 in order to match awarded fees of one-third of \$7.3 million common fund); *Safety Components*, 166 F.Supp.2d at 103 (loadstar of \$534,000.00 would require a multiplier of 2.81 in order to match awarded fees of \$1.5 million); *Medical X-Ray*, 1998 WL 661515, at \*7 (fee represented a multiplier on the attorneys' loadstar of 1.67); *Crazy Eddie*, 824 F.Supp. at 326–27 (the equivalent of a 1.72 multiplier was applied to the attorneys' loadstar).

Here, Lead Counsel maintains that the loadstar is \$12,428,630.00, which accounts for: (1) 23,473 attorney hours billed by the Law Offices of Brian Barry at approximately \$355.00 per hour for a total allowable loadstar of \$8,350,793.00, (2) 8,486.50 attorney hours billed by the law firm Glancy Binkow & Goldberg at

approximately \$366.00 per hour for a total allowable loadstar of \$3,109,050.00; (3) 610.50 attorney hours billed by the law firm of Cohen Milstein Hausfeld & Toll at approximately 316.00 per hour for a total allowable loadstar of \$192,988.00; (4) 1,230.25 attorney hours billed by the law firm O'Neill Lysaght & Sun at approximately \$265.00 per hour for a total allowable loadstar of \$326,619.00; (5) 1,700.55 attorney hours billed by the law firm of Miller Milove & Kob at approximately \$261.00 per hour for an allowable loadstar of \$443,775.00; and (6) 26.20 attorney hours billed by the law firm of Blaise & Hightower at approximately \$207.00 per hour for a total allowable loadstar of \$5,405.00.<sup>16</sup> The \$12,428,630.00 loadstar is nearly 3.5 million more than the fees requested by Lead Counsel. Had Class Counsel sought to recover its fees under the loadstar method, factors would arguably permit an upward adjustment. Assuming that Plaintiffs' loadstar amount is accurate, the Court finds that class plaintiffs' request for substantially less recovery is indicia that the fee amount requested is reasonable.

However, due to the general lack of evidence to support Class Counsel's loadstar amount, this factor is neutral. Although the Court is not readily suspicious of Class Counsel's loadstar amount, the Court is concerned with Lead Counsel's failure to provide information with respect to the hourly rates employed, the hours expended by whom, and the task(s) performed.

**\*23** Nevertheless, in careful consideration of the above factors, this Court finds thirty-three and one-third percent (33 ⅓%) of the common fund of \$27,783,000.00 to be a reasonable percentage award. As such, this Court awards attorney's fees totaling \$9,260,073.90.<sup>17</sup> Of this amount, 5% or \$463,003.69 shall be paid to the law firm of Miller Milove & Kob ("MMK") as discussed further herein.

**a. Class Counsel's Expenses Are Not Demonstrated To Be Reasonable**

Lead Counsel originally sought reimbursement of \$570,090.18 in expenses incurred in litigating this matter. For the following reasons, Lead Counsel's request was initially denied for the reasons set forth below.

"There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." *Gen. Instruments*, 209 F.Supp.2d at 434 (citations and alterations omitted). The appropriate analysis in deciding

which expenses are compensable is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.1994) (citations omitted). "Thus [, reimbursement of] reasonable expenses, through greater than taxable costs, may be proper." *Id.* at 20.

Here, Lead Counsel maintains that its litigation expenses, including, but not limited to, photocopying costs, reporter's fees, mediation fees, expert fees, and attorney service fees, were reasonably incurred. (See *Barry Decl.*, at ¶¶ 53–56.). Although Lead Counsel offers what it considers to be a sufficient "itemization" of expenses, no such detailed enumeration of expenses exists. Instead, Lead Counsel provides an overly simplified, general, and therefore inadequate, summary of expenses by category including, but not limited to Expert and Consulting Fees, On-Line Legal Research, Travel Costs, and Photocopies, which this Court finds inadequate. See *Lyons v. Sutex Corp.*, 987 F.Supp. 271 (S.D.N.Y.1997) ("Plaintiff's counsel has not provided any documentary support for their claim of expenses other than a chart summarizing expenses by category (travel & lodging, meetings & conferences, translations, etc.). This makes it difficult for the Court to assess the propriety of these expenses. The Court is particularly alarmed at the following expense groups: Word Processing (\$ 8,032.00) and Paralegal (\$ 7,458.75). The Word Processing charge suggests billing for secretarial time. As for paralegal charges, plaintiff's counsel has provided no basis by which the Court can judge the reasonableness of this expense, such as time sheets, projects addresses or billing rates").

Here, for instance, Lead Counsel requests \$81,617.50 for Expert and Consulting Fees without disclosing the identity, qualifications, contributions or rates of any expert. In addition, Lead Counsel requests photocopies of \$225,374.92 without indicating the cost per page, making it difficult for the Court to give credence to that figure. In addition, the court is presented with general Storage/Office expenses of \$48,540.40, Telephone/Fax costs of \$2,600.91 and Parking of \$17,977.00, none of which are properly documented.

**\*24** In light of the above, Lead Counsel's request for reimbursement of expenses was denied at that time.<sup>18</sup> However, because Class Counsel is entitled to reasonable reimbursement, the Court permitted counsel an opportunity to supplement the record with respect to its request for reimbursement of expenses following the hearing.

In a supplemental declaration submitted by Lead Counsel, an amended request for expenses in the sum of \$644,093.94 was submitted consisting of \$522,560.84 for Lead Counsel's expenses<sup>19</sup> and \$121,533.10 for expenses of the Claims Administrator. The Court has reviewed the information provided by Lead Counsel and now finds that the expenses submitted to the Court in the total sum of \$644,093.94 are appropriate. The Court Orders Lead Counsel to be reimbursed for its expenses the sum of \$522,560.84 and orders that the Claims Administrator be reimbursed for its expenses the sum of \$121,533.10.

#### 4. *Miller Milove & Kob's Application for Award of Fees, Costs and Expenses*<sup>20</sup>

The law firm of Miller Milove & Kob ("MMK") contends that the "lion's share of legal services provided were prior to the designation of Lead Counsel on January 13, 2003 and were necessary for the creation of the Settlement fund." (Miller Milove & Kob's Motion for an Award of Fees, Costs and Expenses ("MMK Motion") at 2:5–7). As such, MMK requests attorneys' fees of \$1,276,022.50, and reimbursement of costs and expenses of \$48,578.83. According to MMK, its fees, costs and expenses were incurred as a result of litigating this action, as well as the state court action filed in the Superior Court of the state of California for the county of San Diego on November 20, 2001 ("State Court Action").<sup>21</sup>

As the Ninth Circuit has held, "It is well established that an award of attorneys' fees from a common fund depends on whether the attorneys' 'specific services benefitted the fund—whether they tended to create, increase, protect or preserve the fund.'" *Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d 1306, 1308 (9th Cir.1994). An attorney submitting an application for an award of fees and expenses has the burden of establishing entitlement to such monies. *See In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 333–34 (3d Cir.1998). For the reasons discussed below, MMK has failed to meet its burden.

#### I. MMK is not entitled to compensation from the Settlement Funds for time and expenses incurred in the State Court Action

With respect to MMK's purported assistance in this litigation, MMK contends that it benefitted the class because "First, the filing and prosecution of the ... State Court Action preserved statute of limitations, [and s]econd, the legal work benefitted the Plaintiff Class through development of evidence, legal

analysis and allegations." (MMK Motion, at 12:20–26). MMK contends that it developed the core evidence and allegations of securities fraud from which this class arose, thereby paving the road for the present global settlement.

\*25 There is no dispute that Miller Milove & Kob filed the first action in any court on behalf of the Heritage Bondholders. There is also no dispute that the filing of the State Court Action preserved the statute of limitations for claims against various defendants in this case.<sup>22</sup> The major contention here is whether the work performed in filing and litigating the State Court Action " 'benefitted the fund—whether [the actions of MMK] tended to create, increase, protect or preserve the fund.'" *Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d 1306, 1308 (9th Cir.1994).

Here, MMK seeks to recover monies from litigating a case that was dismissed after numerous unfavorable rulings and no recovery was obtained on behalf of the class.<sup>23</sup> Eventually MMK voluntarily dismissed the State Court Action. Based on these grounds, the Court finds that MMK's request for attorneys' fees and expenses for work performed in an unrelated and unsuccessful matter is inappropriate. *Wininger*, 301 F.3d at 577 (Ninth Circuit Court of Appeals affirming district court's decision to refuse to award fees for the unsuccessful efforts of counsel). Moreover, a review of the record reflects that MMK's efforts in the State Court Action had a harmful effect on the class, in that the adverse rulings against MMK in the state court complicated litigation and wasted resources as various defendants expended significant amounts of money litigating the State Court Action for over a year. (*See* Barry Decl. at ¶ 60.) The result of the State Court Action was less funds available to compensate the class. The Court agrees with Lead Counsel that the purported benefit of MMK's efforts in the State Court Action is neutralized or outweighed by the depletion of insurance policies and personal assets of the defendants.

"The equitable common fund/common benefit doctrine authorizes attorney fees only when the litigants preserve or create a common fund for the benefit of others as well as themselves." *Vizcaino v. Microsoft*, 290 F.3d 1043, 1051–52 (9th Cir.2002) (citations omitted). In light of the discussion above, MMK's efforts in the State Court Action can hardly be considered as preserving or creating a common fund. Although MMK's filing of the complaint in the State Court Action effectively preserved the statute of limitations, and thereby allowed Lead Plaintiffs an opportunity to file in federal court, such an act by MMK is not viewed as

sufficient to merit compensation. In addition, although Lead Counsel admits to incorporating information from the State Court Action First Amended Complaint in this action, Lead Counsel contends, and MMK fails to sufficiently dispute, that such information was, for the most part, either: (1) in the public domain; (2) already in Co-Lead Counsel's possession (via documents or confidential witness statements); or (3) available in other complaints (e.g., the *Betker* complaints, the *SEC Receiver* complaint, the *Platt* and *Cornerstone* complaints, and the *Rancho Bankruptcy* filings). Where, as here, there is no clear showing of a connection between the conduct of counsel and the preservation or creation of a common fund for the benefits of others, the Court would be remiss to grant the requested fees and expenses. In short, MMK has simply failed to sufficiently demonstrate that it met its burden of proof that it is entitled to compensation from the Settlement Fund for time spent and expenses incurred in the State Court Action.

*b. Specific time and expenses MMK asserts it incurred in this federal action is not recoverable*

**\*26** As Lead Counsel points out, MMK's fee request includes approximately 450 hours spent drafting a duplicative compliant and moving for lead status in federal court. Such time spent is not compensable. *In re Cendant Corp. Litig.*, 404 F.3d 173, 204–05 (3d Cir.2005) (filing a duplicative complaint for consolidation with an already pending action does not confer a benefit on the class and is not compensable); *In re People Soft, Inc. Sec. Litig.*, No. C99–00472 WHA, Slip op. at 15 (N.D.Cal. Aug.24, 2001) (“[Non-lead counsel's] time spent vying to become class counsel or promoting their lead plaintiff candidate is not compensable. There was no material benefit to the class.”).

Lead Counsel contends, and MMK does not deny, the following: (1) MMK “performed virtually none of the heavy lifting, in terms of briefing, depositions and mediation sessions that led to the substantial benefit to the class;”<sup>24</sup> (2) MMK “refused numerous requests to meaningfully contribute to the litigation fund which was used to generate the class recovery (MMK contributed only 1.8% of the \$570,000.00 in out of pocket expenses risked by Class Counsel);” (3) MMK “refused to produce its client for deposition or produce documents to defendants despite formal requests;” and (4) MMK “failed to name as defendants the parties that ultimately provided the vast majority of the settlement fund.” Nevertheless, MMK demands to be paid at a rate almost double of that of all other counsel. The Court finds MMK's

argument for compensation untenable and unsupported by the record.

The Court agrees with Lead Counsel that MMK should be compensated only for the following requests made upon it by Co-Lead Counsel: (1) draft a discrete subsection of the oppositions to certain motions to dismiss the Third Amended Complaint; (2) issue a subpoena on the Marshall Group; (3) attend one deposition; and (4) employ one attorney to review, code and analyze documents at Co-Lead Counsel's office in Los Angeles. There is no adequate basis to disturb the presumption of correctness that applies to lead plaintiff's decision not to compensate non-lead counsel's fee submissions for work preformed after appointment of lead counsel. See *Cendant*, 404 F.3d at 195.

Accordingly, this Court finds that MMK's request for attorneys' fees of \$1,276,022.50, and reimbursement of costs and expenses of \$48,578.83 is unjustified. In this class action, MMK apparently performed only 3% to 5% of the authorized work and contributed only \$10,032.00 of the costs. MMK has not convincingly established that its alleged contributions assisted in the creation or preservation of the Settlement Fund. Permitting MMK to recover would permit a windfall to an attorney who bears no true relationship to the actual efforts made to benefit the class. For these reasons, MMK's Application for Attorneys' Fees, Costs and Expenses is denied as requested. Instead, this Court awards MMK attorneys' fees totaling \$463,003.69, constituting 5% of the \$9,260,073.90 awarded to Lead Plaintiffs' counsel.<sup>25</sup> This sum of \$463,003.69 shall be deducted from the \$9,260,073.90 paid to Lead Plaintiffs' counsel. Finally, MMK shall be entitled to an award of costs and expenses totaling \$10,032.00.

### III. CONCLUSION

**\*27** In light of the foregoing, this Court:

- (1) GRANTS Plaintiffs' Motion for Final Approval of Class Action Settlement, which defendants U.S. Trust Company, N.A., U.S. Trust Corporation, Jerold V. Goldstein, Clarke Underwood, Geraldine K. Ostlund, Richard Kuhl, Joel Boehm, Atkinson, Andelson, Loya, Ruud & Romo, Sabo & Green, Leo Dierckman, Stephen P. Goodman, HFS Consultants, formally known as Healthcare Financial Solutions and erroneously sued herein as Healthcare Financial Solutions Group, Inc., CBIZ Valuation Group, Inc., CBIZ Accounting, Tax & Advisory, Inc., Century Business Group, Inc., Michael



Sobelman, and Sobelman, Cohen & Sullivan, LLP  
joined in bringing;

(4) DENIES Miller Milove & Kob's Application for Award  
of Fees, Costs and Expenses as requested.

(2) GRANTS IN PART Plaintiffs' Motion for An Award of  
Costs and Expenses to Named Plaintiffs;

IT IS SO ORDERED.

(3) GRANTS Lead Plaintiffs' Application for an Award of  
Attorneys' Fees and Reimbursement of Expenses; and

**All Citations**

Not Reported in F.Supp.2d, 2005 WL 1594403

## Footnotes

- 1 *Preston v. U.S. Trust Corp., et al.*, Case No. BC266510 (L.A.Sup.Ct., Jan. 16, 2002); *Allman et al. v. O.V. Bertolini et al.*, Case No. 02–6484 MMM (C.D.Cal., Aug. 20, 2002).
- 2 Plaintiffs also filed motions for summary judgment against Stephen Goodman (“Goodman”) and Geri Ostlund (“Ostlund”). Goodman and Ostlund reached settlement agreements with Plaintiffs before filing any responsive briefs.
- 3 On May 16, 2005, U.S. Trust Company, N.A. and U.S. Trust Corporation (“U.S. Trust defendants”) joined in Class Plaintiffs' Motion for Final Approval of the Class Action Settlement. U.S. Trust defendants based their joinder on: (1) the Notice of Motion for Final Approval of the Class Action Settlement; (2) the Memorandum of Points and Authorities in Support of Final Approval of Settlement; (3) paragraphs 1 through 32 and Exhibit 1 of the declaration of Brian Barry in Support of Class Plaintiffs' Motion for Final Approval of the Settlement, an Award of Attorneys' Fees and Reimbursement of Expenses and Costs; (4) the pleadings filed on January 10, 2005 by U.S. Trust defendants in support of joint motion for approval of the stipulation and amending stipulation of settlement; (5) the Court's records; and (6) such further pleadings and evidence as may be submitted at or prior to the time of hearing of said motion (“Evidence Supporting Final Approval”). On May 17, 2005, defendants Jerold V. Goldstein, Clarke Underwood, Geraldine K. Ostlund and Richard Kuhl filed a Joinder in Class Plaintiffs' Motion for Final Approval of Class Action Settlement. On May 20, 2005, defendants Joel Boehm (“Boehm”), Atkinson, Andelson, Loya, Ruud & Romo (“Atkinson Andelson”) and Sabo & Green filed a Joinder in Class Plaintiffs' Motion for Final Approval of Class Action Settlement based on the Evidence Supporting Final Approval. On the same date, defendants Leo Dierckman and Stephen P. Goodman separately joined in the motion for final approval of settlement. On May 23, 2005, HFS Consultants, formally known as Healthcare Financial Solutions and erroneously sued herein as Healthcare Financial Solutions Group, Inc. (“HFS”) filed a Joinder in Class Plaintiffs' Motion for Final Approval of the Class Action Settlement based on the Evidence Supporting Final Approval. On May 24, 2005, defendants CBIZ Valuation Group, Inc., CBIZ Accounting, Tax & Advisory, Inc. and Century Business Group, Inc. (collectively, “CBIZ defendants”) filed a Joinder in Class Plaintiffs' Motion for Final Approval of the Class Action Settlement based on the Evidence Supporting Final Approval. On May 25, 2005, Michael Sobelman and Sobelman, Cohen & Sullivan filed a Joinder in Class Plaintiffs' Motion for Final Approval of the Class Action Settlement based on the Evidence Supporting Final Approval.
- 4 CBIZ defendants are collectively, CBIZ Valuation Group, Inc., CBIZ Accounting, Tax & Advisory, Inc., and Century Business Services, Inc.
- 5 For example, the court in *In re Sumitomo Cooper Litig.*, 189 F.R.D. 274 (S.D.N.Y.1999), recounted an instance where “a class action against the manufacturer of the drug Bendectin was originally settled, but settlement approval was reversed by the Sixth Circuit.” *Sumitomo Cooper*, 189 F.R.D. at 282 (citing *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300 (6th Cir.1984)). “Thereafter, as reported by THE WALL STREET JOURNAL (March 13, 1985), the plaintiffs tried the case and, by jury verdict, lost millions of dollars for which they had originally bargained.” *Id.* In *Upson v. Otis* [ 155 F.2d 606, 612 (2nd Cir.1946) ], approval of settlement was reversed because “ ‘on the facts presented to the district judge, the liability of the individual defendants was indubitable and the amount of controversy beyond doubt greater than that offered in the settlement.’ ” *Sumitomo Cooper*, 189 F.R.D. at 282 (quoting *Upson*, 155 F.2d at 612). However, as the *Sumitomo* Court was informed, “the ultimate recovery turned out to be less than the rejected settlement.” *Id.*



- 6 The M & S defendants consist of a group of employees employed by Miller & Schroeder.
- 7 As Plaintiffs point out, if Plaintiffs' counsel is awarded its requested fees and reimbursed expenses, the Settlement Fund, after the subtraction of the fees and expenses, would be no less than 23% of the class' net losses.
- 8 The Bohem defendants are collectively, Joel Boehm and the two law firms that employed Bohem: Sabo & Green LLP and Atkinson, Andelson, Loya, Ruud & Romo LLP ("Atkinson Andelson").
- 9 This Court received an untimely objection via mail by K. Martin on May 25, 2005, ten days after the filing deadline for oppositions. Due to its lateness, and because the document is not file stamped, and therefore not part of the Court's record, the Court does not consider K. Martin's letter in its analysis.
- 10 The Court notes that \$150.00 per hour for 65 hours does not equal \$10,000.00, but \$9,750.00. Nevertheless, the Court acknowledges that the 65 hours is only an approximate number of hours spent. As such, the Court recognizes that \$10,000.00 is only the approximate figure of reimbursement that class representatives Preston, Parrill, Anderson, McKenry, Kivenson and Allman seek to recover.
- 11 Although the application is styled as one brought by "Lead Plaintiffs," the Court notes that it is actually Lead Counsel who applies for an award of attorneys' fees and reimbursement of expenses.
- 12 Federal courts have consistently approved of attorney fee awards over the 25% benchmark. To this end, the Court notes that Lead Plaintiffs attach a list of over 200 cases where a fee of 30% or higher was awarded. Declaration of Brian Barry, ("Barry Decl."), Exh. 5. In *In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1377–78 (N.D.Cal.1989), the Hon. Maralyn Hall Patel of the United States District Judge of the Northern District of California found, after a comprehensive review of fee awards, that the "better practice" would be to set the benchmark percentage at 30%. *Activision*, 723 F.Supp. at 1377–78.
- 13 The law firm of Miller Milove & Kob, who represents plaintiffs Lewis G. Herrmann and Archie Rotblatt (collectively "Herrmann Plaintiffs"), filed an Opposition to Class Counsel's request for attorneys' fees. According to Herrmann Plaintiffs, Class Counsel "should be paid substantially less than the twenty-five percent (25%) benchmark" because 25% is unreasonable in light of: (1) "[T]he limited risk, as the allegations and evidence were well developed by other counsel prior to appointment of Lead Counsel;" (2) "[P]rior rulings of this Court in the *Betker* action which paved the way for the class action;" (3) "Lead Counsels' reliance upon the deposition transcripts from depositions conducted by the U.S. Securities and Exchange Commission ("SEC");" (4) "[T]he *Lundquist* NASD arbitration award which included findings supporting the care allegations of securities fraud;" (5) "[T]he *Lundquist* arbitration transcripts from the Fall of 2001, which included testimony of Settling Defendants Robert Kasirer, James Iverson, John Clarey and Victor Dhooge and which implicated many of the Settling Defendants, particularly the Attorney Defendants, i.e., Joel Boehm, Sabo & Green, and Atkinson Andelson Loya Ruud & Romo;" (6) "Lead Counsels' reliance upon other attorneys and cases to develop the case against U.S. Trust Company of Texas, N.A.;" (7) "[L]imited discovery conducted by Lead Counsel, although they claim to have taken many depositions, they do not indicate whose depositions were conducted and at least several depositions were for limited purposes, such as in connection with document production;" (8) "[T]he pressure exerted upon Settling Defendants by the SEC, the Department of Justice and the Internal Revenue Service;" (9) "[T]he action was not prepared for trial and Lead Counsel was never required to present admissible evidence of any defendants [sic] liability in opposition to a motion for summary judgment or otherwise;" (10) "[T]he strength of the Plaintiffs' case and the results obtained." (Herrmann Plaintiffs' Objection to Application of Lead Counsel for Award of Attorneys Fees and Reimbursement of Expenses ("Herrmann Plaintiffs' Objection"), at 3:6–4:21).

Herrmann Plaintiffs' arguments are directed toward showing that the case was so well developed by the time Class Counsel was appointed, that an insignificant "risk of litigation" existed, and thus, Class Counsel is not entitled to a fee award of one-third of the settlement fund. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2nd Cir.1974). According to Herrmann Plaintiffs, "[t]he accomplishments claimed by Lead Counsel were greatly assisted by others, including not only Miller Milove & Kob, but other counsel prosecuting Heritage Bond related claims for investors and the Federal government[, and thus a]ny competent counsel could have achieved significant results under those circumstances." (Herrmann Plaintiffs' Objection, at 4:22–25) (emphasis added). The Court does not speculate as to how other counsel might have litigated this securities class action. The Court has intimate knowledge, however, that this case was highly complex, and although other law firms may have contributed to the success of resolving this action,

it was Lead Counsel who effectively spearheaded the litigation which resulted in a substantial recovery for the class. Herrmann Plaintiffs' attempt to undercut Class Counsel's vital and significant participation in this action is unpersuasive.

- 14 Courts in the Ninth Circuit have awarded attorney fees in amounts greater than the twenty-five percent (25%) "benchmark percentage." See, e.g., *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir.2000) (affirming award of fees equal to one-third of total recovery); *In re Public Ser. Co. of New Mexico*, 1992 WL 278452, at \*1, \*12 (S.D.Cal. July 28, 1992) (awarding one-third); *Antonopoulos v. North American Thoroughbreds, Inc.*, 1991 WL 427893, at \*1, \*4 (S.D.Cal. May 6, 1991) (awarding one-third); *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747, at \*1, \*10 (S.D.Cal. Aug.30, 1990) (awarding 30% attorneys' fee plus expenses).

Moreover, courts in other districts have awarded attorney fees in amounts greater than 25% of the common fund. See, e.g., *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 300 (1st Cir.1995) (approving a fee of roughly 30.9%); *Nichols v. SmithKline Beecham Corp.*, 2005 WL 950616, at \*1, \*24 (E.D.Pa. April 22, 2005) (awarding fee equal to 30% of a \$65 million fund which represented a multiplier of 3.15 of the loadstar); *In re Raviscent Tech. Inc. Sec. Litig.*, 2005 WL 906361, at \*1, \*12 (E.D.Pa. April 18, 2005) (acknowledging that attorneys' fees of 30–35% were commonly granted in awarding 30% in fees of a \$7 million fund); *In re Corel Corp. Sec. Litig.*, 293 F.Supp.2d 484, 495–99 (E.D.Pa.2003) (awarding one-third of \$7 million settlement fund plus expenses); *In re Combustion, Inc.*, 968 F.Supp. 1116, 1136–1141 (W.D.La.1997) (awarding fee equal to 36% of the settlement fund); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y.1992) (awarding fee of 30%).

- 15 Lead Counsel points out that many class members will receive a share of the \$2 million contributed by the Bank of New York, from which Class Counsel does not seek fees.
- 16 The Court notes that Lead Counsel did not provide information with respect to the hourly rates employed, the hours expended by whom, and the task(s) performed. See *Common Cause v. Jones*, 235 F.Supp.2d 1076, 1078–79 (C.D.Cal.2002) (finding that the loadstar information provided by the lead counsel was without supporting data, and thus, meaningless). While the lack of particularity in Lead Counsel's papers prevents an accurate and detailed review of the loadstar value, the Court concludes that the other factors so strongly cut in favor of finding that the requested fee award of 33 % of the common fund is reasonable and appropriate, that the loadstar amount, under the particular facts of this case, bears little weight on this Court's analysis.
- 17 In awarding attorney fees, this Court is keenly aware of its duty to protect the interests of the class. *Vizcaino*, 290 F.3d at 1052 (" 'Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the feesetting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs.' ") *WPPSS*, 19 F.3d at 1302. Accordingly, fee applications must be closely scrutinized. Rubber-stamp approval, even in the absence of objections, is improper."); see also *In re Coordinated Pre-trial Proceedings in Petroleum Prods., Antitrust Litig.*, 109 F.3d 602, 608 (9th Cir.1997) ("In a common fund case, the judge must look out for the interests of the beneficiaries, to make sure that they obtain sufficient financial benefit after the lawyers are paid. Their interests are not represented in the fee award proceedings by the lawyers seeking fees from the common fund.") (citing *WPPSS*, 19 F.3d at 1300–01). This Court finds the requested attorneys' fee amount amply supported by the analysis set forth in today's ruling.
- 18 The fact that the Notice was sent to possible class members stating that Class Counsel would seek reimbursement of expenses in the approximate amount of \$750,000.00, plus the expense incurred in claims administration including sending notice, did not permit the Court to automatically assume that the requested expenses were reasonable. Such an assumption would have lead the Court to impermissibly neglect its obligation to ensure that Class Counsel recovers only its reasonably justifiable expenses related to litigating this action.
- 19 Lead Counsel originally requested \$570,090.18 in expenses. However, after Lead Counsel "reviewed all expenses thoroughly in accordance with the guidance provided by the Court at the hearing[,] ... certain items that were included in the initial request for reimbursement [were] removed and in-house copying charges from all firms [were] reduced to \$0.15 per page." (Supplemental Declaration of Brian Barry in Support of Class Counsels' Application for Reimbursement of Costs and Expenses, ¶ 2). As indicated herein, Lead Counsel now requests \$522,560.84 in expenses.

20 The Court notes that MMK failed to comply with Local Rules governing typeface size requirements. Although this Court does not consider MMK's failure to follow Local Rules as grounds for denying MMK's present request, the Court cautions MMK that future noncompliance may result in sanctions.

21 As a preliminary matter, and with respect to the State Court Action, the Court notes that it has the jurisdiction and authority to award fees and costs in connection with the state court proceedings. As the Ninth Circuit has stated:

[J]urisdiction over a fund allows for the district court to spread the costs of the litigation among the recipients of the common benefit. *Id.*; see also *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 774 n. 15 (9th Cir.1977) (stating that *either* "control over a fund or jurisdiction over the parties" is required in addition to "a finding of benefit-in-fact") (emphasis added). For instance, in *Angoff*, the First Circuit held the district court erred in refusing to allow attorneys' fees arising from a separate proceeding in state court when it "produced a benefit to the corporation on behalf of which the main action was brought.".... We are aware of no case restricting a district court's equitable powers to award attorneys' fees to the litigation directly before the court.

*Wininger v. SI Mgmt. LP*, 301 F.3d 1115, 1121 n. 3 (9th Cir.2002). The *Wininger* Court further stated that:

The question presented is whether the district court's equitable jurisdiction allows it to award fees for hours spent working on something other than the present litigation. We hold that it does. The level of relatedness to the ongoing litigation is of less importance than the extent to which the non-[present]-litigation work was calculated to—and in fact did—bring about the common fund presently under the district court's control.

*Wininger*, 301 F.3d at 1121 n. 3 (emphasis added).

22 Specifically, the filing of the State Court Action preserved the statute of limitations for claims against Settling Attorney Defendants (Boehm, Sabo & Green and Atkinson Andelson).

23 On May 24, 2002, the state court granted all demurrers for all defendants on all claims in the State Court Action, with the exception of a demurrer on a single claim for breach of fiduciary duty. The claim was later abandoned by MMK when it filed its First Amended Complaint in the State Court Action. The demurrers were sustained based on state of limitations grounds and the lack of any facts supporting the claims asserted.

24 According to Lead-Counsel:

MMK did not participate in:

- a) motion practice (save its small contribution to the first round of motions to dismiss);
- b) researching or drafting the miscellaneous criminal matters (or extensive briefing required by Judge Anderson) which resulted in the class obtaining some of the most useful documents in the case;
- c) the approximately fifteen motions to compel briefed and argued before Magistrate Judge Chapman;
- d) any of the three summary judgment motions filed with the Court;
- e) the numerous discussions and meetings with various defense counsel which resulted in agreements obviating the need for further motions to compel;
- f) any of the depositions (save one meaningless depositions);
- g) preparation of the many mediation sessions; [and]
- h) the negotiation of the global settlement.

(MMK Motion at 8:9–23 (citing Barry Decl. at ¶ 11)).

- 25 This Court initially awarded MMK \$277,802.21 in attorneys' fees, equaling 3% of the \$9,260,073.90 awarded to Lead Plaintiffs' counsel. However, after oral argument, a careful review of the record, and in the Court's discretion, this Court increased the amount to 5%.

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# **EXHIBIT 15**



2024 WL 4454035

Only the Westlaw citation is currently available.

United States District Court, E.D. California.

Janice INSIXIENGMAI, individually  
and on behalf of all other similarly  
situated employees, Plaintiff,

v.

HYATT CORPORATION dba Hyatt Regency  
Sacramento, a Delaware Corporation;  
and Does 1 to 100, inclusive, Defendants.

Case No. 2:18-cv-02993-TLN-DB

|

Signed September 20, 2024

|

Filed September 23, 2024

#### Attorneys and Law Firms

Galen T. Shimoda, Justin Paul Rodriguez, Shimoda Law Corp., Elk Grove, CA, Renald Konini, Brittany V. Berzin, Shimoda & Rodriguez Law, PC, Elk Grove, CA, for Plaintiff.

J. Scott Carr, Kristapor Vartanian, Kabat Chapman & Ozmer LLP, Los Angeles, CA, for Defendants.

#### ORDER GRANTING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS, REPRESENTATIVE ENHANCEMENT, AND SETTLEMENT ADMINISTRATOR COSTS

Troy L. Nunley, United States District Judge

**\*1** TO ALL PARTIES AND THEIR RESPECTIVE  
COUNSEL OF RECORD:

Pursuant to the Court's March 12, 2024, Order Granting Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement (Doc. No. 77), Plaintiff's Motion for Attorney's Fees and Costs, Representative Enhancement, and Settlement Administrator Costs ("Motion") in the above referenced case came on for hearing before this Court, on September 19, 2024, at 2:00 p.m., the Honorable Troy L. Nunley, presiding.

The Court, having received and considered Plaintiff's Motion, the declarations in support, documents filed by the parties in connection with the Motion, the oral arguments of counsel, and other evidence, HEREBY ORDERS AND MAKES DETERMINATIONS AS FOLLOWS:

1. Notice to the Class, including information regarding the amount to be requested for an award of attorney's fees and costs, a Representative Enhancement, and Settlement Administrator Costs, was directed to Class Members in a reasonable manner, and complied with [Rule 23\(h\)\(1\) of the Federal Rules of Civil Procedure](#).

2. Class Members have been given the opportunity to object in compliance with [Rule 23\(h\)\(2\) of the Federal Rules of Civil Procedure](#).

3. No Class Member has objected to the requested attorney's fees and costs, the Representative Enhancement, or the Settlement Administrator Costs being requested.

4. The settlement agreement provides that Class Counsel may seek up to 35% of the common fund settlement created in this case plus their reasonably incurred litigation expenses. Class Counsel seeks \$103,250.00 in attorney's fees, plus \$29,051.07 in reasonably incurred litigation expenses, as provided in the settlement agreement. Defendant does not object to these amounts.

5. The declarations submitted in support of the motion demonstrates that the attorneys representing the class have the experience and qualifications necessary to represent the Class. The results obtained on behalf of the class also demonstrate Class Counsels' skill and quality of work.

6. Class counsel have substantiated their common fund fee request of 35% with a declaration describing the complexity and risks associated with this case, the quality of Class Counsel and the results obtained, and the risks and financial burden undertaken by Class Counsel in agreeing to litigate this matter on a contingency basis over five and a half (5 ½) years. The 35% fee request also falls within range of percentages awarded in similar class action settlements generally and wage and hour class settlements specifically. The lack of objections to the attorney's fees request is further evidence of its reasonableness.

7. A lodestar cross check supports Class Counsel's attorneys fee request as being reasonable. Class counsel has provided

a declaration detailing the billing practices, billing rates, hours worked, work tasks performed and corresponding lodestar for the time invested into this case. The declaration demonstrates a lodestar of approximately \$396,947.50 as of May 8, 2024. Counsel note that this does not include work performed in further communicating with Class Members and the Settlement Administrator, preparing the case for final approval, and overseeing implementation of the settlement after final approval and through the final disbursement of money and compliance hearing.

\*2 8. The Court finds that the hourly rates charged by Class Counsel (Galen T. Shimoda: \$725; Justin P. Rodriguez: \$625; Brittany V. Berzin: \$425, Renald Konini \$425) are within the prevailing range of hourly rates charged by attorneys who provide similar services in wage and hour class actions in California. Furthermore, the Sacramento County Superior Court has approved Class Counsel at these rates as of November 2022. The Court finds that the total hours worked by Class Counsel are reasonable, given the nature of the case and the defenses presented, the work Class Counsel had to undertake, the manner in which Class Counsel allocated their work, and the results achieved.

9. Based on a fee request of \$103,250.00, the declarations of class counsel documenting their lodestar shows that a fee award of this amount would result in a negative multiplier. Class Counsel would otherwise be entitled to a positive multiplier of their total lodestar. *See Ketchum v. Moses*, 24 Cal.4th 1122, 1133-1132, 1138 (2001) (reasoning that contingency fees should be higher than fees for the same legal services paid concurrently with the provision of the services). While the Court finds a multiplier would otherwise be appropriate, the fact that the requested fee award is actually

less than the lodestar amount demonstrates the requested fee is a reasonable percentage fee in this case.

10. Class Counsel also seek reimbursement of \$29,051.07 in advanced litigation costs, which are documented in the declaration of Class Counsel. Class Counsel are entitled to recover the out-of-pocket costs and litigation expenses they reasonably incurred in investigating, prosecuting, and settling this case. *See In re Media Vision Tech. Sec. Litig.*, 913 F.Supp. 1362, 1366 (N.D. Cal. 1996). The Court finds that class counsel's out-of-pocket costs and expenses of \$29,051.07 are documented, and reasonable and necessary to the prosecution of this action.

11. The Settlement Administrator, CPT Group, Inc., was utilized by the parties to provide notice to the class and administer the settlement's terms consistent with the Court's prior order preliminarily approving the Settlement. The Court finds that CPT Group, Inc., has substantiated its fees and costs and that the fees and costs are reasonable.

12. FOR THE FOREGOING REASONS, the Court awards Class Counsel \$103,250.00 in attorney's fees and \$29,051.07 in litigation expenses, awards Plaintiff Janice Insixiengmay \$10,000.00 as a Representative Enhancement, and awards CPT Group, Inc., \$13,500 in Settlement Administrator Costs. The amounts are to be paid from the Gross Settlement Amount pursuant to the terms and timeframe set forth in the settlement agreement.

IT IS SO ORDERED.

#### All Citations

Slip Copy, 2024 WL 4454035

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# **EXHIBIT 16**



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Nigh v. Humphreys Pharmacal, Inc.](#), S.D.Cal., October 23, 2013

2011 WL 4899942

Only the Westlaw citation is currently available.

United States District Court,  
S.D. California.

Shawnda JACK, individually and on  
behalf of other members of the general  
public similarly situated, Plaintiff,

v.

HARTFORD FIRE INSURANCE  
COMPANY, a Connecticut corporation  
and Does 1–50, Inclusive, Defendant.

No. 3:09–cv–1683–MMA(JMA).

|

Oct. 13, 2011.

#### Attorneys and Law Firms

[Kevin Dennis Sullivan](#), [William Bransfield Sullivan](#), Sullivan  
& Christiani LLP, San Diego, CA, for Plaintiff.

[David Dow](#), Littler Mendelson, San Diego, CA, [Michael  
G. Leggieri](#), Littler Mendelson, P.C., Sacramento, CA, for  
Defendant.

#### ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT;

#### ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR ATTORNEYS' FEES

[MICHAEL M. ANELLO](#), District Judge.

\*1 Currently before the Court are Plaintiff's unopposed motion for final approval of settlement [Doc. No. 43] and Plaintiff's unopposed motion for attorney fees, litigation expense award, approval of administrative expenses, an enhancement award for the named plaintiff and PAGA penalties [Doc. No. 44].

#### I. Background

Plaintiff Shawnda Jack ("Plaintiff") commenced the above-referenced wage and hour class action ("Action") against Defendant Hartford Fire Insurance Company ("Defendant") on August 3, 2009, and filed the operative First Amended Complaint ("FAC") on February 22, 2010. Plaintiff worked as a customer care representative for Defendant from August 2004 to February 2009. Plaintiff's FAC alleges Defendant's employment practices violated state and federal law, including the Fair Labor Standards Act ("FLSA") of 1938, the California Wage Orders, the California Business & Professions Code, the California Labor Code, and California's Private Attorneys General Act ("PAGA") of 2004.

The parties engaged in extensive discovery and then participated in mediation in front of Robert Kaplan, Esq. The parties ultimately reached a settlement. On December 15, 2010, the parties filed a joint motion for preliminary approval of settlement. [Doc. No. 38.] On January 20, 2011, the Court granted preliminary approval of the settlement ("Preliminary Approval Order") [Doc. No. 40], appointing Class Counsel and provisionally certifying the Class for settlement purposes only, defined as:

Any person who worked for Hartford Fire Insurance Company in a non-exempt position in California at any time between August 4, 2005 and January 20, 2011.

After the preliminary approval of the settlement, the claims administrator sent via first-class U.S. mail to all Class Members a Notice Form, Claim Form, and Request for Exclusion Form. The claims administrator performed an address trace prior to the initial mailing, and again upon receipt of returned/undeliverable mail. The claims administrator also traced and re-sent returned mailings; the obligation to trace and resend ceased after the two mailings or 25 days after the initial mailing. Heirs of Class Members were entitled to participate, but notices were only sent to Class Members' last known addresses.

Class Members had 45 days from the initial mailing to exercise their option to: (1) object to the settlement; (2) opt out of the class; (3) submit a claim; (4) not respond and be bound to the terms of the Agreement, but not recover or be entitled to any portion of the settlement. The notice informed Class Members that by submitting a claim they agreed to release their California and federal claims; if they did not timely

submit opt-out forms, their California-based claims would be released.

On April 24, 2011, Plaintiff filed the present motions for final approval of settlement and for attorneys' fees. As set forth in the parties' joint stipulation of class action settlement and release of class action claims ("Stipulation of Settlement"), Defendant established a settlement fund of \$1,200,000, allocated as follows: (1) net settlement amount, aka "Payout Fund" \$801,100; (2) attorneys' fees \$360,000; (3) cost reimbursement \$15,000; (4) enhancement award to Class Representative \$2,500; (5) claims administration \$18,400; and (6) penalties pursuant to Private Attorneys General Act of 2004 \$3,000. On June 3, 2011, the parties submitted supplemental briefing in support of the motions. [Doc. No. 50.]

\*2 On October 3, 2011, the parties appeared before the Court for a final approval hearing. Plaintiff was represented by William Sullivan of Sullivan & Christiani, LLC. Defendant was represented by David Dow of Littler Mendelson. No individual appeared at the hearing to object to the proposed settlement. At the conclusion of the hearing, the Court took the motions under submission.

After due consideration of the evidence and arguments presented to the Court in the parties' moving papers as well as at the October 3, 2011 hearing, the Court concludes that good cause supports final approval of the proposed settlement. Therefore, for the reasons set forth below, the Court **GRANTS** final approval of the settlement and **GRANTS** the motion for attorneys' fees, subject to the Court's revision of Plaintiff's proposed fee award. Additionally, the Court **GRANTS** Plaintiffs' motion for costs, enhancements for the Class Representative, claims administration expenses and PAGA penalties.

## II. Discussion

### A. Collective Class Action under FLSA, 29 U.S.C. § 216(b)

Under the Fair Labor Standards Act ("FLSA"), an aggrieved employee may bring a collective action on behalf of himself and other employees "similarly situated" based on an employer's failure to adequately pay overtime wages. 29 U.S.C. § 216(b); *Adams v. Inter-Con Sec. Sys.*, 242 F.R.D. 530, 535–36 (N.D.Cal.2007). The FLSA limits participation in a collective action to only those parties that 'opt-in' to the

suit. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought").

The standards for a collective action are set forth in [Federal Rule of Civil Procedure 23](#) ("Rule 23"). Courts have found that collective action is proper under a two-part test. Under the first part, a court must determine whether the proposed class should be notified of the action and whether the putative Class Members were subject to a single illegal policy, plan or decision. *Murillo v. Pacific Gas & Elec. Co.*, 2010 WL 2889728 \* 2 (C.D.Cal.2010) (internal marks and citation omitted). The second part usually occurs after discovery is complete, at which time the defendants may move to decertify the class. *Id.* In this step, the court makes a factual determination about whether the plaintiffs are similarly situated by weighing such factors as "(1) the disparate factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant which appeared to be individual to each plaintiff, and (3) fairness and procedural considerations." *Misra v. Decision One Mortg. Co.*, 673 F.Supp.2d 987, 993 (C.D.Cal.2008)

Here, the notice provides that if a Class Member does not timely submit opt-out forms, the California-based claims are released [*Hanson Dec.*, Doc 43–3, P. 7–8, § III, ¶ 1]. However, if a Class Member returns a valid Claim Form (thereby opting-in), the Class Member releases both California-based and FLSA claims [*Id.* at P. 7–8, § III, ¶ 2]. Accordingly, the notice complies with the FLSA requirements by requiring the Class Members to affirmatively consent to releasing FLSA claims through the opt-in procedure.

\*3 The requirement that the putative Class Members were subject to a single illegal policy, plan, or decision is also satisfied. Plaintiff alleges that Defendant violated the FLSA by failing to pay and properly calculate overtime to Plaintiff and all other employees similarly situated. Defendant admits that it relied solely upon FLSA members' timesheets and ignored several more accurate time records such as phone log-in reports and computer log-in/out reports. In addition, Defendant relied on time schedules-as opposed to actual work-time—to calculate compensable time. According to Plaintiff, these policies and practices led to inaccurate compensation of Defendant's employees. Defendants' failure to take into account the more accurate time records that were readily available constitutes a single illegal policy, to which all Class Members were subjected.



Finally, because this case settled prior to the close of discovery, Defendant did not move to decertify the Class. *See Misra v. Decision One Mortg. Co.*, 2009 U.S. Dist. LEXIS 119468, 2009 WL 4581276, at \*4 (C.D.Cal. April 13, 2009). Since the analysis required by the second step, including issues of factual similarities between the employees and their claims, largely overlaps with class certification analysis under [Rule 23\(a\) and \(b\)](#), the Court now considers the propriety of class certification under [Rule 23](#). *See id.*

#### ***B. Certification of the Settlement Class under Rule 23(a) and (b)***

[Rule 23\(e\)](#) requires that a court approve a class action settlement. “[I]n the context of a case in which the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.2003). A court must confirm the propriety of certification by assessing the following [Rule 23\(a\)](#) prerequisites: “(1) numerosity of plaintiffs; (2) common questions of law or fact predominate; (3) the named plaintiffs claims and defenses are typical; and (4) the named plaintiff can adequately protect the interests of the class.” *Hanlon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992) (citing *Fed. R. Civ. P. 23(a)*). Under [Rule 23\(b\)\(3\)](#), the Court also must consider whether common questions of law and fact predominate, as well as whether the class action offers a superior method of adjudicating the controversy. [Fed. R. Civ. P. 23\(b\)\(3\)](#).

Plaintiff adequately demonstrates class treatment is appropriate under [Rule 23\(a\)](#). The numerosity requirement is met because the settlement encompasses 2,591 Class Members. [*Hanson Dec.*, Doc. No. 44–4, ¶ 14.] The commonality requirement is met because common questions of law or fact exist (i.e., nonexempt employees allege they were not properly paid all regular and overtime wages, not properly paid for earned paid time off, not provided adequate meal and rest periods, not provided proper itemized wage statements, not timely paid all wages owed at end of employment). The typicality requirement is met because Plaintiff's claims are typical of other non-exempt employees who experienced the same working conditions, and Defendant's payroll policies and practices uniformly applied to all non-exempt Class Members. The adequacy requirement is met because there is no conflict of interest between Plaintiff and the Class Members.

\*4 Furthermore, Plaintiff demonstrates the [Rule 23\(b\)\(3\)](#) requirements are also satisfied. The parties agree that common questions predominate in this action. [*See P & A in Support of Mot. For Prelim. Approval of Settlement*, p. 10.] A class action is superior because common elements among the individual claims exist, but the relatively small size of each Class Member's potential claim would deter them from individually pursuing their claims.

#### ***C. Fairness, Adequacy and Reasonableness of Proposed Settlement under Rule 23(e)***

Courts require a higher standard of fairness when settlement takes place prior to class certification to ensure Class Counsel and defendant have not colluded in settling the case. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998). Ultimately, “[t]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir.1982).

A court considers several factors in determining whether a proposed settlement is “fair, adequate and reasonable” under [Rule 23\(e\)](#). Such factors may include: (1) the strength of the case; (2) the risk, expense, complexity, and likely duration of further litigation and the risk of maintaining class action status throughout the trial; (3) the stage of the proceedings (investigation, discovery and research completed); (4) the settlement amount; (5) the experience and views of counsel; and (6) the reaction of the class to the proposed settlement. *Staton*, 327 F.3d at 959. The Court needs only consider some of these factors—namely, those designed to protect absentees. *See Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir.2003) (overruled in part on other grounds).

The Court concludes that the settlement is fair, adequate and reasonable. The parties decided to settle this action after assessing the claims and possible defenses. The additional time and expense of further litigation also weigh in favor of settlement. Furthermore, the proposed settlement was reached after completing extensive discovery. Thus, Class Counsel possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the monetary results that could be obtained through further litigation. The Court also notes that the settlement was

the result of an arms-length negotiation before a neutral and detached mediator. [*William Sullivan Dec.*, Doc. No. 38–2, ¶ 10.]

Finally, the Court finds that the settlement in this case of \$1,200,000 represents a substantial benefit for the Class because each Class Member will receive a payment on his or her claim. The average payout to Class Members is projected to be \$391.78 per Class Member. The highest payout claimed is \$791.27. [*P & A in Support of Settlement*, p. 10.] The Court also notes that the Class Members' reaction to the proposed settlement has been favorable. In fact, no Class Member has filed an objection to the proposed settlement. [*Id.* at p. 13, ln. 16.]

\*5 Based on the foregoing, the Court concludes that the settlement satisfies the FLSA collective action requirements, the Rule 23(a) and (b) class certification requirements, and the Rule 23(e) requirements for class action settlement. As such, the Court hereby **GRANTS** final approval of the settlement.

### III. Motion for Attorney Fees, Costs, Enhancement Award and Paga Penalty

Also before the Court is Plaintiffs' unopposed motion for attorney fees, litigation expense award, approval of administrative expenses, an enhancement award for the named plaintiff, and PAGA penalties [Doc. No. 44].

#### A. Award of Attorneys' Fees

Rule 23(h) of the Federal Rules of Civil Procedure provides that, “[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.” Fed. R. Civ. P. 23(h). Under the FLSA, an award of attorneys' fees and court costs is mandatory. See 29 U.S.C. § 216(b) (“The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.”)

“In common fund cases such as this, [the Ninth Circuit has] established twenty-five percent (25%) of the common fund as the benchmark award for attorney fees. This benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant

factors.” *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir.1993) (internal marks and citations omitted). “Length and complexity of litigation and degree of success could be considered relevant factors” in determining whether to adjust the benchmark award. *Wininger v. SI Management L.P.*, 301 F.3d 1115, 1127 (9th Cir.2002). If the court determines a benchmark percentage adjustment is warranted, the Ninth Circuit “caution[s] that it must be made clear by the district court how it arrives at the figure ultimately awarded.” *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir.1989). While no factor is dispositive, the following factors are relevant to determining whether the percentage award is appropriate: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *In re Omnivision Technologies, Inc.*, 2007 WL 4293467 \*9 (N.D.Cal.2007), citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir.2002).

Here, Class Counsel requests an award of attorneys' fees in the amount of \$360,000, which represents thirty percent (30%) of the settlement. Upon due consideration, the Court concludes that this case does not warrant an upward adjustment above the twenty-five percent benchmark. There is no evidence to support Class Counsel's claims that the results in this case were exceptional or that this case is extraordinarily factually or legally complex. Although Class Counsel performed competent work in conducting discovery and negotiating settlement, the circumstances do not indicate any special justification for an upward adjustment to thirty percent. Accordingly, the Court approves an award of attorneys' fees of \$300,000 (25% of the \$1,200,000 settlement).

#### B. Litigation and Claims Administration Costs

\*6 Reimbursement of taxable costs is governed by 28 U.S.C. § 1920 and Federal Rule of Civil Procedure 54. Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters. See *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.1994). Here, Class Counsel seeks a total reimbursement of \$15,000 for expenses, including filing fees, deposition fees, mediation fees, legal research fees, copies, fax transmittals, and travel and meal fees in connection with the case.

In addition, Class Counsel requests \$18,400 in claims administration expenses. A third-party claims administrator, CAC Services Group, LLC, was hired to mail notice to Class Members and distribute payments. Class Counsel asserts

that CAC Services Group, LLC performed its functions diligently, and the declaration of Matthew P. Hanson, the claims administrator, supports this claim.

Accordingly, the Court approves reimbursement for litigation expenses totaling \$15,000, and approves administrative expenses in the amount of \$18,400.

### ***C. Enhancement Award for Class Representative***

In evaluating the enhancement award to a class representative, a court should consider all “relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, ... the amount of time and effort the plaintiff expended in pursuing the litigation ... and reasonable fears of workplace retaliation.” *Staton*, 327 F.3d at 977 (internal marks and citations omitted).

Here, the settlement provides an enhancement award to the Class Representative, Shawnda Jack, of \$2,500. Plaintiff provided valuable information and documents from her employment at Hartford, which were instrumental in Class Counsel's understanding of the case. Plaintiff spent more than sixty hours helping prosecute the matter, including meeting with counsel, reviewing documents, clarifying dates and policies, reviewing discovery responses and document production, confirming the truthfulness of claims her counsel asserted, and offering input into the defenses alleged by Hartford [Doc 44–2, ¶¶ 10–13]. As such, Plaintiff performed a vital role in this litigation, and an enhancement award of \$2,500 constitutes fair and reasonable compensation.

Therefore, the Court approves the enhancement award of \$2,500 to Class Representative Plaintiff Shawnda Jack.

### ***D. PAGA Penalties***

Defendant's response to Plaintiff's allegations has virtually negated any “willful” violations of the California Labor Code, including, but not limited to, section 203, which imposes a waiting-time penalty where an employer willfully fails to pay wages to an employee who is discharged or quits. When allegations regarding improper accounting for the amount of time employees' worked were brought to Defendant's attention, Defendant promptly changed its policy to have its managers meaningfully review its employees' timesheets for errors, and crosscheck them with the time reports available to the manager. Nonetheless, the parties have agreed to allocate \$3,000 for PAGA penalties, so that the Labor workforce

and development agency can continue to investigate and prosecute California Labor Code violations. Therefore, the Court hereby approves PAGA penalties in the amount of \$3,000.

## **III. ORDER**

\*7 For the reasons outlined above, the Court **GRANTS** the parties' joint motion for final approval of class action settlement [Doc. No. 43] and **GRANTS** Plaintiffs' unopposed motion for attorneys' fees, litigation expense award, approval of administrative expenses, an enhancement award for the named plaintiff, and PAGA penalties [Doc. No. 44]. The Court approves the terms of the parties' proposed final settlement, subject to the terms and conditions stated herein and set forth below. Accordingly,

### **IT IS HEREBY ORDERED THAT:**

1. All terms used herein shall have the same meaning as defined in the Stipulation of Settlement.
2. Consistent with the definitions provided in the Stipulation of Settlement, the terms “Class” and “Class Members” include: “Any person who worked for Hartford Fire Insurance Company in a non-exempt position in California at any time between August 4, 2005 and January 20, 2011.” For purposes of the Settlement and this Final Order, “Defendant” and/or “Released Parties” include Hartford Fire Insurance Company and its present and former parent companies, subsidiaries, related or affiliated companies, including but not limited to The Hartford Financial Services Group, Inc., Specialty Risk Services, LLC, and any parent, subsidiary, and related companies, joint ventures, partners, shareholders, officers, directors, employees, agents, attorneys, insurers, successors and assigns, and any individual or entity which could be jointly liable with Defendant.
3. This Court has jurisdiction over the subject matter of this Action and over all Parties to this Action, including all Class Members.
4. Distribution of the Notice of Proposed Class Action Settlement and Final Fairness and Approval Hearing, Claim Form and Request for Exclusion Form directed to the Class Members as set forth in the Stipulation of Settlement and the other matters set forth therein, has been completed in conformity with the Preliminary Approval Order, including

individual notice to all Class Members who could be identified through reasonable effort, and constitutes the best notice practicable under the circumstances. The Notice provided due and adequate notice of the proceedings and of the matters set forth therein, including the proposed Settlement set forth in the Stipulation of Settlement, to all persons entitled to such Notice, and the Notice fully satisfied the requirements of due process. All Class Members and all Released Claims and Released Federal Claims are covered by and included with the Settlement and this Final Order.

5. The Court hereby finds the Settlement was entered into in good faith, and further finds that the Settlement is fair, reasonable and adequate, and that Plaintiff has satisfied the standards and applicable requirements for final approval of this class action Settlement under California and federal law, including the provisions of [Federal Rule of Civil Procedure 23](#).

6. The Court hereby approves the Settlement as set forth in the Stipulation of Settlement, and finds that the Settlement is, in all respects, fair, adequate and reasonable, and directs the Parties to effectuate the Settlement according to the terms outlined in the Stipulation of Settlement. The Court finds that the Settlement has been reached as a result of intensive, serious and non-collusive arms length negotiations. The Court also finds that the Class is properly certified for settlement purposes only.

**\*8** 7. The Court hereby finds the One Million Two Hundred Thousand Dollars (\$1,200,000.00) Gross Settlement Amount provided for under the Settlement to be fair and reasonable.

8. The Court **ORDERS** the calculations and the payments to be made and administered from the Gross Settlement Amount in accordance with the terms of the Stipulation of Settlement to each Participating Class Member who submitted a timely and valid claim in accordance with the Stipulation of Settlement.

9. The Court hereby confirms Sullivan & Christiani, LLC as Class Counsel.

10. Pursuant to the terms of the Stipulation of Settlement, and the authorities, evidence and argument submitted by Class Counsel, the Court hereby **AWARDS** Class Counsel attorneys' fees and costs in the amount of three hundred fifteen thousand dollars (\$315,000.00), to be paid from the Maximum Settlement Payout, as final payment for and

complete satisfaction of any and all attorneys' fees and costs incurred by and/or owed to Class Counsel.

11. The Court also hereby approves as Class Representative, and **ORDERS** payment to, the named Plaintiff, Shawnda Jack, for her services as a Class Representative the sum of two thousand five hundred dollars (\$2,500.00), to be paid from the Maximum Settlement Payout and as provided by the terms of the Stipulation of Settlement.

12. The Court also hereby **ORDERS** payment of the sum of three thousand dollars (\$3,000.00) to the California Labor Workforce Development Agency, to be paid from the Maximum Settlement Amount and as provided by the terms of the Stipulation of Settlement.

13. The Court also hereby **ORDERS** the payment of the sum of eighteen thousand four hundred dollars (\$18,400.00) to the CAC Services Group, LLC, to be paid from the Maximum Settlement Payout and as provided by the terms of the Stipulation of Settlement, for its services as Claims Administrator.

14. As of the date of this Final Order, each and every Released Claim of each Class Member and Released Federal Claim of each Participating Class Member is and shall be deemed to be conclusively released as against the Released Parties. All Class Members as of the date of this Final Order and the Effective Date are hereby forever barred and enjoined from prosecuting the Released Claims (as defined in the Stipulation of Settlement and as set forth below) against the Released Parties. In addition, all Participating Class Members as of the date of this Final Order and the Effective Date are hereby forever barred and enjoined from prosecuting the Released Federal Claims (as defined in the Stipulation of Settlement and as set forth below) against the Released Parties.

15. As of the date of this Final Order, the Settlement Class, and each Class Member who has not submitted a valid Request for Exclusion Form, fully releases and discharges the Released Parties from any and all claims, debts, liabilities, demands, obligations, guarantees, costs, expenses, attorneys' fees, damages, causes of action and allegations of any nature, known or unknown, suspected or unsuspected, that were alleged or that could have been alleged, in the Action, and that arise or could have arisen out of the facts alleged in the Action, including the claims brought and the claims which could have been brought in the Action, including, but not limited to claims that arise out of any alleged violations of the wage and



hour provisions of the California Labor Code or the California Wage Orders, or any other wage and hour provisions of any other state law, regulation or statute, including, but not limited to claims for the failure to provide payment for all hours worked, the failure to properly calculate the regular rate of pay, the failure to provide meal periods, the failure to provide rest periods, the failure to provide accurate pay stubs and itemized wage statements, the failure to keep and maintain accurate payroll records, the failure to properly administer paid time off, the rounding of employee time records and wage rates, the administration of make-up time, the failure to timely pay all wages owed to terminated and resigned employees, the failure to pay any penalties, claims for unfair, unlawful, and fraudulent business practices under the [California Business and Professions Code section 17200 et seq.](#), claims for penalties arising under PAGA, and/or related violations of the California Labor Code or Wage Orders, and any other claims whatsoever alleged, or that could have been alleged, in the Action, including without limitation all claims for restitution and other equitable relief, injunctive relief, statutory damages, liquidated damages, exemplary damages, punitive damages, waiting-time penalties, or penalties of any nature whatsoever, arising from employment by Defendant and/or the Released Parties, and/or any of their predecessors in interest from August 4, 2005 up to and including January 20, 2011 (collectively, “Released Claims”). This Release and the Released Claims are specifically intended to cover and release any and all claims, including any and all wage and hour claims as set forth above, that arose, or could have arisen during the Class Period.

**\*9** 16. As of the date of this Final Order, in addition to releasing the Released Parties from the Released Claims as described above, each Settlement Class Member who has submitted a valid Claim Form (“Participating Class Member”), shall fully release and discharge the Released Parties from any and all claims, debts, liabilities, demands, obligations, guarantees, costs, expenses,

attorneys' fees, damages, causes of action and allegations of any nature, known or unknown, suspected or unsuspected, that were alleged or that could have been alleged, in the Action, and that arise or could have arisen out of the facts alleged in the Action, including the claims brought and the claims which could have been brought in the Action, including, but not limited to claims that arise out of any alleged violations of the Fair Labor Standards Act of 1938, including, but not limited to claims for the failure to provide payment for all hours worked, the failure to properly calculate

the regular rate of pay, the failure to properly administer paid time off, the rounding of employee time records and wage rates, the administration of make-up time, and any other claims whatsoever alleged, or that could have been alleged, in the Action under federal law, including without limitation all claims for restitution and other equitable relief, injunctive relief, statutory damages, liquidated damages, exemplary damages, punitive damages, penalties of any nature whatsoever, arising from employment by Defendant and/or the Released Parties, and/or any of their predecessors in interest from August 4, 2005 up to and including January 20, 2011 (collectively “Released Federal Claims”). This Release and the Released Federal Claims are specifically intended to cover and release any and all claims, including any and all wage and hour claims, that arose, or could have arisen during the Class Period.

17. The Released Claims and Released Federal Claims include any unknown and unsuspected claims arising out of or in connection with the claims alleged in the Action and any claims based on the same operative facts that the Class Members and Participating Class Members do not know or suspect to exist in their favor at the time of this release, which, if known by them, might have affected their settlement with, and release of, the Released Parties or might have affected their decision not to object to this Settlement. With respect to the Released Claims and Released Federal Claims, the Class Members and Participating Class Members have expressly waived and relinquished to the fullest extent permitted by law, the provisions, rights and benefits of [Section 1542 of the California Civil Code](#), or any other similar provision under state and federal law.

18. Neither the Settlement nor any of the terms set forth in the Stipulation of Settlement are admissions by Defendant, or any of the other Released Parties, nor is this Final Order a finding of the validity of any claims in the Action, or of any wrongdoing by Defendant, or any of the other Released Parties.

**\*10** 19. The Court hereby **ORDERS** the entry of final judgment and **DISMISSES** the Action. The claims and causes of action in Plaintiffs' First Amended Complaint alleged under federal law on behalf of putative class members employed outside of California are dismissed without prejudice. Except as so excluded, the remaining claims and cause of action and the remainder of Plaintiffs' First Amended Complaint are dismissed with prejudice as



to all Parties, including all Class Members and Participating Class Members.

20. Without affecting the finality of this Final Order in any way, the Court hereby retains continuing jurisdiction over the interpretation, implementation and enforcement of the Settlement and all orders entered in connection therewith.

21. Neither this Final Order nor the Stipulation of Settlement shall be construed as an admission by Defendant or finding by the Court regarding the propriety of the certification of any class in this or any other matter other than for purposes of settlement of this Litigation.

22. If the Settlement does not become final and effective in accordance with the terms of the Stipulation of Settlement, then this Final Order and all orders entered in connection herewith shall be rendered null and void and shall be vacated.

**IT IS SO ORDERED.**

**All Citations**

Not Reported in F.Supp.2d, 2011 WL 4899942

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# **EXHIBIT 17**

2018 WL 4773057

United States District Court, N.D. California.

Shikwana JENNINGS, et al., Plaintiffs,

v.

OPEN DOOR MARKETING,

LLC, et al., Defendants.

Case No. 15-cv-04080-KAW

|

Signed 10/03/2018

**Attorneys and Law Firms**

[Matthew David Carlson](#), [Michael Louis Freedman](#), Lichten & Liss-Riordan, P.C., San Francisco, CA, [Harold Lichten](#), [Jill Stephanie Kahn](#), [Shannon Liss-Riordan](#), Lichten and Liss-Riordan P.C., Boston, MA, for Plaintiffs.

[Kristin Alexandria Smith](#), Law Offices of Burnham Brown, Oakland, CA, [Michael Leslie Thompson](#), Lehr Middlebrooks Vreeland and Thompson, P.C., Birmingham, AL, [Christopher William Decker](#), Ogletree Deakins Nash Smoak & Stewart PC, Los Angeles, CA, [Wendy V. Miller](#), Ogletree Deakins Law Firm, Nashville, TN, for Defendants.

**ORDER GRANTING MOTION FOR SETTLEMENT APPROVAL**

Re: Dkt. No. 297

[KANDIS A. WESTMORE](#), United States Magistrate Judge

\*1 Plaintiffs Shikwana Jennings and Lisa Drake filed this putative class and collective action against Defendants 20/20 Communications, Inc. (“20/20”), Open Door Marketing, LLC (“Open Door”), Larry Clark, and Jerrimy Farris, alleging violations of the Fair Labor Standards Act (“FLSA”) and various California labor laws. (Fourth Amended Compl. (“FAC”) ¶¶ 1-2, Dkt. No. 195.) Pending before the Court is Plaintiffs’ unopposed motion for settlement approval, which seeks to settle the claims of Plaintiffs and the 176 individuals who opted in to the collective action, as well as Plaintiff Jennings’s representative claim for civil penalties under the Private Attorneys General Act (“PAGA”). (Plfs.’ Mot. for Settlement Approval at 1, Dkt. No. 297; Plfs.’ Supp. at 1, Dkt. No. 303.)

Having considered the papers filed by the parties, the relevant legal authority, and the arguments advanced by counsel at the August 16, 2018 hearing, the Court GRANTS Plaintiffs’ motion for settlement approval.

**I. BACKGROUND****A. Factual Background**

Plaintiffs bring the present action on behalf of individuals who worked for Defendants “to promote free cell phones and wireless service plans for low-income individuals who meet the plans’ requirements.” (FAC ¶ 1.) Plaintiffs allege that they were misclassified as independent contractors, resulting in Defendants failing to pay them minimum wage, overtime, expenses, and all wages due at the time of termination, as well as failing to provide itemized wage statements. (FAC ¶ 2.)

Until October 2014, Defendant 20/20 contracted directly with individuals to promote wireless service plans and cellular phones as “Sales Representatives.” (See FAC ¶ 17.) To become a Sales Representative, individuals were required to execute a Mutual Arbitration Agreement. (Dkt. No. 216 at 3.) Plaintiffs allege that Defendant 20/20 would set and monitor performance goals, as well as the hours and locations of work for Sales Representatives. (FAC ¶ 17a.) Defendant 20/20 also required Sales Representatives to send a picture of themselves at work each morning to prove their attendance at the required time, use a script when performing job duties, regularly attend meetings, attend pre-employment training, wear a uniform while working, use company-provided tablets, and inform their supervisors how many customers they signed up each day. (FAC ¶ 17a.)

In October 2014, Defendant 20/20 and the individual Defendants (collectively “Open Door Defendants”) allegedly “jointly created [Open Door] as a ‘spin off’ company from 20/20.” (FAC ¶ 18.) From that point on, Sales Representatives would contract directly with Defendant Open Door rather than Defendant 20/20. The relationship between the Open Door Defendants and the Sales Representatives was largely the same as the prior relationship between Defendant 20/20 and the Sales Representatives, in that the Open Door Defendants set and monitored performance goals, as well as hours and locations of work. (FAC ¶ 18a.) Like Defendant 20/20, the Open Door Defendants also required Sales Representatives to send a picture of themselves at work each morning to prove their attendance at the required time,

use a script when performing job duties, regularly attend meetings, attend pre-employment training, wear a uniform while working, use company-provided tablets, and inform their supervisors how many customers they signed up each day. (FAC ¶ 18a.) During this time, Plaintiff alleges that Defendants were engaged in a joint employer relationship. (FAC ¶ 20.) In January 2016, Defendant Open Door began using an independent contractor agreement that included a mandatory arbitration provision.

### B. Procedural Background

\*2 Plaintiffs filed this action on September 8, 2015. (Compl., Dkt. No. 1.) On June 21, 2016, the parties stipulated to the issuance of notice to all individuals who worked for Defendant Open Door “as independent contractors marketing free cell phones and wireless service plans to potential consumers face-to-face in Nevada and California from October 2014 to the present” who had not entered into an arbitration agreement with either Open Door or 2020. (Dkt. No. 104 at 2.)

On February 24, 2017, Plaintiffs filed their motion to expand the scope of the collective action to include individuals who signed arbitration agreements with Defendants 2020 and Open Door. (Dkt. No. 139.) Defendants opposed the motion, arguing amongst other things that individuals who signed arbitration agreements were not similarly situated. (Dkt. No. 152 at 13.) On March 1, 2017, Defendant 20/20 filed its motion to deny class certification as to individuals who signed arbitration agreements with Defendants. (Dkt. No. 143.)

The Court granted in part and denied in part Defendant 20/20's motion to deny class certification, finding that the named Plaintiffs lacked typicality to represent individuals who had signed arbitration agreements with Defendant 20/20, when Plaintiffs themselves had not. (Dkt. No. 178 at 12.) The Court granted in part and denied in part Plaintiffs' motion to expand the scope of the collective action, finding that Plaintiffs satisfied the limited step one inquiry for conditional certification, but limiting the scope to individuals in California in order to ensure manageability. (*Id.* at 25.)

Defendants then filed a motion to compel arbitration of certain opt-in Plaintiffs who had signed arbitration agreements with Defendant 20/20. (Dkt. No. 216 at 1.) Plaintiffs opposed the motion to compel on three grounds: (1) waiver, (2) the class action waiver violated the National Labor Relations Act per *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016), and (3) the class action waiver was

unenforceable per *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). (Dkt. No. 219 at 1-3.) On November 8, 2017, the Court concluded that Plaintiffs failed to establish waiver and that *Gentry* was no longer good law with respect to contracts that are subject to the Federal Arbitration Act (“FAA”). (Dkt. No. 235 at 7.) The Court, however, stayed Defendant 20/20's motion to compel, pending the Supreme Court's review of *Ernst & Young LLP*. (*Id.* at 1.)

On June 13, 2018, Plaintiffs and Defendant 20/20 filed a notice of settlement. (Dkt. No. 289.) After the parties confirmed that Plaintiffs intended to dismiss the claims against the Open Door Defendants, the Court terminated all pending deadlines and motions, including Defendant 20/20's motion to compel, and ordered that the motion for settlement approval be filed by July 12, 2018. (Dkt. No. 295 at 1.)

On June 28, 2018, the parties filed a request that the Court clarify whether Plaintiffs were required to give formal notice to the opt-in Plaintiffs. (Dkt. No. 294 at 2.) On July 2, 2018, the Court issued an order stating that formal notice would not be required, but that Plaintiffs' counsel was to provide notice to the opt-in Plaintiffs stating that the case had settled and providing information on the hearing on the motion for approval. (Dkt. No. 296.)

On July 12, 2018, Plaintiffs filed the instant unopposed motion for settlement approval. On July 31, 2018, the Court ordered Plaintiffs to provide supplemental briefing on the motion for settlement approval. (Dkt. No. 302.) On August 8, 2018, Plaintiffs filed a supplemental brief.

\*3 The Court held a hearing on Plaintiffs' motion for settlement approval on August 16, 2018.

### C. Settlement Agreement

Under the terms of the settlement agreement, Defendant 20/20 agrees to pay \$125,000. (Liss-Riordan Decl., Exh. A (“Settlement Agreement”) ¶ II.A, Dkt. No. 297-1.) Of this amount, Plaintiff's counsel intends to seek an award of \$25,000, or 20% to cover both attorneys' fees and costs. (Settlement Agreement ¶ II.D.3.) The settlement amount includes a \$5,000 enhancement payment to Plaintiff Jennings and a \$3,000 enhancement payment to Plaintiff Drake. (Settlement Agreement ¶ II.D.2.) Finally, the settlement amount includes \$10,000 in PAGA penalties; \$7,500 will go to the California Labor Workforce Development Agency (“LWDA”) and \$2,500 will be divided amongst California opt-in Plaintiffs, based on the number of weeks worked.

(Settlement Agreement ¶ II.D.1.) This leaves a net amount of \$82,000 for distribution to the opt-in Plaintiffs.

The settlement will be allocated based on the number of weeks worked. (Settlement Agreement ¶ II.D.5.) Specifically, Plaintiffs' counsel will calculate the number of weeks each opt-in Plaintiff claims to have worked for Defendants in California and Nevada. Each week worked in Nevada shall count as one "share," and each week in California shall constitute two "shares." (Settlement Agreement ¶ II.D.5.a.) The total number of shares will be calculated. (Settlement Agreement ¶ II.D.5.b.) The total shares of each individual opt-in Plaintiff shall then be divided by the total number of shares to determine the percent of the net settlement amount to which the individual is entitled. (Settlement Agreement ¶ II.D.5.c-d.)

The opt-in Plaintiffs shall have 180 days to negotiate the checks. (Settlement Agreement ¶ II.E.4.) Uncashed checks will be transferred to the California Department of Industrial Relations--Unclaimed Wage Fund for California opt-in Plaintiffs, and to the Nevada Unclaimed Property Division for Nevada opt-in Plaintiffs.

After the hearing on Plaintiff's motion, the parties agreed to make certain changes to the Settlement Agreement.

First, the parties agreed to modify the communications section. Originally, this section provided that the parties and counsel shall not have any communications regarding the settlement with any person, subject to certain limited exceptions. (Settlement Agreement ¶ V.) The parties have limited the clause to act more as a non-publicity section, removing the prohibition on discussing the litigation or settlement with any person. (Dkt. No. 307.)

Second, the parties have limited the scope of the released claims. The Settlement Agreement initially sought to release all claims pled in the operative complaint, as well as claims that could have been pled in the operative complaint "based on the factual allegations in that complaint, including but not limited to any claims under state or federal statutes or common law regarding the payment of wages, including claims arising under the [FLSA] ... and any in similar state law." (Settlement Agreement ¶ III.A.) The parties have since "agreed to limit the scope of the release in their settlement agreement to the claims asserted in the operative complaint." (Dkt. No. 310 at 2.)

## II. LEGAL STANDARD

\*4 "The [FLSA] seeks to prohibit 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.' " *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (quoting 29 U.S.C. § 202(a).) Employees cannot waive their rights under the FLSA "because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (internal quotation omitted). "Thus, either the Secretary of Labor or a district court must approve the settlement for any FLSA claim." *Gonzalez v. Fallanghina, LLC*, Case No. 16-cv-1832-MEJ, 2017 WL 1374582, at \*2 (N.D. Cal. Apr. 17, 2017); *see also Slezak v. City of Palo Alto*, Case No. 16-cv-3224-LHK, 2017 WL 2688224, at \*1 (N.D. Cal. June 22, 2017).

"The Ninth Circuit has not established the criteria that a district court must consider in determining whether an FLSA settlement warrants approval." *Otey v. Crowdfunder, Inc.*, Case No. 12-cv-5524-JST, 2015 WL 6091741, at \*4 (N.D. Cal. Oct. 16, 2015). Courts in this district typically evaluate the settlement under the standard established by the Eleventh Circuit's decision in *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982). *E.g., id.*; *Gonzalez*, 2017 WL 1374582, at \*2; *Slezak*, 2017 WL 2688224, at \*2. Thus, the courts consider whether the settlement agreement is "a fair and reasonable resolution of a bona fide dispute." *Lynn's Food Stores, Inc.*, 679 F.2d at 1355. If the settlement is a reasonable compromise over issues actually in dispute, the court may approve the settlement "to promote the policy of encouraging settlement in litigation." *Id.* at 1354.

## III. DISCUSSION

### A. FLSA Settlement

#### i. Bona Fide Dispute

"A bona fide dispute exists when there are legitimate questions about the existence and extent of the defendant's FLSA liability." *Gonzalez*, 2017 WL 1374582, at \*2 (internal quotation and modification omitted). Here, the parties disputed whether Plaintiffs were independent contractors or employees. (Plf.'s Mot. for Settlement Approval at 13.) Even



if Plaintiffs were employees, the parties also disputed whether the outside salesperson exception would apply, which would preclude recovery for the overtime and minimum wage claims under the FLSA and California labor law. (*Id.*) Additionally, the parties disputed whether Defendant 20/20 could be deemed the joint employer of Plaintiffs who contracted directly with Defendant Open Door. (*Id.*) Finally, the parties had a dispute regarding the applicable time period of Plaintiffs' claims and the number of hours worked, which would affect Plaintiffs' recovery. (*Id.*) The Court concludes that a bona fide dispute exists as to Defendant 20/20's FLSA liability.

## ii. Fair and Reasonable Resolution

To determine whether a settlement is fair and reasonable, the courts consider the “totality of the circumstances and the purposes of [the] FLSA.” *Slezak*, 2017 WL 2688224, at \*3 (internal quotation omitted). Courts have considered the following factors:

- (1) the plaintiff's range of possible recovery; (2) the stage of proceedings and amount of discovery completed; (3) the seriousness of the litigation risks faced by the parties; (4) the scope of any release provision in the settlement agreement; (5) the experience and views of counsel and the opinion of participating plaintiffs; and (6) the possibility of fraud or collusion.

\*5 *Id.* (quoting *Selk v. Pioneers Mem'l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1173 (S.D. Cal. 2016) ).

### a. Range of Possible Recovery

Plaintiffs estimate that the total damages the opt-in Plaintiffs would have been entitled to is \$511,379.05. (Plfs.' Mot. for Settlement Approval at 3.) This amount was calculated based on the limited workweek data provided by Defendants, as well as self-reported data provided by the opt-ins. (Plfs.' Supp. Brief at 4.) The parties did not have the precise hours worked by individuals, and Plaintiffs assumed a standard workweek of 60 hours and applied the federal minimum wage to reach their calculation.

At the hearing, Plaintiffs confirmed that this is the valuation for the FLSA claims only. As the Settlement Agreement seeks to release California state law claims as well, the actual full verdict value is significantly higher, given the

broader range of California state claims and the higher California minimum wage. This affects the percentage of recovery that the settlement amount represents. As discussed below, however, the significant discount that the settlement represents compared to the full verdict value of the case is justified by the significant risks at issue, which could preclude all liability.

### b. Stage of the Proceedings and Amount of Discovery Completed

Under this factor, the Court considers “the stage of proceedings and the amount of discovery completed to ensure the parties have an adequate appreciation of the merits of the case before reaching a settlement.” *Slezak*, 2017 WL 2688224, at \*4. “So long as the parties have sufficient information to make an informed decision about settlement, this factor will weigh in favor of approval.” *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (internal quotation omitted).

This case has been pending for nearly three years. Numerous motions have been filed and resolved, including motions to compel arbitration, motions to dismiss, a motion to expand the scope of the certified collective action, a motion to deny class certification, and a motion for judgment on the pleadings as to the PAGA claim. (Dkt. Nos. 49, 50, 51, 53, 54, 139, 143, 144, 216.) The parties have also engaged in significant discovery, including the exchange of thousands of pages of documents. (Plf.'s Mot. for Settlement Approval at 17.) The parties also participated in a full-day mediation session in November 2016, prior to which Plaintiffs prepared a detailed damages estimate. (*Id.*; see also Dkt. No. 126.)

The Court concludes that the parties had sufficient information to make an informed decision about settlement, and that this factor therefore weighs in favor of approval.

### c. Seriousness of Litigation Risks

“This factor favors approving a settlement where there is a significant risk that litigation might result in a lesser recovery for the class or no recovery at all.” *Slezak*, 2017 WL 2688224, at \*4 (internal quotation and modification omitted). Here, Plaintiffs contend that the 75% discount is warranted because Plaintiffs faced a significant risk that the Court would conclude that even if Plaintiffs were misclassified

as independent contractors, Plaintiffs would still be exempt from overtime and minimum wage requirements because they were outside salespeople. As discussed above, the discount is actually higher, as Plaintiffs do not consider the value of the California claims.

**\*6** Under federal law, an outside salesperson is exempt where the employee: (1) makes sales or “obtain[s] orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer,” and (2) is customarily and regularly engaged away from the employer's place of business. 29 C.F.R. § 541.500(a). Under California law, an employee is considered an exempt outside salesperson if the person “customarily and regularly works more than half the time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services, or use of facilities.” 8 C.C.R. § 11040(2)(M).

First, Plaintiffs point to *Vasto v. Credico (USA) LLC*, where the district court concluded that the plaintiffs -- who performed work similar to Plaintiffs in the instant case -- were outside salespeople. (Plf.'s Mot. for Settlement Approval at 15; Plf.'s Supp. Brief at 5.) There, the plaintiffs were also field agents who signed up low-income customers for cell phones under a federal subsidy program. 15 Civ. 9298 (PAE), 2017 WL 4877424, at \*1 (S.D.N.Y. Oct. 27, 2017). The plaintiffs used approved pitches and tablets provided by the defendant, and were paid on a commission basis for each qualified enrollee that they signed up. *Id.* at \*3. The plaintiffs reported to work at the defendant's office each day, and participated in morning meetings to get guidance on how to solicit enrollees. *Id.*

The *Vasto* court found that the plaintiffs' primary duty was signing up applicants for the federal subsidy program, and that such activities constituted sales. 2017 WL 4877424, at \*18. Although the field agents promoted a service that was ultimately provided free of charge to the qualifying applicants, the district court found that the cell phone company itself was compensated by the federal government for providing services to the qualified applicants. *Id.* Further, although the plaintiffs argued that they did not obtain a binding commitment from the potential applicant because the defendant could reject an applicant who was not eligible under the federal subsidy program, the district court explained that “[t]here is nothing in the FLSA ... that limits the definition of an outside salesperson to someone who has the unfettered discretion to finalize a binding sale. Rather, it is enough for

employees to have directed efforts toward the consummation of a sale.” *Id.* (internal quotation and citations omitted). The *Vasto* court also found that the plaintiffs bore many of the indicia of outside salespeople, namely that they independently solicited new business in the form of applications for the subsidy program, received a commission-based salary, and worked away from the office with minimal supervision. *Id.* at \*19.

Second, Plaintiffs point to *Dailey v. Just Energy Marketing Corp.*, in which the district court found that the plaintiff whose primary job function was to solicit new customers for the defendant's services was an outside salesperson under California law. (Plf.'s Mot. for Settlement Approval at 15-16; Plf.'s Supp. Brief at 5.) There, the plaintiff reported to the regional office to attend morning meetings, where she would rehearse a ‘pitch’ with other door-to-door workers and share tips about how to persuade customers to sign up for services. Case No. 14-cv-2012-HSG, 2015 WL 4498430, at \*1 (N.D. Cal. July 23, 2015). The plaintiff was directed to target certain geographic area. *Id.* The plaintiff's supervisor would not accompany her in the field, but would stay in contact via telephone and text message. When the plaintiff persuaded a customer to sign up, the defendant would have ultimate authority to reject an application. *Id.* Compensation was based on the number of new customers signed up. *Id.*

**\*7** The district court concluded that the plaintiff was an outside salesperson. 2015 WL 4498430, at \*3. Like *Vasto*, the district court rejected the argument that the plaintiff did not sell services because the customers' applications could be rejected. Instead, the district court found that the right to cancel a contract “does not change the fact that [the p]laintiff's job duties involved the ‘selling’ of or ‘obtaining orders or contracts for [the defendant's] services.’ ” *Id.* (internal modification omitted). To find otherwise would be “to exalt form over substance. If an employee directs his efforts at persuading a particular customer to purchase a product and is compensated on the basis of his success in doing so then the employee is clearly engaged in sales activity and not mere general promotion of the product....” *Id.* (internal quotation omitted). Additionally, the district court found that there were external indicia that the plaintiff was an outside salesperson, including that the plaintiff's compensation was in the form of commissions, the sole purpose of her job was to solicit new customers for the defendant, and that she was not directly supervised while in the field. *Id.* at \*5.

Here, Plaintiffs share many of the same characteristics as the employees in *Vasto* and *Dailey*, creating a significant risk that they too would be found to be outside salespersons. For example, Plaintiffs spent most of their days outside the office, attempting to sign up customers for subsidized cell phones. (Plf.'s Supp. Brief at 5.) Plaintiffs were assigned locations; although they would have to prove that they were at their location by taking a picture of themselves, it does not appear that they were directly supervised. (Jennings Decl. ¶¶ 9, 11, Dkt. No. 21-4; Drake Decl. ¶¶ 11-12, Dkt. No. 21-5.) Plaintiffs were paid by commission, and would use a script or pitch. (Jennings Decl. ¶ 17; Drake Decl. ¶¶ 11, 19.) Plaintiffs were only paid if the customer was qualified for the subsidy program. (Jennings Decl. ¶ 17; Drake Decl. ¶ 19.) Given these similarities, Plaintiffs ran the risk that they would be found to be outside salespersons, which would result in Plaintiffs obtaining no monetary relief.

Plaintiffs faced additional risks that could limit monetary relief. For example, Plaintiffs state that damages would be difficult to prove because Defendants did not maintain detailed information on the hours worked by Plaintiffs. (Plf.'s Supp. Brief at 17.) There was also a pending motion to compel arbitration that likely would have sent some of the opt-in Plaintiffs to arbitration, limiting their ability to litigate the case. (*Id.* at 14-15.) Further, there was the risk that the Court would not find Defendant 20/20 and the Open Door Defendants to be joint employers; in such a case, Plaintiffs who were employed only by the Open Door Defendants might not be able to obtain any recovery because the Open Door Defendants have few monetary assets. (*Id.* at 15.)

The Court finds that there was a significant risk that further litigation would lead to lower or likely even no recovery for Plaintiffs, particularly when other courts have found that individuals working similar jobs to Plaintiffs to be outside salespersons. This factor therefore weighs in favor of approval.

#### d. Scope of Release Provision and Communications about the Action

Again, the Settlement Agreement originally sought to release all claims “which could have been pled in Plaintiffs' Fourth Amended Collective and Class Action Complaint....” (Settlement Agreement ¶ III.A.) The Court raised concerns, however, that the proposed release was overbroad, explaining that courts in this district “ ‘routinely

reject FLSA settlements when the scope of the release goes beyond the overtime claims asserted in the complaint.’ ” (Dkt. No. 309 at 1 (quoting *Dunn v. Teachers Ins. & Annuity Ass'n of Am.*, Case No. 13-cv-5456-HSG, 2016 WL 153266, at \*5 (N.D. Cal. Jan. 13, 2016) ).) The Court thus informed the parties that it would deny the instant motion if the parties did not limit the scope of the release to the claims asserted in the operative complaint. (*Id.* at 4.)

On September 12, 2018, the parties filed a notice stating that “they have agreed to limit the scope of the release in their settlement agreement to the claims asserted in the operative complaint,” and attached an amended release that paralleled that in *Selk*. (Dkt. No. 310 at 2.) Notably, in *Selk*, the district court found that the release was adequate because “[a]t oral argument, counsel for [the defendant] represented to the court that the release requires waiver of only the wage and hour claims *alleged*, and not unrelated claims.” 159 F. Supp. 3d at 1178 (emphasis added). Because the parties likewise state on the record that they have agreed to limit the release to claims asserted in the operative complaint, the Court finds that the scope of release is adequate, and favors approval of the settlement.

\*8 Additionally, the Settlement Agreement's communication paragraph has been limited to act as a non-publicity provision that restricts the parties from publicizing the agreement, such as by issuing press releases or press statements. (Plf.'s Supp. Brief at 7.) The parties have modified the language accordingly. (*See* Dkt. No. 307 at 2.) Thus, the parties have addressed the Court's concern that the Settlement Agreement's language was so broad that it would prevent an opt-in Plaintiff from discussing the settlement in private conversations.

#### e. Experience and Views of Counsel and Participating Plaintiffs

“In determining whether a settlement is fair and reasonable, the opinions of counsel should be given considerable weight both because of counsel's familiarity with the litigation and previous experience with cases.” *Slezak*, 2017 WL 2688224, at \*5. Plaintiff's counsel, Attorney Shannon Liss-Riordan, opines that the settlement is fair, reasonable, and adequate, taking into account the risks faced by Plaintiffs. (Liss-Riordan Decl. ¶¶ 3-5.) Attorney Liss-Riordan has practiced wage and hour actions, with an emphasis on independent contractor misclassification, for five years. (Liss-Riordan Decl. ¶ 2.)

Additionally, Plaintiffs distributed notice to the opt-in Plaintiffs, describing the basic terms of the settlement agreement and estimated recovery. (Liss-Riordan Decl. ¶ 6, Exh. B.) As of the date of this order, no objections have been filed with the Court, and Plaintiffs confirmed that they received no objections at the hearing. The Court therefore concludes that this factor weighs in favor of approval.

#### f. Possibility of Fraud or Collusion

The Court finds that there does not appear to be any signs of collusion. In *In re Bluetooth Headset Products Liability Litigation*, the Ninth Circuit explained that signs of collusion in a class action include:

(1) when counsel receives a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded [citations]; (2) when the plaintiffs negotiate a ‘clear sailing’ agreement providing for the payment of attorney’s fees separate and apart from class funds ... [citations]; and (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund [citations]. 654 F.3d 935, 947 (9th Cir. 2011).

Here, none of these signs are present. Plaintiffs’ counsel is receiving 20% of the settlement amount as attorney’s fees and costs, an amount which is lower than Plaintiffs’ costs. There is also no “clear sailing” provision, nor will unclaimed funds revert to Defendant 20/20. The Court concludes that this factor weighs in favor of approval.

#### iii. Attorney’s Fees

“Where a proposed settlement of FLSA claims includes the payment of attorney’s fees, the court must also assess the reasonableness of the fee award.” *Selk*, 159 F. Supp. 3d at 1180; see also 29 U.S.C. § 216(b). Here, Plaintiffs’ counsel seeks 20% of the total settlement amount, or \$25,000. This amount only partially covers the amount of expenses Plaintiffs’ counsel has incurred. (Liss-Riordan Decl. ¶ 8.) Plaintiffs’ counsel does not explain what their lodestar would be, beyond stating that more than 600 hours have been spent prosecuting the case; nevertheless, given that the attorney’s fees sought does not cover the expenses incurred, and that this case has involved litigating numerous motions, it is clear

that the amount sought is significantly less than the amount that would be awarded under the lodestar method. The Court approves of the attorney’s fees provision.

#### iv. Enhancement Awards

\*9 The Settlement Agreement also provides for enhancement awards for the named Plaintiffs, specifically \$5,000 for Plaintiff Jennings and \$3,000 for Plaintiff Drake. “[A] district court may award an [enhancement] payment to the named plaintiffs in a FLSA collective action to compensate them for work done on behalf of the class.” *Selk*, 159 F. Supp. 3d at 1181. In determining whether an enhancement award is warranted, “the court should consider ... the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.” *Id.* (internal quotation omitted).

At the hearing, Plaintiffs’ counsel explained that the named Plaintiffs participated actively in this case, including initiating the case, providing statements, cooperating with discovery, and providing information to help litigate the case. Without the named Plaintiffs, the opt-in Plaintiffs would likely have received no recovery, especially in light of the significant risks in this case. The Court also notes that in class action settlements, courts in this district have found “that, as a general matter, \$5,000 is a reasonable amount” for an enhancement award. *Harris v. Vector Mktg. Corp.*, Case No. 08-cv-5198-EMC, 2012 WL 381202, at \*7 (N.D. Cal. Feb. 6, 2012). The Court finds that the requested enhancement awards are appropriate, and approves the enhancement awards provision.

#### B. PAGA Settlement

Under PAGA, “court[s] shall review and approve any settlement of any civil action filed pursuant to [PAGA].” *Cal. Labor Code* § 2699(1)(2). A plaintiff who brings a PAGA claim “does so as the proxy or agent of the state’s labor law enforcement agencies.” *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009). “Such a plaintiff also owes responsibility to the public at large; they act, as the statute’s names suggests, as a private attorney general, and 75% of the penalties go to the LWDA for ‘enforcement of labor laws ... and for education of employers and employees about their rights and



responsibilities under this code.’ ” *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016).

Here, the parties allocate \$10,000 to the PAGA claim, or .6% of its total estimated value of \$1.4 million. (Plf.’s Mot. for Settlement Approval at 21.) In this district, courts have raised concerns about settlements of less than 1% of the total value of a PAGA claim. *See Viceria v. Mistras Grp., Inc.*, Case No. 15-cv-2198-EMC, 2016 WL 5907869, at \*9 (N.D. Cal. Oct. 11, 2016). Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement. (Plfs.’ Supp. Brief at 8.)

For the reasons discussed above as to the risks of no recovery, particularly the *Dailey* decision, the Court finds that the PAGA settlement is adequate, despite the significant discount that the settlement represents.

### C. Rule 23 Notice

“Federal Rule of Civil Procedure 23(e) requires courts to approve the proposed voluntary dismissal of class claims. Courts generally apply the same Rule 23(e) standard to FLSA collective action settlements.” *Gonzalez*, 2017 WL 1374582, at \*4 (internal quotation and modification omitted). This applies to pre-certification classes as well. *Diaz v. Tr. Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989); *see also Lyons v. Bank of Am., NA*, Case No. 11-cv-1232-CW, 2012 WL 5940846, at \*1 n.1 (“Courts in this district have expressed some uncertainty about whether Rule 23(e) still applies to pre-certification settlement proposals in the wake of the 2003 amendments to the rule but have generally assumed that it does”). Thus, where parties seek to voluntarily dismiss class claims, the court must inquire into possible prejudice from:

**\*10** (1) class members’ possible reliance on the filing of the action if they are likely to know of it either because of publicity or other circumstances, (2) lack of adequate time for class members to file other actions, because of a rapidly approaching statute of limitations, (3) any settlement or concession of class interests made by the class representative or counsel in order to further their own interests.

*Diaz*, 876 F.2d at 1408.

The Court finds that after applying these factors, there is no prejudice to the class members from the dismissal of the class claims without prejudice. First, there is nothing in the record to suggest that putative class members were aware of the

class action. While putative class members were given notice of the FLSA collective action, the notice did not mention the class action. The case also did not receive publicity or media coverage, and Plaintiffs’ counsel states that they did not receive inquiries about the Rule 23 claims from absent putative class members. (Plfs.’ Supp. Brief at 10.)

Second, there does not seem to be a lack of adequate time for class members to file their own actions. The FLSA generally has a two-year statute of limitations, which is extended to three years if the violation is “willful.” *Gonzalez*, 2017 WL 1374582, at \*5. Plaintiffs explain that the case was filed in September 2015, and that most of the plaintiffs worked for the company in 2014 and 2015, fairly close to the time of the filing, such that there is little risk of the absent class members’ claims being barred by the statute of limitations. (*Id.*) This is particularly the case where “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.” *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

Finally, it does not appear that Plaintiffs sought to settle the case to further their own interests. As discussed above, there is no evidence in the record of fraud or collusion between the parties in settling the case.

Therefore, the Court approves of the dismissal of the class claims without prejudice.

## IV. CONCLUSION

For the reasons stated above, the Court GRANTS the motion for settlement approval, as modified by the parties. (*See* Dkt. Nos. 307, 310.)

Within 60 days of the date of this order, Plaintiffs shall file either a stipulation of dismissal of the entire case or a status report regarding the execution of the Settlement Agreement.

IT IS SO ORDERED.

### All Citations

Not Reported in Fed. Supp., 2018 WL 4773057, 2018 Wage & Hour Cas.2d (BNA) 365,436



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# **EXHIBIT 18**

2022 WL 223964

Only the Westlaw citation is currently available.

United States District Court, E.D. California.

Teresa JUNKERSFELD, an  
individual on behalf of herself and  
others similarly situated, Plaintiff,

v.

**MEDICAL STAFFING  
SOLUTIONS, INC.**, Defendant.

Case No.: 1:19-cv-00236-EPG

I

Filed 01/25/2022

#### Attorneys and Law Firms

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#### ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND SETTING FINAL APPROVAL HEARING

(ECF No. 43)

**ERICA P. GROSJEAN**, UNITED STATES MAGISTRATE  
JUDGE

\*1 Before the Court is Plaintiff Teresa Junkersfeld's ("Plaintiff") motion for preliminary approval of a class action settlement. (ECF No. 43.) The parties have consented to the jurisdiction of a United States Magistrate Judge for all purposes, including entry of final judgment. (ECF Nos. 13, 16-17.) For the following reasons, the Court will grant the motion and set a final approval hearing.

#### I. BACKGROUND

##### A. Procedural History

Defendant Medical Staffing Solutions, Inc. ("Defendant") is a staffing company that employs hourly healthcare workers on short-term travel assignments at medical facilities throughout California and elsewhere. (ECF No. 43-1 at 6.) Plaintiff was employed by Defendant in Oakdale, California between January 2016, and April 2016. (*Id.* at 7.)

Plaintiff filed her complaint commencing this action on February 19, 2019. (ECF No. 1.) Plaintiff alleges that Defendant underpaid overtime by excluding the value of housing and meals payments and incidentals payments from workers' regular rates of pay. (*See id.*) The complaint asserts claims for: 1) failure to pay overtime wages pursuant to [California Labor Code §§ 510, 1194](#); 2) unfair business practices pursuant to [California Business & Professions Code §§ 17200, et seq.](#); 3) waiting time penalties pursuant to [California Labor Code § 203](#); and 4) violation of the Fair Labor Standards Act pursuant to [29 U.S.C. §§ 201, et seq.](#) (*Id.*) Defendant filed an answer on May 3, 2019. (ECF No. 5.)

In December of 2019, following formal and informal discovery, the parties reached a tentative settlement agreement contingent on Defendant's production of confirmatory discovery. (ECF No. 43-1 at 6.) After Defendant produced the confirmatory discovery, Plaintiff exercised her right to void the settlement. (*Id.*) On June 4, 2020, at the parties' request, the Court stayed the case pending the Ninth Circuit's decision in [Clarke v. AMN Services, LLC](#), [987 F.3d 848 \(9th Cir. 2021\)](#). (ECF No. 27.) The Court lifted the stay on March 10, 2021. (ECF No. 32.) The parties subsequently resumed settlement negotiations with the assistance of mediator Michael Russell. (*Id.*) In August of 2021, following a full day of mediation, the parties reached an agreement on the material terms of a class settlement. (*Id.*) The parties executed a long-form settlement agreement in October of 2021. (*Id.*)

On October 21, 2021, Plaintiff filed the motion for preliminary approval of a class action settlement. (ECF No. 43.) Plaintiff asks the Court to preliminarily approve the terms of the settlement agreement, approve the proposed class notice, certify the settlement class, appoint a settlement administrator, and schedule a final approval hearing. (ECF Nos. 43, 43-1 at 23, 43-6.) On October 26, 2021, Defendant filed a statement of non-opposition to the motion. (ECF No. 44.) The Court held a hearing on the motion on November 19, 2021. (ECF No. 46.) The parties appeared telephonically through counsel. (*Id.*)

**B. Proposed Settlement**

The parties' settlement agreement defines the class as:

**\*2** All non-exempt hourly healthcare professionals employed by MSSSI in California at any time from February 19, 2015 and August 5, 2021 who worked overtime and received a meals and incidentals payment and/or a housing payment.

(ECF No. 43-4 at 4, 10.) According to the motion, there are 150 individuals in the settlement class. (ECF No. 43-1 at 9.)

Defendant agrees to pay a non-reversionary settlement amount of \$650,000.00, exclusive of Defendant's share of payroll taxes owed on the "wage" portion of the settlement amount, which Defendant will pay separately.<sup>1</sup> (ECF No. 43-4 at 11.) This amount includes a \$5,000.00 service award to Plaintiff, attorney's fees not to exceed \$216,666.66, attorney's costs not to exceed \$15,000.00, and settlement administration costs not to exceed \$20,000.00. (*Id.* at 12-13.) A total of \$20,000.00 from the gross settlement is allocated to the payment of Private Attorney General Act ("PAGA") penalties, \$15,000.00 of which is paid to the Labor and Workforce Development Agency ("LWDA") and \$5,000.00 of which is included in the net settlement amount. (*Id.* at 12-13.) After these deductions, the balance of \$432,500.00 will be distributed to class members. (ECF No. 43-1 at 11.)

Payments to settlement class members will be made pro rata based on a percentage equal to the number of each class member's overtime hours worked during the class period divided by the total number of all settlement class members' overtime hours worked during the class period. (ECF No. 43-4 at 12.) Each settlement class member's respective share will be calculated by multiplying the net settlement amount by this fraction. (*Id.*) According to the motion, the average individual settlement payment is estimated to be \$2,883.00. (ECF No. 43-1 at 11.)

All class members, except those who opt-out of the settlement, will automatically receive their eligible share without having to submit a claim form. (ECF No. 43-4 at 12.) Any shares that are not distributed because the class member elected to opt-out of settlement will be redistributed on a pro rata basis to the participating settlement class members. (*Id.*) Checks issued to participating settlement class members will remain negotiable for 180 days from the date of mailing. (*Id.* at 14-15.) The settlement administrator will void any check that remains uncashed after this time and the uncashed funds

will be sent to the California State Controller's Office pursuant to California's procedures for unclaimed property. (*Id.* at 15.)

Defendant will provide the settlement administrator with the class list, including overtime hours worked and contact information, within 14 calendar days of preliminary approval of the settlement. (ECF No. 43-4 at 15.) The settlement administrator will mail the notice to all class members by first class mail within five business days of receipt of the class list. (*Id.*) Before mailing the notice, the settlement administrator will process the class list against the National Change of Address Database maintained by the United States Postal Service. (*Id.* at 16.) Notice packets that are not returned "undeliverable" will be presumed to have been delivered. (*Id.*) If a notice packet is returned undeliverable and a forwarding address is provided then the settlement administrator will re-mail notice within three business days. (*Id.*) If no forwarding address is provided, the settlement administrator will employ a more substantive skip-tracing procedure to obtain updated address information and periodically re-mail the notice to those individuals for whom a new address is located. (*Id.*) If the notice is returned after skip-tracing and re-mailing occurs, there will be no further skip-tracing but the settlement class member will still be bound by the terms of the settlement. (*Id.*)

**\*3** Settlement class members may opt out of the settlement, object to the settlement, or dispute the stated overtime hours worked within 45 days from the original mailing date of the notice. (ECF No. 43-4 at 16.) Opt-out requests and objections must be sent to the settlement administrator and will not be honored if postmarked after this deadline. (*Id.* at 16.) Settlement class members who opt-out of the settlement are not eligible to recover a share of the net settlement amount and will have no standing to object to the settlement. (*Id.*) Plaintiff provides a proposed notice outlining the opt-out and objection processes and providing information regarding the final fairness hearing. (ECF No. 43-5.)

The settlement agreement releases Defendant and any parent, subsidiary, affiliate, predecessor or successor, agent, employee, officer, director, attorney, and healthcare facility clients from the following claims by settlement class members:

any and all claims arising between February 19, 2015 and the preliminary approval date that were asserted in the operative Complaint on behalf of the Settlement Class or that could have been pled based on the legal theories and/or factual allegations in the operative Complaint, including,

without limitation, all individual and representative claims for unpaid wages, statutory penalties, civil penalties, PAGA penalties, or other forms of relief, based on the failure to include per diem benefits in the regular rate.

(ECF No. 43-4 at 7.) Plaintiff also agrees to a broader general release of claims:

As a material term of this Agreement, Named Plaintiff Teresa Junkersfeld, in her individual capacity and with respect to her individual claims only, hereby agrees to also generally release Defendant and any parent, subsidiary, affiliate, predecessor or successor, including but not limited to all agents, employees, officers, directors, attorneys, and healthcare facility clients thereof, from all claims, demands, rights, liabilities and causes of action of any and every nature and description whatsoever, known or unknown, asserted or that might have been asserted, including a waiver of [California Civil Code § 1542](#). With respect to the General Release, Named Plaintiff Teresa Junkersfeld stipulates and agrees that, upon the execution of this Agreement, she shall be deemed to have, and by operation of the Final Judgment shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of [Section 1542 of the California Civil Code](#), or any other similar provision under state or federal law as to the generally released claims. [Section 1542](#) provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, AND THAT IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

(ECF No. 43-4 at 18-19.)

## II. LEGAL STANDARD

[Federal Rule of Civil Procedure 23\(e\)](#) requires judicial review and approval of any proposed class action settlement agreement. This requirement is in place because “the parties that are present and settling the case — class counsel, the class representatives, and the defendants — are proposing to compromise the rights of absent class members,” and judicial review “aims to ensure that the interests of these absent class members are safeguarded.” *Lusk v. Five Guys Enterprises*

*LLC*, 2019 WL 7048791, at \*1 (E.D. Cal. Dec. 23, 2019) (quoting *Newberg on Class Actions* § 13:40 (5th ed.)).

[Rule 23\(e\)\(1\)](#), as amended in 2018, requires the movant to “provide the court with information” that shows that “the court will likely be able to” make two separate determinations. [Fed. R. Civ. P. 23\(e\)\(1\)](#). First, approval of the settlement agreement is warranted under [Rule 23\(e\)\(2\)](#). Second, class certification is warranted under [Rule 23\(a\)-\(b\)](#) “for purposes of judgment on the proposal.” [Fed. R. Civ. P. 23\(e\)\(1\)\(B\)\(ii\)](#).

\*4 As for the first determination, [Rule 23\(e\)\(2\)](#) authorizes final approval of class action settlement agreement only if the movant shows that the settlement agreement is “fair, reasonable, and adequate.” [Fed. R. Civ. P. 23\(e\)\(2\)](#). To determine whether the settlement agreement is fair, reasonable, and adequate, the Court must consider four factors. First, whether “the class representatives and class counsel have adequately represented the class.” [Fed. R. Civ. P. 23\(e\)\(2\)\(A\)](#). Second, whether “the proposal was negotiated at arm’s length.” [Fed. R. Civ. P. 23\(e\)\(2\)\(B\)](#). Third, whether “the relief provided for the class is adequate,” considering “(i) the costs, risks and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney’s fees, including timing of payment;” and (iv) any agreement made in connection with the proposal. [Fed. R. Civ. P. 23\(e\)\(2\)\(C\)](#). Fourth, whether “the proposal treats class members equitably relative to each other.” [Fed. R. Civ. P. 23\(e\)\(2\)\(D\)](#). The first and second factors are viewed as “procedural” in nature, and the third and fourth factors are viewed as “substantive” in nature. [Fed. R. Civ. P. 23\(e\)\(2\)](#) Advisory Committee’s note to 2018 amendment.

The Ninth Circuit has also identified eight additional factors the Court may consider, many of which overlap substantially with [Rule 23\(e\)](#)’s four factors:

The strength of the plaintiff’s case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); see also *Flores v. Dart Container Corp.*, 2021 WL



1985440, at \*4 (E.D. Cal. May 18, 2021) (applying the *Hanlon* factors in determining whether a proposed settlement is fair, adequate, and reasonable at the preliminary approval stage).<sup>2</sup>

As for the second determination as to whether class certification is warranted under Rule 23(a)-(b), the Court must determine whether it is “likely” that it will be able to “certify the class for purposes of judgment on the proposal.” Fed. R. Civ. P. 23(e)(1). Accordingly, the Court must review the class certification standards under Rule 23(a)-(b), and based on those standards the Court must “reach a tentative conclusion that it will be able to certify the class in conjunction with final approval of the settlement.” *Lusk*, 2019 WL *Newberg on Class Actions* § 13:18 (5th ed.).

For class certification, the class “must meet the four threshold requirements of Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of representation.” *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2013) (citing Fed. R. Civ. P. 23(a); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). The proposed class must also satisfy the requirements of Rule 23(b), which defines the three different types of classes allowed. Fed. R. Civ. P. 23(b); *Leyva*, 716 F.3d at 512. The plaintiff bears the burden of demonstrating that the requirements of Rule 23 have been satisfied as to the proposed class. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Narouz v. Charter Commc'ns, LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010).

### III. DISCUSSION

#### A. The Settlement Terms are Fair, Reasonable, and Adequate

##### 1. The *Hanlon* Factors

\*5 As noted above, the Court first considers whether the settlement is fair, reasonable, and adequate pursuant to Rule 23(e). Plaintiff contends that the *Hanlon* factors favor preliminary approval of the settlement. (ECF No. 32-1 at 17-22.) The Court agrees.

##### *The Strength of Plaintiff's Case and the Risk and Expense of Further Litigation*

Plaintiff explains that the dispositive issue in this case is whether payments for housing, meals, and incidentals constitute “reasonable payments for traveling expenses, or

other expenses, incurred by an employee in furtherance of his employer's interest and properly reimbursable by the employer” under 29 U.S.C. § 207(e)(2). (ECF No. 43-1 at 18.) The Ninth Circuit has declined to hold that these types of payments must always be included in the regular rate, and it's a case-specific inquiry that turns on whether the payments reimburse for expenses or compensate employees for hours worked. (*Id.* at 18-19.) See *Clarke*, 987 F.3d at 856.

Here, payments are tied to the number of hours worked, which Plaintiff contends is a particularly relevant factor that weighs in her favor. (ECF No. 43-1 at 18.) However, there is no evidence that Defendant makes housing and meals and incidentals payments to employees who do not travel from home and incur expenses, or that it allows employees to bank extra hours worked in one week to offset missed hours in another week, which weigh against a finding that the payments should be included in employees' regular rates. (*Id.* at 19.) Additionally, because the relevant test is case-specific, there are risks and expenses to further litigation and any judgment would likely be appealed and could potentially be reversed. (*Id.*)

In light of Plaintiff's explanations, the Court finds that the *Hanlon* factors concerning the strength of Plaintiff's case and the risks and expenses of further litigation weigh in favor of preliminary approval of the settlement.

##### *The Amount Offered in Settlement*

The proposed settlement recovers \$650,000.00, which Plaintiff's counsel estimates is approximately 74 percent of the total amount of overtime that could be recovered if the claims were successfully litigated. (ECF No. 43-1 at 19.)

At the hearing on the motion, Plaintiff's counsel explained that Defendant's maximum exposure was calculated to be \$875,512.00. Plaintiff obtained the number of overtime and double time hours that the 150 class members worked during the class period, as well as their and hourly per diem rates, from discovery Defendant provided. Plaintiff's counsel divided the weekly per diem rate by the weekly hours worked and then multiplied this figure by 1.5 for overtime hours worked and by two for double time hours worked.<sup>3</sup> According to Plaintiff's counsel, the \$875,512.00 potential maximum recovery was discounted to the \$650,000.00 settlement amount in light of Defendant's defenses. Particularly, *Clarke* relied on facts that are not present in the instant case, including the fact that per diems were paid to all employees regardless

of traveling and employees were allowed to bank hours worked to avoid an offset. These factors could be considered dispositive.

\*6 In determining whether the amount offered is fair and reasonable, a court compares the proposed settlement to the best possible outcome for the class. See *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009). Here, in light of Defendants' defenses and the circumstances of the case, the Court finds that the settlement amount of \$650,000.00,<sup>4</sup> representing approximately 74 percent of the best possible outcome of the class, is reasonable and within the range of possible approval. Thus, this factor favors preliminary approval of the settlement.

#### *The Extent of Discovery Completed*

The motion explains that, prior to reaching settlement, Plaintiff engaged in formal and informal discovery regarding the relevant policies, Defendant's defenses to liability and class certification, and potential damages. (ECF No. 43-1 at 7.) Plaintiff served requests for admissions, interrogatories, and requests for production of documents, which led to Plaintiff obtaining Defendant's corporate policies regarding housing payments, meals and incidentals payments, and overtime payments. (*Id.* at 8.) Plaintiff also obtained the average hourly wages, weekly meals and incidentals payments, and weekly housing payments paid to putative class members. (*Id.*) Plaintiff also informally requested and obtained the total number of overtime hours and double time hours worked by the putative class. (*Id.* at 8.) The parties also reached a tentative settlement in December of 2019 conditioned on certain confirmatory discovery, which Defendant provided. (*Id.*)

\*7 "Class action settlements are favored more when a considerable amount of discovery has been conducted, and this is because the considerable discovery 'suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.' " *Lusk v. Five Guys Enterprises LLC*, 2019 WL 7048792, at \*7 (E.D. Cal. Dec. 23, 2019) (quoting *Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012)); see also *Millan v. Cascade Water Servs., Inc.*, 310 F.R.D. 593, 610-11 (E.D. Cal. 2015) (denying preliminary approval of a class settlement where class counsel relied heavily on information provided by the named plaintiff and defendant, assumed the number of violations, and did not present documentation regarding the extent of discovery); cf. *In re Mego Fin. Corp. Sec.*

*Litig.*, 213 F.3d 454, 459 (9th Cir. 2000), as amended (June 19, 2000) (finding that preliminary approval was appropriate where extensive formal discovery had not been completed but counsel presented the district court with documentation that they had conducted significant informal investigation, discovery, and research).

The Court finds that the parties conducted sufficient formal and informal discovery before agreeing to the proposed settlement amount. The amount of discovery conducted suggests that the settlement amount was reached based on a full understanding of the legal and factual issues in the case. This factor therefore weighs in favor of preliminary approval.

#### *The Experience and Views of Counsel*

Plaintiff submits a declaration from counsel Kye D. Pawlenko in support of the motion. (ECF No. 43-3.) Mr. Pawlenko describes his and his law partner's education and experience handling employment, wage and hour, and class action lawsuits. (*Id.* at 3-4.) The settlement was reached after a full day of mediation with mediator Michael Russell. (*Id.* at 4-5.) Mr. Pawlenko describes the formal and informal discovery conducted prior to settlement as well as his valuation of the class claims in light of the strengths and weaknesses of the case. (*Id.* at 4-6.) Mr. Pawlenko's office recommends preliminary approval of the settlement as fair, adequate, and reasonable given the strengths and weaknesses of the case, and the risks of further litigation. (*Id.* at 6.)

The Court finds that the experience and views of counsel favor preliminary approval of the settlement as fair, reasonable, and adequate. See *Riker v. Gibbons*, No. 3:08-CV-00115-LRH, 2010 WL 4366012, at \*2 (D. Nev. Oct. 28, 2010) ("An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining.") (quoting 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:42 (4th ed. 2002)); see also *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527-28 (C.D. Cal. 2004) ("A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." (citations omitted)).

#### 2. Attorney's Fees and Costs

"When making a preliminary fairness determination of a proposed class action, the court should assess the reasonableness of the attorney's fee award because an inordinate fee may be the sign that counsel sold out the class's claims at a low value in return for the high fee." *Lusk*, 2019

WL 7047891, at \*8 (citation and quotation marks omitted). Where a defendant is willing to pay high fees, this “may also indicate that the relief in the settlement undervalues the class's claims[.]” *Id.* Thus, while the Court acknowledges that the determination of attorney's fees may appropriately be deferred to the final approval stage, the amount of attorney's fees is relevant to the determination of whether a settlement is fair, reasonable, and adequate.

Here, the settlement agreement provides for an award of attorney's fees of up to \$216,666.66, representing 33 percent of the gross settlement amount. (ECF No. 43-4 at 13.) This is above the benchmark for the Ninth Circuit. *See Hanlon*, 150 F.3d at 1029. However, Plaintiff's counsel represents that they will request to be awarded 25 percent of the gross settlement amount, and the remainder will be included in the distribution to the settlement class. (ECF No. 43-1 at 21.)

\*8 In light of Plaintiff's counsel's representations, the Court finds that the proposed attorney's fee award does not weigh against finding that the settlement is fair, reasonable, and adequate at the preliminary approval stage. However, to the extent Plaintiff's counsel elects to request an attorney's fee award that exceeds the 25 percent benchmark, Plaintiff's counsel should explain why special circumstances justify such a departure. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (setting forth factors to be considered when adjusting the 25% benchmark).

### 3. Class Representative Incentive Award

A district court may award incentive payments to named plaintiffs in class action cases. *Rodriguez*, 563 F.3d at 958–59. The purpose of incentive awards is to “compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaking in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Id.* To justify an incentive award, a class representative must present “evidence demonstrating the quality of plaintiff's representative service,” such as “substantial efforts taken as class representative to justify the discrepancy between [his] award and those of the unnamed plaintiffs.” *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 669 (E.D. Cal. 2008). Such incentive awards are particularly appropriate in wage-and-hour actions where a plaintiff undertakes a significant reputational risk in bringing suit against her former employer. *Rodriguez*, 563 F.3d at 958-59.

Here, the settlement agreement provides for a maximum class representative incentive award of \$5,000.00. (ECF No. 43-4 at 12-13.) The motion indicates that Plaintiff will file an application for the incentive award and submit a supporting declaration in connection with her motion for final approval of the settlement, and any amount that is not awarded will be included in the distribution to the settlement class. (ECF No. 43-1 at 10.)

The proposed incentive award represents approximately .8 percent of the total settlement amount, and is less than fifty percent more than the estimated average settlement payment to class members. (*See* ECF No. 43-3 at 5.) The Court will approve the incentive award on a preliminary basis. At the final approval hearing, the Court will review Plaintiff's evidence that the requested incentive award is warranted here, including evidence of the amount of time Plaintiff spent on the litigation, the risks and burdens carried by Plaintiff as a result of the litigation, and the particular benefit that Plaintiff provided to counsel and the class as a whole throughout the litigation. *See Goodwin v. Winn Mgmt. Group LLC*, 2017 WL 3173006, at \*12 (E.D. Cal. July 26, 2017) (citation omitted).

## B. Certification of the Settlement Class

As discussed below, the requirements for class certification in Rule 23(a) and (b) are satisfied here and preliminary certification of the settlement class is appropriate.

### 1. Rule 23(a) Requirements

#### Numerosity

A proposed class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.” *Gen. Tel. Co. of the Nw. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 330 (1980). Courts in the Ninth Circuit have found the requirement satisfied when the class is composed of as few as thirty-nine members. *See Murillo v. Pac. Gas & Elec. Co.*, 266 F.R.D. 468, 474 (E.D. Cal. 2010) (citing *Jordan v. L.A. County*, 669 F.2d 1311, 1319 (9th Cir. 1982) (noting that class sizes of thirty-nine, sixty-four, and seventy-one are sufficient to satisfy the numerosity requirement), *vacated on other grounds*, 459 U.S. 810, 103 (1982)).

\*9 The proposed class contains 150 individuals. (ECF No. 43-1 at 14.) The Court finds this is sufficiently numerous that joinder of all class members is impracticable and the numerosity requirement of Rule 23(a)(1) is satisfied.

### Commonality

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3).” *Hanlon*, 150 F.3d at 1019. “Indeed, Rule 23(a)(2) has been construed permissively.” *Id.* “All questions of fact and law need not be common to satisfy the rule.” *Id.* “The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.” *Id.* To satisfy commonality, there must be a “common contention ... of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A plaintiff can meet this burden by showing “[s]ignificant proof that an employer operated under a general policy” of harmful conduct if the conduct “manifested itself in hiring and promotion [and other employment] practices in the same general fashion ....” *Id.* at 353 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

Plaintiff argues that the class claims hinge on a single common contention that is capable of class wide resolution, *i.e.* Defendant's common policy of excluding housing payments and meals and incidentals payments from the regular rate of pay. (ECF No. 43-1 at 14.) Resolving that common question will drive resolution of each claim asserted in this lawsuit. (*Id.*)

The Court finds that Plaintiff has demonstrated that the commonality requirements of Rule 23(a)(2) are satisfied for purposes of preliminary certification of the settlement class.

### Typicality

Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3); see *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001). This typicality requirement

is satisfied “when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.” *Armstrong*, 275 F.3d at 868; see also *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1463 (9th Cir. 1995) (claims are typical where named plaintiffs have the same claims as other members of the class and are not subject to unique defenses). While representative claims must be “reasonably co-extensive with those of absent class members,” they “need not be substantially identical.” *Hanlon*, 150 F.3d at 1020; see also *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Plaintiff contends that she and all other members of the settlement class received housing payments and meals and incidentals payments that were excluded from their regular rates of pay and her claims are therefore typical. (ECF No. 43-1 at 15.) The Court finds that Plaintiff's claims are reasonably co-extensive with the absent proposed class members and the typicality requirement of Rule 23(a)(3) is satisfied.

### Adequacy of Representation

\*10 Before the Court can certify a class, the Court must be satisfied that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “[A] class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (citations omitted). “The proper resolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *In re Mega Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000), *as amended* (June 19, 2000) (citations omitted).

Plaintiff's counsel provides a declaration describing his firm's experience handling employment, wage and hour, and class action lawsuits. (ECF No. 43-2 at 2-3.) Plaintiff's counsel states that he is not aware of any conflicts between Plaintiff or his firm and the settlement class. (*Id.* at 5.)

The Court finds that Plaintiff's counsel's representations are sufficient to satisfy the adequacy of representation requirement at this stage. However, Plaintiff has not submitted a declaration or other evidence describing her



interests and any conflicts with the class or describing what actions she has taken to prosecute this case vigorously on behalf of the class. While the declaration of Plaintiff's counsel is sufficient for preliminary certification of the class, in seeking final approval of the settlement, Plaintiff is encouraged to submit appropriate evidence addressing any conflicts of interest and her involvement in this case.

## 2. Rule 23(b) Requirements

Plaintiff seeks certification under Rule 23(b)(3), which requires that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3); see also *Amchem*, 521 U.S. at 615. The test of Rule 23(b)(3) is “far more demanding,” than that of Rule 23(a). *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting *Amchem*, 521 U.S. at 623–24).

### Predominance

First, questions of law or fact common to class members must predominate over any questions affecting only individual members. Fed. R. Civ. P. 23(b)(3). This “predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Hanlon*, 150 F.3d at 1022 (quoting *Amchem*, 521 U.S. at 623). “This analysis presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2); thus, the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3).” *Id.* (“In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between the common and individual issues.”). “When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” *Id.* (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1778 (2d ed.1986)).

Plaintiff asserts that common questions predominate here because each class claim hinges on the common question of whether Defendant's uniform policy and practice of excluding housing payments and meals and incidentals payments from the regular rate of pay is unlawful. (ECF No. 43-1 at 16.) If this challenged policy and practice is unlawful, then liability

will be established “in unison” as to each class member. (*Id.*) Conversely, if the challenged policies are lawful, each class members' claims fail. (*Id.*) The case “represents the classic case for treatment as a class action: that is, the commonality linking the class members is the dispositive question in the lawsuit.” (*Id.*)

\*11 The Court agrees that the common claims among the class members predominate over any individualized questions and the claims appear to be ones that can be resolved for all members of the class in a single adjudication. Thus, the predominance requirement is met for purposes of preliminary certification of the settlement class.

### Superiority

Under Rule 23(b)(3), a class action must be “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The matters pertinent to this finding include: “(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.” *Id.*; see *Amchem*, 521 U.S. at 616.

Although the motion does not expressly address the relevant factors under Rule 23(b)(3), Plaintiff argues that where, as here, the lawsuit challenges the legality of a uniform policy of excluding certain payments from the regular rate, courts have found that a class action is a superior means of resolving the dispute. (ECF No. 43-1 at 17.) The Court finds that, in light of the challenge to Defendant's uniform policy, a class action would be the superior method to fairly and efficiently adjudicate the putative class members' claims.

## C. Appointment of Settlement Administrator

The motion requests that the Court appoint CPT Group, Inc., as settlement administrator and preliminarily approve settlement administration costs of up to \$20,000.00. (ECF No. 43-1 at 9-10.) Settlement administration will entail disseminating notice of the settlement, processing requests for exclusion, calculating individual settlement payments, handling disputes regarding individual settlement payments, issuing all payments under the settlement, calculating and processing tax withholdings, and issuing pertinent tax forms. (*Id.* at 9.) Any amount allocated to settlement administration



fees and costs that is not used will be included in the distribution to the settlement class. (*Id.* at 10.)

The Court finds that it is appropriate to appoint CPT Group, Inc. as settlement administrator and to preliminarily approve settlement administration costs not to exceed \$20,000.00.

#### D. Notice Procedures

For proposed settlements under [Rule 23](#), “the court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” [Fed. R. Civ. P. 23\(e\)\(1\)](#); *see also Hanlon*, 150 F.3d at 1025 (“Adequate notice is critical to court approval of a class settlement under [Rule 23\(e\)](#).”). A class action settlement notice “is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill Vill., LLC v. Gen. Elec.*, 561 F.3d 566, 575 (9th Cir. 2004) (internal quotations and citations omitted).

Plaintiff contends that the proposed notice complies with [Rule 23](#) because all members will be sent, via First Class Mail, a notice of the settlement and will have 45 days to opt-out, object, or dispute the number of qualified workweeks attributed to them. (ECF No. 43-1 at 22.) The notice is written in plain language and contains all information required under [Rule 23](#). (*Id.*)

\*12 The Court has reviewed the proposed notice (*see* ECF No. 43-5) and it sufficiently provides notice in a reasonable manner to all class members who would be bound by the settlement. The proposed mail delivery is also appropriate under the circumstances. Thus, the Court will approve the proposed notice.

#### IV. CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Plaintiff's motion for preliminary approval of the class settlement (ECF No. 43) is GRANTED;

2. The Court preliminarily finds that the terms of the settlement are fair, reasonable, and adequate pursuant to [Federal Rule of Civil Procedure 23\(e\)\(2\)](#);
3. The settlement class satisfies the requirements of [Rule 23\(a\) and \(b\)\(3\)](#) and the following class is preliminarily certified under [Rule 23\(c\)\(1\)](#), for purposes of settlement: All non-exempt hourly healthcare professionals employed by MSSSI in California at any time from February 19, 2015 and August 5, 2021 who worked overtime and received a meals and incidentals payment and/or a housing payment;
4. The proposed class notice of settlement (ECF No. 43-5) is approved;
5. CPT Group, Inc. is appointed as settlement administrator;
6. Settlement administration cost of up to \$20,000.00 are approved and the settlement administrator is directed to complete dissemination of the notice in accordance with the settlement; and
7. The Court sets a final approval hearing for **May 20, 2022 at 10:00 AM** in Courtroom 10 (EPG) before Magistrate Judge Erica P. Grosjean, to determine whether the settlement should be granted final approval. The Court will also hear any requests for an incentive award and for attorney's fees and expenses. The motion for final approval of class action settlement and any motion for attorneys' fees and costs shall be filed no later than 28 days before the final approval hearing in accordance with Local Rule 230. The Court reserves the right to alter the date of the final approval hearing without further notice to class members.

IT IS SO ORDERED.

#### All Citations

Not Reported in Fed. Supp., 2022 WL 223964

#### Footnotes

- 1 The settlement agreement allocates 1/3 of the settlement amount as wages to be characterized as W-2 income and 2/3 as interest and penalties to be characterized as 1099 income. (ECF No. 43-4 at 14.)
- 2 The Court must also “review and approve” settlement of the class members' PAGA claims along with their class claims. *See* Cal. Lab. Code § 2669(k)(2); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 435-36 (9th Cir. 2015). While “PAGA does not establish a standard for evaluating PAGA settlements,” *Rodriguez v. RCO Reforesting, Inc.*, 2019 WL

331159 at \*4 (E.D. Cal. 2019) (citing *Smith v. H.F.D. No. 55, Inc.*, 2018 WL 1899912, at \*2 (E.D. Cal. Apr. 20, 2018)), a number of district courts have applied the *Hanlon* factors to evaluate PAGA settlements. *Flores*, 2021 WL 1985440, at \*4, fn. 3 (citations omitted).

- 3 Plaintiff estimated that waiting penalties likely would not be recovered for two reasons. First, Defendant is a temporary staffing agency and waiting time penalties do not apply to temporary services employers under the California Labor Code. Second, Defendant argues that these violations occurred before *Clarke* and it was unknown what test to apply. (See ECF No. 43-1 at 20.)
- 4 Of the \$650,000.00 settlement amount, the parties have allocated \$20,000.00 to PAGA penalties. A total of \$15,000.00, or 75 percent of the PAGA penalties, will be paid to the LWDA and \$5,000.00, or 25 percent of the PAGA penalties, will be distributed to the class. Although Plaintiff's complaint does not allege a PAGA claim (see ECF No. 1), the settlement agreement specifically releases class members' claims for PAGA penalties based on Defendant's failure to include per diem benefits in the regular rate (see ECF No. 43-4 at 7). Plaintiff's briefing does not address the reasonableness of the PAGA penalty amounts. (See ECF No. 43-1.) However, the PAGA settlement is approximately 3% of the proposed total settlement amount, which is similar to settlements that have been approved by other courts. See, e.g., *Ahmed v. Beverly Health & Rehab. Servs., Inc.*, 2018 WL 746393, at \*10 (E.D. Cal. 2018) (approving PAGA settlement of \$4,500, or 1% of the total settlement amount); *Hicks v. Toys 'R' Us—Delaware, Inc.*, 2014 WL 4703915, at \*1 (C.D. Cal. 2014) (approving PAGA settlement of \$5,000 or 0.12% of the total settlement amount); *Schiller v. David's Bridal, Inc.*, 2012 WL 2117001, at \*2 (E.D. Cal. 2012) (approving PAGA settlement of \$7,500 or 0.14% of the total settlement amount); *Franco v. Ruiz Food Prods., Inc.*, 2012 WL 5941801 at \*14 (E.D. Cal. 2012) (approving PAGA settlement of \$10,000, or 0.4% of total settlement amount); *Garcia v. Gordon Trucking*, 2012 WL 5364575 at \*3 (E.D. Cal. 2012) (approving PAGA settlement of \$10,000 or 0.27 % of the total settlement amount); *Munoz v. UPS Ground Freight, Inc.*, 2009 WL 1626376, at \*1 (N.D. Cal. 2009) (approving PAGA settlement of \$60,000 or 2% of the total settlement amount); *Hopson v. Hanesbrands Inc.*, 2009 WL 928133, at \*9 (N.D. Cal. 2009) (approving PAGA settlement of \$1,500 or .037% of the total settlement amount); *Nordstrom Com'n Cases*, 186 Cal. App. 4th 576, 589 (2010) (approving PAGA settlement and release allocating \$0 to PAGA claim).

# **EXHIBIT 19**

2023 WL 6811994

Only the Westlaw citation is currently available.

United States District Court, E.D. California.

Sung Gon KANG, individually and on  
behalf of others similarly situated, Plaintiff,

v.

CREDIT BUREAU  
CONNECTION, INC., Defendant.

No. 1:18-cv-01359-SKO

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Signed October 13, 2023

|

Filed October 16, 2023

#### Attorneys and Law Firms

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#### ORDER GRANTING UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

#### ORDER GRANTING IN PART UNOPPOSED MOTION FOR ATTORNEY'S FEES AND COSTS AND FOR APPROVAL OF SERVICE AWARD AND INDIVIDUAL SETTLEMENT

#### ORDER VACATING HEARING

Sheila K. Oberto, UNITED STATES MAGISTRATE JUDGE

\*1 Pending before the Court is Plaintiff Sung Gon Kang ("Kang")'s unopposed motion for final approval of a class

action settlement and unopposed motion for attorney's fees and costs and for approval of service award and individual settlement. (Docs. 155 & 158.) No objections to the proposed settlement terms were received by the settlement administrator (*see* Doc. 158-1 at 23; Doc. 158-2 ¶ 4) or filed with the Court. Accordingly, the hearing for the motions, currently set for October 25, 2023, will be vacated.

For the reasons explained below, the Court grants preliminary approval of the proposed class action settlement and grants in part the motion for attorney's fees and costs and for approval of service award and individual settlement.<sup>1</sup>

#### I. BACKGROUND

The Court previously summarized Kang's allegations in its June 1, 2023, order granting Kang's motion for preliminary approval of a class action settlement and conditional class certification (Doc. 153), and will not repeat the factual and procedural background in this order. Following the grant of preliminary approval in this action, on August 1, 2023, Kang filed the pending motion for attorney's fees and costs and for approval of service award and individual settlement, and on September 20, 2023, Kang filed the pending motion for final approval of the parties' class action settlement. (Docs. 155 & 158.) In support of the motions, Kang has submitted declarations from class counsel and the settlement administrator in this action. (Docs. 155-2, 155-3, 158-2.) As of the date of this order, no objections to the settlement were received by the settlement administrator or filed with this Court, and no class members have opted out of the settlement. (Doc. 158-1 at 23; Doc. 158-2 ¶ 4.) Defendant Credit Bureau Connection, Inc. ("Credit Bureau") did not oppose either motion.

Under the settlement agreement, Credit Bureau will automatically pay \$1,000 to each member of the FCRA Class without the need for any claim form or other response.<sup>2</sup> (Doc. 149 at 16; Doc. 149-1 at 10, 16.) This amount is "independent of [Credit Bureau's] other financial obligations under the proposed settlement. That is, if the proposed settlement is approved, each FCRA Class member will receive a sum certain rather than a pro rata portion of a common fund against which, for example, the costs of notice and administration or Class Counsel's attorneys' fees and costs would be deducted." (Doc. 149 at 16.)

## II. FINAL CERTIFICATION OF SETTLEMENT CLASS

On March 4, 2022, the Court granted certification of the proposed classes under Rule 23 and found that Kang had satisfied Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation and Rule 23(b)(3)'s requirements of predominance and superiority. (*See* Doc. 121.)

\*2 The Court's findings on these issues have not changed, and no objections to class certification were raised. Accordingly, there is no need for the Court to repeat the analysis on these issues here. *See, e.g., Harris v. Vector Marketing*, No. C-08-5198 EMC, 2012 WL 381202 at \*3, at \*7 (N.D. Cal. Feb. 6, 2012) ("As a preliminary matter, the court notes that it previously certified ... a Rule 23(b)(3) class .... [Thus, it] need not analyze whether the requirements for certification have been met and may focus instead on whether the proposed settlement is fair, adequate, and reasonable."); *In re Apollo Group Inc. Securities Litigation*, No. CV 04-2147-PHX-JAT, 2012 WL 1378677 at \*4 (D. Ariz. Apr. 20, 2012) ("The Court has previously certified, pursuant to Rule 23[,] ... and hereby reconfirms its order certifying a class").

The Court hereby confirms its prior order and certifies the following settlement classes:

"All individuals about whom [Credit Bureau] prepared a report that (1) included an OFAC 'Hit,' (2) was published to a third party from October 2, 2013 to March 4, 2022 and (3) included a U.S. address (including U.S. Territories) for that individual" (the "FCRA Class").

"All individuals about whom [Credit Bureau] prepared a report that (1) included an OFAC 'Hit,' (2) was published to a third party from October 2, 2011 to March 4, 2022; and (3) included a U.S. address (including U.S. Territories) for that individual" (the "CCRAA Class").

(Doc. 153 at 3–4, 15.) For settlement purposes, the parties have defined the class period as the period "from October 2, 2013 to March 4, 2022" for the FCRA Class and the period "from October 2, 2011 to March 4, 2022" for the CCRAA Class.<sup>3</sup> (*See* Doc. 149-1 at 4, 5.) These classes are comprised of an estimated 1,119 individuals (the "Settlement Class" or "Settlement Class Members"), all of whom are members of

the CCRAA Class, and 1,071 of whom are members of the FCRA Class. (Doc. 158-1 at 16, 26; Doc. 149-1 at 4.)

In addition, for the reasons stated in the certification order and the order of preliminary approval, Plaintiff Sung Gon Kang is confirmed as class representative; Caddell & Chapman, and Francis Mailman Soumilas, P.C., are confirmed as co-class counsel; and Continental Datalogix ("CDLx") is confirmed as the settlement administrator. (Doc. 153 at 3, 15; Doc. 149-1 at 4, 6.)

## III. FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Class actions require the district court's approval prior to settlement. *Fed. R. Civ. P. 23(e)*. To approve a settlement, a district court must: (i) ensure notice is sent to all class members; (ii) hold a hearing and make a finding that the settlement is fair, reasonable, and adequate; (iii) confirm that the parties seeking approval file a statement identifying the settlement agreement; and (iv) be shown that class members were given an opportunity to object. *Fed. R. Civ. P. 23(e)(1)–(5)*.

The parties filed the settlement agreement on May 1, 2023 (Doc. 149-1), and class members were given an opportunity to object on or before August 31, 2023. (Doc. 158-2 ¶ 3; *see also* Doc. 158-1 at 23.) Neither CDLx nor the Court received any objections, timely or otherwise, to the settlement. (Doc. 158-2 ¶ 3; *see also* Doc. 158-1 at 23.) The Court now turns to the adequacy of notice and its fairness review of the settlement.

### A. Notice

Adequate notice of the class settlement must be provided under *Rule 23(e)*. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998); *see also Silber v. Mabon*, 18 F.3d 1449, 1453-54 (9th Cir. 1994) (noting that the court need not ensure all class members receive actual notice, only that "best practicable notice" is given); *Winans v. Emeritus Corp.*, No. 4:13-cv-03962-HSG, 2016 WL 107574, at \*3 (N.D. Cal. Jan. 11, 2016) ("While *Rule 23* requires that 'reasonable effort' be made to reach all class members, it does not require that each individual actually receive notice."). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v.*



*Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)). Any notice of the settlement sent to the class should alert class members of “the opportunity to opt-out and individually pursue any state law remedies that might provide a better opportunity for recovery.” *Hanlon*, 150 F.3d at 1025.

\*3 The Court previously reviewed the notice provided in this case at the preliminary approval stage and found it to be satisfactory. (Doc. 153 at 13–14.) Class counsel filed the declaration of Frank Barkan of CDLx in connection with the dissemination of the class notice. (Doc. 156.) Following the grant of preliminary approval, CDLx sent the notice to the class members by both First-Class Mail and email. (*Id.* ¶¶ 3–6.) For mail that was returned as undeliverable with no forwarding address, CDLx used an address locator service to find updated addresses. (*Id.* ¶¶ 7–10.) In the end, CDLx delivered notice to 99.4% of the FCRA Class and 100% of the CCRA Class. (*Id.* ¶ 11.) The settlement administrator also maintained the website [www.KangClassAction.com](http://www.KangClassAction.com), which made materials related to the settlement, class counsel's motion for attorney's fees and costs, and relevant deadlines available to Class Members. (*Id.* ¶ 12; *see also* Doc. 157.) As of the filing of the present motion, CDLx has received one telephone call from a class member and has received and responded to seven email inquiries from class members. (Doc. 158-2 ¶ 5.) Additionally, Credit Bureau prepared the notice required to be served under the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1715. S.A. § 4.1.4, and CDLx mailed the CAFA Notice as required by the settlement agreement. (*See* Doc. 152.)

Considering the foregoing, the Court accepts the reports of CDLx and finds that it provided adequate notice, thereby satisfying [Federal Rule of Civil Procedure 23\(e\)\(1\)](#). *Silber*, 18 F.3d at 1453–54; *Winans*, 2016 WL 107574, at \*3.

## B. Final Fairness Determination

At the final approval stage, the primary inquiry is whether the proposed settlement “is fundamentally fair, adequate, and reasonable.” *Fed. R. Civ. P. 23(e)(2)*; *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1026. “It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.” *Hanlon*, 150 F.3d at 1026 (citing *Officers for Justice v. Civil Serv. Comm’n of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982)); *see also Lane*, 696 F.3d at 818. Having already completed a preliminary examination of the agreement, the Court reviews it again, mindful that the law favors the compromise and settlement of class action suits. *See, e.g., In*

*re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Churchill Vill.*, 361 F.3d at 576; *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice*, 688 F.2d at 625. Ultimately, “the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because [they are] exposed to the litigants and their strategies, positions, and proof.” *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003) (quoting *Hanlon*, 150 F.3d at 1026).

In assessing the fairness of a class action settlement, courts balance the following factors:

- (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

*Churchill Vill.*, 361 F.3d at 575; *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944 (9th Cir. 2015); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 964–67 (9th Cir. 2009). These settlement factors are non-exclusive, and each need not be discussed if they are irrelevant to a particular case. *Churchill Vill.*, 361 F.3d at 576 n.7.

Consideration of the *Churchill* factors alone is not sufficient to survive appellate review. *See Briseño v. Henderson*, 998 F.3d 1014, 1022–26 (9th Cir. 2021) (holding that the revised *Rule 23(e)* requires district courts “to go beyond our precedent” and mandates consideration of “the *Bluetooth* factors” to all class action settlements, regardless of whether settlement was achieved before or after class certification); *see also Fed. R. Civ. P. 23(e)(2)(C)-(D)*. Under the revised *Rule 23(e)*, “district courts must apply the *Bluetooth* factors to scrutinize fee arrangements ... to determine if collusion may have led to class members being shortchanged.” *Briseño*, 998 F.3d at 1026. The so-called *Bluetooth* factors—also referred to as “subtle signs” of collusion—include: (i) “when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded;” (ii) the existence of a “clear sailing” arrangement, which provides “for the payment of attorneys’ fees separate and apart from class funds,” or a provision under which defendant agrees not to object to the attorney's fees sought; and (iii) “when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.” *In re Bluetooth Headset Prods. Liab.*

*Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (internal quotations and citations omitted). “The presence of these three signs is not a death knell—but when they exist, ‘they require[ ] the district court to examine them, ... develop the record to support its final approval decision,’ and thereby ‘assure itself that the fees awarded in the agreement were not unreasonably high.’ ” *Kim v. Allison*, 8 F.4th 1170, 1180 (9th Cir. 2021) (quoting *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015)). Thus, while this Court has wide latitude to determine whether a settlement is substantively fair, it is held to a higher procedural standard, and in order “[t]o survive appellate review ... [it] must show it has explored comprehensively all factors and must give a reasoned response to all non-frivolous objections.” *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 606 (9th Cir. 2021) (quoting *Allen*, 787 F.3d at 1223-24).

### 1. Strength of Plaintiff's Case

\*4 When assessing the strength of a plaintiff's case, the court does not reach “any ultimate conclusions regarding the contested issues of fact and law that underlie the merits of th[e] litigation.” *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1388 (D. Ariz. 1989). The court cannot reach such a conclusion because evidence has not been fully presented. *Id.* Instead, the court “evaluate[s] objectively the strengths and weaknesses inherent in the litigation and the impact of those considerations on the parties’ decisions to reach these agreements.” *Id.*

As described in the motion for preliminary approval of the class settlement, Credit Bureau has affirmative defenses to some class members’ claims and would argue that these defenses, and what Credit Bureau claimed were differences in the ways its consumer reports affected different class members, made the case unmanageable for trial. (See Doc. 153 at 12; See also Doc. 122 at 6–7.) Specifically, these liability defenses include “(1) Defendant is not a credit reporting agency because it does not provide its OFAC reports ‘for monetary fees’ within the meaning of the FCRA, (2) Defendant’s OFAC reports are accurate, and (3) Defendant acted reasonably and not willfully.” (*Id.* at 5.) Although Kang believes that there are strong arguments against each of the above positions, success on any one of Credit Bureau’s defenses would have disposed of the class members’ claims and eliminate any possibility of statutory damages recovery for the class.

Accordingly, the Court finds that consideration of this factor weighs in favor of granting final approval of the parties’ settlement in this action.

### 2. Risk, Expense, Complexity, and Likely Duration of Further Litigation, and Risk of Maintaining Class Action Status Throughout Trial

The second and third *Churchill* factors, the risk, expense, complexity, and likely duration of further litigation, and the risk of maintaining class action status throughout trial, weigh in favor of approval. See Fed. R. Civ. P. 23(e)(2)(C)(i). “[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d at 1101 (citing *Class Plaintiffs*, 955 F.2d at 1276). As a result, “[a]pproval of settlement is preferable to lengthy and expensive litigation with uncertain results.” *Johnson v. Shaffer*, No. 2:12-cv-1059-KJM-AC, 2016 WL 3027744, at \*4 (E.D. Cal. May 27, 2016) (citing *Morales v. Stevco, Inc.*, No. 1:09-cv-00704-AWI-JLT, 2011 WL 5511767, at \*10 (E.D. Cal. Nov. 10, 2011)).

Because of the above-described risks, Kang contends that further litigation would increase risk and delay. (Doc. 158-1 at 28.) The proposed settlement “creates a much faster and direct means of providing relief to Class Members than would be the case if the parties proceeded with litigation,” as the Scheduling Order contemplates completing merits and expert discovery, another round of summary judgment briefing, and trial through October 24, 2023. (*Id.*; see also Doc. 125.)

The Court finds that consideration of this factor weighs in favor of granting final approval.

### 3. Amount Offered in Settlement

To evaluate the fairness of the settlement award, the court should “compare the terms of the compromise with the likely rewards of litigation.” *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968); see also Fed. R. Civ. P. 23(e)(2)(C)-(D). “It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not *per se* render the settlement inadequate or unfair.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). To determine whether a settlement “falls within the range of possible approval,” a court must focus on “substantive fairness and adequacy” and “consider plaintiffs’ expected recovery balanced against the value of the settlement offer.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). In addition, the court must consider whether “the proposal treats class members equitably relative

to each other” and whether “the relief provided for the class is adequate.” *Fed. R. Civ. P. 23(e)(2)(C)-(D)*.

\*5 Here, the settlement agreement provides that each of the 1,071-member FCRA Class will receive a minimum of \$1,000 without the need for any claim form or other response. (Doc. 158-1 at 28; Doc. 149-1 at 10, 16.) This amounts to 95.7% of consumers about whom Credit Bureau prepared a consumer report with an OFAC “Hit” during the class period receiving cash payments via the proposed settlement.<sup>4</sup>

Under the FCRA a prevailing plaintiff may obtain statutory damages of \$100–\$1,000. *See* 15 U.S.C. § 1681n(a)(1)(A). Thus, the automatic \$1,000 payment is the maximum amount of statutory damages available for a willful violation of the FCRA. Kang maintains that this is an “excellent result” that “compares favorably to other FCRA section 1681e(b) class action settlements for statutory damages.” (Doc. 158-1 at 28 (citing *Patel v. Trans Union, LLC*, No. 14-CV-00522-LB, 2018 WL 1258194, at \*8 (N.D. Cal. Mar. 11, 2018) (finally approving class action settlement in which class members received an automatic \$400 payment and could submit a claim for an additional, pro rata share of a claims pool); *Leo v. AppFolio, Inc.*, No. 3:17-cv-05771-RJB, Doc. 62 at 7 (W.D. Wash. July 18, 2019) (\$425 for successful claimants); *McIntyre v. RealPage, Inc.*, No. 18-CV-03934, 2023 WL 2643201, at \*2 (E.D. Pa. Mar. 24, 2023) (finally approving settlement in which class members received automatic payments of approximately \$300)). In addition, members of the largely overlapping CCRAA Class all benefit from Credit Bureau's practice changes that eliminate name-only matching for entities on the OFAC list. (*See* Doc. 158-1 at 29.)

Based on the information presented, the Court concludes that the amount offered in settlement of this action provides adequate relief for the class.

#### 4. Extent of Discovery Completed and Stage of the Proceedings

“In the context of class action settlements, ‘formal discovery is not a necessary ticket to the bargaining table’ where the parties have sufficient information to make an informed decision about settlement.” *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (quoting *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241 (5th Cir. 1982)). Approval of a class action settlement “is proper as long as discovery allowed the parties to form a clear view of the strengths and

weaknesses of their cases.” *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 454 (E.D. Cal. 2013). A settlement is presumed fair if it “follow[s] sufficient discovery and genuine arms-length negotiation.” *Adoma v. Univ. of Phx., Inc.*, 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012) (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)). The court must consider whether the process by which the parties arrived at their settlement is truly the product of arm's length bargaining and not collusion or fraud. *Millan v. Cascade Water Servs., Inc.*, 310 F.R.D. 593, 613 (E.D. Cal. 2015). These concerns are also reflected in Rule 23(e)(2)'s focus on procedural fairness—whether “the class representatives and class counsel have adequately represented the class” and whether “the proposal was negotiated at arm's length.” *Fed. R. Civ. P. 23(e)(2)(A)-(B)*.

As detailed in the Court's order granting preliminary approval, the Court is satisfied that the settlement was the result of “serious, informed, non-collusive negotiations.” (Doc. 153 at 9.) The parties engaged in three mediation sessions prior to settlement. (Doc. 158-1 at 13, 15–16.) The final mediation took place after motion practice, the completion of class certification discovery and completion of “much of [the] merits discovery.” (*Id.* at 29.) Class Counsel had identified all possible class members who met the definitions certified by the Court, had obtained the computer code behind Credit Bureau's “name-only matching logic,” and had already retained experts in OFAC and computer programing and databases. (*Id.*) In the settlement agreement, the parties recite that the settlement was reached after the parties “engaged in vigorous litigation, exchanged voluminous discovery, documents, and information, and conducted multiple depositions, and it is the product of sustained, arm's length settlement negotiations and two (2) formal mediations.” (Doc. 149-1 at 3.)

\*6 Accordingly, the Court concludes that consideration of this factor weighs in favor of granting final approval.

#### 5. Experience and Views of Counsel

Class counsel submitted declarations describing their experience in class action litigation. (*See Docs.* 155-2 & 155-3.) They have “decades of experience in the area of consumer class actions in general, especially those brought under the FCRA in particular, and have been commended by federal courts throughout the country over many years for their litigation proficiency, expertise and high caliber of work.” (Doc. 158-1 at 29. *See also Docs.* 155-2 & 155-3.)



In their view, the proposed settlement “provides adequate relief to Class Members, including the maximum amount of statutory damages available under the FCRA for a 5-year class as well as valuable practice changes.” (*Id.* at 29–30.)

The Court finds that class counsel's experience and views weigh in favor of granting final approval.

#### 6. Presence of a Governmental Participant

As no government entity has participated in this matter, this factor is neutral.

#### 7. Reaction of the Class Members

“It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.” *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529 (citing cases). The presumption that a settlement is fair, reasonable, and adequate is particularly strong when there is an absence of a single objection to a proposed class action settlement. *See id.*; *Barcia v. Contain-A-Way, Inc.*, No. 3:07-cv-00938-IEG-JMA, 2009 WL 587844, at \*4 (S.D. Cal. Mar. 6, 2009). Nevertheless, “[a] court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it.” *Cruz v. Sky Chefs, Inc.*, No. 4:12-cv-02705-DMR, 2014 WL 7247065, at \*5 (N.D. Cal. Dec. 19, 2014) (citing *Churchill Vill.*, 361 F.3d at 577).

According to Kang, no Class Member has filed an objection to the settlement pending final approval. (Doc. 158-1 at 23; Doc. 158-2 ¶ 4.) As a result, currently 100% of the class members will be participating in the settlement. (*Id.*) Accordingly, consideration of this factor weighs in favor of granting final approval.

#### 8. Subtle Signs of Collusion

The Court now turns to the *Bluetooth* factors to examine whether any “more subtle signs” of collusion recognized by the Ninth Circuit are present here.<sup>5</sup> *See Bluetooth*, 654 F.3d at 947.

For the first *Bluetooth* factor, the Court compares the payout to the class (actual and expected) to class counsel's unopposed claim for fees. *See Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 WL 4831157, at \*6 (N.D. Cal. Oct. 12, 2011). The gross settlement amount is \$2.75 million and class

counsel seeks \$1.62 million in attorney's fees—58.9 percent of the settlement amount. This ratio alone can be a sign of collusion. *See Bluetooth*, 654 F.3d at 947. However, given that the fees requested are less than class counsel's lodestar, the Court finds that while the high percentage is a red flag, it does not rise to the level of collusion. Moreover, any concerns regarding collusion are mitigated by the Court's reduction of the fees sought, as set forth below.

\*7 As for the second *Bluetooth* factor, the fact that the proposed settlement contains a “clear sailing” provision (*see* Doc. 149-1 at 15) is not ideal. *See In re Toys R Us-Delaware, Inc.—Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 458 (C.D. Cal. 2014) (“a clear sailing agreement is one where the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling”). Nevertheless, the existence of a such a provision is not necessarily fatal to final approval. *See Bluetooth*, 654 F.3d at 948. The collusion concerns raised by the clear sailing provision are minimized, in this case, however, because the settlement agreement provides that any unpaid attorney's fees and costs will remain in the settlement fund to be distributed to the class in a second distribution following the initial round of automatic payments (Doc. 149-1 at 15–16). *See, e.g., Ferrell v. Buckingham Prop. Mgmt.*, No. 1:19-cv-00332-LJO-SAB, 2020 WL 291042, at \*21 (E.D. Cal. Jan. 21, 2020). Moreover, class counsel did assume substantial risk in litigating this action on a contingency fee basis, and incurring costs without the guarantee of payment for its litigation efforts. That risk is even more acute under the circumstances, as class members' statutory recovery under the FCRA is capped at \$1,000 in statutory damages for each member of a class. *See 15 U.S.C. § 1681n(a)(1)(A)*. The attorney's fees and costs necessary to litigate an FCRA class action thus may often exceed any possible recovery. *See, e.g., Der-Hacopian v. Darktrace, Inc.*, No. 18-CV-06726-HSG, 2020 WL 1904471, at \*8 (N.D. Cal. Apr. 17, 2020).

The third *Bluetooth* factor—whether the parties have arranged for fees not awarded to the class to revert to defendant rather than be added to the settlement fund, *see Bluetooth*, 654 F.3d at 948—is not present here. As set forth above, the settlement agreement is non-reversionary. All funds that are not distributed to the class following the second distribution shall be paid to a *cy pres* recipient. (Doc. 149-1 at 16.)

#### 9. Conclusion

In sum, the *Churchill* fairness factors support approval, and the *Bluetooth* factors do not indicate collusion. The Court is therefore satisfied that the settlement agreement was not the result of collusion between the parties and instead is the product of arms-length negotiations between experienced and professional counsel. There are no objections to address. For each of these reasons, the Court finds that the settlement is fair, reasonable, and adequate under [Rule 23\(e\)](#) and final approval is therefore appropriate.

#### IV. ATTORNEY'S FEES, COSTS, AND SERVICE AWARD

As noted above, Plaintiff has also submitted a motion seeking attorney's fees, class counsel's litigation expenses, and a service award for Kang.

##### A. Attorney's Fees

###### 1. Legal Standard

Reasonable attorney's fees are allowed under the FCRA, [15 U.S.C. § 1681n\(a\)\(3\)](#), and [Federal Rule of Civil Procedure 23\(h\)](#). However, “courts have an independent obligation to ensure that the [fee] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount.” *Bluetooth*, 654 F.3d at 941; *see also Staton*, 327 F.3d at 963 (“[A] district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement.”). Use of the “lodestar” method is appropriate to calculate attorney's fees under a federal fee-shifting statute like the FCRA. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955 (9th Cir. 2007); *see also Staton*, 327 F.3d at 965; *Yeagley v. Wells Fargo & Co.*, 365 F. App'x 886, 887 (9th Cir. 2010) (“Under a fee shifting statute such as the FCRA ... the lodestar method is generally the correct method for calculating attorneys' fees.”).

The lodestar method calculates attorney fees by “by multiplying the number of hours reasonably expended by counsel on the particular matter times a reasonable hourly rate.” *Florida v. Dunne*, 915 F.2d 542, 545 n.3 (9th Cir. 1990) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The product of this computation, the “lodestar” amount, yields a presumptively reasonable fee. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). Next, the Court may

adjust the lodestar upward or downward using a “multiplier” considering factors adopted by the Ninth Circuit:

\*8 (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.<sup>6</sup>

*Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988) (indicating the Court should “consider[ ] some or all twelve relevant criteria set forth in *Kerr*” to determine whether to deviate from the lodestar).

###### 2. Evaluation of the Fees Requested

Pursuant to the proposed settlement, class counsel may seek attorney's fees and costs in the amount of \$1,620,000. (Doc. 149-1 at 15.) Class counsel assert this amount is “reasonable” because it amounts to 91.3% of their total lodestar expended in prosecuting this matter, \$1,690,145.50. (Doc. 155-1 at 17, 21.) For the reasons that follow, the Court finds that the lodestar in this case is excessive, both with the time included and hourly rates applied, and necessitates a reduction in attorney's fees awarded.

###### a. Time expended

In general, the first step in determining the lodestar is to determine whether the number of hours expended was reasonable. *Fischer*, 214 F.3d at 1119. The Court has the discretion to review submitted time sheets to determine whether the time expended was reasonable. *See In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1298 (9th Cir.1994) (concluding the district court acted within its discretion in reducing the lodestar for unnecessary and duplicative work).

The Court has reviewed the billing records provided by class counsel Francis Mailman Soumilas, P.C. (“FMS”) and Caddell & Chapman (“C&C”). (Doc. 155-2 at 16–73; Doc. 155-3 at 22–109.) The reported combined 2,492.7



hours (1,480.8 by FMS + 1,011.9 by C&C) included: pre-suit investigation of the case and claims; preparation of the pleadings and service; communications with Kang and opposing counsel; discovery; motion practice; settlement conferences; and class notices and administration. However, the Court's review of the billing records to determine the tasks undertaken by the law firms has also revealed the inclusion of clerical tasks and a significant amount of time billed for internal communications.

#### *i. Clerical tasks*

The Supreme Court determined that “purely clerical or secretarial tasks should not be billed at a paralegal or [lawyer's] rate, regardless of who performs them.” *Missouri v. Jenkins*, 491 U.S. 274, 288 n.10, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989). As a result, courts eliminate clerical tasks from lodestar calculations. See, e.g., *Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009); *Marquez v. Harper Sch. Dist.*, 546 F. App'x 659, 660 (9th Cir. 2013) (“[t]he district court was within its discretion” when it declined to award fees for clerical tasks); *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 985 (4th Cir. 1997) (approving the deduction of hours spent on secretarial tasks from the lodestar calculation); see also *Weeks v. Kellogg Co.*, No. CV 09-08102(MMM)( ), 2013 WL 6531177, at \*32 (C.D. Cal. Nov. 23, 2013) (“In calculating the lodestar, courts typically exclude time spent on clerical or ministerial tasks because such tasks are properly considered part of an attorney's overhead and are reflected in his or her hourly rate.”). Such tasks may include, but are not limited to, “creating indexes for a binder; filing emails, memoranda, and other correspondence; updating the case calendar with new dates; copying, scanning, and faxing documents; and filing or serving documents.” *Moore v. Chase, Inc.*, Case No. 1:14-cv-01178-SKO, 2016 WL 3648949, at \*3 (E.D. Cal. July 7, 2016), citing *Prison Legal News v. Schwarzenegger*, 561 F.Supp.2d 1095, 1102 (N.D. Cal. 2008).

#### a) Calendaring and Document Retrieval/Compilation

\*9 This Court and others in the Ninth Circuit have determined that calendaring deadlines are clerical tasks that should not be included in a fee award. See, e.g., *Moore*, 2016 WL 3648949, at \*3; *Hill v. Comm'r of Soc. Sec.*, 428 F. Supp. 3d 253, 265 (E.D. Cal. 2019) (observing clerical staff could “easily” complete “calendaring of court dates” and reducing the fee award); *Campbell v. AMTRAK*,

718 F.Supp.2d 1093, 1105 (N.D. Cal. 2010) (deducting calendaring as clerical work from the fee award); *Doran v. Vicorp Rests., Inc.*, 407 F.Supp.2d 1120, 1125 (C.D. Cal. 2005) (noting “calendaring court dates” is clerical and reducing the fee award). Likewise, tasks related to scheduling are clerical, non-compensable tasks. See *Soler v. County of San Diego*, No. 14cv2470-MMA (RBB), 2021 WL 2515236, at \*10 (S.D. Cal. June 18, 2021) (identifying “time spent scheduling ... [as] clerical tasks non-compensable at any billing rate”).

Courts have also declined to award fees for “retrieving electronic court documents or copying” due to the clerical nature of the tasks. *Jones v. Metropolitan Life Ins. Co.*, 845 F. Supp. 2d 1016, 1027 (N.D. Cal. 2012); *Schmidt v. City of Modesto*, No. 1:17-cv-01411-DAD-MJS, 2018 WL 6593362, at \*9 (E.D. Cal. Dec. 18, 2018) (indicating clerical work included downloading, saving, and printing documents). Similarly, courts decline to award fees for staff emailing documents. See *Schmidt*, 2018 WL 6593362, at \*9 (declining to award fees for emailing documents, noting emailing was a clerical task rather than a paralegal task); *LaToya A. v. S.F. Unified Sch. Dist.*, Case No. 3:15-cv-04311-LB, 2016 WL 344558, at \*9 (N.D. Cal. Jan. 28, 2016) (forwarding documents to attorneys is “purely clerical work”). Thus, to the extent the billing records include such tasks, fees for such tasks should not be awarded.

Review of class counsel's billing records shows that paralegals at FMS and C&C included over 30 entries for calendaring, noting deadlines, and compiling and retrieving documents.<sup>7</sup> (See generally Doc. 155-2 at 16–73; Doc. 155-3 at 22–109.) For example, an unnamed FMS paralegal<sup>8</sup> billed a total of 9.3 hours throughout the litigation, from October 4, 2018, to September 8, 2021, for tasks such as “[d]ownload Court order[s], read and identify case deadlines contained therein, [and] add and/or modify case deadlines on litigation calendar.” (See Doc. 155-2 at 22–24, 26–28, 30–31, 33, 35–36, 51.) Similarly, Kathy Kersh, senior paralegal at C&C, billed a total of 6.8 hours from March 7, 2019, to April 10, 2023, for tasks such as reviewing Court orders, updating calendars, creating calendar entries, updating the “case management notebook,” and downloading documents to the firm's “network.” (See Doc. 155-3 at 34, 35, 45, 53, 54, 65, 70–71, 80, 83, 93, 96, 98, 105.)

Associate Jordan Sartell of FMS and Junior Partner Amy Tabor of C&C also billed for administrative tasks related to calendaring, scheduling, and document compilation in this

action. For example, Mr. Sartell indicated that he spent 0.2 hour on May 8, 2020, to “review ECF 68 setting discovery dispute teleconference, [and] calendar same”; 0.2 hour on April 8, 2020, to “review ECF 103, [and] calendar MCC-related deadlines”; 0.3 hour on September 6, 2022, to “review Def’s R 45 subpoena, [and] related calendar items”; and 0.4 hour on December 20, 2022, to “review ECF 134, setting forth court’s instructions and deadlines for 3/9/23 settlement conference; [and] calendar interstitial deadlines.” (See Doc. 155-2 at 40, 46, 59, 63.) Similarly, Ms. Tabor billed 0.1 hour on November 12, 2019, to “[r]eview order vacating hearing [and] calendar deadlines”; 1.5 hours on December 2, 2020, to “[r]eview filings; assemble notebook for motion for summary judgment hearing; [and] calendar deadlines”; and 0.2 hours on March 11, 2021, to “[r]eview notice of motion to compel [and] calendar deadlines.” (See Doc. 155-3 at 56, 79, 81.) Such time will also be deducted from the lodestar calculation as clerical work. See *Henry v. Comm’r of Soc. Sec. Admin.*, No. CV-20-00320-TUC-JGZ, 2023 WL 1434332, at \*6 (D. Ariz. Feb. 1, 2023) (“Communications such as emails and conferences may be considered clerical tasks when the discussion is about deadlines, filings, and other non-substantive administrative work”); *Mrkonjic v. Delta Family-Care*, No. CV 10-2087 GAF, 2014 WL 12967579 C.D. Cal. July 18, 2014 (explaining correspondence regarding deadlines is clerical and “not compensable” [citation omitted]).

**\*10** Based upon the Court’s review of billing entries related to calendaring, scheduling, and the assembly of documents, the Court finds 19.0 hours must be deducted from the lodestar, including 9.3 hours for Jeffrey Kabacinski, 6.8 hours for Kathy Kersh, 1.1 hour for Jordan Sartell, and 1.8 hours for Amy Tabor.

#### b) Communications with the Court

This Court and others have declined to award fees for communicating with the Court—such as emailing or calling courtroom deputy—due to the clerical nature of the task. See, e.g., *Miller v. Schmidt*, No. 1:12-cv-00137-LJO-SAB, 2017 WL 633892, at \*7 (E.D. Cal. Feb. 15, 2017) (agreeing with the party opposing the fee request that “communicating with the Court staff and court reporters is purely clerical work” and excluding the time billed for communications with the courtroom deputies from a fee award); *Robinson v. Plourde*, 717 F. Supp. 2d 1092, 1099-1100 (D. Haw. 2010) (“communication with court staff, scheduling, and

corresponding regarding deadlines, are clerical and not compensable [tasks]”); *Comcast of Illinois X v. Kwak*, 03–00962 DAE–PAL, 2010 WL 3781768, at \*6 (D. Nev. Sept. 20, 2010) (declining to award fees for “ministerial tasks such as contacting court staff for scheduling reasons or noting due dates”).

Michael Caddell of C&C billed 0.2 hour to email the Court, and to review responses, on June 12, 2019; 0.1 hour to review email correspondence from the Court on December 6, 2019; 0.6 hour to review correspondence to and from the Court on May 1, 2020; and 0.4 hour to email the Court, and to review responses, on March 31, 2021. (Doc. 155-3 at 46, 58, 70, 82.) Similarly, Jordan Sartell of FMS billed 0.6 hour to “confer with [co-counsel, opposing counsel,] and courtroom deputy re tomorrow’s scheduling conference” on June 12, 2019; and 0.2 hour to “[r]eview ECF 100 re logistics for upcoming scheduling conference [and] respond to deputy as ordered” on March 31, 2021. (Doc. 155-2 at 33, 46.) This time shall be deducted from the lodestar, for a total deduction of 2.1 hours.

#### ii. Unnecessary (unrelated) tasks

The Court takes judicial notice that a version of this case was originally filed on May 11, 2018, in the Central District of California against Experian Information Solutions, Inc. (“Experian”).<sup>9</sup> See *Kang v. Experian Information Solutions, Inc.*, Case No. 8:18-cv-00830-CJC-DFM (C.D. Cal.). The cases are similar, but the legal theories, facts, and claims differ. (Compare *Kang*, Doc. 1, Case No. 8:18-cv-00830-CJC-DFM (C.D. Cal.) with Doc. 1.) On July 5, 2018, the case was voluntarily dismissed without prejudice. (See *Kang*, Doc. 15, Case No. 8:18-cv-00830-CJC-DFM (C.D. Cal.). From what the Court has gathered from class counsel’s billing records,<sup>10</sup> Kang dismissed his case against Experian after it was discovered that he had named the wrong defendant. (See generally Doc. 155-2 at 18–20; Doc. 155-3 at 22–26.)

**\*11** While the Court acknowledges that time spent on preparing and litigating Kang’s case against Experian may have saved some time on this case, it is not clear that *all* of the time spent litigating against the wrong defendant based on a different legal theory and claims in another venue was necessary to the prosecution of this case. See, e.g., *Buchannon v. Associated Credit Servs., Inc.*, No. 3:20-CV-02245-BEN-LL, 2021 WL 5360971, at \*18–20 (S.D. Cal. Nov. 17, 2021) (reducing attorney’s fees for time spent litigating lawsuit filed in wrong venue). See also *Webb v. Sloan*, 330 F.3d

1158, 1168 (9th Cir. 2003) (“Hours expended on unrelated, unsuccessful claims should not be included in an award of fees.”). Accordingly, the Court in its discretion will reduce by 50% the time expended by FMS from November 21, 2017,

#### **Legal Professional**

Michael A. Caddell

Cynthia B. Chapman

James A. Francis

John Soumilas

Amy E. Tabor

Jordan M. Sartell

Lauren KW Brennan

Kathy Kersh

Jeffrey Kabacinski (FMS Paralegal)

Felicia Labbe

In addition, the Court does not include the 28.5 hours billed by Mr. Francis for attendance at a final approval hearing (*see* Doc. 155-2 at 73), as none was held in this case.

#### **b. Hourly rates**

The Court must also determine whether the hourly rates are reasonable to calculate the lodestar. *See Florida*, 915 F.2d at 545 n.3. The Supreme Court has explained attorney fees are to be calculated with “the prevailing market rates in the relevant community.” *Blum v. Stenson*, 465 U.S. 886, 895–96 and n.11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). In general, the “relevant community” for purposes of determining the prevailing market rate is the “forum in which the district court sits.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). Thus, when a case is filed in the Fresno Division of the Eastern District of California, the Fresno Division of the District “is the appropriate forum to establish the lodestar hourly rate ...” *See Jadwin v. County of Kern*, 767 F.Supp.2d 1069, 1129 (E.D. Cal. 2011). *See also Felix v. WM. Bolthouse Farms, Inc.*, No. 1:19-cv-00312-AWI-JLT, 2020 WL 3819414, at \*1 (E.D. Cal. July 8, 2020) (“This Court sits in the Fresno Division of the Eastern District of California. The prevailing rates outside of the Fresno Division, including

through July 5, 2018, and time expended by C&C from May 8, 2018, through July 5, 2018, as follows:

#### **Deducted Hours**

5.85 (11.7 x .5)

4.0 (8.0 x .5)

3.2 (6.4 x .5)

2.9 (5.8 x .5)

6.9 (13.8 x .5)

11.45 (22.9 x .5)

6.0 (12.0 x .5)

6.6. (13.2 x .5)

1.0 (2 x .5)

1.15 (2.3 x .5)

the prevailing rates for the Sacramento Division, are generally irrelevant.”).

The fee applicant bears a burden of establishing that the requested rates are commensurate “with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum*, 465 U.S. at 895 n.11, 104 S.Ct. 1541. Applicants meet this burden by producing “satisfactory evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Id.*; *see also Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1110–11 (9th Cir. 2014) (“Affidavits of the plaintiffs’ attorney[s] and other attorneys regarding prevailing fees in the community ... are satisfactory evidence of the prevailing market rate”). The Court may apply “rates [from] outside the forum ... ‘if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case.’” *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992)).

To calculate their lodestar, class counsel applied hourly rates ranging from \$465 per hour for associates to \$1,075 per

hour for a senior partner. (See Doc. 155-1 at 19.) Class counsel also seek hourly rates for their paralegals ranging from \$375 to \$175 per hour. (*Id.*) Class counsel do not assert the requested rates are aligned with the market rate in the Fresno Division or provide any evidence concerning their hourly rates or those of other attorneys in the community. They do not contend that counsel was unavailable in Fresno.<sup>11</sup> They instead assert that the rates are “reasonable and within the range of the appropriate market rates charged by attorneys with comparable experience levels for litigation of a similar nature, given their experience level, practice concentration and background.” (Doc. 155-2 ¶ 26. See also Doc. 155-3 ¶ 36 (C&C’s hourly rates are “consistent with market rates for complex class action litigation.”).)

\*12 In support of its rates, FMS cites an October 18, 2022, expert report from Abraham C. Reich of Fox Rothschild, LLP recommending the hourly rates to be charged by FMS in each of the legal markets in which the firm has an office, and asserts that “[c]ourts across the country have relied upon Mr. Reich’s expert opinion to approve [FMS’s] hourly rates.” (Doc. 155-2 ¶ 26 (citing cases).) As Fresno is not one of the markets discussed in the report, and none of the cited court cases that relied on the report are venued in the Fresno Division, the rates recommended therein are “irrelevant.” *Felix*, 2020 WL 3819414, at \*1.

C&C similarly relies on cases from other forums to support the assertion the Court should adopt the hourly rates they identified. (See Doc. 155-3 ¶ 36 (citing *Hooker v. Sirius SM Radio, Inc.*, No. 4:13-cv-0003, Dkt. 215 (E.D. Va. May 11, 2017); *Henderson v. Axiom Risk Mitigation*, No. 3:12-cv-0589 (E.D. Va. 2015); *Brown v. Lowe’s*, No. 5:13-cv-0079, Dkt. 173 (W.D.N.C. November 1, 2016); *Berry v. LexisNexis Risk & Info Analytics Group, Inc.*, No. 3:11-cv-0754, Dkt. 129 (E.D. Va. Sept. 5, 2014); *United States of America, ex rel. Ivey Woodard v. DaVita Inc.*, Civil Case No. 1:05-cv-0227, Dkt. 195-1 (E.D. La.)).) However, as the matter is pending in the Fresno Division of the Eastern District, the identified actions from federal courts in Virginia, North Carolina, and Louisiana do not assist *this* Court.<sup>12</sup> *Jadwin*, 767 F. Supp. 2d at 1129. Plaintiff has not provided adequate evidentiary support to demonstrate that the use of an attorney from outside the relevant community was necessary for purposes of charging another community’s higher hourly rates. See, e.g., *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 945–46 (9th Cir.2007) (the party seeking fees “bears the burden of documenting the hours expended in the litigation and

must submit evidence supporting those hours and the rates claimed.”) (emphasis added) (citation omitted).

#### i. Attorneys

James Francis of FMS reports that he has practiced law for 28 years, and his partner, John Soumilas, has 24 years of experience. (Doc. 155-2 ¶ 31.) FMS associates Jordan Sartell and Lauren Brennan each have 11 years of experience. (*Id.*) C&C senior partner Michael Caddell reports that he has practiced law for 44 years, and senior partner Cynthia Chapman has practiced for 33 years. (Doc. 155-3 ¶ 34.) Amy Tabor, junior partner at C&C, has 20 years of experience. (*Id.*) The hourly rates requested for these attorneys exceed those typically awarded in the local forum.

The Court has performed a comprehensive survey of attorney fees awarded in the Eastern District and finds current hourly rates range from \$200 to \$750, with hourly rates exceeding \$600 reserved for attorneys who have been practicing approximately 30 years. See, e.g., *Cianchetta v. BMW of N. Am., LLC*, No. 2:20-cv-00241-KJM-JDP, 2022 WL 2160556, at \*6 (E.D. Cal. June 13, 2022) (reducing the hourly rate for attorneys in their first year of practice to \$200); *Seebach v. BMW of N. Am., LLC*, No. 2:18-cv-00109-KJM AC, 2020 WL 4923664 at \*3 (E.D. Cal. Aug. 21, 2020) (awarding the hourly rates of \$200 for an attorney who had been admitted to practice less than two years, and \$505 for an attorney “with roughly 20 years of experience” in 2020); *Siafarikas v. Mercedes-Benz USA, LLC*, No. 2:20-cv-01784-JAM-AC, 2022 WL 16926265, at \*3 (E.D. Cal. Nov. 10, 2022) (approving the hourly rate of \$250 for an attorney “who has practiced law for three years” and \$500 for an attorney who had practiced law for 21 years); *Garybo v. Leonardo Bros*, No. 1:15-cv-01487-DAD-JLT, 2021 WL 4493502, at \*5 (E.D. Cal. Sept. 30, 2021) (adopting the recommended hourly rate of \$500 for attorneys who were admitted to practice for 20 years or more to calculate a lodestar); *Mostajo v. Nationwide Mut. Ins. Co.*, No. 2:17-cv-00350-DAD-AC, 2023 WL 2918657, at \*11 (E.D. Cal. Apr. 12, 2023) (approving of “hourly rates ranging from \$650 through \$750” for “attorneys with over thirty years of experience” for purposes of calculating a lodestar); *Cooks v. TNG GP*, No. 2:16-cv-01160-KJM-AC, 2021 WL 5139613, at \*6 (E.D. Cal. Nov. 4, 2021) (calculating the lodestar using the rate of \$695 for attorneys with 30 years’ experience). With these parameters in mind, the hourly rates for counsel must be adjusted to those of the local forum.



\*13 The rates for attorneys practicing 30 years or more—including Michael Caddell and Cynthia Chapman—will be calculated at the rate of \$750 and \$650 per hour, respectively. The rate for attorneys practicing law for 20 years or more—including Amy Tabor, John Soumilas, and James Francis—will be calculated at the rate of \$525 per hour. The rate for Jordan Sartell and Lauren Brennan, who have been practicing for 11 years, will be adjusted to \$425 per hour.

ii. *Paralegals*

To calculate their lodestar, class counsel applied the following hourly rates for their paralegals: \$375 for Kathy Kersh of C&C, who has 33 years of experience; \$305 for FMS paralegal Jeffrey Kabacinski, who has 25 years of experience; and \$175 for Felicia Labbe of C&C, who has 13 years of experience. (See Doc. 155-2 ¶ 31; Doc. 155-3 ¶ 34.) These amounts exceed the hourly rates for comparably experienced paralegals in the Eastern District.

Paralegal rates within the Eastern District range from \$75 to approximately \$150.00 per hour, depending on experience. See, e.g., *Schmidt*, 2018 WL 6593362, at \*6 (“the reasonable rate of compensation for a paralegal would be between \$75.00 to \$150.00 per hour depending on experience”); *Bernal v. Sacramento Cty. Sheriff Dep’t*, No. 2:19-cv-00482-MCE-AC, 2023 WL 2504895, at \*5 (E.D. Cal. Mar. 14, 2023) (rates of “approximately \$100 per hour” were reasonable for paralegals in this district); *Gilbert v. Jabar Wireless Inc.*, No.

2:21-cv-02055 DAD AC, 2023 WL 3055108, at \*9 (E.D. Cal. Apr. 24, 2023) (finding the hourly rate of \$115 was reasonable for “experienced paralegals”); *Block v. Narwal*, No. 1:22-cv-00597-ADA-EPG, 2022 WL 17455502, at \*9 (E.D. Cal. Dec. 6, 2022) (finding the requested rate of \$115 was reasonable for paralegals who had more than ten years of experience); *Freshko Produce Servs. v. ILA Prods*, No. 1:19-cv-00017-DAD-BAM, 2021 WL 4033176, at \*4 (E.D. Cal. Sept. 2, 2021) (finding \$150 per hour was reasonable “for a paralegal with more than 30 years of experience” for calculating a lodestar).

In accordance with the foregoing, the rate for paralegal with 20 years or more experience—including Kathy Kersh and Jeffrey Kabacinski—will be calculated at the rate of \$150 per hour. The rate for Felicia Labbe, with 13 years of experience, will be adjusted to \$115 per hour.

3. Amount of Fees to be Awarded

Based upon the survey of fees awarded in the Eastern District and the Court’s own knowledge, the adjusted rates are reasonable and align with prevailing local market rates. See *Cianchetta*, 2022 WL 2160556, at \*6; *Garybo*, 2021 WL 449350, at \*5; see also *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011) (concluding “the district court did not abuse its discretion either by relying, in part, on its own knowledge and experience” to determine reasonable hourly rates). With the time and hourly adjustments set forth above, the lodestar totals \$1,113,560.50:

**Legal Professional**

Michael A. Caddell  
Cynthia B. Chapman  
James A. Francis  
John Soumilas  
Amy E. Tabor  
Amy E. Tabor  
Lauren KW Brennan  
Kathy Kersh  
Jeffrey Kabacinski  
Felicia Labbe

| Time   | Rate  | Lodestar     |
|--------|-------|--------------|
| 313.45 | \$750 | \$235,087.50 |
| 137.6  | \$650 | \$89,440     |
| 216.3  | \$525 | \$113,557.50 |
| 228.7  | \$525 | \$120,067.50 |
| 354.1  | \$525 | \$185,902.50 |
| 700.65 | \$425 | \$185,902.50 |
| 20.9   | \$425 | \$8,882.50   |
| 157.9  | \$150 | \$23,685     |
| 250    | \$150 | \$37,500     |
| 14.45  | \$115 | \$1,661.75   |



**Total****\$1,113,560.50**

Because the requested fees in the amount of \$1,620,000 (less \$77,613.38 in requested costs) exceed the adjusted lodestar by almost \$500,000, the lodestar does not support the reasonableness of the request. Rather, in view of the presumptive reasonableness of the lodestar figure, *Gonzalez*, 729 F.3d at 1202, and in the absence of any strong justification for an upward adjustment under the factors articulated in *Kerr v. v. Screen Extras Guild, Inc.*, the Court finds the adjusted lodestar amount is fair, reasonable, and adequate as required under Rule 23.<sup>13</sup> Accordingly, the request for fees will be granted in the modified amount of \$1,113,560.50.

**B. Litigation Costs**

\*14 “[A]n attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund.” *Norris v. Mazzola*, No. 15-cv-04962-JSC, 2017 WL 6493091, at \*14 (N.D. Cal. Dec. 19, 2017) (citation and internal quotation marks omitted); *Smith v. Am. Greetings Corp.*, No. 14-cv-02577-JST, 2016 WL 2909429, at \*9 (N.D. Cal. May 19, 2016) (“An attorney is entitled to ‘recover as part of the award of attorney’s fees those out-of-pocket expenses that would normally be charged to a fee paying client.’”) (quoting *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)).

Pursuant to the settlement agreement, class counsel was authorized to seek up to \$1,620,000 in attorney’s fees and costs from the gross settlement fund. (See Doc. 149-1 at 10, 15.) Class Counsel now seek litigation expenses in the amount of \$77,613.38. (Doc. 155-1 at 21.) The itemized costs include filing fees, copying and postage, mediation fees, expert costs, legal research charges, document review, and travel expenses for depositions and mediations. (See Doc. 155-2 ¶¶ 35–36; *id.* at 75–76.; Doc. 155-3 ¶ 37; *id.* at 111.) Costs including “filing fees, mediator fees ..., ground transportation, copy charges, computer research, and database expert fees ... are routinely reimbursed” in class action cases. *Alvarado v. Nederend*, No. 1:08-cv-01099 OWW DLB, 2011 WL 1883188, at \*10 (E.D. Cal. Jan. May 17, 2011); *Rodriguez v. Danell Custom Harvesting, LLC*, 327 F.R.D. 375, 394 (E.D. Cal. 2018) (“Reasonable expenses may be awarded for travel, postage, telephone, fax, notice, online legal research fees, mediation fees, filing fees and photocopies”); see also *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007) (“The reimbursement for travel expenses, both

under 28 U.S.C. § 1920 and Rule 54(d), is within the broad discretion of the Court” [citation omitted]).

Because the costs requested are reasonable and do not exceed the amount authorized, the request for litigation costs will be granted in the amount of \$77,613.38.

**C. Service Award**

A class representative may “receive a share of class recovery above and beyond [his] individual claim” with a service payment, also known as an “incentive payment.” *China Agritech, Inc. v. Resh*, — U.S. —, 138 S. Ct. 1800, 1811 n.7, 201 L.Ed.2d 123 (2018); see also *Staton*, 327 F.3d at 977 (“named plaintiffs ... are eligible for reasonable incentive payments”). However, incentive payments for class representatives are not to be given routinely. The Ninth Circuit observed: “[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.” *Staton*, 327 F.3d at 975 (citations omitted). Further, “‘excessive payments to named class members can be an indication that the agreement was reached through fraud or collusion.’” *Id.* (citation omitted).

The Ninth Circuit has emphasized that “district courts must be vigilant in scrutinizing all incentive awards.” *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1165 (9th Cir. 2013). In evaluating a request for a service payment to a class representative, the Court must consider: “‘the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation,’ and any financial or reputational risks the plaintiff faced.” *Named Plaintiffs & Settlement Class Members v. Feldman (In re Apple Inc. Device Performance Litig.)*, 50 F.4th 769, 786 (9th Cir. 2022) (quoting *Roes, I-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1057 (9th Cir. 2019)); see also *Staton* 327 F.3d at 977.

\*15 The settlement agreement provides that Kang may apply for a service award “not to exceed \$15,000.” (Doc. 149-1 at 10.) Kang now requests that the Court approve a service payment in that amount. (Doc. 155-1 at 21.)

### 1. Time Expended

The Eastern District has awarded service payments for “substantial efforts taken as a class representative when the plaintiff has undertaken at least 30 to 40 hours of work.” *Greer v. Dick’s Sporting Goods, Inc.*, No. 2:15-CV-01063-KJM-CKD, 2020 WL 5535399, at \*4 (E.D. Cal. Sept. 15, 2020) (internal quotation marks, citation omitted); *see also Emmons v. Quest Diagnostics Clinical Laboratories, Inc.*, No. 1:13-cv-00474-DAD-BAM, 2017 WL 749018, at \*8 (E.D. Cal. Feb. 27, 2017) (awarding payments when each plaintiff reported “approximately 30–40 hours assisting their attorneys in the prosecution of this lawsuit” [modification adopted]). As Kang has neither submitted a declaration to the Court nor provided any other evidence of the time he expended on the matter, this factor does not support approval of a service payment.<sup>14</sup>

### 2. Actions Taken to Benefit the Class

According to the motion, Kang “made substantial contributions to this litigation, “participating actively in discovery by providing documents to Class Counsel and preparing for and sitting for a lengthy deposition for which he had to take time off from work.” (Doc. 155-1 at 22.)

Lack of substantiation notwithstanding, Kang likely would have taken many of these actions even if proceeding with individual claims. For example, he would likely have submitted to a deposition if he brought the claims on his own behalf only. In addition, he would have assisted with discovery even if the action was not filed on behalf of a class. On the other hand, his actions—including assisting with discovery, reviewing documents, and attending a deposition—undoubtedly benefitted class members, most of whom will receive an automatic payment at the statutory maximum amount. Kang’s actions also resulted in a change in practice by Credit Bureau. Therefore, the identified actions support a service payment for Kang.

### 3. Workplace Retaliation

The Court may consider whether the named plaintiff has “reasonable fears of workplace retaliation” in evaluating a request for a service payment. *Staton*, 327 F.3d at 977. Because Kang is not an employee of Credit Bureau, and therefore cannot suffer workplace retaliation, this factor does not support a service payment.

### 4. Reputational Risk

Class Counsel assert that Kang “did risk further reputation[al] harm arising from [Credit Bureau’s] matching procedures, which went unchanged until the last days of this matter.” (Doc. 155-1 at 22.) Yet, this risk of reputational harm would exist regardless of whether Kang had elected to file *individual* claims rather than a class action. Such alleged risk also lacks evidentiary support and is speculative. The Ninth Circuit observed: “the trial court is not bound to, and should not, accept conclusory statements about ‘potential stigma’ and ‘potential risk,’ in the absence of supporting evidence.” *See Wilson v. Telsa, Inc.*, 833 Fed. App’x 59, 62 (9th Cir. 2020) (quoting *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 805, 96 Cal.Rptr.3d 441 (2009)). The Ninth Circuit determined a court did not abuse its discretion in reducing a requested class representative payment from \$10,000 to \$5,000 based on the speculative “risk of reputational injury.” *Id.* This factor does not support the requested service payment for Kang.

### 5. Financial Risk

\*16 Class counsel provides no argument as to any financial risk to Kang. Thus, this factor does not support the award of a service payment.

### 6. Amount of the Request

Considering the factors set forth above—in particular the actions taken by Kang that resulted in substantial benefit to the classes and a change in practice by Credit Bureau—the Court finds that an incentive award is appropriate.

In determining the amount to be awarded, the Court may consider the actions undertaken by the class representative, the fairness of the hourly rate, and how large the incentive award is compared to the average award class members expect to receive. *See, e.g., Ontiveros v. Zamora*, 303 F.R.D. 356, 366 (E.D. Cal. Oct. 8, 2014) (evaluating the hourly rate the named plaintiff would receive to determine whether the incentive award was appropriate); *Rankin v. Am. Greetings, Inc.*, No. 2:10-CV-01831-GGH, 2011 WL 13239039, at \*2 (E.D. Cal. July 6, 2011) (noting the incentive award requested was “reasonably close to the average per class member amount to be received”); *Alvarado*, 2011 WL 1883188 at \*10-11 (considering the time and financial risk undertaken by the plaintiff). Notably, a service payment of \$5,000 for the class representative “is presumptively reasonable” in the Ninth Circuit. *Richardson v. THD At-Home Servs.*, No. 1:14-

cv-0273-BAM, 2016 WL 1366952, at \*13 (E.D. Cal. Apr. 6, 2016); *see also* *Gonzalez v. NCI Group, Inc.*, No. 1:18-cv-00948-AWI-SKO, 2023 WL 373252, at \*9 (E.D. Cal. Jan. 24, 2023) (“Courts routinely find rewards in the amount of \$5,000 to be reasonable”); *Bellignhausen v. Tractor Supply Co.*, 306 F.R.D. 245, 266 (N.D. Cal. 2015) (observing that in the Northern District, “a \$5,000 payment is presumptively reasonable”).

#### **a. Actions of the class representative**

In *Alvarado*, this Court noted the class representatives “(1) travelled from Bakersfield to Sacramento for mediation sessions (2) assisted Counsel in investigating and substantiating the claims alleged in this action; (3) assisted in the preparation of the complaint in this action; (4) produced evidentiary documents to Counsel; and (5) assisted in the settlement of this litigation.” 2011 WL 1883188, at \*11. The Court also noted the plaintiffs “undertook the financial risk that, in the event of a judgment in favor of Defendant in this action, they could have been personally responsible for the costs awarded in favor of the Defendant.” *Id.* In light of these facts, the Court found an award of \$7,500 for each plaintiff was appropriate for the time, efforts, and risks undertaken. *Id.* Likewise, in *Bond v. Ferguson Enters., Inc.*, the Court found approved payments of \$7,500 for the named plaintiffs who: “(1) provided significant assistance to Class Counsel; (2) endured lengthy interviews; (3) provided written declarations; (4) searched for and produced relevant documents; (5) and prepared and evaluated the case for mediation, which was a full day session requiring very careful consideration, evaluation and approval of the terms of the Settlement Agreement on behalf of the Class.” No. 1:09-cv-1662 OWW MJS, 2011 WL 2648879, at \*15 (E.D. Cal. June 30, 2011).

\*17 Similarly, the Northern District determined class representatives failed to justify incentive awards of \$10,000 although the plaintiffs reported “they were involved with the case by interacting with counsel, participating in conferences, reviewing documents, and attending the day-long mediation that resulted in the settlement.” *Wade v. Minatta Transport Co.*, No. C10-2796 BZ, 2012 WL 300397 at \*—, 2012 U.S. Dist. LEXIS 12057 at \*3 (N.D. Cal. Feb. 1, 2012). On the other hand, the Northern District determined a service award of \$10,000 was appropriate for a class representative who “sat for depositions, met with attorneys and coworkers throughout the life of the case, withstood five years of

litigation, and was in the unique position of still being employed by Converse, Inc. at the commencement of the lawsuit against his employer.” *Chavez v. Converse, Inc.*, No. 15-cv-03746-NC, 2020 WL 10575028, at \*1, 7 (N.D. Cal. Nov. 25, 2020).

Although Kang did not attend the mediation sessions, it appears his remaining actions are comparable to the plaintiffs in *Alvarado*, *Bond*, and *Wade*. However, he seeks a service payment that is?? twice the service payments awarded to those class representatives. Further, Kang seeks an award greater than what was approved for Chavez, who was in the “unique position” of being a current employee of the defendant while a class representative. This factor does not support a conclusion that the amount of service payment requested by Kang is fair or reasonable.

#### **b. Comparison of the award to those of the class members**

The Ninth Circuit indicated the Court may consider the “proportion of the [representative] payment[s] relative to the settlement amount, and the size of each payment.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015); *see also* *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1265 (C.D. Cal. 2016); *see also* *Emmons*, 2017 WL 749018 at \*9 (awarding class representative payments of \$8,000, 14.5 times the average award and 0.3% of the gross settlement of \$2.35 million); *Patel v. Trans Union, LLC*, No. 14-cv-00522-LB, 2018 WL 1258194, \*3, 7–8 (N.D. Cal. Mar. 11, 2018) (awarding enhancement payment of \$10,000, which was 25 times the average award and 0.125 % of the gross settlement). For example, in *Rankin*, the Court found a service award of \$5,000 was reasonable, observing “the sum is reasonably close to the average per class member amount to be received.” 2011 WL 13239039, at \*2.

As previously noted, Kang's requested service award is 15 times higher than the \$1,000 payment to each FRCA Class Member and comprises over one percent of the total amount paid to the FRCA Class. *See Sandoval v. Tharaldson Employee Mgmt.*, No. EDCV 08-482-VAP, 2010 WL 2486346, at \*9–10 C.D. Cal. June 15, 2010 (collecting cases and concluding that plaintiff's request for an incentive award representing one percent of the settlement fund was excessive). *See also Sanchez v. Frito-Lay, Inc.*, No. 1:14-cv-00797-DAD-BAM, 2019 WL 4828775, at \*20–21 (E.D. Cal. Sept. 30, 2019) (recommending \$10,000 incentive award payment to named plaintiff be reduced to \$7,500), *report and*

*recommendation adopted*, No. 1:14-CV-797-AWI-MJS, 2015 WL 5138101 (E.D. Cal. Aug. 26, 2015). Given the significant disparity between the award to the FRCA Class and Kang's requested service payment—as well as the percentage of the settlement fund—this factor does not support the amount requested, and instead favors a reduction to the service award.

**c. Reduction of the service award is warranted**

A “substantial effort” by a plaintiff is necessary to support a service payment of \$10,000 or more. *See Coburn v. City of Sacramento*, No. 2:19-cv-00888-AC, 2020 WL 7425345, at \*8 (E.D. Cal. Dec. 17, 2020); *see also Amaro v. Gerawan Farming Inc.*, No. 1:14-cv-00147-DAD-SAB, 2020 WL 6043936, at \*10 (E.D. Cal. Oct. 12, 2020) (awarding a payment of \$10,000 to plaintiffs who spent over 370 hours each during the course of the litigation on tasks such as “talking to co-workers, assisting class counsel, attending the mediation, and organizing class members to keep them apprised of the status of [the] case”); *Valentine v. Rehab. Ctr. of Santa Monica Holding Co. GP*, 2021 U.S. Dist. LEXIS 243660, at \*13–14 (C.D. Cal. Dec. 20, 2021) (finding the class representative failed to justify a service enhancement of \$10,000, though the plaintiff reported 59.5 hours, during which she “was deposed, worked closely with [class] counsel, assisted in the preparation of pleadings, provided factual information and assisted in identifying potential witnesses”).

\*18 Because the factors discussed above support an incentive award—and the actions of Kang clearly benefited class members—a service payment is appropriate. But Kang has offered no “clear and specific evidence demonstrating significant contributions to the litigation of this case” as he was instructed to do. (*See* Doc. 153 at 11 n.5.) On the other hand, Kang released individual claims for which he did not seek class treatment and such a release may support an increase in the service payment. *See, e.g., Ontiveros*, 303 F.R.D. at 366.

Considering the foregoing, a service payment of \$5,000 for Kang is appropriate in light of the actions taken, benefit to the class, and the sacrifice of his individual claims. *See Gonzalez*, 2023 WL 373252, at \*9 (noting service awards of \$5,000 are routinely found reasonable); *see also Vasquez v. Coast Valley Roofing*, 266 F.R.D. 482, 490–491 (E.D. Cal. 2010) (finding the requested payment of \$5,000 was “reasonable and appropriate”). Thus, the request for a service payment to

Kang as class representative will be granted in the modified amount of \$5,000.00.

**V. CONCLUSION AND ORDER**

For the reasons stated above, IT IS HEREBY ORDERED THAT:

1. The hearing set for October 25, 2023, is VACATED;
2. The proposed classes identified in the settlement agreement (Doc. 149-1 at 4, 5) are certified for settlement purposes;
3. Plaintiff Sung Gon Kang's unopposed motion for final approval of a class action settlement (Doc. 158) is GRANTED, and the Court approves the settlement as fair, reasonable, and adequate;
4. Named plaintiff Sung Gon Kang is confirmed as class representative; Kang's counsel, Caddell & Chapman, and Francis Mailman Soumilas, P.C., are confirmed as class counsel; and Continental Datalogix is confirmed as the settlement administrator;
5. Kang's unopposed motion for attorney's fees and costs and for approval of service award and individual settlement (Doc. 155) is GRANTED IN PART;
6. The Court awards the following sums:
  - a. Class counsel shall receive \$1,113,560.50 in attorney's fees and \$77,613.38 in expenses. Class counsel shall not seek or obtain any other compensation or reimbursement from Credit Bureau, Kang, or class members;
  - b. Kang shall receive \$5,000 as a service award; and
  - c. Continental Datalogix shall receive \$44,139 in settlement administration costs (*see* Doc. 158-2 ¶6).
7. The parties are directed to effectuate all terms of the Settlement Agreement (Doc. 149-1) and any deadlines or procedures for distribution set forth therein;
8. This action is DISMISSED with prejudice, with the Court specifically retaining jurisdiction over this action for the purpose of enforcing the parties' settlement agreement; and



9. The Clerk of the Court is directed to CLOSE this case.

#### All Citations

Slip Copy, 2023 WL 6811994

IT IS SO ORDERED.

#### Footnotes

- 1 On February 28, 2023, the parties consented to the jurisdiction of the U.S. Magistrate Judge. (See Docs. 141–143.)
- 2 The “FRCA Class” is defined as “All individuals about whom [Credit Bureau] prepared a report that (1) included an OFAC ‘Hit,’ (2) was published to a third party from October 2, 2013 to March 4, 2022 and (3) included a U.S. address (including U.S. Territories) for that individual.” (Doc. 149-1 at 5.)
- 3 The distinction between the two classes arises from the CCRAA’s 7-year statute of limitations, [Cal. Civ. Code § 1785.33](#), which is longer than the FCRA’s 5-year statute of limitations, [15 U.S.C. § 1681p](#).
- 4 The remaining consumers are members of the CCRAA Class, who are entitled to only injunctive relief.
- 5 Plaintiff’s briefing does not address these factors.
- 6 The Ninth Circuit has since determined the “desirability” of a case is no longer a relevant factor. [Resurrection Bay Conservation Alliance v. City of Seward](#), 640 F.3d 1087, 1095, n.5 (9th Cir. 2011) (citation omitted).
- 7 FMS appears to acknowledge the expenditure of administrative time on this matter, as they seek 18.7 hours categorized as “File Admin.” (See Doc. 155-2 ¶ 24.)
- 8 Although identified only as “Paralegal” in its billing records, Mr. Francis’s declaration names Jeffrey Kabacinski as the paralegal who worked on this matter at FMS.
- 9 A court “may take judicial notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue.” [United States ex rel. v. Robinson Rancheria Citizens Council v. Borneo, Inc.](#), 971 F.2d 244, 248 (9th Cir. 1992); [St. Louis Baptist Temple, Inc. v. FDIC](#), 605 F.2d 1169, 1172 (10th Cir. 1979). See also [Fed. R. Evid. 201](#).
- 10 Notably, Kang makes no mention of his prior case in his briefing. It does explain, however, why class counsel’s billing records begin almost one year before the complaint in this case was filed.
- 11 Class counsel assert that “most local legal communities do not have lawyers with the relevant experience” (Doc. 155-1 at 19) but do not go as far as to claim that **Fresno** is one of those communities.
- 12 The Ninth Circuit’s decision in [Prison Legal News v. Schwarzenegger](#), 608 F.3d 446, 455 (9th Cir. 2010), on which class counsel rely, does not alter this analysis. Rather, it reinforces the principle that, when determining a reasonable hourly fee for an attorney fee award, the “scope of comparison,” while not limited to subject matter, is confined to “attorneys in the **relevant community**.” *Id.* (emphasis added).
- 13 The only *Kerr* factor discussed by Kang in his briefing is the “benefit obtained by the class.” (See Doc. 155-1 at 21.) While the Court agrees that the classes obtained a substantial benefit in having obtained the maximum amount of statutory damages and practice changes, it also observes that the fee award is still a substantial percentage (40.5%) of the total amount Credit Bureau has agreed to pay to settle this case, and in fact exceeds the \$1,071,000 automatic payment to the FRCA Class. In this way, the Court’s determination is in line with other district court decisions, cited by Kang, approving fee requests in FCRA actions that comprise large percentage of the settlement amount in view of the “unique properties of FCRA actions.” [Arnold v. DMG Mori USA, Inc.](#), No. 18-CV-02373-JD, 2022 WL 18027883, at \*5 (N.D. Cal. Dec. 30, 2022) (collecting cases). See also Doc. 158-1 at 20 n.11.
- 14 Previously, the Court indicated that it was Kang’s burden to “provide clear and specific evidence demonstrating significant contributions to the litigation of this case.” (Doc. 153 at 11 n.5.) Nevertheless, Kang did not submit any evidence of



his time or work on the litigation. The Court declines to speculate as to the unidentified time or work Kang may have expended on the action.

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# **EXHIBIT 20**

2011 WL 2313604

Only the Westlaw citation is currently available.  
United States District Court,  
S.D. California.

Lloyd MARTIN, et al., individually and  
on behalf of others similarly situated, and,  
Grady O'Bryant, et al., individually and on  
behalf of others similarly situated, Plaintiffs,

v.

AMERIPRIDE SERVICES,  
INC., et al., Defendants.

No. 08cv440–MMA (JMA).

I

June 9, 2011.

#### **Attorneys and Law Firms**

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[Julie A. Vogelzang](#), Duane Morris Llp, San Diego, CA, for  
Defendants.

#### **ORDER ON FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

#### **ORDER ON FINAL APPROVAL OF CLASS ACTION SETTLEMENT, JUDGMENT AND DISMISSAL**

[MICHAEL M. ANELLO](#), District Judge.

**\*1** On June 6, 2011, this matter came before the Court on Plaintiffs' Motion for Final Approval of Class Settlement, Approval of Attorneys Fees and Costs, and Class Representative Service Payment [Doc. No. 57]. At the hearing, the Court advised the parties of its tentative decision to grant Plaintiffs' motion. For the following reasons, the Court **AFFIRMS** its tentative ruling and **GRANTS** Plaintiffs' motion in its entirety.

#### **Background**

The operative pleading in this case is the First Amended Consolidated Complaint (the “complaint”) [Doc. No. 35], filed on July 1, 2009. Individually named plaintiffs acting as class representatives include: Lloyd Martin, Kirk Sword, Daniel Gore, Grady O'Bryant, Jorge Mejia, Paul Luna, Kye Jacoby, and Rigo Martinez. These individuals were employed by Defendant AmeriPride Services, Inc. as route delivery drivers (holding the official title of customer service representatives or “CSRs”) during the class period commencing on January 15, 2004. AmeriPride is in the business of linen supply, supplying to customers clean laundered towels, linens, uniforms, wearing apparel, and other items. AmeriPride employs CSRs to operate delivery trucks to supply its products and services to its local customers on routes assigned to them by AmeriPride.

Plaintiffs brought this class action against their employer AmeriPride alleging that they and other CSRs are misclassified as “exempt” employees and are thus entitled to unpaid overtime wages and other remedies under California law. Specifically, Plaintiffs' complaint alleges that AmeriPride violated California state law, and alleges five causes of action under the California Labor Code and California Business and Professions Code for (1) overtime pay for introductory employees; (2) overtime pay for regular full-time employees; (3) meal periods; (4) rest periods; and (5) unfair business practices.

#### **Procedural History**

This matter began as two separate purported class action law suits filed in California state court by Martin, Sword, and Gore in San Diego County, and O'Bryant in Sacramento County. AmeriPride answered the complaint in each case, and simultaneously removed the Martin, et al. action to this Court and the O'Bryant action to the United States District Court for the Eastern District of California. The O'Bryant court transferred that action to this Court. On October 15, 2008, this Court ordered the two actions consolidated. The operative complaint was filed on July 1, 2009.

On September 7, 2010, the parties notified the Court that the action had settled and the Court ordered the parties to file a motion for preliminary approval of class settlement. *See* Doc. No. 46. On December 3, 2010, Plaintiffs filed

an unopposed motion for preliminary approval. *See* Doc. No. 51. On January 4, 2011, the Court granted the motion and approved a preliminary settlement, authorized the notice process, and scheduled a hearing on final approval. *See* Doc. No. 55.

**\*2** On April 11, 2011, Plaintiffs filed the motion for final approval currently pending before the Court. *See* Doc. Nos. 57–59. On April 15, 2011, AmeriPride filed an opposition to the motion, asserting that Plaintiffs “are now seeking to fundamentally alter the terms of the agreed-upon Settlement Agreement.” *See* Doc. No. 60. According to AmeriPride, disputes developed between the parties with respect to material terms of the Settlement Agreement, including the definition of the class, the effective date of the Settlement Agreement, the timing for deposit of settlement funds, the release of claims, and payment of employment taxes.

In light of the issues raised in AmeriPride's opposition, the Court vacated the Final Approval Hearing which had been previously set for April 25, 2011 and rescheduled the hearing for June 6, 2011, in order to allow counsel for the parties to meet and confer regarding the outstanding disputes related to the Settlement Agreement. *See* Doc. No. 61. On May 27, 2011, in compliance with the Court's order, the parties filed a Joint Statement advising the Court regarding the status of settlement, confirming that all disputes except one have been resolved, and setting forth each party's position on the sole remaining dispute—the effective date of the Settlement Agreement. Because the parties indicated in the Joint Statement that they would seek the Court's determination on the issue, and the dispute did not threaten the integrity of the Settlement Agreement, the Court found the settlement of this class action ready for final approval.

### ***Terms of the Settlement***

#### ***1. Settlement Class***

This Court provisionally certified the settlement class as follows: “Any individual who was employed as Customer Service Representative (including introductory and/or probationary Customer Service Representatives) in California for AmeriPride during the Class Period (January 15, 2004 through December 31, 2009).” Several class members have claimed compensation for time worked during the class period as relief drivers, wholesale drivers or “route jumpers.” Subsequent to their meet and confer efforts during the month of May, the parties agreed that the settlement class

does not include these types of drivers because they are in a different payroll category and are compensated differently than CSRs, except as to those class member CSRs who may have been relief and/or wholesale drivers at times during the class period. *See Joint Hearing Statement*, Doc. No. 62.

On Friday, May 20, 2011, the Settlement Administrator mailed responses to claimants who filed claims or disputes indicating whether the claim or dispute was accepted or denied and the basis for the denial consistent with the parties' agreed upon definition of the Settlement Class.

Subsequent to their meet and confer efforts during the month of May, the parties also agreed that all named plaintiffs have agreed to a comprehensive release that releases all claims against AmeriPride “arising out of their employment with Defendant or termination thereof and/or any other event, act, occurrence, or omission taking place on or before the Settlement Effective Date ...” *See Joint Hearing Statement*, 4. With respect to the unnamed class members, the parties agree that all class members—as defined above—are releasing any and all wage claims that were brought or could have been brought against AmeriPride during the class period. The parties agree that AmeriPride employees who are not part of the settlement class are not releasing any claims.

#### ***2. Settlement Terms***

**\*3** AmeriPride has agreed to pay a gross settlement amount of \$5,250,000 (five million two hundred fifty thousand dollars) (“the common fund”). Upon final approval, the common fund will be allocated among payments to class members, administrative costs, attorneys fees, litigation costs, and class representative service awards. The entire fund is non-reversionary and will be distributed to individual class members on a pro rata basis based on the time and location of where the class member worked as well as the number of weeks worked.

Subsequent to their meet and confer efforts during the month of May, the parties agreed that the Settlement Agreement states that AmeriPride will pay the employer taxes on the portion of each Settlement Payment deemed to be wages, which is fifty percent (50%) of the Settlement Payment. *See Joint Hearing Statement*, 5. This portion will be issued via W–2 form. The other portion is for penalties and interests for which no taxes are due because it will be issued via 1099–MISC form. The employer taxes will be paid by AmeriPride from monies separate and apart from the common fund.

The class representatives will receive an enhancement award of \$18,500. The parties stipulate to award attorneys fees to Class Counsel in the amount of 25% of the common fund (\$1,312,500), to be split equally between Wagner & Jones LLP and Tosdal Smith Steiner & Wax LLP, plus actual litigation costs of \$16,891.77 to Wagner & Jones and \$14,720.42 to Tosdal Smith Steiner & Wax.

### 3. Effective Settlement Date

The meaning of the term “Effective Settlement Date” remains in dispute. The parties have requested that the Court determine the issue. The “Effective Settlement Date” is defined in the Settlement Agreement as:

Effective Settlement Date: The Effective Settlement Date is the date on which this Settlement will become final and effective, which shall be upon the occurrence of all of the following events:

- (a) entry of the Preliminary Approval Order;
- (b) the occurrence of the Final Settlement Hearing;
- (c) entry of the Final Judgment; and
- (d) the Final Judgment becomes final, which shall mean,
  - (i) the date the Final Judgment is signed by the Court if there are no objections to the settlement; or
  - (ii) if there are objections to the settlement which are not withdrawn, and if an appeal, review or writ is not sought from the Judgment, the date one day after which the Final Judgment is no longer subject to judicial review or other challenge; or
  - (iii) if a timely notice of appeal is filed, the day after the Final Judgment is affirmed, or the appeal or review is dismissed or denied and the Final Judgment is no longer subject to judicial review or other challenge.

“A settlement agreement is treated as any other contract for purposes of interpretation.” *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir.), cert. denied sub nom., *Paymaster Corp. v. American Bankers Ins. Co. of Fla.*, 506 U.S. 1022, 113 S.Ct. 660, 121 L.Ed.2d 585 (1992); see also *Winet v. Price*, 4 Cal.App.4th 1159, 1164, 6 Cal.Rptr.2d 554 (Cal.Ct.App.1992). Under California law, contract interpretation is a question of law. *SDR Capital Mgmt., Inc. v. Am. Int'l Specialty Ins. Co.*, 320 F.Supp.2d 1043, 1046 (S.D.Cal.2004); see also *Parsons v.*

*Bristol Develop. Co.*, 62 Cal.2d 861, 44 Cal.Rptr. 767, 402 P.2d 839 (Cal.1965). “The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.” *Byrne v. Laura*, 52 Cal.App.4th 1054, 60 Cal.Rptr.2d 908, 916 (Cal.Ct.App.1997). “When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible.” *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal.App.4th 944, 135 Cal.Rptr.2d 505, 513 (Cal.Ct.App.1992). “If contractual language is clear and explicit, it governs.” *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 10 Cal.Rptr.2d 538, 833 P.2d 545, 552 (Cal.1992). A court must interpret contractual language in its ordinary sense, unless terms are used by the parties in a technical sense, or a special meaning is given to them by usage. Cal. Civ.Code § 1638.

\*4 Plaintiffs argue that “the express terms of subsection (d) (i) above states that the ‘Final Judgment becomes final’ on ‘the date the Final Judgment is signed by the Court [because] there are no objections to the settlement.’ It is undisputed that no objections to the settlement have yet been filed. This means that the Effective Settlement Date is the date of entry of final judgment.” See *Joint Hearing Statement*, 6. AmeriPride counters that the Effective Settlement Date is not only after the Final Judgment is signed by the Court, but *also* after the time for an appeal has expired. *Id.* at 8, 10 Cal.Rptr.2d 538, 833 P.2d 545.

First, the Court finds that the use of the word “or” to transition between subsections (d)(i), (ii), and (iii), does not support AmeriPride's interpretation of the contract language. Merriam Webster's Eleventh Collegiate Dictionary (2005) defines “or” as “used as a function word to indicate an alternative.” Here, use of the word “or” indicates that subsections (d)(i), (ii), and (iii), above, are alternatives to one another, and as such, the Final Judgment becomes final as defined by one subsection—not all three, as AmeriPride insists. If the word “and” instead of “or” had been used, the language of the contract would support AmeriPride's position, but the result would be unworkable because the three conditions in subsections (d)(i), (ii), and (iii) cannot obtain simultaneously.

The parties confirmed during the final approval hearing that there are no objections to the settlement. Subsection (d)(i) expressly contemplates such a situation and provides that the Final Judgment becomes final “the date the Final Judgment is signed by the Court *if there are no objections to the settlement.*” (emphasis added). Unlike subsections (d)(i) (no



objections) and (d)(ii) (objections), subsection (d)(iii), which provides the meaning of the word “final” in the event a timely notice of appeal is filed, does not expressly contemplate either the presence or absence of objections to the settlement, as it does not even contain the word “objections.” Seizing on this, AmeriPride argues that subsection (d)(iii) applies irrespective of whether there are objections to the settlement and therefore applies here.

AmeriPride's interpretation of the contract language is untenable because the Effective Settlement Date cannot at once be the date the Court signs the Final Judgment (subsection (i)) *and* some undetermined date in the future (subsection (iii)), as the two are mutually exclusive.<sup>1</sup> Furthermore, AmeriPride's interpretation of subsection (d) (iii) renders subsection (d)(i) superfluous. The Court will not conclude that the carefully negotiated Settlement Agreement in this case contains unnecessary or extraneous language, particularly when that language bears directly upon the deposit and distribution of millions of dollars. Subsection (d) (iii) must be interpreted as impliedly contemplating objection to the settlement, from which a timely notice of appeal could be filed. Otherwise the word “final” has no clear meaning, when the terms of the Settlement Agreement obviously intended the opposite result.

**\*5** Accordingly, the Court finds that because there are no objections to the settlement, the Final Judgment in this case becomes final pursuant to subsection (d)(i)—the date the Final Judgment is signed by the Court. The preliminary approval order has been entered and the final settlement hearing occurred on June 6, 2011. Therefore, upon entry of the Final Judgment and on the date the Final Judgment is signed by the Court, the Settlement will become final and effective.

### ***Motion for Final Approval of Class Settlement***

#### ***1. Class Certification***

A plaintiff seeking a Rule 23(b)(3) class certification must first satisfy the prerequisites of Rule 23(a). Once subsection (a) is satisfied, the purported class must then fulfill the requirements of Rule 23(b)(3). In the present case, the Court had previously preliminarily certified the following California class:

“Any individual who was employed as Customer Service Representative (including introductory and/or probationary Customer Service Representatives) in

California for AmeriPride during the Class Period (January 15, 2004 through December 31, 2009).”

At that time, the Court concluded that the proposed classes satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). *See* Doc. No. 55. The Court also found that the proposed classes satisfied the predominance and superiority requirements of Rule 23(b)(3). Based on its previous findings, the Court certifies the class for the purpose of settlement.

#### ***2. The Settlement***

##### ***a) Legal Standard***

Courts require a higher standard of fairness when settlement takes place prior to class certification to ensure class counsel and defendant have not colluded in settling the case. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998). Ultimately, “[t]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir.1982).

A court considers several factors in determining whether a proposed settlement is “fair, adequate and reasonable” under Rule 23(e). Such factors may include: (1) the strength of the case; (2) the risk, expense, complexity and likely duration of further litigation and the risk of maintaining class action status throughout the trial; (3) the stage of the proceedings (investigation, discovery and research completed); (4) the settlement amount; (5) whether the class has been fairly and adequately represented during settlement negotiations; and (6) the reaction of the class to the proposed settlement. *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir.2003). The Court need only consider some of these factors—namely, those designed to protect absentees. *See Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir.2003) (overruled in part on other grounds).

**\*6** Judicial policy favors settlement in class actions and other complex litigation where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F.Supp. 1379, 1387 (D.Ariz.1989). On November 6, 2009, the parties and their counsel attended one full day mediation, which was conducted by a highly qualified

mediator. Subsequent to the mediation, the parties continued negotiations with the assistance of the mediator, which resulted in an oral agreement on the common fund settlement and stipulated Settlement Agreement currently before the Court for final approval. *See Kopfman Decl'n* ¶¶ 35–36.

#### b) Analysis

##### *(1) The strength of the case, and risk, expense, complexity and likely duration of further litigation*

Regarding the strength of Plaintiffs' case, the Court must “determine whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinarily strong case.” *Livingston v. Toyota Motor Sales USA*, 1995 U.S. Dist. LEXIS 21757 (N.D.Cal.1995). Here, Plaintiffs assert that the proposed settlement is both fair and reasonable in light of AmeriPride's available legal and factual grounds for defending against the asserted claims. For example, Plaintiffs contend that, absent settlement, AmeriPride would have asserted a defense that Plaintiffs and the class members are exempt from overtime compensation requirements. *See Kopfman Decl'n* ¶¶ 41–45. Such a defense would present a serious threat to Plaintiffs' claims, as well as create uncertainty as to the appropriateness of class certification. Plaintiffs also asserts that the risk of further litigation is significant, as is the likely duration of further litigation. *Id.* ¶ 47. Given these risks, the actual recovery through settlement confers substantial benefits on the class that outweigh the potential recovery through full adjudication.

##### *(2) The stage of the proceedings (investigation, discovery and research completed)*

In the context of class action settlements, as long as the parties have sufficient information to make an informed decision about settlement, “‘formal discovery is not a necessary ticket to the bargaining table.’” *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir.1998) (quoting *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241 (5th Cir.1982)). Here, the parties engaged in extensive formal and informal discovery, as is reflected by looking at the docket of this case. The parties participated in a number of discovery conferences with the assigned magistrate judge. Depositions were conducted, experts hired and consulted, and so on. *See Kopfman Decl'n* ¶¶ 48–49.

##### *(3) The settlement amount*

To assess whether the amount offered is fair, the Court may compare the settlement amount to the parties' estimates of the maximum amount of damages recoverable in a successful litigation. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459. While settlement amounts that are close to the plaintiffs' estimate of damages provide strong support for approval of the settlement, settlement offers that constitute only a fraction of the potential recovery do not preclude a court from finding that the settlement offer is fair. *Id.* (finding settlement amount constituting one-sixth of the potential recovery was fair and adequate). Thus, district courts have found that settlements for substantially less than the plaintiffs' claimed damages were fair and reasonable, especially when taking into account the uncertainties involved with litigation. *See, e.g., Glass v. UBS Fin. Serv., Inc.*, No. C–06–4068 MMC, 2007 U.S. Dist. LEXIS 8476, 2007 WL 2216862, at \*4 (N.D. Cal. Jan. 26, 2007) (finding settlement of wage and hour class action for 25 to 35% of the claimed damages to be reasonable); *Williams v. Costco Wholesale Corp.*, No. CV–02–2003 IEG, 2010 U.S. Dist. LEXIS 67731, 2010 WL 2721452, at \*4 (S.D.Cal. July 7, 2010) (finding settlement amount constituting approximately 75.6% of the plaintiffs' claimed losses from unpaid overtime pay to be adequate).

\*7 Here, the common fund represents approximately 36% of the total potential damages in the case. *See Kopfman Decl'n* ¶ 49. The average class member will receive a settlement payment of \$11,552.31. In addition, AmeriPride has implemented methods of now compensating CSRs in compliance with California's wage and hour laws, such that class members who are still employed by AmeriPride will continue to reap the benefits of settlement by receiving full overtime compensation. The amount offered in settlement is adequate.

##### *(4) Whether the class has been fairly and adequately represented during settlement negotiations*

Class Counsel have significant experience in both the substance of wage and hour claims as well as the procedures for class and collective actions. *See Kopfman Decl'n* ¶¶ 4–6. As such, their support of the settlement should be accorded significant consideration. *See, e.g., Nat'l Rural Telcoms Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D.Cal.2004) (“Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation. This is because parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected

outcome in the litigation”) (internal quotation marks and citations omitted).

(5) *The reaction of the class to the proposed settlement*

The Ninth Circuit has held that the number of class members who object to a proposed settlement is a factor to be considered. *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832, 837 (9th Cir.1976). The absence of any objector strongly supports the fairness, reasonableness, and adequacy of the settlement. See *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 175 (S.D.N.Y.2000) (“If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.”) (citations omitted); *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 624 (N.D.Cal.1979) (finding “persuasive” the fact that 84% of the class has filed no opposition). Here, no class members have objected to the Settlement Agreement and no class member has opted out. See *Kopfman Decl’n* ¶ 52.

3. *Conclusion*

The Court **GRANTS** the motion for final approval, finding that the Settlement Agreement is “fair, adequate and reasonable” under Rule 23(e).

*Motion for Award of Attorneys Fees and Costs*

1. *Relevant Law*

Rule 23(h) of the Federal Rules of Civil Procedure provides that, “[i]n a certified class action, the court may award reasonable attorneys fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed.R.Civ.P. 23(h). California recognizes the common fund doctrine for the award of attorneys fees. Under California and Ninth Circuit precedent, a court has discretion to calculate and award attorneys fees using either the lodestar method or the percentage-of-the-fund method. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 253, 110 Cal.Rptr.2d 145 (2001); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir.2002).

\*8 The Ninth Circuit has held that 25% of the gross settlement amount is the benchmark for attorneys fees awarded under the percentage method, with 20 to 30% as the usual range in common fund cases where the recovery is between \$50 and 200 million. *Vizcaino*, 290 F.3d at 1047. Other case law surveys suggest that 50% is the upper limit, with 30–50% commonly being awarded in cases in which the common fund is relatively small. See Rubenstein, Conte

and Newberg, Newberg on Class Actions at § 14:6. Indeed, California cases in which the common fund is small tend to award attorneys fees above the 25% benchmark. See *Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1127 (C.D.Ca.2008) (holding attorneys fees for large fund cases are typically under 25% and cases below \$10 million are often more than the 25% benchmark). More particularly, courts may award attorneys fees in the 30–40% range in wage and hour class actions that result in recovery of a common fund under \$10 million. See *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491–92 (E.D.Ca.2010) (citing to five recent wage and hour class actions where federal district courts approved attorney fee awards ranging from 30 to 33%); *Singer v. Becton Dickinson and Co.*, 2010 U.S. Dist. LEXIS 53416, 2010 WL 2196104, \* 8 (S.D.Ca. June 1, 2010) (approving attorney fee award of 33.33% of the common fund and holding that award was similar to awards in three other wage and hour class action cases where fees ranged from 30.3% to 40%); *Romero v. Producers Dairy Foods, Inc.*, 2007 U.S. Dist. LEXIS 86270, 2007 WL 3492841 (E.D.Ca. Nov.14, 2007).

2. *Analysis*

Regardless of whether the court uses the percentage approach or the lodestar method, the main inquiry is whether the end result is reasonable. *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir.2000). The Ninth Circuit has identified a number of factors that may be relevant in determining if the award is reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee; (5) the burdens carried by class counsel; and (6) the awards made in similar cases. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir.2002). An explanation is necessary when the district court departs from the “benchmark” of 25% of recovery. *Powers*, 229 F.3d at 1256–57. The award sought in this case equals 25% of the common fund.

Here, the results achieved in this case were favorable. The risks of litigation were real and substantial. The complexity and duration of the case, coupled with the intensity of settlement negotiations, weighs in favor of awarding the 25 percent “benchmark” amount that counsel request here, for a total award of \$1,312,500 plus actual costs and expenses incurred prior to entry of final approval. See *Kopfman Decl’n* ¶ 57. Class Counsel took this case on a contingent fee basis and had to forego other financial opportunities to litigate it for more than three years. See *Kopfman Decl’n* ¶¶ 60–61. Fifth, the request for attorneys fees in the amount of 25% of the common fund falls within the typical range of 20 to

50% awarded in similar cases, and is lower than many other awards where counsel worked on a contingent basis. *See, e.g., Ingalls v. Hallmark Mktg. Corp.*, 08cv4342 VBF (Ex), Doc. No. 77, P 6 (C.D.Cal. Oct. 16, 2009) (awarding 33.33% fee on a \$ 5.6 million wage and hour class action); *Birch v. Office Depot, Inc.*, Case No. 06cv1690 DMS (WMC), Doc. No. 48, P 13 (S.D.Cal. Sept. 28, 2007) (awarding a 40% fee on a \$ 16 million wage and hour class action); *Rippee v. Boston Mkt. Corp.*, Case No. 05cv1359 BTM (JMA), Doc. No. 70, at 7–8 (S.D.Cal. Oct. 10, 2006) (awarding a 40% fee on a \$ 3.75 million wage and hour class action). Finally, no class members have objected to the attorneys fees.

### 3. Conclusion

\*9 The Court **APPROVES** an award of attorneys fees equal to 25% of the value of the common fund as well as Class Counsel's request for litigation costs and expenses in the requested amount.

## Class Representative Service Payments

### 1. Relevant Law

In assessing the reasonableness of an incentive award, several district courts in the Ninth Circuit have applied the five-factor test set forth in *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995), which analyzes: (1) the risk to the class representative in commencing a class action, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation. *See, e.g., Carter v. Anderson Merchs., LP*, No. EDCV 08–0025–VAP, 2010 U.S. Dist. LEXIS 55629, 2010 WL 1946757, at \*3 (C.D.Cal. May 11, 2010); *Williams v. Costco Wholesale Corp.*, No. 02cv2003 IEG, 2010 U.S. Dist. LEXIS 67731, 2010 WL 2721452, at \*7 (S.D.Cal. July 7, 2010).

### 2. Analysis

No class members have objected to Plaintiffs' intent to seek an enhancement award of \$18,500. The \$18,500 incentive award is also well within the acceptable range awarded in similar cases. *See, e.g., Brotherton v. Cleveland*, 141 F.Supp.2d 907, 913–14 (S.D.Ohio 2001) (approving an award of \$50,000 where the class representative “has been instrumental in bringing [the] lawsuit forward” and “has performed numerous

tasks in association with [the] litigation”). Each named plaintiff has provided a declaration to the Court summarizing the time and resources expended in assisting with the preparation for and litigation of this case. For example, Plaintiff O'Bryant responded to written discovery requests and assisted in the preparation of initial disclosures. *See O'Bryant Decl'n* ¶ 15. O'Bryant also traveled to San Diego twice at personal expense to participate in depositions and the full day mediation, *id.* ¶¶ 16–17, as did the other named plaintiffs. *See Jacoby Decl'n* ¶¶ 13–14; *Mejia Decl'n* ¶¶ 12–13; *Martinez Decl'n* ¶¶ 11–12; *Luna Decl'n* ¶¶ 11–12; *Martin Decl'n* ¶ 12; *Sword Decl'n* ¶ 8; *Gore Decl'n* ¶ 12.

### 3. Conclusion

The Court **APPROVES** the service fee award as reasonable.

## Conclusion

The Court **GRANTS** Plaintiffs' motion in its entirety, and finds the proposed settlement of this class action appropriate for final approval pursuant to [Federal Rule of Civil Procedure 23\(e\)](#). The Court further finds that the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, and does not improperly grant preferential treatment to any individuals. The Court finds that the settlement was entered into in good faith; that the settlement is fair, reasonable and adequate; and that Plaintiffs have satisfied the standards for final approval of a class action settlement under federal law.

## JUDGMENT AND ORDER OF DISMISSAL

\*10 This Court **APPROVES** the settlement and directs the Parties to effectuate the Settlement Agreement according to its terms.

The Court **DISMISSES** this case on the merits and with prejudice, pursuant to the terms of the Settlement Agreement.

The Court retains continuing jurisdiction over the interpretation, implementation and enforcement of the Settlement Agreement and all orders and judgments entered in connection therewith.

If this Judgment and the settlement do not become final and effective in accord with the terms of the Settlement



Agreement, then this Judgment and all orders entered in connection therewith shall be deemed null and void and shall be vacated.

**All Citations**

Not Reported in F.Supp.2d, 2011 WL 2313604

**IT IS SO ORDERED.**

**Footnotes**

- 1** By way of contrast, at least one court has approved a final settlement wherein the settlement agreement included a definition of the effective date of settlement as: "The effective date shall be the date of final approval if no objections are filed to the settlement. If objections are filed and overruled, and no appeal is taken of the final approval order, then the effective date of final approval shall be sixty-five (65) days after the district court enters final approval. If an appeal is taken from the Court's overruling of objections to the settlement, then the effective date of final approval shall be twenty (20) days after the appeal is withdrawn or after an appellate decision affirming the final approval decision becomes final. No money will be distributed unless and until the effective date of final approval occurs." [Chiaromonte v. Pitney Bowes, Inc. 2008 WL 510765 \(S.D.Cal.\)](#). The terms of the *Chiaromonte* settlement agreement were clear that an appeal would only effect the finality of the judgment and subsequent distribution of funds in the event objections were filed. Absent any objections, the settlement became effective on the date of final approval, period. The settlement agreement was written such that the three possibilities were plainly mutually exclusive.

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# **EXHIBIT 21**

2014 WL 12571448

Only the Westlaw citation is currently available.

United States District Court, S.D. California.

Quentin MOORE and Leah Ervin,  
individually, and on behalf of all  
others similarly situated, Plaintiff,

v.

FITNESS INTERNATIONAL,  
LLC, Defendant.

Case No. 3:12-CV-1551-LAB-NLS

Signed 01/14/2014

Filed 01/14/2014

**Attorneys and Law Firms**

Molly Anne Sario, Sario & Associates, A, or  
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**ORDER GRANTING JOINT MOTION FOR FINAL  
APPROVAL OF CLASS/COLLECTIVE ACTION  
SETTLEMENT**

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# **EXHIBIT 22**

2019 WL 2029061

Only the Westlaw citation is currently available.

United States District Court, N.D. California.

[Payal PATEL](#), Plaintiff,

v.

NIKE RETAIL SERVICES, INC., Defendant.

Case No. 14-cv-04781-RS

|

Signed 05/08/2019

#### Attorneys and Law Firms

Aparajit Bhowmik, [Kyle Roald Nordrehaug](#), [Ruchira Piya Mukherjee](#), [Victoria Bree Rivapalacio](#), [Norman B. Blumenthal](#), Blumenthal, Nordrehaug & Bhowmik, La Jolla, CA, [David Elliot Gonzalez](#), Lawyers for Justice, PC, Glendale, CA, [Molly Ann DeSario](#), Capstone Law APC, Los Angeles, CA, for Plaintiff.

[Jonathan Douglas Meer](#), [Michael Afar](#), [Orly Zelta Elson](#), [Sheryl Lyn Skibbe](#), Seyfarth Shaw LLP, Los Angeles, CA, for Defendant.

#### ORDER GRANTING APPROVAL OF SETTLEMENT OF PAYAL PATEL'S PAGA CLAIM

[RICHARD SEEBORG](#), United States District Judge

#### I. INTRODUCTION

\*1 This suit involves a dispute over the labor practices of Defendant Nike Retail Services, Inc. ("Nike") with regard to its employment of "assistant head coaches" ("AHC"). In November 2013, Plaintiff Payal Patel filed suit against Nike in Alameda County Superior Court for violating various provisions of California's wage and hour statutes, including a claim for civil penalties under the Private Attorneys General Act ("PAGA"). Nike then removed the action to federal court in October 2014. Patel's motion for class certification was subsequently denied in 2016. Patel and Nike now jointly seek approval of a settlement agreement resolving her individual claims and her representative PAGA claim. (Dkt. 138.) This proposed settlement can be evaluated without oral argument pursuant to Local Rule 7-1(b). For the reasons explained below, approval is granted.

#### II. BACKGROUND

The full facts of this case have been set forth in this Court's prior orders and need not be repeated here. For roughly three years, Patel was employed as an "assistant head coach" ("AHC") of a clearance store operated by Nike. Nike classified Patel as exempt from overtime pay and other benefits, a move Patel contends violates various provisions of California's wage and hour statutes. 40 aggrieved employees are covered by the PAGA action. (Dkt. 138, Ex. A.) Patel originally brought suit in Alameda County Superior Court in November 2013, which was subsequently removed to federal court by Nike in October 2014. Patel's motion for class certification was denied in March of 2016 because she failed to show how any of her misclassification theories could be established with common proof. Subsequently, Nike twice unsuccessfully moved to strike Patel's allegation in support of her representative PAGA claim, or alternatively, for judgment on the pleadings.

On January 10, 2019, the parties participated in a settlement conference with a Magistrate Judge, at which they reached an agreement to settle the claims in this suit. On April 11, 2019, the parties submitted a joint stipulation requesting approval of the PAGA settlement and dismissal of Patel's individual and PAGA claims. (Dkt. 138.) In the settlement, Nike agrees to pay a total of \$ 185,000 (the "Gross Settlement Amount"). Of this amount, \$ 80,000 would be paid to Patel's counsel as attorneys' fees with \$ 60,000 in litigation costs. Additionally, \$ 20,000 would be paid to Patel to resolve her individual claims. Further, \$ 19,739 would be allocated to settlement of the PAGA claim, with 75% (\$ 14,804.25) to be paid as a [Labor Code section 558](#) payment to the aggrieved employees as part of their individual PAGA payments, and 25% (\$ 4,934.75) to be paid as a [Labor Code section 2699](#) payment, with 75% (\$ 3,701.06) of this amount being paid to the Labor Workforce Development Agency ("LWDA") and 25% (\$ 1,233.69) being paid to the aggrieved employees as part of their individual PAGA payments. Each individual PAGA payment is to be based on the number of pay periods attributed and apportioned to each aggrieved employee during the PAGA period (as determined by Patel's expert, Eric Lietzow) as a percentage of the total pay periods attributed to all aggrieved employees during that period. Finally, \$ 5,261 is to be paid to Simpluris, Inc. for administering the settlement. In the event the actual cost to administer the settlement is less, the difference will be added to the PAGA payment. If the

actual expenses exceed the allocation, those expenses are to be paid from the Gross Settlement Amount. The parties were ordered to submit a joint supplemental brief explaining why their PAGA settlement comports with the current case law rubric analyzing the fairness, reasonableness, and adequacy of PAGA settlements. (Dkt. 139.)

### III. LEGAL STANDARD

\*2 A plaintiff suing under PAGA “does so as the proxy or agent of the state’s labor law enforcement agencies.” *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009). Accordingly, a judgment in a PAGA action binds not only the plaintiff, but also the government and nonparty aggrieved employees. *Id.* at 985; see also *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 380 (2014). Under PAGA, a trial court must review and approve any settlement of PAGA claims. Cal. Lab. Code § 2699(l)(2).<sup>1</sup> Additionally, the proposed settlement must be submitted simultaneously to the California Labor and Workforce Development Agency. *Id.* However, PAGA does not establish a clear standard for evaluating PAGA settlements. *Ramirez v. Benito Valley Farms, LLC*, No. 16-CV-04708-LHK, 2017 WL 3670794, at \*3 (N.D. Cal. Aug. 25, 2017). Despite the lack of guidance, courts have been appropriately wary of plaintiffs using a PAGA claim as a “bargaining chip” without due consideration of the public interest and the rights of other aggrieved individuals. *O’Connor v. Uber Techs. Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016).

Accordingly, certain courts have been willing to approve PAGA settlements only if (1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA’s public policy goals. See *Rincon v. West Coast Tomato Growers, LLC*, No. 13-CV-2473-JLS, 2018 WL 828104, at \*2 (S.D. Cal. Feb. 12, 2018); *Gutilla v. Aerotek, Inc.*, No. 15-CV-00191-DAD-BAM, 2017 WL 2729864, at \*3 (E.D. Cal. March 22, 2017). As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). *Rincon*, 2018 WL 828104, at \*2. As a district court in the Southern District of California noted, the *Hanlon* factors are designed to determine the fairness of a settlement and consequently are useful in evaluating PAGA settlements. *Rincon*, 2018 WL 828104, at \*2. As these cases prove persuasive, the PAGA settlement agreement between Patel and Nike will be evaluated accordingly.

Of the *Hanlon* factors, the following are relevant to evaluating the PAGA settlement: (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel. These factors will be evaluated in light of PAGA’s public policy goals of “benefit[ing] the public by augmenting the state’s enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance.” *O’Connor*, 201 F. Supp. 3d at 1132-33.

### IV. DISCUSSION

#### A. Statutory Requirements

Patel satisfied the initial notice requirement prior to filing the PAGA claim. As alleged in the Complaint, Patel gave the required statutory notice on September 24, 2013 to the LWDA and Nike before filing the PAGA action. (See Compl. ¶ 97 & Ex. 1 (Dkt. 2-1).)<sup>2</sup> Further, Patel waited longer than the then-statutory waiting period of 33 days of the postmark date of the written notice if the LWDA did not provide a response.<sup>3</sup> (*Id.*) Finally, although the current PAGA statute does not appear to require any written notice to the LWDA regarding proposed settlements of PAGA claims filed before July 2016,<sup>4</sup> the parties served the LWDA with the Joint Stipulation which included the settlement agreement via the LWDA’s online process. (Dkt. 141.) Patel’s counsel represents the LWDA has not indicated any response or opposition to the proposed PAGA settlement. (Nordrehaug Decl. ¶ 2.) Therefore, the analysis can proceed to consider whether the settlement agreement is fair, reasonable, and adequate in view of PAGA’s public policy goals.

#### B. Fairness, Reasonableness, and Adequacy of PAGA Settlement

\*3 The balance of the *Hanlon* factors favors approving the PAGA settlement because the agreement is fair, reasonable, and adequate in light of PAGA’s public policy objectives.

##### 1. Strength of Patel’s Case

In general, legal uncertainty favors approval of a settlement. *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 WL 4105971, at \*10 (N.D. Cal. Nov. 16, 2007). Here, Patel would

be required to prove at trial each of the underlying Labor Code violations as to each of the 40 allegedly aggrieved employees in order to seek penalties under PAGA. *See Cardenas v. McLane Foodservice, Inc.*, No. SACV 10-473 DOC (FFMx), 2011 WL 379413, at \*3 (C.D. Cal. Jan. 31, 2011) (“Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant.”). The strength of each aggrieved employees' PAGA claim may vary. Moreover, even if Patel prevailed, Patel may not recover all of the civil penalties sought. A court may reduce the penalty when “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” *Cal. Lab. Code*, § 2699(e)(2); *see also Fleming v. Covidien, Inc.*, No. ED CV 10-01487 RGK (OPx), 2011 WL 7563047, at \*4 (C.D. Cal. Aug. 12, 2011) (finding the maximum PAGA penalties “unjust” because the employees had suffered no injuries and reducing the penalties by over 80%). Therefore, this factor favors approving the settlement.

### *2. Risk, Expense, Complexity, and Likely Duration of Further Litigation*

For similar reasons, the need to demonstrate all 40 aggrieved employees' entitlement to a PAGA award threatens a risky, expensive, and complex trial that would extend the duration of the lawsuit. Additionally, Patel risks an adverse judgment which could result in either a diminished recovery or no recovery at all. Finally, Nike risks the potential for a judgment levying a significantly higher fine and attorneys' fee award than that proposed in the settlement agreement. Thus, this factor also favors approving the settlement.

### *3. Amount Offered in Settlement*

Overall, the amount offered in settlement weighs towards approval of the settlement. First, the parties contend the proposed PAGA payment represents 22.8% of the \$ 86,554 that Patel's trial expert valued the PAGA claims.<sup>5</sup> (Nordrehaug Decl. ¶ 6.) Second, over 80% of the PAGA payment is to be paid to the aggrieved employees, with the remaining approximately 19% (\$ 3,701.06) to be paid to the LWDA. This appears to be an adequate amount to advance PAGA's purpose of deterring noncompliance with California's labor law. Moreover, only the aggrieved employees' PAGA claims are being released. No individual claims of the aggrieved employees (besides Patel) are being released that are not tied to PAGA. As the Settlement Agreement states, “in no event shall the PAGA Released Claims in this Settlement Agreement release any claim of any

individual other than the Plaintiff, including any class claim, which does not arise under PAGA.” (Dkt. 138, Ex. 1 at ¶ III(5).)

\*4 As for Patel's individual settlement amount, although \$ 20,000 appears to be quite generous on its face, the parties assert this is less than half of what Patel's trial expert valued her individual claims (\$ 49,224). (Nordrehaug Decl. ¶ 3.) Moreover, Patel is the only named plaintiff, and she has borne the risk alone in pursuing litigation against a former employer for several years. In light of the circumstances, her individual settlement amount appears to be reasonable.

The amount set aside for the settlement administrator, Simpluris, (\$ 5,261) does not appear to be excessive. Moreover, any surplus is to be added to the PAGA payment.

Finally, as for the attorneys' fees and costs, PAGA provides for reasonable awards but does not provide a specific standard for evaluating attorneys' fees in a settlement of PAGA claims. *Cal. Lab. Code* § 2699(g)(1). In the Ninth Circuit, district courts generally may award attorneys' fees under a fee-shifting statute using either the lodestar method or the percentage-of-the-fund method. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *see also Rincon*, 2018 WL 828104, at \*5 (approving attorneys' fees in a PAGA case using both the lodestar and the percentage methods); *Ramirez*, 2017 WL 3670794, at \*6-7 (approving attorneys' fees in a PAGA case using the lodestar method).

The proposed attorneys' fees (\$ 80,000) and costs (\$ 60,000) constitute the largest single awards in the Gross Settlement Amount (combined they are almost 76% of the total settlement). Patel's counsel estimate that they have collectively spent 909.45 hours litigating this case for over five years and calculate a lodestar fee of \$ 437,549.75. (Nordrehaug Decl. ¶ 4 & Ex. 1 at 45.) The total fee is based on hourly rates of \$ 175-795. Thus, their requested fee award is approximately 18% of the lodestar. This appears to be reasonable in light of over five years of work involving substantial discovery, motion practice, and mediation efforts. The request for \$ 60,000 in costs also seems appropriate, particularly since it constitutes only 61% of counsel's estimated \$ 99,118.54 of costs. (Nordrehaug Decl. ¶ 5 & Ex. 1 at 51.) Therefore, this factor favors approving the settlement.

### *4. Extent of Discovery Completed and Stage of the Proceedings*



This case has been litigated for several years: originally filed in 2013 and removed to federal court in 2014. At the time the proposed PAGA settlement was reached, the parties had completed both percipient and expert discovery and the parties were preparing for trial. Because the parties have engaged in extensive discovery and worked on this case for several years, this factor weighs in favor of finding the settlement fair, reasonable, and adequate.

#### 5. *Experience and Views of Counsel*

Patel's counsel represents they have extensive experience in employment litigation, including both wage and hour class actions and representative PAGA actions. (Nordrehaug Decl. ¶ 8; *see also* Ex. 2.) Based upon this experience, Patel's counsel believes the PAGA settlement is fair, reasonable, and adequate. Furthermore, Patel's counsel notes that Nike's counsel have been successful in defeating class actions and PAGA actions at the trial court level and on appeal. Based on the conduct observed during the approximately five years of litigation of this case (including losing a motion for class certification), Patel's counsel reasonably believe that Nike would continue to defend the claims aggressively through

trial and through appeal, if necessary. This factor favors approving the PAGA settlement.

#### 6. *The Presence of a Government Participant*

\*5 As discussed above, the LWDA has not directly intervened in this case or spoken on the proposed PAGA settlement. Therefore, this factor is neutral.

### V. CONCLUSION

For the foregoing reasons, the settlement agreement between Patel and Nike is approved and the case is terminated. Jurisdiction is retained to resolve disputes under the settlement agreement.

### IT IS SO ORDERED.

#### All Citations

Not Reported in Fed. Supp., 2019 WL 2029061

#### Footnotes

- 1 Although the current subsection appears only to apply to cases filed on or after July 1, 2016, the prior version of [§ 2699\(l\)](#) called for court approval of penalties sought as part of a proposed settlement. *See* 2004 Cal. Legis. Serv. Ch. 221 (S.B. 1809) (WEST) § 3. While PAGA requires court approval of any settlement of PAGA claims, court approval is not required to settle Patel's individual non-PAGA claims. Accordingly, only settlement provisions related to Patel's PAGA claim or her request for attorneys' fees will be discussed in this order.
- 2 At the time, the statute required only written notice by certified mail to both the LWDA and the employer. *See* 2004 Cal. Legis. Serv. Ch. 221 (S.B. 1809) (WEST) § 4.
- 3 The letter to the LWDA was postmarked September 20, 2013; Nike's was postmarked September 26, 2013. The Complaint was dated November 21, 2013.
- 4 [California Labor Code section 2699\(l\)\(2\)](#) states that, for cases filed on or after July 1, 2016, "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the [LWDA] at the same time that it is submitted to the court."
- 5 The parties state in their joint brief that there are approximately 783 alleged violations of the California Labor Code. (Dkt. 142 at 5.)

# **EXHIBIT 23**

2016 WL 1161453

Only the Westlaw citation is currently available.

United States District Court, N.D. California.

Barbara RUCH, Plaintiff,

v.

AM RETAIL GROUP, INC. Individually  
and DBA, G.H. Bass & CO., Defendant.

Case No. 14-cv-05352-MEJ

|

Signed 03/24/2016

#### Attorneys and Law Firms

[Alan Irwin Schimmel](#), [Stacey Rae Cutting](#), [Michael William Parks](#), Schimmel and Parks, APLC, Sherman Oaks, CA, for Plaintiff.

[Angelito Remo Sevilla](#), [Conor John Dale](#), [Fraser Angus McAlpine](#), Jackson Lewis P.C., San Francisco, CA, for Defendant.

#### ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Re: Dkt. No. 23

[MARIA-ELENA JAMES](#), United States Magistrate Judge

#### INTRODUCTION

\*1 Plaintiff Barbara Ruch (“Plaintiff”) moves for preliminary approval of a class action settlement. Dkt. No. 23. Defendant AM Retail Group Inc. (“AMRG”) does not oppose the motion. Dkt. No. 27. Through her Motion, Plaintiff seeks an order (1) preliminarily approving the proposed settlement of this case on the terms set forth in the parties’ proposed Stipulation of Class Action Settlement (“Settlement Agreement”) (Dkt. No. 24-1); (2) conditionally certifying a settlement class; (3) approving their proposed Settlement Notice, attached as Exhibit A to the Settlement Agreement; (4) appointing Plaintiff and her Counsel as Class Representative and Class Counsel, respectively; and (5) scheduling a hearing for final approval of the Settlement. Mot. at 1-2. Having carefully considered the Motion, the proposed

Settlement Agreement, all supporting documents, and the relevant legal authority, the Court **PRELIMINARILY APPROVES** the Settlement Agreement for the reasons set forth below.

#### BACKGROUND

##### A. Factual Background

AMRG does business under numerous business names, including G.H. Bass & Co. (“G.H. Bass”). Compl. ¶¶ 2, 9, Dkt. No. 1-4. AMRG employed Plaintiff as a Store Sales Manager (“SSM”) in its G.H. Bass store in Petaluma, California from November 4, 2013 until July 17, 2014. *Id.* ¶¶ 15, 27; Parks Decl. ¶ 10,<sup>1</sup> Dkt. No. 26. Before November 4, 2013, she was employed by PVH Corp. (the prior owner of G.H. Bass stores in California) as the Petaluma store’s SSM.<sup>2</sup> Compl. ¶ 14; Parks Decl. ¶ 10. Plaintiff was classified as an “exempt” employee by PVH, and this classification remained in effect for G.H. Bass SSMs in California until November 14, 2014. Parks Decl. ¶ 10. However, Plaintiff alleges her duties primarily consisted of non-exempt activities, including sales, customer service, cashiering, store presentation, store maintenance, opening and closing procedures, and weekly meetings. Compl. ¶ 15. Although she alleges she was frequently required to work 50-80 hours per week, her paycheck reflected that she worked only 40 hours per week. *Id.* ¶ 17. Plaintiff alleges AMRG mischaracterized the SSM position as exempt from overtime compensation. *Id.* ¶ 19.

In addition to her overtime claims, Plaintiff alleges AMRG failed to provide meal and rest breaks; instead, they were informed their breaks were “working breaks.” *Id.* ¶ 22. Plaintiff also alleges AMRG’s employees were forced to incur expenses without reimbursement, such as using their personal cell phones and vehicles for business purposes, and being required to purchase and wear G.H. Bass clothing. *Id.* ¶¶ 24-25.

Plaintiff filed this class action complaint against AMRG on October 10, 2014 in Sonoma County Superior Court. Dkt. No. 1-4. She alleges ten causes of action: (1) Failure to Reimburse for Reasonable Business Expenses, [Cal. Lab. Code § 2802](#); (2) Failure to Pay Overtime Compensation, *id.* § 510; (3) Failure to Pay for All Hours Worked, Cal. Indus. Welfare Comm’n Wage Order 4-2001; (4) Failure to Provide Accurate Wage Statements, [Cal. Lab. Code § 226\(a\)](#); (5) Failure to Keep Accurate Payroll Records, *id.* § 1174(d); (6) Failure to Provide Rest Periods or Compensation in Lieu Thereof,

*id.* § 226.7; (7) Waiting Time Penalties, *id.* §§ 201-02; (8) Unfair Business Practices, *Cal. Bus. & Prof. Code* § 17200; (9) Failure to Comply with Private Attorneys General Act, *Cal. Lab. Code* § 2698; and (10) Statutory and Common Law Retaliation and Termination, *id.* § 1102.5. Compl. ¶¶ 40-108.

\*2 As part of the Court's Alternative Dispute Resolution program, the parties elected to participate in private mediation. Dkt. No. 9. Prior to formal mediation, the mediator, Michael Dickstein, and the parties engaged in extensive pre-mediation exchanges of information in anticipation of the mediation. Parks Decl. ¶ 16. On October 5, 2015, the Parties participated in formal mediation facilitated by Mr. Dickstein, which resulted in a written memorandum of understanding that memorialized the core terms of the proposed settlement. *Id.* ¶ 17; Mot. at 27. The Parties also spent another several weeks negotiating the long form settlement agreement, with back and forth on the details of the settlement and proposed notice. *Id.* (both).

## B. Settlement Terms

Under the terms of the Settlement Agreement, AMRG has agreed to a guaranteed fund settlement amount of \$1,150,000.00, with no reversion of funds back to it. Parks Decl. ¶ 18; Settlement Agreement at 8. In determining this amount, the parties exchanged both formal and informal discovery, and the production of electronic spreadsheets detailing compensation, time worked and hours allotted to the stores of the putative class enabled them to accurately estimate the range of possible class-wide recoveries. Parks Decl. ¶ 19; Mot. at 26.

### 1. The Settlement Class

The Potential Class Members ("PCMs") in this case are "all Store Managers, Assistant Store Managers, Managers in Training, and Sales Associates employed by and on the payroll of AMRG in California at any time from October 10, 2010 through October 5, 2015." Settlement Agreement at 6. There are over 3,000 PCMs. Parks Decl. ¶ 27. "Settlement Class" means those PCMs who have not properly and timely opted-out of the settlement in connection with the opt-out procedures described below. Settlement Agreement at 7.

There are three proposed subclasses: (1) the "Unpaid Overtime Subclass" consisting of all California Store SSMs of G.H. Bass & Co. from November 4, 2013 to November 14, 2014;<sup>3</sup> (2) the "Meal/Rest Break Premium Pay Subclass" comprising all California store employees of

AMRG from October 12, 2010 to October 5, 2015; and (3) the "Reimbursement Subclass" consisting of all persons employed by and on the payroll of AMRG in California at any time from October 10, 2010 through October 5, 2015. *Id.* at 6-7. The parties also categorize employees who are primarily impacted by the unpaid reimbursement claims as "Keyholder Employees," defined as "all Store Managers, Assistant Store Managers, and Managers in Training employed by and on the payroll of AMRG in California at any time from October 10, 2010 through October 5, 2015." *Id.* at 7.

### 2. Distribution of Settlement Payments

\*3 The parties agree that out of the \$1,150,000.00 settlement amount, at least \$742,500<sup>4</sup> will be distributed directly to PCMs by check (the "Net Settlement Fund"), with each PCM's estimated Settlement Payment<sup>5</sup> amount and the bases for the calculation stated in the Notice of Settlement. *Id.* at 11-12. In the event that PCMs do not claim their checks and thus remain unpaid, that residual amount will be redistributed to the Settlement Class, unless the total amount of unclaimed checks is equal to or less than \$1,000.00, in which case the balance will be paid by the Settlement Administrator<sup>6</sup> to the Legal Aid Society-Employment Law Center as a cy pres beneficiary. *Id.* at 14.

Payment will be divided to the Settlement Subclasses as follows:

#### a. Unpaid Overtime Class

Forty-five percent (45%) of the Net Settlement Fund will be allocated and distributed to members of the Unpaid Overtime Subclass. *Id.* at 11. This portion of the Net Settlement Fund will be distributed such that:

(1) Fifty percent (50%) of this portion shall be treated as wages and divided among each Settlement Class Member who will receive a percentage of the amount distributed based on: (a) the number of work weeks that each member of the Overtime Subclass was employed by AMRG between November 4, 2013 through November 14, 2014 as the numerator, and (b) the total number of work weeks that all members of the Unpaid Overtime Subclass were employed by AMRG between November 4, 2013 through November 14, 2014 as the denominator, and

(2) Fifty percent (50%) shall be treated as penalties and interest and paid pursuant to a Form 1099 to be divided as follows: i) one-half (1/2) to be divided and allocated equally among each member of the Unpaid Overtime Subclass and one-half (1/2) to be divided and allocated equally among those members of the Unpaid Overtime Subclass who were terminated or separated from AM Retail Group on or before October 5, 2015. Any residual amount allocated to the Unpaid Overtime Subclass that remains unclaimed will be reallocated and divided equally to other members of the Unpaid Overtime Subclass pursuant to Form 1099.

*Id.*

#### *b. Meal/Rest Break Premium Pay Subclass*

Forty-five percent (45%) of the Net Settlement Fund will also be allocated to members of the Meal/Rest Break Premium Pay Subclass. *Id.* This portion of the Net Settlement Fund will be distributed such that:

(1) Fifty percent (50%) of this portion shall be treated as wages for payroll tax purposes and divided among each member who will receive a percentage of the amount based on the following calculation (a) the number of work weeks that each member of the Subclass was employed by AM Retail Group between October 10, 2010 through October 5, 2015 as the numerator, and (b) the total number of work weeks that all members of the Subclass were employed by AM Retail Group between October 10, 2010 through October 5, 2015 as the denominator, and

(2) Fifty percent (50%) shall be treated as penalties and interest and paid pursuant to a Form 1099 to be divided as follows: i) one-half (1/2) to be divided and allocated equally among each member of the Unpaid Overtime Subclass and one-half (1/2) to be divided and allocated equally among those members of the Meal/Rest Break Premium Pay Subclass who were terminated or separated from AM Retail Group on or before October 5, 2015. Any residual amount allocated to the Meal/Rest Break Premium Pay Subclass that remains unclaimed will be reallocated and divided equally to other members of the Meal/Rest Break Premium Pay Subclass pursuant to Form 1099.

\*4 *Id.* at 11-12.

#### *c. Reimbursement Subclass*

Ten percent (10%) of the Net Settlement Fund will be distributed to members of the Reimbursement Subclass and paid pursuant to a Form 1099, with seventy-five (75%) divided equally amount Keyholder Employees and twenty-five (25%) divided equally among non-Keyholder Employees. *Id.* at 12.

#### 3. Allocation and Taxability of Settlement Distributions

The Settlement Administrator will provide to AMRG records of what was paid to each Settlement Class member. *Id.* The Settlement Administrator shall provide each Settlement Class member a W-2 form reflecting the portion of each Settlement Payment attributable to wages and the taxes withheld from those wages. *Id.* at 13. The Settlement Administrator shall also provide each Settlement Class Member a 1099 Form reflecting the portion of each Settlement Payment attributable to penalties. *Id.* The Settlement Administrator shall provide each Settlement Class Member with appropriate documentation setting forth the amount of any tax or other payment withheld, and employer contribution made, in accordance with state and federal tax requirements. *Id.* Settlement Class Members shall be responsible for remitting to state and/or federal taxing authorities any applicable other taxes due. *Id.*

#### 4. Other Payments

##### *a. Service Award*

The Settlement Agreement calls for \$5,000 to be paid as a Service Award to Plaintiff for her time and efforts in bringing and prosecuting this matter. *Id.* at 9. Any service award will be reported as “other income” on a 1099 Form. *Id.* at 12. In exchange for this Service Award, Plaintiff agrees not to publicize the settlement beyond what is expressly approved by the Court, agrees to respond to any inquiry regarding the settlement only by referring the inquiry to Class Counsel, and saying nothing further other than “the matter was resolved.” *Id.* at 10. The Settlement Agreement is not contingent upon the Court granting Plaintiff's request for a Service Award. *Id.*

##### *b. Attorneys' Fees and Costs*



The Settlement Agreement also permits an award of attorneys' fees and costs to Class Counsel, Alan I. Schimmel and Michael W. Parks of the law firm of Schimmel & Parks, APLC. *Id.* at 5, 9. Class Counsel may seek up to 30% of the \$1,150,000 Settlement Fund (\$345,000) and payment of up to \$20,000 for out-of-pocket litigation costs. *Id.* at 9. Class Counsel will file their application for attorneys' fees and costs prior to the final approval hearing, and the Settlement Agreement is not contingent upon the Court granting counsel's request. *Id.*

#### *c. Administrative Costs*

The parties estimate Administrative Costs, defined as "the estimated reasonable cost for providing Class Notice, various efforts to locate class members, and administering payment of claims on behalf of the Settlement Class," at \$30,000. *Id.* at 4, 10. These funds shall be deducted from the overall settlement amount and any residual amount will be included as part of the distribution to the Settlement Class. *Id.* at 10.

#### *d. LWDA Payment*

Under the Agreement, \$10,000 will be allocated to penalties that will be paid to the California Labor and Workforce Development Agency ("LWDA") in satisfaction of claims for penalties owed to the agency under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), with 25% of the amount to be allocated to the Net Settlement Fund. *Id.*; *see also* [Cal. Lab. Code § 2699\(i\)](#).

#### 5. Notification of Settlement

**\*5** The parties agree to jointly review and approve a class list identifying all PCMs and specifying the number of weeks worked by each such person during the relevant period for each Subclass. Settlement Agreement at 16. Notice shall be provided to PCMs as follows:

Within seven (7) days of entry of the Order Granting Preliminary Approval, Defendant shall provide the Settlement Administrator with each Potential Class Member's name, last-known mailing address, and the above information to determine Potential Class Members' individual Settlement Payment. Defendant shall provide this information in the form of an Excel spreadsheet or similar sortable electronic format. Within seven (7)

days after the end of the Notice Period, the Settlement Administrator shall provide Class Counsel and counsel for Defendant with a list of the names of the Settlement Class Members, with such names to be kept confidential and used by Class Counsel only for the purposes of this settlement and for no other purpose.

The Notice of Class Action Settlement and Hearing Date for Court Approval ("Class Notice")...as approved by the Court, shall be sent by the Settlement Administrator to the Potential Class Members, by First Class U.S. Mail to those addresses provided, as soon as practicable but in any event within fourteen (14) days after receipt of class member information from Defendant.

The Class Notice shall set forth a brief description of the Action, provide the definition of the Settlement Class, inform Potential Class Members of the nature and scope of the settlement of claims, disclose key terms of the settlement including each Potential Class Member's potential individual award, the basis for the calculation of the award, attorneys' fees, and Service Award, inform Potential Class Members of their opportunity to be heard at the Final Settlement Hearing, inform Potential Class Members of their right to submit an objection to any term of the Settlement Agreement, to opt-out of the settlement, and the procedures for doing so, and explain the res judicata effect of not opting out. The Class Notice will set forth contact numbers for Class Counsel, Defendant's Counsel, and the Settlement Administrator.

The Settlement Administrator will attempt to locate any Potential Class Members whose Class Notice is returned by the Post Office. Defendant will inform the Settlement Administrator of the social security number of each Potential Class Member whose Class Notice is returned. The Settlement Administrator will initially perform a National Change of Address (NCOA) search on the entire Potential Class Member list and will conduct address verification of returned mail or engage in other methodology as may be appropriate to ensure that reasonable efforts are made to send the Class Notice to all Potential Class Members. For those Potential Class Members for whom a mailing address is not available, or for whom the mailed Class Notice comes back undeliverable, the Settlement Administrator may utilize other methods to the extent appropriate in an effort to obtain proper mailing addresses for such individuals.

If an envelope has not been returned within thirty (30) days of the mailing, it shall be conclusively presumed that the Potential Class Member received the notice.

\*6 At least twenty-one (21) days before the Final Settlement Hearing, the Settlement Administrator shall prepare a declaration of due diligence and proof of mailing with regard to the mailing of the Class Notice, and any attempts by the Settlement Administrator to locate Potential Class Members ("Due Diligence Declaration"). The Settlement Administrator shall prepare a separate declaration identifying the name of each Potential Class Member who submitted a timely and valid opt-out ("Opt-Out Declaration"). Class Counsel shall be responsible for filing the Due Diligence Declaration and Opt-Out Declaration with the Court.

Unless a Potential Class Member submits and signs a timely, valid request to be excluded, that Potential Class Member shall be a member of the Settlement Class and shall be bound by all of the terms of the Settlement Agreement and the Court's Order of Final Approval and Judgment.

*Id.* at 17-18.

#### 6. Opt-Out Procedure and Objections

Except for the named Plaintiff, PCMs shall be entitled to opt-out of the Settlement Class by signing and mailing an opt-out request to the Settlement Administrator within the Notice Period<sup>7</sup> a request clearly stating their intention to be excluded from the Settlement Class. *Id.* at 16. The Settlement Administrator will notify Class Counsel and counsel for Defendant of any opt-outs received. *Id.*

The Class Notice shall provide that members of the Settlement Class who wish to object to the Settlement Agreement must file with the Court a written statement objecting to the Settlement Agreement, postmarked no later than the last day of the Notice Period.<sup>8</sup> *Id.* No PCM shall be entitled to be heard at the final approval hearing or to object to the Settlement Agreement unless the individual's written statement of objections and supporting materials have been timely filed. PCMs who fail to file and serve timely written objections shall be deemed to have waived any objections. *Id.*

#### 7. Final Approval and Judgment Order

Rule 23(e)(2) contemplates that the Court will conduct a final approval hearing. *Id.* at 18. After the final approval hearing, and upon the Court's finding that the settlement is fair, reasonable, and adequate, the parties will move the Court to enter an Order granting final approval of the Settlement, which will

- (a) approve the Settlement Agreement, adjudging the terms thereof to be fair, reasonable and adequate, and directing consummation of its terms and provisions; (b) approve an award of Attorneys' Fees and Costs to Class Counsel; (c) approve a Service Award to Named Plaintiff; (d) approve settlement Administrative Costs; (e) enter judgment against Settlement Class Members such that they will take nothing by their Complaint in this Action other than what is provided for in the Settlement Agreement; and (f) permanently bar and enjoin all the Settlement Class Members from prosecuting any Released Claims against any Released Parties.

*Id.* at 18-19.

#### 8. Releases

The Settlement Agreement provides that judgment will be entered upon final approval of the Settlement, and the final approval order and judgment entered by the Court will constitute a

binding and final resolution, release, and discharge the Released Parties from any and all claims each Settlement Class Member, including Named Plaintiff, jointly and severally, has or could have against the Released Parties based on the facts alleged in the Complaint, including all claims, judgments, liens, losses, debts, liabilities, demands, obligations, guarantees, penalties, costs, expenses, attorneys' fees, damages, indemnities, actions, causes of action, and obligations of every kind in law, equity or otherwise, known or unknown, suspected or unsuspected, disclosed or undisclosed, contingent or accrued, alleged in the Complaint, or based on the allegations made therein ("Released Claims"). The Released Claims include claims under the California Labor Code sections cited in Plaintiff's pleadings, such as [sections 201, 202, 203, 204, 226, 226.7, 227.3, 510, 510, 558, 1174, 1174.5, 1194, 1197, 2802, and 2699](#), and Wage Order Nos. 4 and 15. The Released Claims include any right of Settlement Class Members to penalties for failure to pay wages, wage statement penalties, and PAGA penalties based on the California Labor Code sections cited in Plaintiff's pleadings. This Settlement Agreement shall

constitute, and may be pleaded as, a complete and total defense to any Released Claims asserted by any Settlement Class Member in the future.

\*7 *Id.* at 15. If a Settlement Class Member brings a separate action seeking penalties arising from facts or claims other than those released as part of the Settlement Agreement, but that relate to the Settlement Period of October 10, 2010 through October 5, 2015, and prevails in that action, penalties awarded in the separate action shall be reduced by “the settlement amounts attributable to the same category of penalties released” under the terms of the Settlement Agreement. *Id.*

#### 9. Payment

The Settlement Administrator shall verify that payment is made to the class members and Plaintiff, and this verification and proof of payment shall be filed with the Court and provided to the parties. *Id.* at 13. Any checks issued by the Settlement Administrator shall remain valid and negotiable for sixty (60) days from the date of their issuance and may thereafter automatically be cancelled if not cashed within that time. *Id.* At the conclusion of the 60-day check cashing period, the Settlement Administrator shall inform the parties regarding the status of any uncashed checks, including the amount and identity of the settlement class member. *Id.* The parties will follow the cy pres provision as to unclaimed amounts. *Id.* at 13-14.

### LEGAL STANDARD

The Ninth Circuit maintains a “strong judicial policy” that favors the settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Nonetheless, a class action may not be settled without court approval. *Fed. R. Civ. P. 23(e)*. When the parties to a putative class action reach a settlement agreement prior to class certification, “courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

Courts generally employ a two-step process in evaluating a class action settlement. First, the court must assess whether a class exists. *Id.* (citing *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). This level of attention “is of vital importance, for a court asked to certify a settlement class will

lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.” *Id.*

Second, the court must determine whether the proposed settlement “whether a proposed settlement is fundamentally fair, adequate, and reasonable,” recognizing that “[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Where the parties reach a settlement prior to class certification, courts apply “a higher standard of fairness and a more probing inquiry than may normally be required under Rule 23(e).” *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (internal quotations and citation omitted). The Court’s task at the preliminary approval stage is to determine whether the settlement falls “within the range of possible approval.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (internal quotations and citation omitted). “The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge.” *Class Plaintiffs*, 955 F.2d at 1276.

Preliminary approval of a settlement is appropriate if “the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.” *In re Tableware*, 484 F. Supp. 2d at 1079 (internal quotations and citation omitted). The proposed settlement need not be ideal, but it must be fair and free of collusion, consistent with a plaintiff’s fiduciary obligations to the class. *Hanlon*, 150 F.3d at 1027 (“Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.”). To assess a settlement proposal, courts must balance a number of factors:

\*8 the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the state of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

*Id.* at 1026 (citations omitted). The proposed settlement must be “taken as a whole, rather than the individual component parts” in the examination for overall fairness. *Id.* Courts do not have the ability to “delete, modify, or substitute certain

provisions” because the settlement “must stand or fall in its entirety.” *Id.*

If the court preliminarily certifies the class and finds the proposed settlement fair to its members, the court schedules a final approval hearing pursuant to [Federal Rule of Civil Procedure 23\(e\)\(2\)](#) to make a final determination of whether the settlement is “fair, reasonable, and adequate.” [Fed. R. Civ. P. 23\(e\)\(2\)](#); see also *In re Google Referrer Header Privacy Litig.*, 2014 WL 1266091, at \*2 (N.D. Cal. Mar. 26, 2014).

## DISCUSSION

### A. Class Certification

The Court has discretion to certify a class action under [Rule 23](#). *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). To obtain class certification, the plaintiff must satisfy the four prerequisites identified in [Rule 23\(a\)](#) as well as one of the three subdivisions of [Rule 23\(b\)](#). *Amchem Prods.*, 521 U.S. at 614. The four prerequisites are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. See [Fed. R. Civ. P. 23\(a\)\(1\)-\(4\)](#). If these requirements are satisfied, the Court then examines whether the plaintiff satisfies one of the requirements of [Rule 23\(b\)](#). Plaintiff seeks certification under [Rule 23\(b\)\(3\)](#), which is appropriate where common questions of law or fact predominate and class resolution is superior to other available methods. [Fed. R. Civ. P. 23\(b\)\(3\)](#).

#### 1. [Rule 23\(a\)](#)

##### a. Numerosity

[Rule 23\(a\)\(1\)](#) provides that a class action may be maintained only if “the class is so numerous that joinder of all parties is impracticable.” [Fed. R. Civ. P. 23\(a\)\(1\)](#). No specific number is required, although there is a presumption that a class with more than 40 members is impracticable to require joinder. *Ries v. Ariz. Bevs. U.S. LLC, Hornell Brewing Co.*, 287 F.R.D. 523, 536 (N.D. Cal. 2012); *Bellinghausen v. Tractor Supply Co.*, 303 F.R.D. 611, 616 (N.D. Cal. 2014) (“Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.” (citation omitted)).

The numerosity requirement is satisfied here as there are over 3,000 PCMs. Parks Decl. ¶ 27.

##### b. Commonality

[Rule 23\(a\)\(2\)](#) requires some “questions of fact and law which are common to the class.” To satisfy this requirement, the claims must “depend upon a common contention” such “that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). But this does not necessitate that “every question in the case, or even a preponderance of questions, is capable of class wide resolution.” *Wang v. Chinese Daily News*, 737 F.3d 538, 544 (9th Cir. 2013). “So long as there is ‘even a single common question,’ a would-be class can satisfy the commonality requirement of [Rule 23\(a\)\(2\)](#).” *Id.* (citing *Wal-Mart Stores*, 131 S. Ct. at 2556). “[C]ommonality cannot be determined without a precise understanding of the nature of the underlying claims.” *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014) (citing *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1194-95 (2013); additional citation omitted).

\*9 This case is based on common questions of both law and fact, as Plaintiff’s claims are based on common policies that applied to each AMRG employee. With respect to the Overtime Wage Subclass, AMRG uniformly classified Plaintiff and all G.H. Bass SSMs as “exempt” from November 4, 2013 to November 14, 2014. Parks Decl. ¶ 11. With regard to the Meal/Rest Break and Reimbursement Subclasses, all AMRG employees were subject to its meal and rest break policy, expense reimbursement policy, and dress policy. *Id.* ¶ 28. Thus, [Rule 23\(a\)\(2\)](#) is satisfied.

##### c. Typicality

[Rule 23\(a\)\(3\)](#) requires that the representative party’s claim be “typical of the claim...of the class.” [Fed. R. Civ. P. 23\(a\)\(3\)](#). “Under this rule’s permissive standards, representative claims are typical if they are reasonably co-extensive with those absent class members; they need not be substantially identical.” *Parsons*, 754 F.3d at 685 (quoting *Hanlon*, 150 F.3d at 1020). “The test of typicality is ‘whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.’” *Id.* (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).



Typicality is met here: Plaintiff's individual claims are the same as the claims brought on behalf of all PCMs. Plaintiff alleges she was denied proper overtime wages like the other G.H. Bass SSMS, that she was denied off-duty meal and rest breaks like other AMRG employees, and that she did not receive proper reimbursement like other AMRG employees. Her claims are typical because she was subject to the same conduct as other PCMs, suffered the same damages, and she does not seek any unique or personalized claims. Accordingly, the Court finds Plaintiff satisfies Rule 23(a)(3)'s typicality requirement.

#### *d. Adequacy of Representation*

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Due process concerns are central to this determination: "[A]bsent class members must be afforded adequate representation before entry of judgment which binds them." *Hanlon*, 150 F.3d at 1020 (citation omitted). Two questions must be considered in this determination: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* The Court finds Plaintiff meets these requirements.

First, there is no evidence Plaintiff or her counsel have any conflicts of interest with other PCMs. Plaintiff brought this case against AMRG as a class action, and she "surrenders any right to compromise the claims of the group without the Court's approval or to put her claims ahead of the claims of the group." Mot. at 20; Parks Decl. ¶ 31. Second, based on the available information, the Court is satisfied Plaintiff and her counsel have and will continue to vigorously prosecute this action on behalf of the class. Plaintiff shares the same interests as the absent class members, namely, bringing claims for injury caused by the same company-wide policies and practices and seeking the same penalties. Third, Plaintiff is represented by experienced class action attorneys who have qualified as lead class counsel in class actions pending in courts throughout California and across the country. Parks Decl. ¶ 34 (listing cases). Accordingly, the Court finds both Plaintiff and her counsel are adequate representatives.

#### *e. Summary*

\*10 In light of the foregoing, the Court finds Plaintiff has satisfied Rule 23(a)'s four prerequisites to maintaining a class action. Accordingly, the Court turns to Rule 23(b) concerning the type of class action that may be maintained.

#### 2. Rule 23(b)(3)

Plaintiff seeks to certify this proposed class under Rule 23(b)(3), which requires the Court to find that: (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These provisions are referred to as the "predominance" and "superiority" requirements. See *Hanlon*, 150 F.3d at 1022-23. The matters pertinent to these findings include: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id.*

The Court finds this case meets Rule 23(b)(3)'s requirements as the common questions raised predominate over any individualized questions concerning the proposed Settlement Class. As discussed above, Plaintiff's claims are typical of the class and are based on AMRG's common policies. Plaintiff asserts AMRG committed these violations in the same manner as to all PCMs. Thus, the class has suffered a common injury. As to superiority, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem Prods.*, 521 U.S. at 620. Thus, any manageability problems that may have existed are eliminated by the settlement. As such, the Court finds that Rule 23(b)(3)'s requirements are satisfied for purposes of this Motion.

#### 3. Class Certification Summary

In view of the analysis above, the Court finds Plaintiff has satisfied the requirements of Rule 23(a) and (b)(3). Accordingly, for purposes of this Motion, the Court certifies



the proposed Settlement Class and appoints Plaintiff's counsel as Class Counsel to effectuate the Settlement Agreement.

## B. Preliminary Fairness Determination

The Court now preliminarily examines the Settlement Agreement to ensure it is “fair, reasonable, and adequate.” [Fed. R. Civ. P. 23\(e\)\(2\)](#). As noted, when settlement occurs before formal class certification, settlement approval requires a higher standard of fairness in order to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the class. [Lane v. Facebook, Inc.](#), 696 F.3d 811, 819 (9th Cir. 2012). Nonetheless, “class action settlements do not need to embody the best result for preliminary approval.” [In re Google](#), 2014 WL 1266091, at \*6. The preliminary approval stage is characterized “as an ‘initial evaluation’ of the fairness of the proposed settlement made by the court on the basis of written submissions and informal presentation from the settling parties.” [In re High-Tech Emp. Antitrust Litig.](#), 2013 WL 6328811, at \*1 (N.D. Cal. Oct. 30, 2013) (citation omitted). “At this point, the court’s role is to determine whether the settlement terms fall within a reasonable range of possible settlements, with ‘proper deference to the private consensual decision of the parties’ to reach an agreement rather than to continue litigating.” *Id.* (quoting [Hanlon](#), 150 F.3d at 1027).

\*11 “The Court may grant preliminary approval of a settlement and direct notice to the class if the settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval.” [Angell v. City of Oakland](#), 2015 WL 65501, at \*7 (N.D. Cal. Jan. 5, 2015) (quoting [Harris v. Vector Mktg. Corp.](#), 2011 WL 1627973, at \*7 (N.D. Cal. Apr. 29, 2011) and [In re Tableware](#), 484 F. Supp. 2d at 1079)). “Closer scrutiny is reserved for the final approval hearing.” [Harris](#), 2011 WL 1627973, at \*7.

### 1. Settlement Negotiations

Based on the parties' written submissions, the settlement in this case appears to be the product of serious, informed, non-collusive negotiations. Prior to formal mediation, the mediator, Michael Dickstein, and the parties engaged in extensive pre-mediation exchanges of information in anticipation of the mediation. Parks Decl. ¶ 16. On October 5, 2015, the Parties participated in formal mediation facilitated

by Mr. Dickstein, which resulted in a written memorandum of understanding that memorialized the core terms of the proposed settlement. *Id.* ¶ 17; Mot. at 27. The Parties also spent another several weeks negotiating the long form settlement agreement, with back and forth on the details of the settlement and proposed notice. *Id.* (both). “[S]ettlements are entitled to ‘an initial presumption of fairness’ because they are the result of arm’s-length negotiations among experienced counsel.” [In re High-Tech Emp. Antitrust Litig.](#), 2013 WL 6328811, at \*1 (quoting [Newberg on Class Actions](#) § 11:41 (4th ed.)). Accordingly, the process by which the parties reached their settlement weighs in favor of preliminary approval.

### 2. The Presence of Obvious Deficiencies

The Court must next analyze whether there are obvious deficiencies in the Settlement Agreement. The Court finds none at this time. First, the proposed Settlement results in a substantial monetary benefit to all PCMs. The Settlement Class will share in proceeds of no less than \$742,500 after deduction for attorneys' fees and costs, the class representative service award, payments to the LWDA pursuant to PAGA, and settlement administration costs. Further, the parties have exchanged a significant amount of both formal and informal discovery, and the production of electronic spreadsheets detailing compensation, time worked and hours allotted to the stores of the putative class have enabled Plaintiff to accurately estimate the range of possible class-wide recoveries. Parks Decl. ¶ 19; Mot. at 26. The amount of discovery and investigation completed prior to reaching a settlement is an important consideration because it demonstrates whether the parties and the Court have sufficient information before them to assess the merits of the claims. See [Lewis v. Starbucks Corp.](#), 2008 WL 4196690, at \*6 (E.D. Cal. Sept. 11, 2008) (“approval of a class action settlement is proper as long as discovery allowed the parties to form a clear view of the strengths and weaknesses of their cases”).

Second, as discussed above, the Settlement Agreement's release language appropriately releases only claims based on the same factual predicate as the underlying claims in this case. The release only covers claims that are asserted or could have been asserted based on the allegations in the operative Complaint. Such a narrow release warrants preliminary approval. See, e.g., [Hesse v. Sprint Corp.](#), 598 F.3d 581, 590 (9th Cir. 2010) (“A settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, but only where the

released claim is based on the identical factual predicate as that underlying the claims in the settled class action.” (internal quotation marks and citations omitted)); *Angell*, 2015 WL 65501, at \*7 (“While the scope of the release in the revised settlement agreement is still broad, it is acceptable because the claims released are limited to those ‘against the Defendants, their agents, and their employees arising from the events alleged in Plaintiffs’ Complaint.’”).

\*12 Third, any checks that are not cashed within the time provided in the Notice, and any Settlement Payments that otherwise cannot be distributed, shall be paid to the Legal Aid Society – Employment Law Center as a cy pres recipient. *See Angell*, 2015 WL 65501, at \*7 (the settlement agreement should “provide for a cy pres recipient or specify what would happen with the funds if a check is undeliverable or remains uncashed.”) As the Ninth Circuit has held, there must be “a driving nexus between the plaintiff class and the cy pres beneficiaries.” *Dennis*, 697 F.3d at 865 (internal quotations and citation omitted). Thus, a “cy pres award must be guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members, and must not benefit a group too remote from the plaintiff class.” *Id.* (internal quotations and citation omitted). As this case involves wage and hour employment claims, the designated cy pres recipient is adequate to meet the requirements for preliminary approval.

Finally, although the Court is not approving the amount requested for attorneys’ fees and costs at this stage, the Settlement Agreement provides that any such award to Class Counsel will not exceed 30% of the Settlement Fund and payment of up to \$20,000 for out-of-pocket litigation costs. Settlement Agreement at 9. “In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” *Fed. R. Civ. P. 23(h)*. Thus, in awarding attorneys’ fees under *Rule 23(h)*, “courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (citations omitted). Here, given that Class Counsel’s fee award will total no more than 30% of the Settlement Amount, the Court finds Class Counsel’s proposed fees are reasonable at this stage and do not suggest against granting preliminary approval. *See id.* (“[C]ourts typically calculate 25% of the fund as the ‘benchmark’ for a reasonable fee award, providing adequate explanation in the record of any ‘special circumstances’ justifying a departure.”); *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at \*29 (N.D. Cal.

Apr. 1, 2011) (approving fee of 42% of common fund in wage and hour class action); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) (noting common fund awards range around 30%).

Accordingly, the lack of obvious deficiencies in the Settlement Agreement weighs in favor of granting preliminary approval.

### 3. Preferential Treatment

The third factor the Court considers is whether the Settlement Agreement provides preferential treatment to any class member. Having reviewed the agreement, the Court finds there is no preferential treatment to any class member. As noted above, the settlement funds will be distributed based on the number of work weeks that each member of the Settlement Class was employed by AMRG, and the payment amount and the bases for the calculation will be stated in the Notice of Settlement. Settlement Agreement at 11-12. While the Settlement Agreement authorizes an incentive award to Plaintiff of up to \$5,000, “the Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable.” *Harris*, 2011 WL 1627973, at \*9 (citing *Staton*, 327 F.3d at 977). Additionally, while the Court is not approving the amount of the incentive award at this stage, the Court notes the proposed award is not outside the range of reasonableness. *See, e.g., Angell*, 2015 WL 65501, at \*8 (granting preliminary approval of settlement agreement authorizing \$9,000 incentive award for each of eight class representatives); *Covillo v. Specialty’s Cafe*, 2014 WL 954516, at \*8 (N.D. Cal. Mar. 6, 2014) (approving \$8,000 incentive award); *Barel v. Bank of Am.*, 255 F.R.D. 393, 402 (E.D. Pa. 2009) (approving \$10,000 incentive award).

\*13 Accordingly, the Court finds this factor weighs in favor of preliminary approval.

### 4. Reasonable Range of Possible Approval

Finally, the Court must determine whether the proposed settlement falls within the range of possible approval. To determine whether an agreement is fundamentally fair, adequate, and reasonable, the Court may preview the factors that ultimately inform final approval: (1) the strength of plaintiff’s case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and

the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Hanlon*, 150 F.3d at 1026.

Considering all the circumstances, the Court finds these factors all weigh in favor of preliminary approval of the proposed Settlement Agreement. The Net Settlement Fund of \$742,500 represents a fair compromise given the litigation risks and uncertainties presented by continued litigation. While Class Counsel believes that the Class's claims are meritorious, AMRG vigorously disputes this. Mot. at 23; Parks Decl. ¶ 41. Further, there is a risk that the Court may deny class certification or, following initial certification, subsequently decertify the class based on unanticipated individualized issues or manageability concerns. The outcome of a trial (and potential subsequent appeals) are inherently uncertain in terms of both outcome and duration. Further litigation would involve considerable costs and a significant investment of time by the parties and their respective counsel and would burden the resources of the Court. Class Counsel believes the proposed settlement is fair, reasonable, adequate, and is in the best interest of the Settlement Class in light of all known facts and circumstances. Parks Decl. ¶ 25. Finally, the Court has not received any reactions from Class Members at this time; the Court awaits those responses in conjunction with the final approval hearing. Thus, the balance of the factors considered by the Court weighs in favor of preliminary approval.

### C. Class Notice

#### 1. Method of Providing Notice

[Rule 23\(c\)\(2\)\(B\)](#) provides that “[i]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” The notice must fairly apprise prospective class members of the terms of the proposed settlement and of their options with respect to the settlement. *Eisen v. Carlisle & Jacquelin*, 447 U.S. 156, 174 (1974).

Following preliminary approval, the Settlement Agreement provides that the Settlement Administrator will send by first class mail a copy of the court-approved notice to all PCMs. Settlement Agreement at 16-18. This method appears to provide the best notice practicable as not all PCMs are current employees of AMRG. Parks Decl. ¶ 27; see *Phillips*

*Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (“The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” (internal citations and quotations omitted)). As such, it is likely that PCMs will receive the best practicable notice of the proposed settlement by U.S. mail. Therefore, the Court approves the method of notice provided in the Settlement Agreement as it provides the best notice that is practicable under the circumstances. See [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#).

#### 2. Contents of the Notice

\*14 As to the contents of the notice, [Rule 23](#) requires “[t]he notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under [Rule 23\(c\)\(3\)](#).” [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#).

The proposed Settlement Notice complies with all these requirements. In addition, the notice explains in plain English that PCMs may opt-out or object within 60 days, indicates the time and place of the final approval hearing, provides information regarding the attorneys' fees and class representatives' incentive awards, and indicates that additional information regarding the Settlement is available through Class Counsel, whose contact information is provided in the Notice. The Notice also explains how the settlement fund will be allocated. Accordingly, the Court finds the contents of the Class Notice comply with [Rule 23](#)'s requirements.

However, the Court does find certain minor changes appropriate for clarity.

#### a. Section 1 (Why Should You Read This Notice?)

The bracketed portion of this section (“[For Overtime Subclass only]” through “November 14, 2014.”) is potentially confusing and unnecessary given the explanation of the subclasses in Section 4. The parties shall remove this portion.

*b. Section 4 (The Proposed Settlement)*

As this section provides a breakdown of payments by subclass, the parties should include a definition of each subclass prior to an explanation of the payment formulas. The parties shall add this between paragraphs 2 and 3.

In the last sentence of paragraph 2, the notice states the “Net Settlement Amount will be available for distribution...” As checks will be mailed automatically if the Court grants final approval, this should be changed to “Net Settlement Amount will be distributed...”

Also, paragraph 7 refers to “Class Settlement Net Fund.” For consistency, this should be changed to “Net Settlement Amount.”

*c. Section 8 (What Must I Do To Object To the Settlement?)*

This section requires PCMs who wish to object to the settlement to file any objection with the Court and serve it on counsel for the parties. As filing with the Court will provide adequate notice, the requirement for serving or mailing to the parties should be removed. In addition, the following instructions on how to submit objections should be included:

All written objections and supporting papers must be submitted to the Court either by (a) mailing them to United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102; or (b) filing them in person at any location of the United States District Court for the Northern District of California. All submissions must identify the case name and number (*Ruch v. AM Retail Group, Inc.*, Case No. C-14-5352 MEJ).

3. Costs of Notice Provision and Settlement Administration

The Settlement Agreement provides that the estimated Administrative Costs associated with providing Notice and administering payment of claims is \$30,000, which shall be deducted from the Settlement Fund. Settlement Agreement at 10. As the Agreement also provides that any applicable left over residual amount will be included as part of the distribution of the Net Settlement Fund, this amount appears reasonable.

**CONCLUSION**

**\*15** In light of the analysis above, the Motion for Preliminary Approval of Class Settlement is **GRANTED** as follows:

1) This Order incorporates by reference the definitions in the Settlement Agreement and all terms defined therein shall have the same meaning in this Order as set forth in the Settlement Agreement.

2) The proposed Settlement Class is hereby conditionally certified pursuant to [Federal Rules of Civil Procedure 23\(a\) and \(b\)\(3\)](#) for purposes of settlement. The Settlement Class is defined as: “All Store Managers, Assistant Store Managers, Managers in Training, and Sales Associates employed by and on the payroll of AMRG in California at any time from October 10, 2010 through October 5, 2015.” For the Overtime Subclass only, the Settlement Class is defined as “All persons employed by and on the payroll of AMRG as Store Sales Manager of G.H. Bass & Co. in California from November 4, 2013 to November 14, 2014.” Certification of the Settlement Class is solely for settlement purposes and without prejudice in the event the Settlement Agreement is not finally approved or otherwise does not take effect.

3) The Settlement Agreement is preliminarily approved as fair, adequate, and reasonable pursuant to [Federal Rule of Civil Procedure 23\(e\)](#).

4) The Court appoints and designates Plaintiff Barbara Ruch as class representative for settlement purposes only.

5) The Court appoints Alan I. Schimmel and Michael W. Parks of Schimmel & Parks, APLC as Class Counsel for the Settlement Class.

6) The Court appoints ILYM Group, Inc. as the Settlement Administrator. The Settlement Administrator shall be responsible for providing notice to the class of this Settlement, and of the preliminary and final approval thereof.

7) Prior to distribution of notice to Potential Class Members, the parties shall file a revised notice form as detailed above by April 7, 2016. *See supra* at 22:13-23:7. In addition to the finalized notice, the parties shall include a version that highlights all edits. If the Court approves the revised notice, it will issue a scheduling order addressing deadlines for notice



to the class, opt-out and objection timing, Plaintiff's motion for final settlement approval and motion for attorneys' fees and costs, and the final approval hearing.

**All Citations**

Not Reported in Fed. Supp., 2016 WL 1161453

**IT IS SO ORDERED.**

**Footnotes**

- 1** Certain facts set out in this Order appear only in Plaintiff's Motion and Parks' Declaration. However, in his Declaration, Park attests that the parties engaged in formal discovery efforts and confirmed certain facts. Park Decl. ¶¶ 7, 9. As Plaintiff's Motion is unopposed, the Court considers these facts undisputed.
- 2** AMRG acquired G.H. Bass in November 4, 2013. Compl. ¶ 15.
- 3** On November 14, 2014, AMRG reclassified the G.H. Bass SSMS as non-exempt. Parks Decl. ¶ 11. Accordingly, Plaintiff's misclassification claim is directed to the population of G.H. Bass SSMS who worked as exempt employees before that reclassification. All other AMRG SSMS were classified as non-exempt and paid overtime. *Id.*
- 4** Distribution of the remaining \$407,500 is described below.
- 5** "Settlement Payment" means the amount to be paid to individual PCMs pursuant to the calculations set forth below.
- 6** "Settlement Administrator" means the firm of ILYM Group, Inc., which is the entity the parties selected to provide notice of this proposed class action settlement to the proposed classes and to perform other related functions to administer the settlement set forth in the Settlement Agreement.
- 7** "Notice Period refers to the time period of 60 days from the mailing date postmarked on the Notice of Settlement mailed by the Settlement Administrator, within which Potential Class Members may opt-out of the Settlement." *Id.* at 6.
- 8** The current Class Notice also requires members to serve this objection on counsel for the parties. However, the Court finds filing provides adequate notice to the parties. Therefore, as addresses below, the parties shall remove this provision.

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End of Document

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# **EXHIBIT 24**



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Georgino v. Sur la Table, Inc.](#), C.D.Cal., May 9, 2013  
2012 WL 2117001

Only the Westlaw citation is currently available.  
United States District Court,  
E.D. California.

Estella SCHILLER, individually, and on  
behalf of other members of the general  
public similarly situated, and as an  
aggrieved employee pursuant to the  
Private Attorneys General Act, Plaintiff,  
v.

DAVID'S BRIDAL, INC., a  
Florida Corporation; and Does 1  
through 10, inclusive, Defendants.

No. 1:10-cv-00616-AWI-SKO.

I  
June 11, 2012.

#### Attorneys and Law Firms

[Gene Franklin Williams](#), [Miriam Leigh Schimmel](#), [Payam Shahian](#), [Sue Jin Kim](#), Initiative Legal Group APC, Los Angeles, CA, for Plaintiff.

[Cary G. Palmer](#), [Erika Barbara Pickles](#), Jackson Lewis LLP, Sacramento, CA, for Defendants.

#### FINDINGS AND RECOMMENDATIONS THAT:

#### THE MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT BE GRANTED

#### THE MOTION FOR ATTORNEYS' FEES BE GRANTED

#### OBJECTIONS DUE: 14 DAYS

[SHEILA K. OBERTO](#), United States Magistrate Judge.

## I. INTRODUCTION

\*1 On March 9, 2012, Plaintiff Estella Schiller filed motions for final approval of a class action settlement, for an award of attorneys' fees, and for an enhancement award for Plaintiff as class representative.<sup>1</sup> (Docs.48, 49.) No opposition to the motions was filed, and no objection by a Class Member was submitted. The matter was heard on May 16, 2012; Arthur Meneses, Esq., of Initiative Legal Group APC appeared on behalf of Plaintiff, and Cary Palmer, Esq., of Jackson Lewis LLP appeared on behalf of Defendant David's Bridal, Inc. ("David's Bridal" or "Defendant"). No Class Member appeared at the hearing. For the reasons set forth below, the Court RECOMMENDS that Plaintiff's motions for (1) final approval of the class action settlement, (2) an award of attorneys' fees, and (3) an enhancement award to Plaintiff as class representative be GRANTED.

## II. FACTUAL BACKGROUND

This case was filed on January 15, 2010 (Doc. 1, Exh. A, p. 3), in Stanislaus County Superior Court and was removed by Defendant to federal court on April 8, 2010. (Doc. 1.) The complaint stated putative class wage-and-hour claims alleging that Defendant failed to (1) pay overtime wages; (2) provide meal periods and pay meal period premiums; (3) reimburse for necessary business-related expenses and costs; (4) pay minimum wages; (5) timely pay wages upon termination; (6) timely pay wages during employment; (7) provide accurate and itemized wage statements; and (8) comply with the [California Business & Professions Code §§ 17200 et seq.](#) (Doc. 1, Exh. A; Doc. 37.)<sup>2</sup> The complaint also sought penalties under the California Private Attorneys General Act of 2004 ("PAGA"). Plaintiff unsuccessfully challenged Defendant's removal to federal court. (Doc. 23.) Discovery commenced in September 2010. (See Doc. 31.) A Second Amended Complaint alleging the same claims was filed on June 29, 2011. (Doc. 37.)

On May 4, 2011, the parties mediated their dispute with David Rotman, Esq., and after approximately 10 hours of negotiation, the parties reached a settlement of Plaintiff's claims. (Williams Decl., Doc. 39-1, ¶ 8.) The parties memorialized the terms of their proposed settlement in a "Joint Stipulation of Settlement and Release Between Plaintiff and Defendant" ("Settlement Agreement") (Doc.

39–1, Exh. 1), and on October 7, 2011, filed a request for preliminary approval of the class settlement. (Doc. 39.) On November 9, 2011, the Court granted preliminary approval for the settlement, authorized the notice process, and scheduled a hearing to consider final approval of the settlement. (Doc. 46.) On March 9, 2012, Plaintiff filed a Motion for Final Approval of Class Action Settlement (“Motion for Final Approval”), a motion for attorneys’ fees, and a request for an enhancement award. (Docs. 48, 49.) Defendant filed a statement of non-opposition to Plaintiff’s motions. (Doc. 54.) On April 9, 2012, the Court issued an order for supplemental briefing and reset the hearing on Plaintiff’s motions to May 16, 2012. (Doc. 55.) A hearing was held on May 16, 2012, and Plaintiff’s motions were submitted for decision.

### III. THE PARTIES’ SETTLEMENT

\*2 On October 7, 2011, the parties filed a Notice of Settlement, indicating that they had negotiated a resolution of their dispute. (Doc. 39.) The terms of the parties’ Settlement Agreement is summarized below.

#### A. The Composition of the Settlement Classes

The Settlement Agreement provides for the certification, for settlement purposes only, of two classes comprised of (1) all salaried store employees of David’s Bridal in California between January 1, 2007, and November 9, 2011; and (2) all hourly store employees of David’s Bridal in California between January 1, 2007, and November 9, 2011 (the “Settlement Classes”). (Doc. 39–1, Exh. A, ¶ 5.) The parties agreed that the Settlement Classes would not include any person who previously settled or released any of the claims covered by the Settlement Agreement, or any person who previously was paid or received awards through civil or administrative actions for the claims covered by the Settlement Agreement. (Doc. 39–1, Exh. 1, ¶ 5.)

#### B. The Material Terms of the Settlement Agreement

Plaintiff and Defendant have agreed to settle the underlying class claims in exchange for a “Maximum Settlement Amount,” which totals \$518,245.00.<sup>3</sup> The Maximum Settlement Amount includes:

- (1) A payment of 33 1/3 percent of the Maximum Settlement Amount for attorneys’ fees and up to \$25,000

in costs to be paid to Class Counsel, (Doc. 39–1, Exh. 1, ¶ 16);

- (2) A payment of \$5,000 to Plaintiff as the class representative, (Doc. 39–1, Exh. 1, ¶ 14(c)(v));
- (3) A payment of \$7,500 to the California Labor and Workforce Development Agency for payment of civil penalties, (Doc. 39–1, Exh. 1, ¶ 14(c)); and
- (4) The costs of administration of settlement to Simpluris, Inc., the settlement administrator, up to \$30,000, (Doc. 39, 15:18);<sup>4</sup>

The remainder of the settlement amount, after deduction of the above-noted payments, constitutes the “Net Settlement Amount” and will be used to pay the Class Members. (Doc. 39–1, Exh. 1, ¶ 14(c).) After deductions, there will be approximately \$286,078.00 remaining as the Net Settlement which will be distributed as follows:

- (1) Class Members who submit valid and timely claim forms are entitled to payment from the Net Settlement Amount, (Doc. 39–1, Exh. 1, ¶ 14(c));
- (2) No matter how many Class Members submit valid claim forms, at least 55% of the Net Settlement Amount will be paid to Participating Class Members, (Doc. 39–1, Exh. 1, ¶ 14(c));
- (3) If less than 55% of the Net Settlement is claimed, the difference between 55% of the Net Settlement Amount and the Net Settlement Amount claimed will be distributed to the Participating Class Members in proportion to their recovery under the Settlement (Doc. 39–1, Exh. 1, ¶ 13); and
- (4) Any Net Settlement Amount in excess of 55% that is not claimed by Participating Class Members will be retained by Defendant (Doc. 39–1, Exh. 1, ¶ 14(c)).

#### C. The Scope of the Release in the Settlement Agreement

\*3 The parties’ Settlement Agreement sets forth the following release by the Class Members:

21. Upon final approval by the Court of this Stipulation of Settlement, and except as to such rights or claims as may be created by this Stipulation of Settlement, the Hourly Associate Class and the Store Manager Class, and each member of those Classes who has not submitted a valid Request for Exclusion, fully releases and discharges

Defendant, its present and former parent companies, subsidiaries, related or affiliated companies, shareholders, officers, directors, employees, agents, attorneys, insurers, successors and assigns, and any individual or entity which could be jointly liable with Defendant, from any and all claims, debts, liabilities, demands, obligations, guarantees, costs, expenses, attorneys' fees, damages, action or causes of action under any state, federal or local law, arising out [of] the allegations made in the Action and that reasonably arise out of the facts alleged in the Action.

(Doc. 39–1, Exh. 1, ¶ 21.)

### 1. Claims Released by the Hourly Associate Class

a. The claims to be released by the Hourly Associate Class include all claims under state, federal, and local law arising out of the allegations made in the Lawsuit and that reasonably arise out of the facts alleged in the Lawsuit as to the Hourly Associate Class, including claims for alleged unpaid wages, unpaid overtime wages, unpaid minimum wages, off-the-clock work regular rate of pay, unreimbursed business expenses, failure to provide meal periods or pay meal period premiums, failure to provide rest periods or pay rest period premium payments, failure to timely pay wages during employment, failure to timely pay wages at separation, failure to provide accurate and itemized wage statements, failure to maintain payroll records as required by law, additional 401(k) benefits and/or deferred compensation benefits and/or matching benefits for payments received under the Settlement, unfair competition, unfair business practices, unlawful business practices, fraudulent business practices, injunctive relief, penalties, interest, fees, costs, claims for restitution and other equitable relief, liquidated damages, and any other claims and allegations made in the Lawsuit and that arise out of the facts alleged in the Lawsuit, from January 1, 2007[,] up to and including the date of this Final Order, arising from employment by Defendant within California (“Hourly Associate Released Claims”). The Released Claims do not include workers' compensation claims. In addition, as of the date of the final approval of the Settlement, the Class Representative and the Settlement Class and each member of the Class who has not submitted a valid Request for Exclusion will be forever [ ] barred and enjoined from instituting or accepting damages or obtaining relief against Defendant for any acts or omissions occurring during the period from January 1, 2007[,] up to and including the date of entry of the final approval order, relating to the Released Claims.

\*4 (Doc. 39–1, Exh. 1, ¶ 21(a).)

### 2. Claims to be Released by the Store Manager Class

b. The claims to be released by the Store Manager Class include all claims under state, federal, and local law arising out of the allegations made in the Lawsuit and that reasonably arise out of the facts alleged in the Lawsuit as to the Store Manager Class, including claims for alleged unreimbursed business expenses, unfair competition, unfair business practices, unlawful business practices, fraudulent business practices, injunctive relief, penalties, interest, fees, costs, claims for restitution and other equitable relief, liquidated damages, and any other claims and allegations made in the Lawsuit and that arise out of the facts alleged in the Lawsuit from January 1, 2007 [,] up to and including the date of this Final Order, arising from employment by Defendant within California (“Store Manager Released Claims”). The Released Claims do not include workers' compensation claims. In addition, as of the date of the final approval of the Settlement, the Class Representative and the Settlement Class and each member of the Class who has not submitted a valid Request for Exclusion will be forever [ ] barred and enjoined from instituting or accepting damages or obtaining relief against Defendant for any acts or omissions occurring during the period from January 1, 2007[,] up to and including the date of entry of the final approval order, relating to the Released Claims.

(Settlement Agreement, Doc. 39–1, Exh. 1, ¶ 21(b).)

### D. Notice to the Class Members

The procedures for giving notice to the Class Members, as set forth in the parties' Settlement Agreement (*see* Doc. 39–1, Exh. 1, ¶ 18) and ordered in the Court's Preliminary Approval Order (Doc. 46), have been carried out by the Settlement Administrator, Simpluris, Inc. (Bui Supp. Decl., Doc. 57, ¶ 2.)<sup>5</sup> On November 10, 2011, Simpluris received the Class Notice prepared jointly by Class Counsel and counsel for Defendant and approved by the Court. (Bui Decl., Doc. 52, ¶ 4.)<sup>6</sup> The Class Notice summarized the Settlement Agreement's principal terms, provided Class Members with an estimate of how much they would be paid if the Settlement Agreement received final approval, and advised Class Members regarding how to submit claims for payment, opt out of the Settlement, or object to the Settlement. (Bui Supp. Decl., Doc. 57, Exh. B.)

Counsel for Defendant subsequently provided Simpluris with a list (“Class List”) of all Class Members, their mailing

addresses, and other information necessary to calculate estimated settlement payments. (Bui Decl., Doc. 52, ¶ 4.) The mailing addresses contained in the Class List were processed and updated using the National Change of Address Database maintained by the U.S. Postal Service. (Bui Decl., Doc. 52, ¶ 5.) On December 23, 2011, a Notice Packet, containing a claim form and the approved Class Notice (*see* Bui Supp. Decl., Doc. 57, Exhs. A–B), was mailed to 3,326 Class Members via First-Class U.S. mail. (Bui Supp. Decl., Doc. 57, ¶ 4.) A toll-free telephone number was included in the Class Notice for the purposes of allowing the Class Members to call Simpluris for inquiries regarding the Settlement. (Bui Decl., Doc. 52, ¶ 3.)

\*5 On January 18, 2012, an additional person was added to the Settlement Class and a Notice Packet was mailed to this individual. (Bui Supp. Decl., Doc. 57, ¶ 6.) This person was a former employee of Defendant, and contacted Simpluris to inquire about the Settlement Agreement. (Bui Supp. Decl., Doc. 57, ¶ 6.) This individual was employed by Defendant during the period covered by the settlement, but was not named in the Class List provided by Defendant. (Bui Supp. Decl., Doc. 57, ¶ 6.) Defendant's counsel was able to confirm that this individual was a member of the Settlement Class, thus bringing the total number of Class Members to 3,327. (Bui Supp. Decl., Doc. 57, ¶ 6.)

A total of 699 Class Notice and Claim Forms (“Notice Packets”) were returned by the post office. (Bui Decl., Doc. 52, ¶ 8.) For those individuals without a forwarding address, Simpluris attempted to locate their current mailing address using Accurant, a research tool owned by LexisNexis. (Bui Decl., Doc. 52, ¶ 8.) In total, 621 Notice Packets were re-mailed to either a new address, a forwarding address provided by the U.S. Postal Service, or pursuant to the individual's request. (Bui Decl., Doc. 52, ¶ 8.) Ultimately, 143 Notice Packets remain undeliverable because Simpluris was unable to find a current mailing address. (Bui Decl., Doc. 52, ¶ 8.)

As of April 18, 2012, Simpluris has received a total of 779 completed Claim Forms from Class Members. Of the 779 claim forms submitted, 19 were untimely and 7 were deficient. (Bui Supp. Decl., Doc. 57, ¶ 7.) The 779 claims received from participating Class Members represent 23.41 percent of the entire Settlement Class. (Bui Supp. Decl., Doc. 57, ¶ 7.) Participating Class Members have claimed approximately 41.02 percent of the Net Settlement Amount, or approximately \$114,879.50. (Bui Supp. Decl., Doc. 57, ¶ 7.) As April 18, 2012, there were five (5) requests for

exclusion, which represents 0.15 percent of the Settlement Classes, and no Class Member has submitted an objection to the Settlement Agreement. (Bui Supp. Decl., Doc. 57, ¶¶ 9–10.)<sup>7</sup>

## IV. DISCUSSION

### A. Final Approval of the Class–Action Settlement Should be Granted

#### 1. The Rule 23(a) Class–Certification Requirements Are Satisfied

[Federal Rule of Civil Procedure 23\(e\)](#) requires court approval of class action settlements. “[I]n the context of a case in which the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.2003). In confirming the propriety of class certification, courts assess the following prerequisites: “(1) numerosity of plaintiffs; (2) common questions of law or fact predominate; (3) the named plaintiff's claims and defenses are typical; and (4) the named plaintiff can adequately protect the interests of the class.” *Hanlon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992) (citing [Fed.R.Civ.P. 23\(a\)](#)).

##### a. Numerosity

\*6 Numerosity requires that the class be so numerous that the joinder of individual class members would be impracticable. [Fed.R.Civ.P. 23\(a\)\(1\)](#). Across the two Settlement Classes, 3,327 California Class members were ultimately identified. The number of Class Members in this case indicates that the numerosity factor has been satisfied. *See, e.g., Jordan v. L.A. Cnty.*, 669 F.2d 1311, 1319 (9th Cir.1982) (indicating that class sizes of 39, 64, and 74 are sufficient to satisfy the numerosity requirement), *vacated on other grounds*, 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982).

##### b. Commonality

[Rule 23\(a\)](#) also requires there be “questions of law or fact common to the class.” The Rule does not require that all questions of law or fact be common to every single member of the class. To satisfy the commonality requirement, Plaintiff need only point to a single issue common to the class. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 (9th Cir.2007). Commonality exists when there is either a common



legal issue stemming from divergent factual predicates or a common nucleus of facts resulting in divergent legal theories. *Hanlon v. Chrysler Corp.* (“*Chrysler Corp.*”), 150 F.3d 1011, 1019 (9th Cir.1998). In other words, commonality is generally satisfied where, as in this case, “the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.” *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir.2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504–05, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005). Differences in the ways in which these practices affect individual members of the class do not undermine the finding of commonality. *Id.*, at 868 (finding commonality requirement satisfied despite individual class members having different disabilities, since all suffered similar harm as a result of defendant's actions).

Here, the parties have agreed for purposes of settlement only that the following questions of law and fact are common to the classes:

- (1) Whether Defendant complied with applicable laws affecting Plaintiff and the Settlement Classes regarding hours worked, unpaid wages, overtime wages, minimum wages, meal and rest periods, record-keeping violations, pay stubs, wage statements and methods of payment, under the California Labor Code and Wage Orders of the California Industrial Welfare Commission;
  - (2) Whether Defendant engaged in unfair, unlawful or fraudulent business practices affecting Plaintiff and the Settlement Classes in violation of [California Business and Professions Code sections 17200–17208](#); and
  - (3) Whether Plaintiff and the Settlement Classes are entitled to injunctive or declaratory relief.
- (Doc. 39–1, Exh. 1, ¶ 6(b)(i)–(iii).) These common questions of law or fact are sufficient to satisfy the commonality requirement.

### c. Typicality

Typicality exists when “the claims or defenses of the representative are typical of the claims or defenses of the class.” *Fed.R.Civ.P. 23(a)(3)*. “Typicality ... is said ... to be satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.” *Armstrong*, 275 F.3d at 868. Under the rule's “permissive standards,” representative claims are typical if they are “reasonably co-extensive with those of absent class members; they need to

be substantially identical.” *Chrysler Corp.*, 150 F.3d at 1020. Plaintiff's claims are “co-extensive” with the other Class Members, as Plaintiff and the absent Class Members were all Defendant's employees who were paid under the same pay practices and worked under the same company-wide employment policies. The typicality requirement is satisfied.

### d. Adequacy of Representation

\*7 The final *Rule 23(a)* prerequisite, adequacy of representation, is satisfied if “the representative parties will fairly and adequately protect the interests of the class.” *Fed.R.Civ.P. 23(a)(4)*. The satisfaction of constitutional due process concerns requires that absent class members be afforded adequate representation prior to an entry of judgment, which binds them. *Chrysler Corp.*, 150 F.3d at 1020. Determining the adequacy of representation requires consideration of two questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Id.*

The adequacy-of-representation requirement is met here because Plaintiff has the same interests as the absent Class Members, e.g., obtaining payment for wages unlawfully withheld and reimbursement of business expenses. Further, there is no apparent conflict of interest between the named Plaintiff's claims and those of the other Class Members, particularly because Plaintiff has no separate and individual claims apart from the Classes.

Moreover, here there are no allocation dilemmas among the Settlement Classes as in *Amchen Products, Inc. v. Windsor* (“*Amchen*”), 512 U.S. 591 (1997). In *Amchen*, the settlement agreement eliminated all present and future claims against asbestos manufacturers, and the class counsel was attempting to represent both groups of plaintiffs, i.e., those who had present claims and those who had future claims. The conflict between the two groups of plaintiffs was that “the present plaintiffs had a clear interest in a settlement that maximized current funds, while future plaintiffs had a strong interest in preserving funds for their future needs and protecting the total fund against inflation.” *Chrysler Corp.*, 150 F.3d at 1020–21 (discussing *Amchen*, 512 U.S. 591 (1997)). This case does not involve sub-classes or classes with diverging interests with respect to allocation of the settlement funds in the same manner as *Amchen*. The Court does not perceive any conflicts of interest between Plaintiff and Class Counsel and other Class Members.

In considering the adequacy requirement, the Court also evaluates whether Plaintiff and Class Counsel will pursue the Classes' claims with vigor. The Ninth Circuit has held that, "[a]lthough there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation." *Chrysler Corp.*, 150 F.3d at 1021. There is no challenge to the competency of the Class Counsel, and the Court finds that Plaintiff is represented by experienced and competent counsel who have successfully certified 21 class actions through contested motions. (Meneses Decl., Doc. 50, ¶ 2.) Further, this is not a case where Class Counsel will receive a disproportionate distribution of the settlement or where the Class Members will receive no monetary distribution, but Class Counsel will be rewarded amply. *Chrysler Corp.*, 150 F.3d at 1021.

\*8 The rationale to settle this case was supported, in part, by the pendency of *Brinker Restaurant Corp. v. Superior Court*, 165 Cal.App.4th 25, 80 Cal.Rptr.3d 781 (2008), *aff'd in part*, 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513 (2012) before the California Supreme Court at the time the matter was settled. California law, as it related to certain of the Classes' claims, was in potential flux, and settlement, rather than continued litigation, was potentially more beneficial to the Class Members. In other words, it appears that the settlement was arrived at for strategic reasons that benefitted the Classes, rather than Class Counsel's inability or unwillingness to pursue further litigation. See *Chrysler Corp.*, 150 F.3d at 1021 (class counsel inadequate by definition where counsel demonstrates an inability or unwillingness to try the case). In sum, the Court finds that the adequacy factor is satisfied.

#### e. Conclusion

As initially determined in the Court's preliminary approval order and as set forth above, the Rule 23(a) requirements for class certification have been satisfied.

## 2. Rule 23(b)(3) Requirements

In addition to meeting the requirements of Rule 23(a), to be certified a class must also meet at least one of the requirements of Rule 23(b). Plaintiff asserts that class resolution is superior to other available methods for the fair and efficient adjudication of the controversy and the requirements of Rule 23(b) are met.

Pursuant to Rule 23(b)(3), a class action may be maintained if:

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods of fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Certification under Rule 23(b)(3) is appropriate whenever the interests of the parties can be served best by settling their differences in a single action. Courts refer to the requirements of Rule 23(b)(3) as its "predominance" and "superiority" requirements. *Amchen*, 521 U.S. at 615.

#### a. Predominance

As the Rule 23(a)(3) analysis already considers the issue of commonality, the focus of the Rule 23(b)(3) predominance inquiry is on the balance between individual and common issues. *Hanlon*, 150 F.3d at 1022. In other words, "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchen*, 521 U.S. at 623. The "main concern in the predominance inquiry ... [is] the balance between individual and common issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir.2009).

\*9 The parties' Settlement Agreement sufficiently demonstrates that "[a] common nucleus of facts and potential legal remedies dominates this litigation." *Chrysler Corp.*, 150 F.3d at 1022. If individual Class Members were to sue individually, members of the same proposed settlement class would bring essentially the same claims against Defendant. The central issues raised by the complaint concern policies and practices of Defendant which applies broadly to all the employees in each of the two proposed settlement classes. *Similar to Wright v. Linkus Enterp., Inc.*, 259 F.R.D. 468, (E.D.Cal.2009), this case derives from alleged policies that required Class Members to work, for example, without

compensation, meal and rest periods, and/or reimbursement for expenses. The alleged company-wide and uniform employment policies comprise a common nucleus of facts for employees in each group of salaried and hourly store employees. *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 399 (C.D.Cal.2008) (class certification is usually appropriate where “liability turns on an employer’s uniform policy that is uniformly implemented, since in that situation predominance is easily established”); see also *Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508, 520 (N.D.Cal.2008) (common issues predominate meal break claims and claims for failure to provide itemized wage statements because these were class-wide policies, and litigation of these claims involve class-wide proof rather than individualized inquiry). Moreover, the alleged violations of state law entitle the Class Members to the same legal remedies. Thus, despite the minor factual differences among Class Members in each of the two proposed settlement classes—such as the number of hours worked—common issues predominate.

#### b. Superiority

In addition to the predominance requirement, Rule 23(b)(3) provides a non-exhaustive list of matters relevant to the Court’s determination that class action treatment is superior to other methods of adjudication. Rule 23(b)(3)(A)-(D). The first factor considers the interest of each member in “individually controlling the prosecution or defense of separate actions.” Rule 23(b)(3)(A). This factor weighs against class certification where each class member has suffered sizeable damages or has an emotional stake in the litigation. See, e.g., *In re N. Dist. of Cal., Dalkon Shield, Etc.*, 693 F.2d 847, 856 (9th Cir.1982), *abrogated on other grounds in Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir.1996). In this case, where monetary damages that each Class Member suffered individually are relatively modest, certifying a class action is favored. *Id.*

The second factor to consider is “the extent and nature of any litigation concerning the controversy already begun by or against members of the class.” Fed.R.Civ.P. 23(b)(3)(B). The only known litigation concerning the controversy is the case at issue in this settlement; thus this factor favors certification.

\*10 The third Rule 23(b)(3) factor is “the desirability or undesirability of concentrating the litigation of the claims in the particular forum” (Fed.R.Civ.P. 23(b)(3)(C)), and the fourth factor is “the likely difficulties in managing a class action” (Fed.R.Civ.P. 23(b)(3)(D)). The fourth factor “encompasses the whole range of practical problems that

may render the class format inappropriate for a particular suit.” *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 164, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). In the context of settlement, however, the third and fourth factors are rendered moot and are not relevant. See *Amchem*, 521 U.S. at 620 (where a district court is confronted with a settlement-only class certification, the court need not inquire whether the case, if tried, would present manageability problems because the point is that there will be no trial).

“Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be the superior method for managing litigation if no realistic alternative exists.” *Valentino*, 97 F.3d at 1234. The potential recovery by any individual plaintiff is relatively small and thus individual members of the classes would likely be unwilling or unable to institute separate suits, and the filing of individual suits by 3,327 separate plaintiffs would create an unnecessary burden on judicial resources. In sum, the Rule 23(b)(3) predominance and superiority requirements are satisfied.

#### c. Conclusion

For the reasons set forth above, the Settlement Classes here meet the class-certification requirements of Rules 23(a) and 23(b)(3).

### 3. The Proposed Settlement is Fair, Reasonable, and Adequate

Settlements are afforded a presumption of fairness if (1) the negotiations occurred at arm’s length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected. 4 William B. Rubenstein, Alba Conte, & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed. West 2011). Here, the parties’ Settlement Agreement was reached through the efforts of counsel in mediation with the assistance of a mediator who has experience handling wage-and-hour class-action disputes. Thus, the parties’ settlement is entitled to a presumption of fairness.

A settlement may be approved only after a hearing and on a finding that it is fair, reasonable, and adequate. Fed.R.Civ.P. 23(e)(1)(C). Such approval is required to ensure that any settlement reached is consistent with the plaintiff’s fiduciary obligations to the class. See *Ficalora v. Lockheed Cal. Co.*, 751 F.2d 995, 996 (9th Cir.1985). The court also serves as guardian for the absent class members who will be bound by

the settlement, and therefore must independently determine the fairness of any settlement. *Id.* However, the court's role in intruding upon what is otherwise a private consensual agreement is limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or collusion between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned. *FDIC v. Alshuler (In re Imperial Corp. of Am.)*, 92 F.3d 1503, 1506 n. 5 (9th Cir.1996). Therefore, the settlement hearing is not meant to be conducted as a trial or rehearsal for trial on the merits. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir.1982).

**\*11** In determining whether a proposed settlement is “fair, reasonable, and adequate” pursuant to [Rule 23\(e\)](#), courts may consider factors including (1) the strength of the case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the settlement amount; (5) the extent of discovery completed and the stage of the proceedings; (6) whether the class has been fairly and adequately represented during the settlement negotiations; and (7) the reaction of the class to the proposed settlement. See *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.2004) (citing *Chrysler Corp.*, 150 F.3d at 1026).

#### a. The Strength of Plaintiff's Case

The initial fairness factor addresses Plaintiff's likelihood of success on the merits and the range of possible recovery. See *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 964–65 (9th Cir.2009). In determining the probability of the plaintiff's success on the merits, there is no “particular formula by which that outcome must be tested.” *Id.* at 965. Instead, the court's assessment is based on “nothing more than an ‘amalgam of delicate balancing, gross approximations and rough justice.’” *Officers for Justice*, 688 F.2d at 625 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir.1974)). The court is not required to “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of the outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Id.* Rather, the court may presume that, through negotiation, the parties, their counsel, and the mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery. See *Rodriguez*, 563 F.3d at 965 (“We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution ...”).

Plaintiff acknowledges that it was forced “to discount David's Bridal's potential liability by the risks associated with certifying a claim for meal break violations,” particularly because of the pendency of *Brinker Rest. Corp. v. Super. Ct.*, 165 Cal.App.4th 25, 31, 80 Cal.Rptr.3d 781 (2008) before the California Supreme Court. (Doc. 48, 19:18–20:5.) In *Brinker*, the Supreme Court considered whether California law requires an employer to ensure meal breaks are taken or whether an employer need only provide a meal break. This unsettled area of California law potentially diminished Plaintiff's possible recovery with respect to the meal break claim.<sup>8</sup>

Further, Plaintiff indicates that Defendant began automatically paying meal period premiums in November 2008; since 2008, Defendant has paid over 10,500 meal period premiums to putative class members and continues to automatically pay meal period premiums. (Doc. 48, 20:5–12.)

Plaintiff's rest-break claim rested on a similar theory of liability as the meal-break claim, but because employers have no obligation to record rest breaks, the relative lack of written proof as to this claim diminished the prospect of certifying that claim and the value of the claim was significantly discounted. (Doc. 48, 20:13–20.)

**\*12** Therefore, although Plaintiff maintained her strong belief in the underlying merits of the case, Plaintiff's counsel has acknowledged the weaknesses in both the meal and rest-break claims and considered the uncertainties surrounding proving the claims in a lengthy and complex jury trial in negotiating the settlement amount. As a result, Plaintiff's likelihood of success appears to have been properly accounted for in the settlement amount. This factor weighs in favor of approval.

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

The risk, expense, complexity, and likely duration of further litigation are factors that consider “the probable costs, in both time and money, of continued litigation.” *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D.Del.2002). Generally, “unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” *Nat'l Rural Telecomms. Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D.Cal.2004) (quoting 4 A Conte & H. Newberg, *Newberg on Class Actions*, § 11:50 at 155 (4th ed.2002)).



Moreover, settlement is encouraged in class actions where possible. See *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir.1976) (“It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which present serious problems of management and expense.”).

In this case, there remained significant procedural hurdles for the putative class to confront, including certification of the class. Avoiding such unnecessary expenditures of resources and time benefits all the parties and the Court. Moreover, there were significant risks in continued litigation and no guarantee of recovery given the current state of the law due to the pendency of *Brinker*. The settlement, therefore, provides Class Members with another significant benefit that they would not receive if the case proceeded: certain and prompt relief. See *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D.Colo.1974) (“It has been held proper to take the bird in hand instead of a prospective flock in the bush.”). This factor weighs in favor of approval.

#### c. The Risk of Maintaining Class Action Status Throughout the Trial

A settlement in this case was reached prior to the Supreme Court's recent decision in *Brinker Restaurant Corp. v. Superior Court*. Given the recent decision by the California Supreme Court in that case, class certification for Plaintiff's claim regarding missed meal breaks would be more difficult. See *Brinker*, 53 Cal.4th at 1040, 139 Cal.Rptr.3d 315, 273 P.3d 513 (holding employer is required to provide a meal period to employees, but “is not obligated to police meal breaks and ensure no work thereafter is performed”). On the other hand, the fact that one claim may not be amenable to class treatment does not necessarily affect the propriety of class certification with respect to other claims of the class or necessarily impact the ability to maintain class-action status throughout trial. See generally *Norris–Wilson v. Delta–T Grp., Inc.*, 270 F.R.D. 596, (S.D.Cal.2010) (granting class certification find that “[t]he overtime, wage statement, and waiting time claims are suitable for class-wide treatment, but the meal and rest break and reimbursement claims aren't.”) Because the Court is not aware of any risks to maintaining class-action status throughout trial, this factor is neutral.

#### d. The Settlement Amount

\*13 “[S]ettlement is about compromise, a yielding of the highest hopes in exchange for certainty and resolution.” *In re Warfarin*, 212 F.R.D. at 257–58. Class counsel negotiated a Maximum Settlement Amount of \$518,245 to resolve the claims. The Maximum Settlement Amount includes (1) \$166,667 for attorneys' fees and up to \$25,000 in costs to be paid to Class Counsel; (2) a \$5,000 Class Representative enhancement award; (3) a \$7,500 PAGA payment to the California Labor and Workforce Development Agency; and (4) \$28,000 in Claims Administration Costs. The Net Settlement Amount to the Classes is approximately \$286,078.00. Twenty-four percent of the Settlement Classes claimed 41 percent of the Net Settlement Amount. Predicated on the weeks worked by a particular Class Member during the relevant time period, the average recovery is \$198.70 across the Settlement Classes, and the highest recovery is approximately \$695.78. Although a larger award was theoretically possible, “the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes.” *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir.1998) (internal citations and quotation marks omitted).

In light of the claims at issue in this case and the size of the proposed settlement classes, the Court finds that the Settlement Amount appears fair and reasonable and this factor weighs in favor of final approval.

#### e. The Extent of Discovery Completed and the Stage of the Proceedings

“A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair.” *DIRECTV*, 221 F.R.D. at 528. What is required is that “sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently.” 4 William B. Rubenstein, Alba Conte, & Herbert B. Newbert, *Newberg on Class Actions* § 11.41 (4th ed. West 2011). Here, Plaintiff's counsel expended significant time and resources conducting formal discovery including propounding interrogatories and 276 document requests. (Williams Decl., Doc. 39–1, ¶ 5; Doc. 48, 11:26–12:1.) In response to these discovery requests, Defendant produced, among other things, 4,700 pages of responsive documents as well as the names and contact information of prospective Class Members. (Williams Decl., Doc. 39–1, ¶ 5, Doc. 48, 12:1–4.) Class counsel interviewed prospective Class Members and, during the course of mediation, Defendant informally produced class-wide data that enabled Class Counsel to realistically estimate



Defendant's exposure. (Williams Decl., Doc. 39–1, ¶ 6; Doc. 48, 12:5–12.)

As sufficient discovery has been conducted and the matter was settled during arms-length negotiations, this factor weighs in favor of approval.

#### **f. Whether the Class Has Been Fairly and Adequately Represented During the Settlement Negotiations**

In considering the adequacy of the terms of a settlement, the trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties. See *DIRECTV*, 221 F.R.D. at 528 (“Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation”) (internal quotation marks and citations omitted). This reliance is predicated on the fact that “[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.” *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.1995).

**\*14** Here, the experience and view of Class Counsel weigh in favor of approving the Settlement. Class Counsel understood the complex risks and benefits of any settlement and concluded that the proposed Settlement was a just, fair, and certain result. (Williams Decl., Doc. 39–1, ¶ 8.) Moreover, Class Counsel is experienced in this area of law and the settlement was reached after lengthy mediation. This factor weighs in favor of approval.

#### **g. The Reaction of the Class to the Proposed Settlement**

Where a settlement agreement enjoys overwhelming support from the class, this lends weight to a finding that the settlement agreement is fair, adequate, and reasonable. *DIRECTV*, 221 F.R.D. at 529 (“It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members”); see also *Boyd v. Cechtle Corp.*, 485 F.Supp. 610, 624 (N.D.Cal.1979) (finding that objections from only 16 percent of the class was persuasive that the settlement was adequate).

Here, less than two-tenths of one percent of Class Members opted out of the Settlement. The Class Administrator, Simpluris, has received 779 valid Claim Forms, representing approximately 24 percent of the total Class Members identified across the Settlement Classes. Finally, no objection

to the Settlement Agreement was received, and no Class Member appeared at the final approval hearing to state any objection. The response of the Settlement Classes was positive, and this weighs in favor of finding that the settlement is favorable to the Class Members.

#### **4. The Proposed Payment to the Claims Administrator is Reasonable and Should be Approved**

The \$28,000 that Plaintiff requests be approved as payment to the Claims Administrator appears fair and reasonable. The fee requested here is consistent with other Claims Administration fees in similar class-action settlements, particularly in light of the number of Notice Packets that the Claims Administrator was required to process. See, e.g., *Harris v. Vector Marketing Corp.*, 2012 WL 381202, at \* (N.D.Cal. Feb.6, 2012) (awarding \$250,000 in administration costs where claims administrator sent out 68,487 notices). The Court finds the requested Claims Administration fee to be reasonable and recommends that it be approved and awarded.

#### **5. The Proposed PAGA Payment is Reasonable and Should be Approved**

A settlement reached between the parties on a PAGA claim is subject to court review and approval. Cal. Lab.Code § 2699(l). Pursuant to the Settlement Agreement, the parties have agreed to pay \$7,500 to the California Labor and Workforce Development Agency (“LWDA”) from the Maximum Settlement Amount as civil penalties pursuant to the California Labor Code Private Attorneys General Act of 2004, codified at California Labor Code §§ 2699, et seq. This comports with settlement approval of PAGA awards in other cases. See, e.g., *Chu v. Wells Fargo Investments, LLC*, No. C 2011 WL 672645, at \* 1 (N.D.Cal. Feb. 16, 2011) (approving PAGA settlement payment of \$7,500 to the LWDA out of \$6.9 million common-fund settlement). The Court finds that the PAGA Payment is set at a reasonable amount, and recommends that it be approved.

#### **6. Conclusion**

**\*15** In sum, as set forth above, the relevant factors weigh in favor of approving the parties' Settlement Agreement. It represents a substantial recovery that avoids the risks associated with protracted litigation in a document-intensive wage-and-hour case. It is HEREBY RECOMMENDED that the Settlement be APPROVED.

## B. Plaintiff's Motion for Attorneys' Fees and Litigation Expenses Should be Granted

### 1. Payment of Attorneys' Fees in the Amount of \$166,667 is Fair and Reasonable

The parties' Settlement Agreement provides that Defendant will pay "33 1/3 percent of the Maximum Settlement Amount for Class Counsel's attorneys' fees, plus costs not to exceed \$25,000, subject to Court approval." (Doc. 39-1, Exh. 1, ¶ 16.) Defendant further agreed that it would not oppose Class Counsel's application for attorneys' fees and costs up to this amount.<sup>9</sup> (Doc. 39-1, Exh. 1, ¶ 16.) On March 9, 2012, Plaintiff filed a motion for an award of attorneys' fees and costs in the amount of \$166,667.00 and \$25,000.00, respectively. (Doc. 49, 11:5-7.)

Federal Rule of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h). In diversity actions such as this, the Ninth Circuit applies state law to determine the right to fees and the method for calculating fees. See *Mangold v. Cal. Public Util. Comm.*, 67 F.3d 1470, 1478 (1995); see also *Hartless v. Clorox Co.*, 273 F.R.D. 630, 642 (S.D.Cal.2011).

The California Supreme Court has held that, "when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorneys' fees out of the fund." *Serrano v. Priest*, 20 Cal.3d 25, 34, 141 Cal.Rptr. 315, 569 P.2d 1303 (1977). A common fund results when "the activities of the party awarded fees have resulted in the preservation or recovery of a certain or easily calculable sum of money-out of which sum or 'fund' the fees are to be paid." *Id.* at 35, 141 Cal.Rptr. 315, 569 P.2d 1303. Here, the structure of the parties' Settlement Agreement creates a Maximum Settlement Amount that constitutes a common fund out of which reasonable attorneys' fees will be paid.

California courts employ two methods when calculating a reasonable award of attorneys' fees in common fund actions. See *Lealao v. Beneficial Cal., Inc.*, 82 Cal.4th 19, 26 (2000). The first calculates attorneys' fees based on a percentage of the benefit bestowed upon the class. *Id.* ("Percentage fees have traditionally been allowed in such common fund cases, although, as will be seen, the lodestar methodology may also

be utilized in this context.").<sup>10</sup> The second approach utilizes the lodestar method determined by multiplying the hours counsel reasonably expended by a reasonable hourly rate, which may then be enhanced by a multiplier. *Id.*

**\*16** A California appellate court has recently evaluated the two differing methods and summarized the law as follows:

Regardless of whether attorney fees are determined using the lodestar method or awarded based on a "percentage-of-the-benefit" analysis under the common fund doctrine, "[t]he ultimate goal ... is the award of a 'reasonable' fee to compensate counsel for their efforts, irrespective of the method of calculation ... It is not an abuse of discretion to choose one method over another as long as the method chosen is applied consistently using percentage figures that accurately reflect the marketplace.

*In re Consumer Privacy Cases ("Consumer Privacy")*, 175 Cal.App.4th 545, 557, 96 Cal.Rptr.3d 127 (2009).

Under the percentage method, "[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Id.* at 558, n. 13, 96 Cal.Rptr.3d 127 (internal citation and quotation marks omitted). Here, the Settlement Agreement provides that out of the common fund, up to 33 and 1/3 percent will be paid for attorneys' fees. (Doc. 39-1, p. 14:26-28.)

No one set of factors has been prescribed by the California courts to evaluate the reasonableness of the percentage-of-the-benefit requested in common fund settlements; instead, the goal is to assess the reasonableness of the requested fee. *Consumer Privacy*, 175 Cal.App.4th at 557, 96 Cal.Rptr.3d 127. To assess reasonableness, Plaintiff cites several California cases that discuss factors in determining a multiplier where fees were calculated under the lodestar method. For example, in *Cundiff v. Verizon California, Inc.*, 167 Cal.App.4th 718, 724 n. 3, 84 Cal.Rptr.3d 377, the court noted that a lodestar figure may be adjusted based on various factors including, "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, and (4) the contingent nature of the fee award."

Many of the same factors assessed by California courts in calculating a lodestar multiplier are considered by federal courts in weighing the reasonableness of a percentage-

of-the-benefit attorneys' fee award. The Ninth Circuit has approved consideration of six factors to determine whether the percentage requested is fair and reasonable: (1) the results achieved; (2) the risk of litigation; (3) the skill required; (4) the quality of work performed; (5) the contingent nature of the fee and the financial burden; and (6) the awards made in similar cases. *Vizcalino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.2002); *Six Mexican Workers v. Az. Citrus Growers*, 904 F.2d 1301 (9th Cir.1990); *In Re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1046 (N.D.Cal.2007). The typical range of acceptable attorneys' fees under this approach in the Ninth Circuit is 20 percent to 33 and 1/3 percent of the total settlement value, with 25 percent considered a benchmark percentage. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir.2000).

**\*17** California courts do not prescribe the 25-percent benchmark that is established under federal law in the Ninth Circuit as a starting point to evaluate fee requests. See 1 Richard M. Pearl, *California Attorney Fee Awards*, §§ 8.12–8.15 (3d ed.2012). Nonetheless, the 25-percent benchmark is a helpful assessment tool in evaluating the requested fee award, even where use of the benchmark is not required. As there is no definitive set of factors that California courts mandate or endorse for determining the reasonableness of attorneys' fees in the context of a common-fund percentage-of-the-benefit approach, the Court considers the reasonableness of the percentage requested in light of the factors endorsed by the Ninth Circuit, with the 25 percent award as a starting point.

### 1. The Results Achieved

The claims in this case concerning Defendant's alleged failure to pay class members for meal and rest breaks, provided compliant wage statements, or reimburse employees for business expenses are not types of claims that generally produce substantial individual damage awards; thus the recovery of \$518,245 is a favorable result, particularly in light of the pendency of *Brinker* during the settlement negotiations.

Plaintiff notes that Class Members will receive an average of approximately \$198.70, with the highest payment to a Class Member being \$695.78. Plaintiff contends that this is a substantial recovery where Defendant asserted compelling defenses to liability; Plaintiff also notes several similar actions where the gross recoveries per class member were less than \$90, including *Doty v. Costco*, No. 05–cv–03241 (C.D.Cal. May 14, 2007) (\$58 average gross recovery); *Sorenson v. PetSmart*, No. 2:06–cv–02674–JAM–

DAD (E.D.Cal. Dec. 17, 2008) (\$57 average gross recovery). Overall, the Court finds that the results achieved are good, which is highlighted by the fact that there was no objection to the settlement amount or the attorneys' fees requested. See *DIRECTV*, 221 F.R.D. at 529.

### 2. The Risks Involved

As noted above, there were significant risks involved in this litigation. Specifically, some of the central claims involved the timely provision of rest and meal periods—an issue that was pending before the California Supreme Court at the time this case was settled. Further, Plaintiff notes that Defendant began automatically paying meal period premiums in November 2008 and has paid over 10,500 meal period premiums since that time. (Doc. 48, 20:5–12.) Moreover, as noted above, the rest period claims were similar to those for meal periods. Proof of missed rest periods was complicated by the lack of payroll records, and would have had to be established through declarations, which would have diminished the prospect of certifying that claim. (Doc. 48, 20:13–25.)

As to Plaintiff's claim that Defendant provided employees with non-compliant wage statements, Plaintiff would have been required to show that the failure to provide an accurate paystub caused an employee to suffer injury. There was a risk that Plaintiff would not have been able to establish that Class Members suffered actual injury as a result of non-compliant wage statements. Plaintiff maintains that employers have successfully argued that the “suffering injury” requirement is not satisfied merely by the deprivation of a legal right, and thus Plaintiff would have been required to confront this defense in litigating this claim.

**\*18** With respect to Defendant's alleged failure to reimburse Class Members for expenses necessarily incurred by employees in the execution of their duties, the claim was generally predicated on the mileage Class Members were required to drive to perform the tasks for Defendant. (Doc. 48, 21:24–22:5.) Defendant claimed that most of the miles driven by Class Members were actually part of those members' return commutes because the banking tasks were performed at the end of the Class Members' shifts, and thus not compensable. Plaintiff and Class Members faced risk that Defendant's argument would undercut the viability of this claim.

As a result, Plaintiff and the Classes faced significant substantive risks in further litigation of these claims.

### 3. Skill Required and Quality of the Work Performed

The case required specialized skills to litigate the legal theories relating to the wage-and-hour law at issue, particularly in light of the uncertainty of California law as it related to meal breaks. As it related to rest periods, this was challenging in light of the fact that Defendant did not keep records of rest breaks.

Moreover, this case was actively litigated for approximately two years, there was motion practice, and significant discovery was taken. *See generally Navarro v. Servisair*, No. C 08–02716 MHP, 2010 WL 1729538, at \*3 (N.D.Cal. Apr.27, 2010) (finding proposed award of 30 percent of settlement fund unjustifiably departed from benchmark due in part to speed with which parties reached a settlement). Overall, the specialized skill of Class Counsel in this area of the law was generally an asset to the Class Members and the quality of work performed was good.

### 4. The Contingent Nature of the Representation

Class Counsel litigated the case on a contingency basis, which necessarily presented considerable risk. *See In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 396–98 (S.D.N.Y.1999) (“No one expects a lawyer whose compensation is contingent on the success of his services to charge, when successful, as little as he would charge a client who in advance of the litigation has agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee dependent solely on the reasonable amount of time expended.”). Class Counsel also maintains that the contingent nature of the work was even riskier here because Class Counsel advanced substantial costs that would not be recouped had the litigation been unsuccessful. (Doc. 49, 28:5–6.)

In considering both the contingent nature of the work performed by Class Counsel as well as the risk involved in the costs advanced, these factors support the fee award requested. *See Graham v. Daimler Chrysler Corp.*, 34 Cal.4th 553, 580, 21 Cal.Rptr.3d 331, 101 P.3d 140 (2004) (“A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services.”) (internal citations omitted).

### 5. Awards Made in Similar Cases

\*19 Finally, the percentage award requested in this case is commensurate with the percentage-of-the-benefit awards made in other wage-and-hour actions in this district:

- (1) *Bond v. Ferguson Enterprises, Inc.*, No. 1:09–cv–01662–OWW–MJS, Docket No. 59 (E.D. Cal. June 30, 2011) (court approved attorneys' fees in the amount of 30 percent of the common fund);
- (2) *Vasquez v. Coast Valley Roofing*, 266 F.R.D. 482 (E.D.Cal.2010) (wage-and-hour action putative class-action settlement where court approved award of attorneys' fees in the amount of 33.3 percent of the common fund);
- (3) *Benitez v. Wilbur*, No. 1:08–cv–01122 LJO GSA, Doc. No. 52 (E.D.Cal., Dec. 15, 2009) (awarding 33.3 percent of the benefit to the class in attorneys' fees);
- (4) *Chavez v. Petrissans*, (Case No. 1:08–cv–00122 LJO GSA, Doc. No. 89 (E.D.Cal. Dec. 15, 2009) (court approved awards of attorneys' fees of 33.3 percent of the common fund);
- (5) *Romero v. Producers Dairy Foods, Inc.*, No. 1:05–cv–0484–DLB, 2007 WL 3492841, at \*4 (E.D.Cal. Nov.14, 2007) (class-action settlement where court approved attorneys' fees in the amount of 33 percent of common fund);
- (6) *Vasquez v. Jim Aartman, Inc.*, No. 1:02–cv–05624–AWI–LJO, Doc. No. 130 (classaction settlement where court approved attorneys' fees in the amount of 30 percent of the settlement amount);
- (7) *Baganha v. Cal. Milk Transport*, No. 1:01–cv–05729–AWI–LJO, Doc. No. 147 (class-action settlement where court approved attorneys' fees in the amount of 31.25 percent of settlement amount); and
- (8) *Randall Willis et al. v. Cal. Western Transport and Earl Baron et al. v. Cal Western Transport* (consolidated cases), No. 1:00–cv–05695–AWI–LJO (court approved attorneys' fees in the amount of 33.3 percent of the settlement amount).

The Settlement Agreement's provision of \$166,667 in attorneys' fees (approximately 32.1 percent of the total settlement amount), is fair and reasonable in light of the awards of attorneys' fees in similar wage-and-hour cases in this district.



6. The Fee Request is Reasonable

Although Class Counsel's requested fees exceed the 25 percent benchmark under federal law, this diversity case is not governed by federal law. Further, even applying the federal-law benchmark, the Court finds sufficient reasons to exceed that marker considering the risks of litigation, the contingent nature of the work, the favorable reaction of the class, and the fee awards in other wage-and-hour cases. As discussed below, the requested fee is far smaller than the lodestar calculation, even where the hourly rates requested by counsel are reduced to account for attorney hourly rates charged in the local community. See *Vasquez*, 266 F.R.D. at 491 (approving attorneys' fees award of 33 1/3 of the settlement fund and noting it was "significantly less" than the asserted lodestar). Reducing the award to 25 percent of the class recovery would not adequately compensate counsel and would essentially result in an unreasonably low award of attorneys' fees, particularly in light of the lodestar cross-check.

**\*20** Based on the risks faced in the litigation, the contingent nature of the work performed, the reaction of the class, and awards in other wage-and-hour cases, the Court concludes there are sufficient reasons to depart upward from the benchmark even if this case were governed by federal law. In any event, under both California and federal standards for assessing fee awards, the requested 32.1 percent of the class recovery represents a reasonable fee award and should be approved. See *Ozga v. U.S. Remodelers, Inc.*, No. C 09–05112 JSW, 2010 WL 3186971, at \* 3 (N.D.Cal. Aug.9, 2010) (departure from benchmark warranted due to excellent results, reaction of the class, the risks faced due to the uncertainty of California law in similar wage-and-hour cases).

3. Cross-Check of Percentage Request with Lodestar Calculation Indicates Fee Award is Reasonable

Courts frequently cross-check a percentage fee request with the lodestar analysis. See, e.g., *Sutter Health Uninsured Pricing Cases*, 171 Cal.App.4th 495, 512, 89 Cal.Rptr.3d 615

(2009) (cross-checking percentage-based award by noting that multiplier of 2.52 is "fair and reasonable").

"In conducting a lodestar cross-check, the court must first determine the dollar value of the proposed percentage-based fee award." *In re Portal Software, Inc. Sec. Litig.* ("*Portal Software*"), No. C–03–5138–VRW, 2007 WL 4171201, at \*14 (N.D.Cal. Nov.26, 2007). The requested award here is \$166,667.00, which represents a requested fee of 32.1 percent of the \$518,245.00 Settlement Amount. The next step is to cross-check the proposed percentage fee against the lodestar. *Id.* "Three figures are salient in a lodestar calculation: (1) counsel's reasonable hours, (2) counsel's reasonable hourly rate and (3) a multiplier thought to compensate for various factors (including unusual skill or experience of counsel, or the ex ante risk of nonrecovery in the litigation)." *In re HPL Tech., Inc. Sec. Litig.* ("*HPL Tech.*"), 366 F.Supp.2d 912, 919 (N.D.Cal.2005).

The multiplier is calculated from the ratio of the proposed percentage fee to the computed lodestar fee and is assessed for reasonableness. *Portal Software*, 2007 WL 4171201, at \* 14. Where the use of the lodestar method is used as a cross-check to the percentage method, it can be performed with a less exhaustive cataloguing and review of counsel's hours. See *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir.2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting."); *In re Immune Response Sec. Litig.*, 497 F.Supp.2d 1166 (S.D.Cal.2007) ("Although counsel have not provided a detailed cataloging of hours spent, the Court finds the information provided to be sufficient for purposes of lodestar cross-check."); *Sutter Health Uninsured Pricing Cases*, 171 Cal.App.4th 495, 512, 89 Cal.Rptr.3d 615 (2009) (where lodestar used to cross-check percentage approach, documentation of the lodestar figure is often submitted in summary or declaration form, without submission of full time records).

**\*21** Here, Class Counsel's asserted lodestar totals \$275,404.50. By declaration, Class Counsel indicates the following rates, hours, and fees of each attorney who performed work on the litigation:

Schedule of Fees

| Attorney       | Title   | Hourly Rate | Hours Worked | Total Fees Requested |
|----------------|---------|-------------|--------------|----------------------|
| Arthur Meneses | Partner | \$695       | 30.7         | \$21,337             |



|                  |                       |       |              |                  |
|------------------|-----------------------|-------|--------------|------------------|
| Mark Estrella    | Former Senior Counsel | \$655 | 60.8         | \$39,824         |
| Gene Williams    | Senior Counsel        | \$590 | 61.8         | \$36,462         |
| David Medby      | Former Senior Counsel | \$520 | 22.3         | \$11,596         |
| Jamie Greene     | Associate             | \$420 | 47.5         | \$19,950         |
| Eduardo Santos   | Associate             | \$420 | 112.8        | \$47,376         |
| Liana Beneli     | Associate             | \$395 | 25.1         | \$9,915          |
| Sue Kim          | Associate             | \$395 | 174.3        | \$68,849         |
| Alexandria Witte | Associate             | \$330 | 14.2         | \$4,686          |
| Carla Topdjian   | Associate             | \$330 | 46.7         | \$15,411         |
| <b>Total</b>     |                       |       | <b>596.2</b> | <b>\$275,406</b> |

(Meneses Decl., Doc. 50, ¶ 9.)<sup>11</sup>

The Court finds the 596.2 hours expended on the litigation to be reasonable in light of law and motion practice with respect to subject matter jurisdiction, the amount of discovery conducted, the number of Defendant's employees included in the Settlement Classes, and the mediation preparation required. The Court notes that in *Alvarado v. Nederend*, No. 1:08-cv-01099-OWW-DLB, 2011 WL 1883188, at \* 8 n. 2 (E.D.Cal. May 17, 2011), counsel expended approximately 308 hours reaching a settlement in a wage-and-hour class action involving issues related to meal and rest breaks with approximately 150 class members. Class membership here is significantly larger than that in *Alvarado* and arguably entailed review of a larger amount of discovery. The Court finds no reason to reduce the number of hours set forth in counsel's lodestar calculations.

As it relates to Class Counsel's requested hourly rates, in *Bond v. Ferguson Enterprises, Inc.*, No. 1:09-cv-01662-OWW-MSJ, 2011 WL 2648879, at \*11–13 (E.D.Cal. Jun.30, 2011), the court recently considered a motion for attorneys' fees in

the context of finally approving a wage-and-hour class action settlement. In performing a lodestar cross-check of the class counsel's fee request, the court noted that “[p]revailing hourly rates in the Eastern District of California are in the \$400/hour range.” *Id.* at \* 12. The court then compared the requested rates to those prescribed under the Laffey Matrix, a widely recognized compilation of attorney and paralegal rates used in the District of Columbia, and frequently used in determining fee awards. *Id.* In comparison to the Laffey Matrix rates, adjusted for cost of living, the hourly rates requested by the class counsel in *Bond* were approximately 10 percent higher. The court determined that a 10 percent “haircut” to class counsel's requested rates was justified. Thus, for example, a requested hourly rate of \$750 for a partner with more than 20 years of experience was adjusted to \$675 per hour. A requested hourly rate of \$290 for an associate with two years of experience was adjusted to \$261 per hour.<sup>12</sup>

**\*22** In this case, a similar reduction should be applied to account for hourly rates in the relevant community. While Class Counsel cites numerous cases where their requested hourly rates have been approved, none of these cases is

from the Fresno division of the Eastern District, which is the relevant community for purposes of the fee motion. *Nichols v. City of Taft*, 155 Cal.App.4th 1233, 1242–43, 66 Cal.Rptr.3d 680 (2007) (“The lodestar figure is calculated using the reasonable rate for comparable legal services in the *local community* for noncontingent litigation of the same type, multiplied by the reasonable number of hours spent on the case.”) The hourly rates requested by Class Counsel are similar to those requested in *Bond* and should be

#### Schedule of Fees

| Attorney         | Title                 | Hourly Rate | Adjusted Hourly Rate | Hours Worked | Total Fees       |
|------------------|-----------------------|-------------|----------------------|--------------|------------------|
| Arthur Meneses   | Partner               | \$695       | \$556                | 30.7         | \$17,069         |
| Mark Estrella    | Former Senior Counsel | \$655       | \$524                | 60.8         | \$31,859         |
| Gene Williams    | Senior Counsel        | \$590       | \$472                | 61.8         | \$29,170         |
| David Medby      | Former Senior Counsel | \$520       | \$416                | 22.3         | \$9,277          |
| Jamie Greene     | Associate             | \$420       | \$336                | 47.5         | \$15,960         |
| Eduardo Santos   | Associate             | \$420       | \$336                | 112.8        | \$37,901         |
| Liana Beneli     | Associate             | \$395       | \$316                | 25.1         | \$7,932          |
| Sue Kim          | Associate             | \$395       | \$316                | 174.3        | \$55,079         |
| Alexandria Witte | Associate             | \$330       | \$264                | 14.2         | \$3,749          |
| Carla Topdjian   | Associate             | \$330       | \$264                | 46.7         | \$12,329         |
| <b>Total</b>     |                       |             |                      | <b>596.2</b> | <b>\$220,325</b> |

The resulting lodestar amounts to \$220,325 for 596.2 hours expended, which equates to an across-the-board billing rate of \$369.54 per hour for attorney time, without consideration of the attorneys' years of experience. The adjusted rates range from \$264 to \$556 per hour to account for the

reduced. Moreover, because the declaration filed to support the requested rates does not specify the numbers of years each attorney has been practicing in this area of law, or practicing law in general, a larger across-the-board reduction is warranted. For these reasons, reducing the requested hourly rates by 20 percent is a reasonable “haircut” that accounts for the rates in this forum. This adjustment is as follows:

respective attorney's greater experience and position within Class Counsel's firm.<sup>13</sup> This comports generally with the observation by the Court in *Bond* that the prevailing rates in the Eastern District are in the range of \$400 per hour for attorney work, and is consistent with the \$225 to \$675 range of hourly rates awarded in *Bond*. Where the lodestar is utilized

as a cross-check, such a “rough calculation” is appropriate. *Bond*, 2011 WL 2648879, at \* 12 (“Because the lodestar is being used here as a cross-check, the court may use a ‘rough calculation of the lodestar.’ ” (quoting *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06–04149 MMM, 2008 WL 8150856, at \* 9 (C.D.Cal. July 21, 2008) (courts “generally also use a rough calculation of the lodestar as a cross-check to assess the reasonableness of the percentage award”))).

\*23 Notwithstanding this reduction in hourly rates, however, the resulting lodestar (\$220,325) is still greater than the percentage fee award counsel requests (\$166,667). This results in an implied multiplier of 0.76 (\$166,667 / \$220,325), i.e., a negative multiplier. An implied negative multiplier supports the reasonableness of the percentage fee request. See, e.g., *Portal Software*, 2007 WL 4171201, at \* 16 (resulting negative multiplier under lodestar cross-check analysis “suggest[ed] that the percentage-based amount is reasonable and fair based on the time and effort expended by class counsel”). The lodestar cross-check confirms the reasonableness of the percentage-fee requested by Class Counsel.

Based on the factors weighed in considering the award under the percentage method and the lodestar cross-check method, the requested award of fees is reasonable and the Court RECOMMENDS that Class Counsel's request for attorneys' fees be GRANTED.

### C. Plaintiff's Motion for the Award of an Enhancement to the Class Representative Should be Granted

Plaintiff seeks an enhancement award in the amount of \$5,000 for Class Representative Estella Schiller. This payment is intended to recognize the time and efforts Ms. Schiller spent for the benefit of Class Members, as well as the additional risk Ms. Schiller undertook.

An enhancement award paid to a class representative must be assessed by the court because “[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.” *Staton*, 327 F.3d at 975 (quoting *Weseley v. Spear, Leeds & Kellogg*, 711 F.Supp. 713, 720 (E.D.N.Y.1989) (internal quotation marks omitted)). Thus, in considering an enhancement award to a class representative, a court should weigh all “relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, ... the amount of time and

effort the plaintiff expended in pursuing the litigation[,] ... and reasonable fears of workplace retaliation.” *Staton*, 327 F.3d at 977 (internal quotation marks and citation omitted).

In this case, the Class Representative assisted in the prosecution and settlement of the Class' claims by (1) reviewing her own personal employment records to select documents she believed would assist Class Counsel in litigating the case; (2) spending time assisting Class Counsel with discovery; (3) assisting with settlement negotiations, and (4) spending time evaluating the settlement. (Schiller Decl., Doc. 51, ¶¶ 8–11.) Plaintiff estimates that she spent approximately 25 to 30 hours assisting Class Counsel in the prosecution of the case. (Schiller Decl., Doc. 51, ¶ 13.) Further, Plaintiff agreed to execute a general release of claims which is broader than the release signed by the other Class Members. (Schiller Decl., Doc. 51, ¶ 12.) Plaintiff, as Class Representative, undertook a financial risk that, in the event of a judgment in favor of Defendant, she may have been personally responsible for any costs awarded in favor of Defendant. See, e.g., *Whiteway v. FedEx Kinkos Office & Print Servs., Inc.*, No C 05–2320 SBA, 2007 WL 4531783, at \* 2–\*4 (N.D.Cal. Dec.17, 2007). Additionally, there has been no objection to the Class Representative enhancement award.

\*24 Finally, the amount requested is consistent with other incentive awards in this Circuit. See *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir.2000) (approving \$5,000 to two plaintiff representatives of 5,400 potential class members in a \$1.75 million settlement); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at \* 5 (N.D.Cal. Feb.16, 2011) (awarding \$10,000 to two plaintiff representatives involved in case for five years and \$4,000 to three representative plaintiffs participating in case for two years, from a \$6.9 million settlement fund); *Hopson v. Hanesbrands, Inc.*, No. 08–cv–0844 EDL, 2009 WL 928133, at \*10 (N.D.Cal. Apr.3, 2009) (approving \$5,000 award to one member of 217–member class from \$408,420 settlement amount); *Glass v. UBS Fin. Servs.*, No. C–06–4068 MMC, 2007 WL 221862, at \*16–17 (N.D.Cal. Jan.26, 2007) (approving \$25,000 award to each of four plaintiff representatives of 13, 176–member class from \$45 million settlement amount).

In view of the work the Class Representative has performed on behalf of Class Members, the risk the Class Representative undertook, and the Class Members' response to the Settlement, the requested payment is reasonable and appropriate. The Court RECOMMENDS that Plaintiff's

request for a \$5,000 Class Representative enhancement award be GRANTED.

approval of the class action settlement filed at Docket No. 59 is recommended for issuance.

#### IV. RECOMMENDATION

Based on consideration of the memorandums, declarations, and exhibits filed in support of the present motions, the Court RECOMMENDS as follows:

1. Plaintiff's Motion for Final Approval of the Class Action Settlement be GRANTED;
2. Plaintiff's Motion for Attorneys' Fees be GRANTED in the amount of \$166,667.00;
3. Plaintiff's Request for a Class Representative Enhancement Award be GRANTED; in the amount of \$5,000 and
4. Should the district court adopt these findings and recommendations, Plaintiff's proposed order for final

These findings and recommendations are submitted to the district judge assigned to this action, pursuant to [28 U.S.C. § 636\(b\)\(1\) \(B\)](#) and this Court's Local Rule 304. Within fourteen (14) days of service of this recommendation, any party may file written objections to these findings and recommendations with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge will review the magistrate judge's findings and recommendations pursuant to [28 U.S.C. § 636\(b\)\(1\)\(C\)](#). The parties are advised that failure to file objections within the specified time may waive the right to appeal the district judge's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.1991).

IT IS SO ORDERED.

#### All Citations

Not Reported in F.Supp.2d, 2012 WL 2117001

#### Footnotes

- 1 Although the electronic docket indicates that Plaintiff filed a "Motion for Judgment," the caption of the motion filed is a "Motion for Final Approval of Class Action Settlement." (Doc. 48.)
- 2 Plaintiff filed the original complaint on January 15, 2010, Defendant was served with a First Amended Complaint on March 9, 2010 (See Doc. 1, ¶ 13), and a Second Amended Complaint was filed with this Court on June 29, 2011 (Doc. 37).
- 3 Plaintiff's Motion for Final Class Settlement Approval indicates that Class Counsel originally negotiated a Maximum Settlement Amount of \$500,000. According to Plaintiff, to ensure that the Maximum Settlement Amount remained fair and adequate consideration, Class Counsel obtained a guarantee from Defendant that if, after preliminary approval, the Class size or total number of work weeks exceeded the original estimates by more than 10 percent, the Maximum Settlement Amounts would be increased proportionally. After preliminary approval, the size of the Classes and the total work weeks exceeded the original estimates by more than 10 percent and the Maximum Settlement Amount was increased to \$518,245.00 to account for this. (Doc. 48, 9:13, n. 2.) At the May 16, 2012, hearing, counsel for both parties confirmed the Maximum Settlement Amount is \$518, 245.00.
- 4 An supplemental declaration submitted by a case manager of Simpluris, Inc. indicates that the total cost for administering the settlement was \$28,000. (Bui Supp. Decl., Doc. 57, ¶ 11.)
- 5 Michael Bui, a case manager for Simpluris, Inc., filed a supplemental declaration in support of Plaintiff's Motion for Final Approval on April 18, 2012, to clarify certain typographical errors contained in his original March 9, 2012, declaration. (Doc. 57.)
- 6 On November 9, 2011, the Court appointed Initiative Legal Group APC "Class Counsel." (Doc. 46.)
- 7 At the May 16, 2012, hearing, the parties confirmed that this information remained unchanged as of the date of the hearing.

- 8 On April 12, 2012, the California Supreme Court issued its decision in *Brinker*, affirming it in part and holding that employers need only provide a meal break, not ensure that it is taken by the employee. *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513 (2012).
- 9 A defendant's agreement not to oppose a fee request up to a certain amount as part of a settlement is often referred to as a "clear sailing" provision or clause. See, e.g., *Appollo Grp. Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2012 WL 1378677, at \*5 (D.Ariz. Apr.20, 2012). Notwithstanding an agreement between the parties related to the payment of attorneys' fees, courts have an independent duty to determine whether the requested attorneys' fees are reasonable. *Bluetooth Headset Prods. Liab. Litig. v. Brennan*, 654 F.3d 935, 941 (9th Cir.2011).
- 10 But see *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1809, 56 Cal.Rptr.2d 483 (1996) ("The award of attorney fees based on a percentage of a 'common fund' recover is of questionable validity in California."). Although the California Supreme Court recognized the use of a percentage method in common fund cases in *Serrano v. Priest*, 20 Cal.3d 24 (1977), the *Dunk* court asserted that later cases have cast doubt upon the use of the percentage method to determine attorneys' fees in California Class actions. *Id.* (citing *People ex rel. Dep't of Transp. v. Yuki*, 31 Cal.App.4th 1754, 1769, 37 Cal.Rptr.2d 616 (1995), *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal.App.3d 914, 954, 218 Cal.Rptr. 839 (1985), *Jutkowitz v. Bourns, Inc.*, 118 Cal.App.3d 102, 110, 173 Cal.Rptr. 248 (1981)). Several recent California cases following *Dunk*, however, apply the percentage method of calculation. See *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 63 (2008); *Apple Computer, Inc. v. Super. Ct.*, 126 Cal.App.4th 1253, 1270, 24 Cal.Rptr.3d 818 (2005) (noting that although awards in common fund cases are calculated on percentage, ultimate goal is reasonable fee to compensate counsel); *Bell v. Farmers Ins. Exch.*, 115 Cal.App.4th 715, 726, 9 Cal.Rptr.3d 544 (2004).
- 11 The figures in the table were rounded up or down to the nearest dollar by Class Counsel, and thus, the total reflects this rounding.
- 12 The version of the court's order in *Bond* that is published electronically on Westlaw contains a formatting error such that the entire text of the order does not appear on the electronic Westlaw publication. The complete order is located on the court's electronic docket at number 59 in case 1:09-cv-01662-OWW-MSJ.
- 13 The Court was able to ascertain the number of years each attorney performing work on the case has been admitted to practice law in California through the records maintained by the State Bar of California located at <https://www.calbar.ca.gov>.



# **EXHIBIT 25**



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Gonzalez v. Southern Wine & Spirits of America Inc.](#),  
C.D.Cal., April 24, 2014

2010 WL 2196104

Only the Westlaw citation is currently available.

**This decision was reviewed by West editorial  
staff and not assigned editorial enhancements.**

United States District Court,  
S.D. California.

Kirkland SINGER, individually and on behalf  
of Current and Former California Employees  
of Beckton, Dickinson and Company  
and Med-Safe Systems, Inc., Plaintiff,

v.

BECTON DICKINSON AND COMPANY;  
Med-Safe Systems, Inc., doing business as BD  
Medical; and Does 1–10, inclusive, Defendants.

No. 08–CV–821–IEG (BLM).

|

June 1, 2010.

#### Attorneys and Law Firms

[Diane Elizabeth Richard](#), Gracehollis LLP, San Diego, CA,  
for Plaintiff.

[Denise M. Visconti](#), [Van Allyn Goodwin](#), Littler Mendelson,  
San Diego, CA, for Defendants.

ORDER GRANTING:

- (1) CLASS CERTIFICATION;
- (2) FINAL APPROVAL OF CLASS SETTLEMENT;
- (3) REQUEST FOR ATTORNEYS' FEES AND COSTS; and
- (4) REQUEST FOR AN ENHANCEMENT AWARD.

[IRMA E. GONZALEZ](#), Chief Judge.

\*1 Currently before the Court are Plaintiff Kirkland Singer's ("Singer") Motion for Final Approval of Settlement and Motion for an Award of Class Representative Enhancement Award and Attorneys' Fees and Costs. For the reasons set forth below, the Court GRANTS both motions.

#### BACKGROUND

The facts of this case are known to the Court and the parties and need not be repeated herein.

##### I. Procedural Background

On March 27, 2008, Plaintiff filed a purported class action against Defendants on behalf of himself and other current and former employees in the Superior Court for the County of San Diego. [Doc. No. 1]. Defendants removed the case to this Court on May 6, 2008. [*Id.*] On August 11, 2008, following the Court's Order on Defendants' Motion to Strike and Motion to Dismiss, Plaintiff filed a First Amended Complaint ("FAC"). [Doc. No. 16].

In his FAC, Plaintiff alleged wage and hour violations over a class period extending back to March 27, 2004, and sought various forms of relief such as unpaid wages, including statutory wages for meal periods and rest breaks, vacation wages, interest, waiting time penalties, PAGA penalties, restitution, damages, injunctive and other equitable relief, and attorneys' fees and costs under various provisions of the California Labor Code and the applicable wage orders of the Industrial Wage Commission. Primarily, Plaintiff alleged as class claims that: (1) Defendants had an illegal "use-it-or-lose-it" policy, whereby employees forfeited accrued vacation wages ("Vacation Claims"); and (2) Defendants did not pay non-exempt employees all wages due and owing, including meal and rest period premiums, overtime, reporting time, and minimum wages ("Non-Exempt Claims").<sup>1</sup>

Subsequently, according to Plaintiff, parties engaged in extensive informal and formal discovery, investigation, and pre-trial motion practice concerning the facts and the law. As part of those efforts, Plaintiff was subjected to a two-day deposition, and Plaintiff's counsel conducted a two-day deposition of Defendant Med-Safe's person most knowledgeable (Nathan Miller) about policies and practices at

its Oceanside facility relating to reporting time pay, meal and rest periods, vacation/paid-time off, timekeeping, and payroll.

Finally, in April 2009, the parties agreed to engage in settlement discussions, which culminated in a formal, full-day mediation session on May 21, 2009 before a respected neutral mediator, Joel M. Grossman, Esq., who is highly experienced in wage and hour matters such as the claims in this case. Although the May 21, 2009 mediation session resolved much of the dispute, it did not result in a settlement. Mr. Grossman therefore made a mediator's proposal to resolve the parties' impasse, which the parties accepted on June 2, 2009. Subsequently, the parties worked for five months to prepare the present class settlement agreement, and a separate settlement agreement concerning Plaintiff's individual misclassification claim.

## II. The Proposed Settlement

\*2 Pursuant to the proposed settlement, Defendants agreed to pay up to One Million Dollars ("Gross Fund Value") to compensate the Vacation Settlement Group Members and Non-Exempt Settlement Group Members (collectively, "Settlement Group Members"), including Plaintiff, for their alleged unpaid wages, interest, and penalties, and to provide for the accompanying costs, penalty payments, and fees. Specifically, out of the Gross Fund Value: (1) \$3,000.00 has been allocated to be paid to the California Labor Workforce Development Agency ("LWDA") for PAGA penalties pursuant to [Labor Code Section 2699](#); (2) \$8,000.00 will be paid to Simpluris, Inc. for the claim administration process; (3) Plaintiff Singer is entitled to recover a service enhancement award of up to \$25,000.00 for his service to the Settlement Group Members; (4) the firm of GraceHollis LLP would recover an award of litigation costs up to \$11,500.00 and attorneys' fees up to \$333,333.00; and (5) Defendants will pay the employer's portion of payroll taxes attributable to the "wage" component of the individual settlement awards.

Thereafter, \$548,775.00 will be allocated to the Non-Exempt Settlement Group Members ("Non-Exempt Settlement Fund") and \$73,392.00 will be allocated to the Vacation Settlement Group Members ("Vacation Settlement Fund"), for a combined maximum of \$622,167.00 to be paid out as Net Fund Value. Out of this, \$3,000.00 will be paid to the LWDA for PAGA penalties, leaving \$619,167.00 to be paid out to the Settlement Group Members ("Payout Fund"). Under the terms of the proposed settlement, all Settlement Group Members who do not opt-out of the settlement, including

Plaintiff Singer, will be eligible to submit a Claim Form for a settlement award.<sup>2</sup>

The settlement agreement contemplated that there would be approximately 258 persons in the Vacation Settlement Group, and 98 of these would be eligible to claim funds from the Vacation Settlement Fund. To be eligible, each purported class member's employment with Defendants must have ended between March 27, 2004 and December 31, 2006. The Vacation Settlement Awards will be based on 110% of actual vacation wages purportedly owed, calculated by multiplying each Vacation Settlement Member's amount of accrued, unpaid vacation time by that person's final hourly rate of pay. For each Vacation Settlement Award, 50% shall be allocated to "wages," 40% shall be allocated to "penalties," and 10% shall be allocated to "interest." Of the 50% allocated to "wages," payroll deductions will be made for state and federal withholding taxes and any other applicable payroll deductions owed by Defendants as a result of the payment.

The settlement agreement also contemplated that an estimated 251 persons in the Non-Exempt Settlement Group would be eligible to claim funds from the Non-Exempt Settlement Fund. The payment of Non-Exempt Settlement Awards will be calculated by assigning a certain dollar value to each week of work by each employee in a non-exempt position during the class period. For each Non-Exempt Settlement Award, 50% shall be allocated to "wages," 40% shall be allocated to "penalties," and 10% shall be allocated to "interest." Of the 50% allocated to "wages," payroll deductions will be made for state and federal withholding taxes and any other applicable payroll deductions owed by Defendants as a result of the payment.

\*3 In exchange for these awards, the settlement agreement provides that both Vacation Settlement Group Members and Non-Exempt Settlement Group Members will release their respective claims against Defendants for the applicable class periods. Plaintiff Singer furthermore will release all claims against Defendants relating to his employment and separation therefrom, not just the non-exempt and vacation claims. Moreover, the settlement agreement contemplates that Plaintiff's Second Amended Complaint ("SAC"), alleging federal/FLSA claims for overtime, will be deemed filed and dismissed as of final approval of the proposed settlement.<sup>3</sup>

Finally, the proposed settlement provides that it is a "claims made settlement," and therefore any unclaimed share of the Payout Fund shall not become part of the final payout to the

class members, but rather will be retained by Defendants. However, if the total payout to the class members is less than 50% of the Payout Fund, the claimed awards of all Settlement Group Members will be reapportioned so that at least 50% of the Payout Fund is paid out.

### III. Preliminary approval of the settlement and reaction of the class members

On December 9, 2009, the Court preliminarily certified the two classes for settlement purposes, appointed class counsel, granted preliminary approval of the settlement, and ordered Plaintiff to disseminate notice of the settlement to class members. [Doc. No. 42]. On December 29, 2009, the Claim Administrator mailed the notice of class settlement to a total of 266 current and former employees in one or both of the Settlement Groups. (Tittle Decl. ¶¶ 8–9.) The notice provided class members with an opportunity to file a claim for monetary relief, opt out of the settlement, or object to the settlement. (*Id.*, Ex. A.) Out of the 266 notice packets mailed, 87 were returned by the post office. (*Id.* ¶ 10.) After conducting an additional search for updated addresses, 86 of those notice packets were re-mailed. (*Id.*) Ultimately, 29 notice packets were undeliverable because the Claim Administrator was unable to find a better address. (*Id.*)

The Claim Administrator received a total of 175 completed Class Forms, out of which only 174 were valid. (*Id.* ¶ 11.) The 174 valid claims received represented 65.41% of the entire Settlement Class. (*Id.*) The valid claims received in the Vacation Class represented 49.29% of the Vacation Settlement Class and 50.81% of the gross amount claimed. (*Id.*) The valid claims received in the Non-Exempt Class represented 66.02% of the Non-Exempt Settlement Class and 81.78% of the gross amount claimed. (*Id.*) There were no objections or requests for exclusion received. (*Id.* ¶¶ 13–14.)

## DISCUSSION

When the parties reach a settlement agreement prior to class certification, the court is under an obligation to “peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.2003). Thus, the court must first assess whether a class exists, and second, determine whether the proposed settlement is “‘fundamentally fair, adequate, and reasonable.’” *Id.* (citations omitted). Accordingly, in the present case, the Court will first

examine the propriety of class certification, followed by the fairness of the settlement agreement, and will then address the questions of attorneys' fees and enhancement award.

### I. Class certification

\*4 A plaintiff seeking a Rule 23(b)(3) class certification must first satisfy the prerequisites of Rule 23(a). Once subsection (a) is satisfied, the purported class must then fulfill the requirements of Rule 23(b)(3). In the present case, the Court had previously preliminarily certified the following two classes: the Non-Exempt Settlement Group and the Vacation Settlement Group. See *Singer v. Becton Dickinson & Co.*, No. 08-CV-821-IEG (BLM), 2009 WL 4809646, at —3–6 (S.D.Cal. Dec.9, 2009). At that time, the Court concluded that the proposed classes satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). See *id.* at —3–5. The Court also found that the proposed classes satisfied the predominance and superiority requirements of Rule 23(b)(3). See *id.* at —5–6. Having reviewed those elements again, the Court adopts its prior analysis in this regard. Accordingly, because Plaintiff has satisfied the requirements of both Rule 23(a) and Rule 23(b)(3), the Court **GRANTS** certification of both classes for the purposes of settlement.

### II. The Settlement

Federal Rule of Civil Procedure 23(e) requires the court to determine whether a proposed settlement is “‘fundamentally fair, adequate, and reasonable.’” *Staton*, 327 F.3d at 959 (quoting *Hanlon*, 150 F.3d at 1026). To make this determination, the court must consider a number of factors, including: (1) the strength of plaintiff's case; (2) “‘the risk, expense, complexity, and likely duration of further litigation;’” (3) “‘the risk of maintaining class action status throughout the trial;’” (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. See *id.* (quoting *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir.2003)). In addition, the settlement may not be the product of collusion among the negotiating parties. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir.2000) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir.1992)).

*A. The strength of Plaintiff's case, the risk, expense, and likely duration of further litigation, and the risk of maintaining class action status throughout the trial*

Plaintiff asserts that the proposed settlement is both fair and reasonable in light of Defendants' available legal and factual grounds for defending against the asserted claims. For example, Defendants contended that they made meal periods available to non-exempt employees and that the non-exempt employees took compliant meal periods. Moreover, Plaintiff admitted that there was "uncertainty surrounding meal and rest periods" that could have ultimately barred or limited any recovery on "late," "short," or "missed" meal and rest period class claims. Specifically, Plaintiff was concerned the California Supreme Court would adopt Defendants' construction of the meal period provision—i.e., that all that Defendants had to do was make a meal period available.

\*5 In addition, Plaintiff recognized that until mid-2007 there was legal uncertainty as to whether meal and rest premiums were wages or penalties, which could have ultimately limited the extent of Defendants' liability under Sections 203 and 226 of the Labor Code, as well as any accompanying PAGA penalties. Finally, in deciding to settle, Plaintiff took into consideration that if he did not settle, he would be required to take the risk and expense of bringing a class certification motion in August 2009, and subsequently the risk and expense of trial and any subsequent appeal. In light of these admitted weaknesses, the Court agrees that the actual recovery through settlement confers substantial benefits on the class that outweigh the potential recovery through full adjudication.

*B. The amount offered in settlement*

In the present case, the proposed settlement yields a Payout Fund of \$619,167.00 to the Settlement Group Members, which constitutes 28.84% of the claimed losses. Broken down by class, the Vacation Settlement Group Members will be able to recover approximately 110% of their claimed losses, while the Non-Exempt Settlement Group Members will be able to recover approximately 26% of their claimed losses. Such a disparity between recoveries appears to be justified by the comparative strengths of the claims. As noted above, Plaintiff had a number of reservations about the Non-Exempt Claims due to the factual and legal uncertainties associated with those claims, which is why those claims were discounted. On the other hand, Defendants' liability for the Vacation Claims was

more straightforward, which is why those claims were not discounted.

In light of the uncertainties involved with respect to the Non-Exempt Claims, the Court finds the amounts offered in settlement to be adequate. *See, e.g., Glass v. UBS Fin. Serv., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at \*4 (N.D.Cal. Jan.26, 2007) (finding settlement of a wage and hour class action for 25 to 35% of the claimed damages to be reasonable in light of the uncertainties involved in the litigation). Moreover, Plaintiff notes that the Settlement Group Members will further benefit from the employment policy changes that Defendants enacted due to this lawsuit. For example, since this lawsuit was instituted, Defendants have apparently reviewed the policies and procedures utilized at the Oceanside facility, conducted an in-depth review of all wage statements and payroll records, and implemented certain auditing tools and training efforts to ensure ongoing compliance with California law. Notably, Defendants appear to have ceased the use of the challenged "auto-deduction" policy and have also implemented a system to pay meal premiums for non-compliant meal periods. Accordingly, the Court finds the amount offered in settlement and the non-monetary benefits to the class members weigh in favor of granting final approval of the settlement.

*C. The extent of discovery completed and the stage of the proceedings*

\*6 In the context of class action settlements, as long as the parties have sufficient information to make an informed decision about settlement, " 'formal discovery is not a necessary ticket to the bargaining table.' " *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir.1998) (quoting *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241 (5th Cir.1982)).

In the present case, parties appear to have engaged in substantial and exhaustive informal and formal discovery. First, even before the lawsuit was initiated, Plaintiff's counsel apparently engaged in a considerable amount of investigative work to determine the size and scope of the claims. Plaintiff's counsel also filed a letter with the LWDA and Defendants, outlining the specific facts and theories upon which Plaintiff relied. Subsequently, two-day depositions were taken of Plaintiff Singer and Defendant Med-Safe's person most knowledgeable (Nathan Miller) about the class claims. In addition, according to Plaintiff, over 325 discovery responses were prepared and assessed, and more than 2,300 pages of documents were produced and analyzed, in the initial disclosures that ensued.



Finally, and most importantly, the parties engaged in settlement discussions, which culminated in a formal, full-day mediation session on May 21, 2009 before a neutral mediator, Joel M. Grossman, Esq., who is highly experienced in wage and hour matters such as the claims in this case. The proposed settlement in this case is the direct result of Mr. Grossman's mediator proposal, which was made to resolve the parties' impasse. Moreover, after the agreement to settle was reached, the parties spent an additional five months preparing the settlement documents. Accordingly, the parties' extensive investigation, discovery, and subsequent settlement discussions weigh heavily in favor of granting final approval.

#### *D. The experience and views of counsel*

As already noted, Plaintiff's counsel has extensive experience, having represented employees and employers in employment litigation matters since 1995, and having acted as class counsel in numerous employment law cases. Accordingly, because counsel believes the present settlement is both fair and adequate, especially in light of some of the factual and legal uncertainties, this also weighs in favor of granting final approval.

#### *E. The reaction of the class members to the proposed settlement*

After dissemination of the class notice to the 266 members, which provided each class member with the terms of the settlement and with an option to opt-out or file an objection, not one class member has filed an objection or a request for exclusion. The absence of any objector strongly supports the fairness, reasonableness, and adequacy of the settlement. *See In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 175 (S.D.N.Y.2000) (“If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.” (citations omitted); *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 624 (N.D.Cal.1979) (finding “persuasive” the fact that 84% of the class has filed no opposition).

\*7 Moreover, there was a total of 174 claim forms returned, which amounts to 65.41% of the entire Settlement Class. This is a significant return rate that also strongly supports the fairness, reasonableness, and adequacy of the settlement. Accordingly, the overall reaction of the class members weighs in favor of granting final approval.

#### *F. Collusion between the parties*

The collusion inquiry addresses the possibility the agreement is the result of either overt misconduct by the negotiators or improper incentives of certain class members at the expense of other members of the class. *Stanton*, 327 F.3d at 960. In the present case, because there is no evidence of overt misconduct, the Court's inquiry focuses on the aspects of the settlement that lend themselves to self-interested action.

First, as already noted, the distribution between the two classes does not appear to be the result of collusion between the parties. Rather, both the distribution and the disparity in ultimate recovery appear to be reasonable in light of the number of affected class members in each class and the merits of the respective claims.

The \$25,000 incentive award for Plaintiff Singer also does not appear to be the result of collusion. The Court evaluates incentive awards using “ ‘relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, ... the amount of time and effort the plaintiff expended in pursuing the litigation ... and reasonable fears of workplace retaliation.’ ” *Stanton*, 327 F.3d at 977 (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.1998)). In the present case, Singer has protected the interests of the class and exerted considerable time and effort in maintaining this action for the past two-and-a-half years, conducting extensive informal discovery, and engaging in day-long settlement negotiations with a respected mediator. The two classes have benefitted from these actions by, *inter alia*, receiving a settlement constituting 110% recovery on the Vacation Claims and the substantive changes in Defendants' policies and procedures at the Oceanside facility regarding the Non-Exempt Claims. Moreover, Singer has agreed not to seek an award of more than \$750.00 from the Payout Fund.

Finally, the attorneys' fees also do not appear to be the result of collusion. Plaintiffs may simultaneously negotiate the merits and attorneys' fees. *Stanton*, 327 F.3d at 971. In the present case, the settlement agreement provides that Plaintiff's counsel, the firm of GraceHollis LLP, would recover an award of litigation costs up to \$11,500.00 and attorneys' fees up to \$333,333.00. With respect to the litigation costs, seeing as Plaintiff's counsel has already incurred costs in the amount of \$12,990.17, the Court finds the award to be reasonable. Likewise, as discussed in more detail below, the Court finds reasonable the recovery of attorneys' fees sought by Plaintiff's counsel.

\*8 For the foregoing reasons, the Court finds that the settlement in this case appears to be “fair, reasonable, and adequate.” *Fed. R. Civ. P. 23(e)(2)*; *Staton*, 327 F.3d at 959. Accordingly, the Court **GRANTS** Plaintiff’s motion for final approval of the settlement.

### III. Attorneys’ fees and costs for class counsel

The settlement agreement provides that Plaintiff’s counsel, the firm of GraceHollis LLP, would recover an award of litigation costs up to \$11,500.00 and attorneys’ fees up to \$333,333.00. Parties to a class action may appropriately negotiate the payment of attorneys’ fees and costs in conjunction with the settlement of the action itself. *See Evans v. Jeff D.*, 475 U.S. 717, 734–35, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986). In the present case, with respect to the litigation costs, seeing as Plaintiff’s counsel has already incurred costs in the amount of \$12,990.17, the Court finds the award to be reasonable. With respect to the attorneys’ fees, the Ninth Circuit has established a 25% “benchmark” for common fund cases. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir.1993). This “benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.” *Six (6) Mexican Workers v. Az. Citrus Growers*, 904 F.2d 1301, 1311 (1990).

Regardless of whether the court uses the percentage approach or the lodestar method, the main inquiry is whether the end result is reasonable. *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir.2000). The Ninth Circuit has identified a number of factors that may be relevant in determining if the award is reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee; (5) the burdens carried by class counsel; and (6) the awards made in similar cases. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir.2002). Nonetheless, an explanation is necessary when the district court departs from the “benchmark” of 25% of recovery. *Powers*, 229 F.3d at 1256–57. The Court turns to each of these factors in turn.

First, the results achieved in this case were very favorable. Broken down by class, the Vacation Settlement Group Members were able to recover approximately 110% of their claimed losses, while the Non-Exempt Settlement Group Members—whose claims faced greater uncertainties—were able to recover approximately 26% of their claimed losses.

Second, as detailed above, the risks of litigation were real and substantial. Third, the complexity and duration of the case, coupled with the intensity of settlement negotiations, weighs in favor of departing from the 25% “benchmark.” Fourth, class counsel took this case on a contingent fee basis and had to forego other financial opportunities to litigate it for more than two years. Fifth, the request for attorneys’ fees in the amount of 33.33% of the common fund falls within the typical range of 20% to 50% awarded in similar cases, and is commensurate with other cases litigated by Plaintiff’s counsel. *See, e.g., Ingalls v. Hallmark Mktg. Corp.*, 08cv4342 VBF (Ex), Doc. No. 77, ¶ 6 (C.D.Cal. Oct. 16, 2009) (awarding 33.33% fee on a \$5.6 million wage and hour class action); *Birch v. Office Depot, Inc.*, Case No. 06cv1690 DMS (WMC), Doc. No. 48, ¶ 13 (S.D.Cal. Sept. 28, 2007) (awarding a 40% fee on a \$16 million wage and hour class action); *Rippee v. Boston Mkt. Corp.*, Case No. 05cv1359 BTM (JMA), Doc. No. 70, at 7–8 (S.D.Cal. Oct. 10, 2006) (awarding a 40% fee on a \$3.75 million wage and hour class action).

\*9 For all of the foregoing reasons, the Court believes that a departure from the 25% “benchmark” is warranted in this case. This is especially so in light of the fact that not a single class member objected to Plaintiff’s counsel’s intent to seek up to \$333,333.00 in attorneys’ fees and up to \$11,500 in costs. Accordingly, the Court finds that the attorneys’ fees and costs requested are reasonable.<sup>4</sup>

### IV. Enhancement award for class representative

Finally, the \$25,000 incentive award for Plaintiff Singer also appears to be reasonable. “The criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.” *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995) (citations omitted).

In the present case, the above factors weigh in favor of approving the enhancement award requested. Plaintiff Singer has protected the interests of the class and exerted considerable time and effort in maintaining this action for the past two-and-a-half years, conducting extensive informal discovery, and engaging in day-long settlement

negotiations. Overall, Plaintiff spent more than 165 hours in connection with prosecution and settlement of the class action claims. The two classes have undoubtedly benefitted from these actions by, *inter alia*, receiving a settlement constituting 110% recovery on the Vacation Claims and the substantive changes in Defendants' policies and procedures at the Oceanside facility regarding the Non-Exempt Claims. Plaintiff Singer has also agreed not to seek an award of more than \$750.00 from the Payout Fund. Finally, no class members has objected to Plaintiff's intent to seek an enhancement award of \$25,000.

The \$25,000 incentive award is also well within the acceptable range awarded in similar cases. *See, e.g., Brotherton v. Cleveland*, 141 F.Supp.2d 907, 913–14 (S.D. Ohio 2001) (approving an award of \$50,000 where the class representative “has been instrumental in bringing [the] lawsuit forward” and “has performed numerous tasks in association with [the] litigation”); *Van Vranken*, 901 F.Supp. at 300 (approving an award of \$50,000 for the named

plaintiff). Accordingly, the Court finds the enhancement award requested to be reasonable.

## CONCLUSION

For the foregoing reasons, the Court: (1) **GRANTS** certification of the applicable classes; (2) **GRANTS** final approval of the settlement; (3) **GRANTS** the request for award of attorneys' fees and costs and **AWARDS** the firm of GraceHollis LLP litigation costs in the amount of \$11,500.00 and attorneys' fees in the amount of \$333,333.00; and (4) **GRANTS** the request for an enhancement award and **AWARDS** Plaintiff Singer a class representative enhancement award in the amount of \$25,000.

**\*10 IT IS SO ORDERED.**

## All Citations

Not Reported in F.Supp.2d, 2010 WL 2196104

## Footnotes

- 1 Plaintiff also alleged that Defendants misclassified him as an exempt employee between February 24, 2004 and April 30, 2005. Plaintiff's misclassification claim, however, was alleged solely as an individual claim, and not on the behalf of the purported class.
- 2 Plaintiff Singer, however, cannot recover more than \$750.00 from the Payout Fund.
- 3 The settlement agreement provides that, “[t]o effectuate the Non-Exempt Released Federal Claims by Non-Exempt Settlement Class Members, the Named Plaintiff shall file a Second Amended Complaint alleging Federal/FLSA claims for overtime for the purpose of confirming such claims are at issue and are being released.” The Court already granted the parties' joint motion in this regard on December 9, 2009. [See Doc. No. 40; see also Doc. No. 44.]
- 4 The Court also notes that the class counsel's lodestar in this case—i.e., the amount billed to date—already equals \$347,958.00. (See Hollis Decl. ¶¶ 36–38.) The “lodestar,” however, is only a cross-check on the reasonableness of the fee award. *See, e.g., Vizcaino*, 290 F.3d at 1050 & n. 5 (“The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement.”).

# **EXHIBIT 26**

2022 WL 4004773

Only the Westlaw citation is currently available.

United States District Court, N.D. California.

Shannon SOBASZKIEWICZ, et al., Plaintiffs,

v.

FEDEX CORPORATION, et al., Defendants.

Case No. 18-cv-07553-PJH

|

Signed September 1, 2022

#### Attorneys and Law Firms

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#### ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 372

[PHYLLIS J. HAMILTON](#), United States District Judge

\*1 Defendant's motion for summary judgment came on for hearing before this court on July 28, 2022. Plaintiffs were

represented by Nathan Piller and Joshua Konecky. Defendant FedEx Ground was represented by Jessica Scott and Brandy Cody. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby rules as follows.

#### BACKGROUND

This is a wage and hour suit brought by long-haul and local delivery drivers who provided transportation and delivery services in California for defendants FedEx Ground Package System, Inc. and FedEx Corporation. Dkt. 371, ¶ 40. Plaintiffs allege that FedEx's labor force was previously made up of individual drivers that FedEx hired directly and labeled as independent contractors. *Id.*, ¶ 7. Plaintiffs allege that, following litigation challenging the "independent contractor" classification, FedEx then pivoted to an "independent service provider" ("ISP") model. *Id.* Plaintiffs allege that the ISPs are "little more than job placement outfits," and that the ISP model is "just a continuation of FedEx's continuing practice of misrepresenting and obscuring the true relationship between FedEx and its drivers: that of employer-employee." *Id.*

The complaint was initially filed as a class action, but class certification was denied, leaving twelve causes of action asserted on behalf of individual plaintiffs Shannon Sobaszkievicz, Herman Overpeck, and Kevin Sterling:

- (1) Common Law Fraudulent Misrepresentation;
- (2) Common Law Conversion;
- (3) Failure to Pay for All Hours Worked, [Cal. Labor Code §§ 201, 202, 204, 221-23, and 226.2](#);
- (4) Failure to Provide Meal Periods, [Cal. Labor Code §§ 226.7, 512 and 8 Cal. Code Regs. § 11090](#);
- (5) Failure to Provide Rest Periods, [Cal. Labor Code § 226.7 and 8 Cal. Code Regs. § 11090](#);
- (6) Failure to Pay Minimum Wages, [Cal. Labor Code §§ 1182.11-82.12, 1194, and 1197-97.1](#);
- (7) Failure to Pay Overtime Compensation, [Cal. Labor Code §§ 510, 515.5, 1194, and 1198 et seq.](#);
- (8) Failure to Keep Accurate Payroll Records, [Cal. Labor Code §§ 1174-74.5](#);



(9) Failure to Furnish Accurate Wage Statements, [Cal. Labor Code § 226](#);

(10) Waiting Time Penalties, [Cal. Labor Code §§ 201–03](#);

(11) Unfair Competition and Unlawful Business Practices, [Cal. Bus. & Prof. Code § 17200](#), [et seq.](#); and

(12) Private Attorneys General Act violations, [Cal. Labor Code § 2698](#), [et seq.](#)

Defendant FedEx Ground (hereafter, “FedEx”) has moved for summary judgment on some, but not all, of plaintiffs’ claims. The scope of FedEx’s motion will be discussed below.

## DISCUSSION

### A. Legal standard

Summary judgment is proper where the pleadings, discovery, and affidavits show that there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(a\)](#). Material facts are those which may affect the outcome of the case. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* “A ‘scintilla of evidence,’ or evidence that is ‘merely colorable’ or ‘not significantly probative,’ is not sufficient to present a genuine issue as to a material fact.” [United Steelworkers of Am. v. Phelps Dodge Corp.](#), 865 F.2d 1539, 1542 (9th Cir. 1989) (citation omitted).

\*2 Courts recognize two ways for a moving defendant to show the absence of genuine dispute of material fact: (1) proffer evidence affirmatively negating any element of the challenged claim and (2) identify the absence of evidence necessary for plaintiff to substantiate such claim. [Nissan Fire & Marine Ins. Co. v. Fritz Cos.](#), 210 F.3d 1099, 1102 (9th Cir. 2000) (“In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.”)

“Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or by the depositions, answers to

interrogatories, and admissions on file, come forth with specific facts to show that a genuine issue of material fact exists.” [Hansen v. United States](#), 7 F.3d 137, 138 (9th Cir. 1993). “When the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact.” *Id.*

The court must view the evidence in the light most favorable to the nonmoving party: if evidence produced by the moving party conflicts with evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014); [Leslie v. Grupo ICA](#), 198 F.3d 1152, 1158 (9th Cir. 1999). However, when a non-moving party fails to produce evidence rebutting defendants’ showing, then an order for summary adjudication is proper. [Nissan Fire](#), 210 F.3d at 1103 (“If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment.”)

### B. Analysis

#### 1. Fraudulent misrepresentation (claim 1)

Plaintiffs’ fraudulent misrepresentation claim is based on the theory that FedEx “misrepresented their employment status to justify writing them out” of employee benefit plans. *See, e.g.*, Dkt. 385 at 25.

The elements of a fraudulent misrepresentation claim are: (1) a misrepresentation, (2) knowledge of falsity (scienter), (3) intent to induce reliance, (4) reasonable reliance, and (5) damages. [Lazar v. Superior Court](#), 12 Cal.4th 631, 638 (1996).

FedEx challenges multiple elements of the fraud claim, but the one the court finds most convincing is the argument that plaintiffs have no evidence of reliance. Specifically, FedEx argues that plaintiffs did not change their position, to their detriment, in reliance on any alleged misrepresentation. *See* Dkt. 386 at 12-13 (citing [Goldilocks Corp. of S. Cal., Inc. v. Ramkabar Motor Inn Inc.](#), 26 Fed. App’x 693, 696 (9th Cir. 2002)).

Plaintiffs’ response is that reliance is a question of fact for the jury, and they cite their own declarations as being “more than sufficient to raise a triable issue of fact.” *See* Dkt. 385 at 30-31. Plaintiffs argue that they “did not seek health, disability, or retirement benefits from FedEx” and “justifiably

relied on FedEx's misrepresentation to believe that doing so would be futile or meaningless." *Id.* at 31. Plaintiffs further argue that "the alleged misrepresentation was so ingrained in the fabric of the scheme, that it would not even occur to drivers like plaintiffs to seek such benefits directly from FedEx, or to challenge any determination that they might not be entitled to employment benefits from FedEx." *Id.*

\*3 FedEx in turn argues that "plaintiffs have never pled or testified that FedEx Ground told them they would get benefits or that they were its employees before they accepted employment with their service providers." Dkt. 372 at 21. Citing plaintiffs' own declarations and deposition testimony, FedEx argues that plaintiffs "understood they would not receive benefits from FedEx Ground" and that they did not make any "change in position" in reliance on any alleged misrepresentation. *Id.* at 21-22.

The record indicates that FedEx is correct in its argument that plaintiffs never actually took any action in reliance on any misrepresentation by FedEx. Plaintiff Sobaszekiewicz stated in her declaration that "I did not feel that I was in a position to seek these benefits," and plaintiff Sterling similarly testified at his deposition that, when he was hired, he did not have any discussion about benefits. *See* Dkt. 372 at 22 (citing Sobaszekiewicz decl., ¶ 48; Sterling dep., 38:14-16). In short, plaintiffs have not presented any evidence that they took action or changed their position in reliance on FedEx's alleged misrepresentation.

Plaintiffs argue that their legal theory is supported by a district court opinion in [Gray v. FedEx](#), 2014 WL 4386741 (E.D. Mo. Sept. 5, 2014), but that case involved only the narrow issue of ERISA preemption. The *Gray* court was not presented with the issue of whether plaintiffs had presented sufficient evidence of reliance to overcome summary judgment. Plaintiffs also argue that FedEx's benefit plans violate the Internal Revenue Code, but plaintiffs provide no support for the proposition that the Internal Revenue Code creates a private right of action that can be asserted through a fraud claim.

Thus, because plaintiffs cannot show any evidence of reliance, FedEx's motion for summary judgment is GRANTED as to plaintiffs' first cause of action for fraudulent misrepresentation.

In addition, in its previous order denying plaintiffs' motion for class certification, the court stated that it "finds persuasive

the view" taken by other courts in this circuit "that the Labor Code's remedies are intended to be exclusive, and thus preclude common law claims based on the same conduct." Dkt. 362 at 9-11 (citing [Santiago v. Amdocs, Inc.](#), 2011 WL 1303395 (N.D. Cal. Apr. 11, 2011); [Green v. Party City Corp.](#), 2002 WL 553219 (C.D. Cal. Apr. 9, 2002); [Madrigal v. Tommy Bahama Grp., Inc.](#), 2010 WL 4384235 (C.D. Cal. Oct. 18, 2010); [In re Wal-Mart Stores, Inc. Wage and Hour Litig.](#), 505 F.Supp.2d 609, 618 (N.D. Cal. 2007)). This provides a further basis for granting FedEx's motion for summary judgment as to plaintiffs' claim for fraud.

## 2. Conversion (claim 2)

Plaintiffs' conversion claim is based on the same theory as the fraudulent misrepresentation claim, that FedEx "misrepresented their employment status to justify writing them out" of employee benefit plans. *See, e.g.*, Dkt. 385 at 25.

The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of property, (2) defendant's conversion by a wrongful act or disposition of property rights, and (3) damages. [Lee v. Hanley](#), 61 Cal.4th 1225, 1240 (2015).

FedEx argues that plaintiffs cannot meet the first element of a conversion claim, because they had no right to ownership or possession of the disputed property. FedEx largely relies on a California Supreme Court case, [Voris v. Lampert](#), 7 Cal.5th 1141 (2019). *Voris* involved an employee seeking unpaid wages via a conversion claim, and the court held as follows:

\*4 The employee's claim is not that the employer has wrongfully exercised dominion over a specifically identifiable pot of money that already belongs to the employee—in other words, the sort of wrong that conversion is designed to remedy. Rather, the employee's claim is that the employer failed to reach into its own funds to satisfy its debt.

7 Cal.5th at 1152-53.

As in *Voris*, this case involves no "specifically identifiable pot of money that already belongs to the employee." Instead, plaintiffs are arguing that "the employer failed to reach into its own funds to satisfy its debt." Thus, the court concludes that the California Supreme Court's opinion in *Voris* does indeed foreclose plaintiffs' theory of relief, and thus, FedEx's motion for summary judgment is GRANTED as to plaintiffs' second cause of action for conversion. Additionally, similar to the fraudulent misrepresentation claim, the court previously

found persuasive the view that the Labor Code's remedies preclude a conversion claim based on the same conduct, and that finding provides a further basis for granting FedEx's summary judgment motion as to plaintiffs' conversion claim.

### 3. Overtime (claim 7), meal breaks (claim 4), and rest breaks (claim 5)

In the parties' papers and at the hearing, the parties grouped these three claims together because they involve related issues, and the court will do the same in this order.

#### a. Overtime

Starting with the overtime claim, certain categories of employees in California are considered "exempt" from state-law overtime protections. One of these exemptions is commonly referred to as the "motor carrier exemption," and is contained in section 3(L) of Wage Order 9 of the California Industrial Welfare Commission. The motor carrier exemption states that California's overtime pay requirements are "not applicable to employees whose hours of service are regulated by ... the United States Department of Transportation Code of Federal Regulations." 8 C.C.R. § 11090(3)(L).

FedEx argues that the plaintiffs in this case fall within the scope of the motor carrier exemption, thus making them ineligible to assert a claim for overtime. FedEx argues that the 'hours of service' regulations apply to "all motor carriers and drivers." A "driver" is defined as "any person who operates any commercial motor vehicle." And a "commercial motor vehicle" is in turn defined as a motor vehicle with a gross vehicle weight rating of 10,001 pounds or more (sometimes also referred to as a "heavy vehicle") that is used to transport goods in interstate commerce. See 49 C.F.R. § 390.5, 395. In effect, that results in three elements to determine whether the 'hours of service' regulations apply: (1) a driver, (2) transporting goods in interstate commerce, (3) using a heavy vehicle.

As the alleged employer, FedEx bears the burden of showing that the plaintiffs are exempt from overtime pay requirements. See, e.g., Gieg v. DDR, Inc., 407 F.3d 1038, 1045 (9th Cir. 2005); Hill v. R+L Carriers, Inc., 690 F.Supp.2d 1001, 1005 (N.D. Cal. 2010). Exemptions from overtime provisions are construed narrowly. See Gieg at 1045; Ramirez v. Yosemite Water Co., Inc., 20 Cal.4th 785, 794 (1999).

As a threshold matter, plaintiffs do not appear to dispute that the motor carrier exemption applies to Sobaszekiewicz and Overpeck, both of whom drove heavy vehicles. Thus, FedEx's motion for summary judgment is GRANTED as to Sobaszekiewicz and Overpeck as to their seventh cause of action for failure to pay overtime.

\*5 However, as to plaintiff Sterling, the parties dispute whether the motor carrier exemption applies. Specifically, plaintiffs argue that a portion of Sterling's workdays did not involve use of a "heavy vehicle," and thus argue that he was not "regulated by" the 'hours of service' regulations at those times, making him eligible to recover overtime pay.

FedEx acknowledges that plaintiff Sterling drove approximately 14 percent of his routes using a "light vehicle," but argues that the 86 percent of time he spent driving a "heavy vehicle" is sufficient to bring him within the scope of the 'hours of service' regulations, thus making him overtime-exempt under California's motor carrier exemption.

The parties appear to agree on the relative proportion of time that Sterling spent driving "heavy vehicles" (approx. 86 percent) versus the time he spent driving "light vehicles" (approx. 14 percent). However, they disagree about how those percentages affect the "motor carrier exemption" analysis. FedEx's position is that Sterling's time spent driving heavy vehicles is enough to make him subject to the DOT's 'hours of service' regulations (and thus overtime-exempt) at all times, even those times when he was not driving heavy vehicles. See, e.g., Dkt. 372 at 25-27. Plaintiffs, on the other hand, argue that Sterling's time spent driving light vehicles suffices to remove him from the 'hours of service' regulations for all of his shifts, making him eligible for overtime protection even for shifts when he was driving a heavy vehicle. See Dkt. 385 at 13-15. As an alternative, plaintiffs argue that Sterling should be eligible for overtime protection at least on the days when he drove a light vehicle, even if he remains ineligible for overtime on days when he drove a heavy vehicle. See id. at 17-18.

While the parties' papers also raise a dispute over a "de minimis" driving requirement, as well as a dispute over the relative scope of the federal motor carrier exemption versus the scope of California's motor carrier exemption, the court finds that it need not resolve those disputes in order to rule on the present motion. The touchstone of California's motor carrier exemption is whether the driver's "hours of service are regulated by" the Department of Transportation's rules. 8

[C.C.R. § 11090\(3\)\(L\)](#). And because those DOT rules apply only to drivers who use “heavy vehicles,” it follows that the DOT rules do not apply to drivers of non-heavy vehicles. And because the DOT ‘hours of service’ rules do not apply to those drivers of non-heavy vehicles, those drivers are outside the scope of California’s motor carrier exemption, and thus the drivers are eligible to recover overtime under California law.

Additionally, because California has a daily overtime requirement, a driver may recover overtime for any workdays when he was not covered by the motor carrier exemption. See, e.g., [Wamboldt v. Safety-Kleen Systems, Inc.](#), 2008 WL 728884 (N.D. Cal. Mar. 17, 2008) (“California has a daily overtime requirement, whereas federal law provides for a weekly overtime requirement. As such, the logical conclusion to be reached vis-a-vis the California motor carrier exemption is that California more broadly awards overtime for days in which drivers are not covered by the exemption.”); see also [Hinds v. FedEx Ground](#), 2020 WL 12048882 at \*7 (N.D. Cal. June 1, 2020) (“on those days” when the drivers drove light vehicles, “they were not subject to the DOT’s hours of service regulations.”). Thus, for the 14 percent of days when Sterling was not driving a heavy vehicle, Sterling does not fall within California’s motor carrier exemption, and thus remains eligible to pursue state-law overtime claims.<sup>1</sup>

**\*6** The parties raise another issue related to Sterling’s eligibility to pursue overtime claims, separate and independent from the issue of whether Sterling drove a heavy vehicle. Plaintiffs argue that Sterling fell under a “short-haul exception” to the Department of Transportation’s ‘hours of service’ regulations. The “short-haul exception” applies to drivers who stay within a 150-mile radius of their regular work reporting location, and those drivers need not comply with all of the DOT’s ‘hours of service’ regulations. See 49 C.F.R. § 395.1(e).

The parties did not specifically state which portion of Sterling’s workdays are allegedly subject to the “short-haul exception.” While the complaint’s allegations suggest that most, if not all, of Sterling’s shifts would qualify as “short-haul” shifts, see Dkt. 371, ¶ 42, the papers offer no additional clarity on the scope of any “short-haul exception” as applied to this case.

Additionally, the parties’ papers do not address many key issues surrounding the “short-haul exception.” For instance, the “short-haul exception” itself is actually made up of two separate short-haul exceptions, both set forth in 49 C.F.R.

§ 395(e). In that regulation, section 395(e)(1) sets forth a “short-haul exception” for drivers who stay within a 150-mile radius of their normal work reporting location, while section 395(e)(2) sets forth a standalone exception for drivers who stay within a 150-mile radius of their normal work reporting location and who drive “property-carrying commercial motor vehicles not requiring a commercial driver’s license.” See 49 C.F.R. § 395(e).

While the two “short-haul exceptions” have many similarities, they are different in at least one key respect relevant to this summary judgment motion. Specifically, short-haul drivers under section 395(e)(1) are taken out of the scope of § 395.8 and § 395.11 of the DOT’s ‘hours of service’ regulations, while drivers covered by section (e)(2) are taken out of the scope of not only §§ 395.8 and 395.11, but also § 395.3(a)(2) of the ‘hours of service’ regulations.<sup>2</sup> See 49 C.F.R. § 395(e). And as discussed at length above, the applicability of the ‘hours of service’ regulations is central to resolving the overtime claim and the meal/rest break claims.

Moreover, in addition to the papers’ lack of clarity regarding the proportion of Sterling’s shifts that potentially fall under the “short-haul exception,” and the parties’ failure to distinguish between the two separate “short-haul exceptions” set forth in the regulations, there is another hurdle standing in the way of a definitive resolution of this issue. Specifically, there is currently conflicting law regarding the “short-haul exception” and the question of whether short-haul drivers are considered ‘covered’ by the DOT’s ‘hours of service’ regulations, given that those drivers are subject to only some, not all, of the regulations. Compare [Dilts v. Penske Logistics](#) 769 F.3d 637, 648 n.2 (9th Cir. 2014) (“Plaintiff drivers work on short-haul routes and work exclusively within the state of California. They therefore are not covered by other state laws or federal hours-of-service regulations”); [Int’l Brotherhood of Teamsters, Local 2785 v. FMCSA](#), 986 F.3d 841, 853 (9th Cir. 2021) (“the plaintiffs in [Dilts](#) worked exclusively in California as short-haul drivers and were thus not even ‘covered by ... federal hours-of-service regulations.’”) with [Espinoza v. Hepta Run, Inc.](#), 74 Cal. App. 5th 44, 57 (2022) (“the FMCSA’s reasoning supports applying preemption to short haul drivers rather than excluding them.”).

**\*7** Because the parties did not present detailed arguments regarding the short-haul exception, and because there is conflicting law on the issue of whether short-haul drivers are eligible to pursue overtime and meal/rest break claims, and because FedEx, as the alleged employer, bears the burden



of showing that Sterling is indeed exempt from overtime protections, the court concludes that FedEx's motion for summary judgment must be DENIED as to Sterling's seventh cause of action for overtime, to the extent that Sterling can show that he was either driving a short-haul route and/or driving a light vehicle.

#### b. Meal/rest breaks

Now, on to the meal/rest break claims. As mentioned before, these claims involve issues that are substantively similar to the issues involved in the overtime claim, but they have a different legal foundation. Instead of determining whether plaintiffs are “exempt” from overtime protections, here the analysis focuses on whether plaintiffs’ meal/rest break claims are preempted by federal law.

Specifically, FedEx argues that plaintiffs are precluded from pursuing their meal/rest break claims due to a preemption order issued by the Federal Motor Carrier Safety Administration (“FMCSA”), which is part of the Department of Transportation. The FMCSA issued an order in 2018 stating that “California may no longer enforce the MRB Rules with respect to drivers of property-carrying CMVs subject to FMCSA's HOS rules.” [83 Fed. Reg. 67470-01 \(Dec. 28, 2018\)](#). To clarify, the “MRB Rules” refer to “meal and rest break rules,” and the “FMCSA's HOS rules” refer to the same ‘hours of service’ rules promulgated by the Department of Transportation, of which the FMCSA is a sub-agency.

As with the motor carrier exemption in the overtime context, the scope of FMCSA preemption is defined by the applicability of the DOT's ‘hours of service’ rules. If the ‘hours of service’ rules apply, then the meal/rest break claims are preempted; but if the ‘hours of service’ rules do not apply, then the meal/rest break claims are not preempted.

With that background, the analysis is the same as in the overtime context. On days when plaintiff Sterling was driving a light vehicle, he was not within the scope of the DOT's ‘hours of service’ rules (which apply only to heavy-vehicle drivers), which means his meal/rest break claims were not preempted. Thus, summary judgment must be DENIED at least to the extent that Sterling seeks meal/rest break damages for days he drove a light vehicle.

Also, the “short-haul exception” also applies with equal force here as it did in the overtime context. Thus, for the same

reasons as already stated, as to whether short-haul drivers are eligible to pursue meal/rest break claims, the court concludes that FedEx has not met its burden to show that Sterling is ineligible to pursue meal/rest break claims.

Thus, FedEx's motion for summary judgment is DENIED as to Sterling's fifth cause of action for meal breaks and sixth cause of action for rest breaks, to the extent that Sterling can show that he was either driving a short-haul route and/or driving a light vehicle. As to plaintiffs Sobaszekiewicz and Overpeck, FedEx's motion is GRANTED as to the meal/rest break claims, as plaintiffs do not dispute that they were subject to the DOT's ‘hours of service’ rules.<sup>3</sup>

#### 4. Inaccurate wage statements (claim 9)

**\*8** [Cal. Labor Code § 226\(a\)\(8\)](#) requires an employer to provide a wage statement showing “the name and address of the legal entity that is the employer.” Plaintiffs argue that FedEx prohibits the ISPs from listing FedEx's name on the wage statements, which violates section (a)(8).

As an initial matter, FedEx's motion points out that plaintiff Overpeck was based in New Jersey for the majority of his employment, and spent only eight weeks working for a California-based ISP. [See](#) Dkt. 372 at 32. FedEx argues that Overpeck's claim must be limited to those eight weeks, and plaintiffs do not address this argument in their opposition.

As to the other plaintiffs, the primary argument in FedEx's motion is that plaintiffs have not shown evidence of any injury resulting from the omission of FedEx from the wage statements. The ‘injury’ requirement has previously been a source of dispute in this case, and was partially addressed in the court's class certification order:

FedEx argues that plaintiffs, in addition to proving the element that an employer failed to provide an accurate itemized statement, must also prove that (1) the employer's failure to provide the statement was knowing and intentional and (2) the employee suffered injury. [Iltjas v. Ripley Entm't Inc.](#), 403 F.Supp.3d 793, 802 (N.D. Cal. Aug. 14, 2019) (citing [Willner v. Manpower Inc.](#), 35 F. Supp. 3d 1116, 1128 (N.D. Cal. 2014)); [see also](#) [Frausto v. Bank of Am., Nat'l Ass'n](#), 2019 WL 5626640, at \*10 (N.D. Cal. Oct. 31, 2019).

FedEx cites a case from this court holding that “[t]he injury requirement in section [226(e)] cannot be satisfied simply because one of the nine itemized requirements in section



[226(a)] is missing from a wage statement.” [Ridgeway v. Wal-Mart Stores, Inc.](#), 2014 WL 2600326, at \*8 (N.D. Cal. June 10, 2014) (quoting [Price v. Starbucks Corp.](#), 192 Cal. App. 4th 1136, 1142–43 (2011)). “By employing the term ‘suffering injury,’ the statute requires that an employee may not recover for violations of section [226(a)] unless he or she demonstrates an injury arising from the missing information.” *Id.* (quoting [Price](#), 192 Cal. App. 4th at 1142–43) (emphasis in [Price](#)); see also [Frausto](#), 2019 WL 5626640, at \*11.

FedEx argues that each employee would need to individually prove that they suffered an injury, thereby preventing plaintiffs’ proposed class from being able to meet the commonality and/or predominance requirements. Plaintiffs cite no cases where a court has found their theory of liability under [section 226\(a\)\(8\)](#) to be viable. In the absence of any such cases, this court concludes that each plaintiff will need to separately prove their injury under [section 226\(a\)\(8\)](#).

Dkt. 362 at 11-12.

Plaintiffs have argued, and continue to argue that an injury can be ‘deemed’ as a matter of law from the omission of the employer’s name and address. Dkt. 385 at 21-22. Plaintiffs further argue that they have presented evidence of injury, in the form of the plaintiffs being prevented from seeking and obtaining redress from FedEx for workplace violations.

However, despite plaintiffs’ assertion that they were prevented from seeking and obtaining redress from FedEx, the practical reality is that the plaintiffs knew who FedEx was and knew how to contact them – the real substance of their injury is not a lack of information, it’s a lack of FedEx’s willingness to pay certain employment benefits. Accordingly, the court concludes that plaintiffs are not able to prove any injury as the result of FedEx’s omission from the wage statement. Thus, with regard to the claim that the wage statements were inaccurate due to the omission of FedEx, FedEx’s motion for summary judgment is GRANTED due to lack of injury. However, the parties’ papers suggest that this claim is also partially based on the alleged failure to pay overtime and meal/rest breaks, so to the extent that those claims are viable as to plaintiff Sterling, then any wage-statement claims that derive from those claims are also viable, and summary judgment is DENIED to that extent. Additionally, this claim remains in the case to the extent that is based on time that plaintiffs spent (1) preparing their vehicles and (2) in sleeper berths, because FedEx did not move for summary judgment as to those portions of any claim.

\*9 FedEx raises one other argument in connection with the wage statement claim; namely, that it had a “good faith belief” that it was not plaintiffs’ employer, and because any violation must be “knowing and intentional,” FedEx argues that it cannot be liable. FedEx also raises this “good faith” argument in connection with the inaccurate wage statement claim, the failure to maintain payroll records claim, and the waiting time claim.

FedEx’s argument largely relies on [Arroyo v. Int’l Paper Co.](#), 2020 WL 887771 (N.D. Cal. Feb. 24, 2020). [Arroyo](#) involved a very narrow issue regarding pay statement inaccuracy – the plaintiff claimed that the wage statement was “confusing” because it was unclear about whether the ‘hours worked’ referred to just regular hours, or regular hours plus overtime hours. The plaintiff further claimed that the wage statement was confusing as to the rate of overtime pay. The record further showed that the employer had conducted an internal audit of its wage statement compliance and had made changes to increase clarity. Based on that record, the [Arroyo](#) court concluded that there was no evidence of a “knowing and intentional” violation, as required by [section 226](#). *Id.*; see also [Utne v. Home Depot U.S.A., Inc.](#), 2019 WL 3037514 (N.D. Cal. July 11, 2019).

In contrast, in a case involving the broader issue of overtime exemption and whether the wage statements were accurate as to the employees’ ‘exempt’ status, the court concluded that “the ‘knowing and intentional requirement’ merely requires that the defendant knew ‘that facts existed that brought its actions or omissions within the provisions of [section 226\(a\)](#)—i.e., that [the employer] knew that its wage statements did not contain’ the required information.” [Senne v. Kansas City Royals Baseball Corp.](#), 2022 WL 783941 (N.D. Cal. Mar. 15, 2022). A plaintiff is “not required to demonstrate that [the employer] knew that this conduct, if otherwise proven, was unlawful.” *Id.* Ultimately, the [Senne](#) court “reject[ed] Defendants’ suggestion that a good faith belief that Plaintiffs are exempt would establish that their violation of [Section 226](#) was not ‘knowing and intentional.’ ” *Id.* see also [Willner v. Manpower Inc.](#), 35 F.Supp.3d 1116, 1129-32 (N.D. Cal. 2014) (“the court concludes that a ‘knowing and intentional’ violation requires a showing that the defendant knew that facts existed that brought its actions or omissions within the provisions of [section 226\(a\)](#)”).

Overall, the court concludes that FedEx’s argument is an over-extension of the “knowing and intentional” requirement.

The cases cited by FedEx, Arroyo and Utne, both involved narrow disputes over wage statement inaccuracies. As mentioned above, Arroyo involved confusion over the rate of overtime pay, and Utne involved a narrow dispute over the compensability of pre-shift work time. The court rejects FedEx's efforts to turn these narrow holdings into a blanket rule immunizing FedEx from liability stemming from the fundamental issue of employee classification. Accordingly, to the extent that FedEx seeks summary judgment on any claim based on a "knowing and intentional" requirement or a "good faith" defense, that request is denied.

#### 5. Failure to maintain payroll records (claim 8)

California Labor Code section 1174.5 requires "[a]ny person employing labor" to "maintain the records" of employment. FedEx seeks summary judgment on this claim based on the argument that, even if it is a joint employer of plaintiffs, the statute does not specifically require a second, joint employer to maintain its own payroll records.

\*10 While there is no specific case law requiring each joint employer to maintain records, the language of the statute imposes the record-keeping requirement on "any person employing labor." Cal. Lab. Code § 1174.5. The issue of whether FedEx is a joint employer is still unresolved, but if FedEx were found to be a joint employer, the language of section 1174.5 indicates that FedEx would indeed be required to maintain payroll records.

It may be the case that, even if FedEx is a joint employer, it need not create a separate set of records, but rather it need only share access to the same set of payroll records maintained by its co-joint-employer. However, in the absence of any authority on the issue, the court concludes that FedEx's motion for summary judgment must be DENIED as to the eighth cause of action for failure to maintain payroll records.

#### 6. Waiting time penalties (claim 10)

FedEx moves for summary judgment on this claim solely on the basis of its "good faith" defense. For the reasons set forth above, that argument is rejected, and FedEx's motion for summary judgment is DENIED as to the tenth cause of action for waiting time penalties.

#### 7. Failure to pay for all hours worked (claim 3) and failure to pay minimum wage (claim 6)

FedEx moves for summary judgment on these claims only to the extent that they are derivative of the claims for benefits, overtime, and meal/rest breaks. For the same reasons as set forth above, the court grants the motion to the extent that these claims are based on benefits, but denies the motion to the extent the claims are based on overtime or meal/rest break claims on behalf of plaintiff Sterling as to days when he drove light vehicles and/or short-haul routes. The court further grants the motion to the extent that these claims are based on overtime or meal/rest break claims brought by plaintiffs Sobaszekiewicz and Overpeck. These claims also remain viable to the extent they are based on time that plaintiffs spent (1) preparing their vehicles and (2) in sleeper berths, because FedEx did not move for summary judgment as to those portions of these claims.

#### 8. UCL (claim 11)

This claim mirrors the two claims in the previous section – FedEx moves for summary judgment only to the extent that this claim is derivative of the claims for benefits, overtime, and meal/rest breaks. For the same reasons as above, the court grants the motion to the extent the UCL claim is based on benefits, but denies the motion to the extent the UCL claim is based on overtime and meal/rest break claims on behalf of Sterling as to days when he drove light vehicles and/or short-haul routes, and grants the motion to the extent the UCL claim is based on overtime and meal/rest break claims on behalf of Sobaszekiewicz and Overpeck. And as before, this claim also survives to the extent it is based on time that plaintiffs spent (1) preparing their vehicles and (2) in sleeper berths, because FedEx did not move for summary judgment as to those portions of this claim.

#### 9. PAGA (claim 12)

The parties appear to agree that this claim is now time-limited to alleged violations that occurred on or after January 29, 2019, and further agree that plaintiff Overpeck may no longer pursue representative PAGA claims. To the extent that FedEx seeks further relief on this claim as derivative of the claims for benefits, overtime, and meal/rest breaks, the court reaches the same conclusion as above. Namely, the court grants the motion to the extent the PAGA claim is based on benefits, but denies the motion to the extent the PAGA claim is based on overtime and meal/rest break claims as to drivers of light vehicles and/or short-haul routes, and grants the motion to the extent the PAGA claim is based on overtime and meal/rest break claims on behalf of drivers who drove heavy vehicles and/or long-haul routes. And as before, this claim

also survives to the extent it is based on time that plaintiffs spent (1) preparing their vehicles and (2) in sleeper berths.

## CONCLUSION

**\*11** For the reasons set forth above, the court rules as follows:

As to the first cause of action for fraudulent misrepresentation, FedEx's motion for summary judgment is GRANTED as to all plaintiffs.

As to the second cause of action for conversion, FedEx's motion for summary judgment is GRANTED as to all plaintiffs.

As to the third cause of action for failure to pay for all hours worked, FedEx's motion for summary judgment is GRANTED to the extent it is based on benefits claims, GRANTED as to Sobaszekiewicz and Overpeck to the extent this claim is derivative of overtime or meal/rest break claims, and DENIED as to Sterling on the same basis to the extent that he drove light vehicles and/or short-haul routes.

As to the fourth cause of action for failure to provide meal periods, FedEx's motion for summary judgment is GRANTED as to Sobaszekiewicz and Overpeck and DENIED as to Sterling to the extent that he drove light vehicles and/or short-haul routes.

As to the fifth cause of action for failure to provide rest periods, FedEx's motion for summary judgment is GRANTED as to Sobaszekiewicz and Overpeck and DENIED as to Sterling to the extent that he drove light vehicles and/or short-haul routes.

As to the sixth cause of action for failure to pay minimum wage, FedEx's motion for summary judgment is GRANTED to the extent it is based on benefits claims, GRANTED as to Sobaszekiewicz and Overpeck to the extent this claim is derivative of overtime or meal/rest break claims, and DENIED as to Sterling on the same basis to the extent that he drove light vehicles and/or short-haul routes.

As to the seventh cause of action for failure to pay overtime, FedEx's motion for summary judgment is GRANTED as to Sobaszekiewicz and Overpeck and DENIED as to Sterling to the extent that he drove light vehicles and/or short-haul routes.

As to the eighth cause of action for failure to maintain payroll records, FedEx's motion for summary judgment is DENIED as to all plaintiffs.

As to the ninth cause of action for inaccurate wage statements, FedEx's motion for summary judgment is GRANTED, except to the extent that this claim derives from Sterling's overtime and meal/rest break claims.

As to the tenth cause of action for waiting time penalties, FedEx's motion for summary judgment is DENIED as to all plaintiffs.

As to the eleventh cause of action under the UCL, FedEx's motion for summary judgment is GRANTED to the extent it is based on benefits claims, GRANTED as to Sobaszekiewicz and Overpeck to the extent this claim is derivative of overtime or meal/rest break claims, and DENIED as to Sterling on the same basis to the extent that he drove light vehicles and/or short-haul routes.

As to the twelfth cause of action under PAGA, FedEx's motion for summary judgment is GRANTED as to all claims prior to January 29, 2019, and is further GRANTED except to the extent that the claim is based on overtime and meal/rest break claims as to drivers of light vehicles and/or short-haul routes.

To the extent that plaintiffs seek further discovery under [Rule 56\(d\)](#), the request is DENIED.

**\*12** The parties shall appear by videoconference for a case management conference on **September 15, 2022**, at **2:00 p.m.**

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2022 WL 4004773

## Footnotes

- 1 Plaintiffs also argue that Sterling did not transport goods in interstate commerce, but both the Supreme Court and the Ninth Circuit have rejected such a narrow interpretation of the interstate commerce requirement. See, e.g., [Southwest Airlines v. Saxon](#), 142 S.Ct. 1783 (2022); [Rittman v. Amazon.com](#), 971 F.3d 904, 915 (9th Cir. 2020).
- 2 While not directly relevant to this motion's outcome, the court additionally notes that short-haul drivers, under either section 395(e)(1) or (e)(2), are also taken out of the scope of § 395.3(a)(3)(ii) of the 'hours of service' regulations. See 49 C.F.R. § 395.3(a)(3)(ii).
- 3 To the extent that plaintiffs argue that the FMCSA's preemption order is not retroactive, which would allow some of Sobaszekiewicz's and Overpeck's meal/rest break claims to proceed, the court concludes that the FMCSA has taken the position that the order is indeed retroactive, and in the absence of Ninth Circuit authority holding otherwise, the court will follow the FMCSA's guidance. See Dkt. 388-1 (FMCSA Legal Opinion of Chief Counsel).

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# **EXHIBIT 27**



2017 WL 714367

Only the Westlaw citation is currently available.

United States District Court, E.D. California.

Sarmad SYED and Ashley Balfour,  
individually, and on behalf of all  
others similarly situated, Plaintiffs,

v.

M-I, L.L.C., a Delaware limited liability  
company, doing business as **M-I SWACO**;  
and Does 1 through 10, inclusive, Defendants.

No. 1:12-cv-01718-DAD-MJS

|

Signed 02/22/2017

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#### ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND PRELIMINARY CLASS CERTIFICATION

[Dale A. Drozd](#), UNITED STATES DISTRICT JUDGE

\*1 On December 21, 2016, plaintiffs filed a motion for order granting preliminary approval of class action settlement. (Doc. No. 76.) The motion is unopposed and came before the court for hearing on February 7, 2017. (Doc. No. 79.) Attorneys Jeff Holmes, James Hill, and Diana Khoury appeared telephonically on behalf of plaintiffs. Attorneys Jason Mills and Joseph Marra appeared telephonically on behalf of defendants. Oral argument was heard and the motion was taken under submission. (*Id.*) With leave of court, on February 14, 2017, plaintiffs' counsel filed additional briefing addressing issues raised by the court at the hearing. (Doc. No.

80.) For the reasons discussed below, the court will grant the pending motion.

#### FACTUAL BACKGROUND

On October 18, 2012, plaintiffs Sarmad Syed and Ashley Balfour, individually and on behalf of all others similarly situated, brought this action against defendant M-I, L.L.C., doing business as M-I SWACO, ("M-I SWACO") as a collective class action under the Fair Labor Standards Act, [29 U.S.C. §§ 201, et seq.](#), ("FLSA") for failure to pay overtime and minimum wages and as a putative class action under [Federal Rule of Civil Procedure \("Rule"\) 23](#) for the California state law claims of 1) failure to pay minimum wages; 2) failure to pay overtime wages; 3) failure to provide meal periods under [Labor Code §§ 226.7 and 512](#); 4) failure to provide rest breaks under [Labor Code §§ 226.7 and 512](#); 5) failure to furnish itemized wage statements; 6) failure to pay wages timely upon termination; 7) unfair competition; and 8) penalties pursuant to [Labor Code § 2699](#) (the "California Class"). (Doc. No. 1.)

Plaintiffs' complaint alleges as follows. Defendant M-I SWACO is a corporation that employees more than 13,000 individuals in more than 75 countries around the world providing services and products related to drilling for hydrocarbons. (Doc. No. 1 at 5.) Plaintiffs and other similarly situated employees were employed by defendants as "mud engineers." (*Id.* at 6.) Plaintiffs allege that, during their employment, defendant failed to pay them at the legally required time-and-a-half rates for work in excess of forty hours per week, failed to keep records, failed to pay them at overtime rates or at all for overtime work, required them to work during meal periods without compensation, deprived them of rest periods, failed to timely furnish accurate wage statements, and failed to timely pay all wages due. (*Id.* at 12–25.)

On November 26, 2014, the court conditionally certified a FLSA class consisting of:

All persons who were or are employed by Defendant, on or after August 5, 2010 (the "FLSA Class Period"), in the job position known as drilling fluids specialist ("DFS"), "mud engineer," "mud man," "mud man trainee," or "consultant mud man," or equivalent titles (the "FLSA Collective Plaintiffs").

(Doc. No. 36 at 15.) On March 8, 2016, plaintiffs filed a motion for class certification pursuant to [Rule 23 of the Federal Rules of Civil Procedure](#). (Doc. No. 62.) However, the court never ruled on that motion because plaintiffs filed a notice of settlement on September 9, 2016. (Doc. No. 68.) The settlement was the result of a mediation facilitated by Jeffrey Krivis on September 1, 2016 in Encino, California. (Doc. No. 76-2 at 14.)

**\*2** The proposed settlement agreement defines the “FLSA Collective Action Class” as “the 115 individuals employed by Defendant in a Covered Position during the period from November 26, 2011 through November 30, 2016, who previously consented to join the Federal Labor Standards Act Collective Action, pursuant to Section 16(b), [29 U.S.C. § 216\(b\)](#), (“FLSA”) and who have not performed work for Defendant in California during that time period.” (*Id.* at 26.) The “[California Rule 23](#) Class Member(s)” or “California Class” is defined as “all persons employed by Defendant in California in a Covered Position at any time during the period from October 18, 2008 through November 30, 2016. There are an estimated 353 members in this group, which includes current and former employees who performed work for Defendant solely in California, as well as employees who performed work for Defendant both in California as well as outside of California.” (*Id.*) “Covered Position” means “a drilling fluid specialist, mud engineer, mud man, mud man trainee, or consultant mud man, or equivalent title, as enumerated in Appendix No. 1 to this Agreement.” (*Id.* at 28.) Based upon a review of defendant's business and personnel records, there are 115 FLSA collective class members who had an estimated 6,074 weeks worked during the FLSA class period and 353 [California Rule 23](#) class members who had an estimated 23,880 weeks worked during the California class period. (*Id.* at 35.)

Under the proposed settlement agreement, defendants will make a gross payment of \$7,000,000. (Doc. No. 76-2 at 35.) This amount is non-reversionary with no portion reverting to defendant. (*Id.* at 29.) The agreement provides the following allocation of that payment: (i) attorneys' fees of not more than one third, or \$2,333,333.33, to be paid to class counsel; (ii) estimated litigation expenses of up to \$40,000 to be paid to class counsel; (iii) estimated settlement administration costs of \$11,500 to be paid to the administrator CPT Group, Inc.; (iv) class representative fees of \$20,000 to be paid to plaintiff Sarmad Syed and \$15,000 to plaintiff Ashley Balfour; (v) penalties of \$100,000 under the California Private Attorney's General Act of 2004, as amended (the

“PAGA”), with 75% of that (\$75,000) to be paid to the Labor and Workforce Development Agency in settlement of the PAGA claim; and (vi) the net settlement amount estimated at \$4,505,166.67, less employer-sided taxes estimated at \$213,243.27, to be distributed to the class members, with California class members receiving an estimated \$165.68, less taxes, for each week worked during the California class period and FLSA class members receiving \$55.23, less taxes, for each week worked during the FLSA class period. (*Id.* at 36–39.)<sup>1</sup>

If the court awards less than the amounts requested by class counsel for attorneys' fees and/or costs, the difference shall become part of the net settlement amount to be distributed to class members. (*Id.* at 38.) Class members must return requests for exclusion to be excluded from the settlement but will not be required to return a claim form to receive payment. (*Id.* at 37.) All unclaimed shares will be reallocated to participating class members on a proportionate basis. (*Id.*) The funds with respect to settlement payment checks that are uncashed ninety-five days after being mailed will be paid to the California Industrial Relations Unclaimed Wages Fund for the California class members and to Workplace Fairness for the FLSA class members. (*Id.* at 47.)

As noted at the outset, on December 21, 2016, plaintiffs filed the instant unopposed motion for preliminary approval of class action settlement. (Doc. No. 76.) Plaintiffs seek an order: (i) continuing certification of the FLSA class as a collective action under § 216(b) of the FLSA; (ii) provisionally certifying the California Class pursuant to [Rule 23](#); (iii) appointing plaintiffs' attorneys as class counsel; (iv) appointing the named plaintiffs as the class representatives; (v) appointing CPT Group Class Action Administrators, Inc. (“CPT”) as the settlement administrator; (vi) setting a date for the final fairness and approval hearing should preliminary approval be granted. (Doc. No. 76-1 at 9.)

#### LEGAL STANDARD

**\*3** “Courts have long recognized that settlement class actions present unique due process concerns for absent class members.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (citation and internal quotations omitted). To protect the rights of absent class members, [Rule 23\(e\) of the Federal Rules of Civil Procedure](#) requires that the court approve all class action settlements “only after a hearing and on finding that it is fair, reasonable, and adequate.” [Fed.](#)

R. Civ. P. 23(e)(2); *Bluetooth*, 654 F.3d at 946. However, it has been recognized that when parties seek approval of a settlement agreement negotiated prior to formal class certification, “there is an even greater potential for a breach of fiduciary duty owed the class during settlement.” *Bluetooth*, 654 F.3d at 946. Thus, the court must review such agreements with “a more probing inquiry” for evidence of collusion or other conflicts of interest than what is normally required under the Federal Rules. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); see also *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

When parties seek class certification only for purposes of settlement, Rule 23 “demand[s] undiluted, even heightened, attention” to the certification requirements. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The district court must examine the propriety of certification under Rule 23 both at this preliminary stage and at a later fairness hearing. See, e.g., *Ogbuehi v. Comcast*, 303 F.R.D. 337, 344 (E.D. Cal. Oct. 2, 2014); *West v. Circle K Stores, Inc.*, No. 2:04-cv-00438-WBS-GGH, 2006 WL 1652598, at \*2 (E.D. Cal. June 13, 2006).

Review of a proposed class action settlement ordinarily involves two hearings. See Manual for Complex Litigation (4th) § 21.632. First, the court conducts a preliminary fairness evaluation and, if applicable, considers class certification. If the court makes a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms, the parties are directed to prepare the notice of certification and proposed settlement to the class members. *Id.* (noting that if the parties move for both class certification and preliminary approval, the certification hearing and preliminary fairness evaluation can usually be combined). Second, the court holds a final fairness hearing to determine whether to approve the settlement. *Id.*; see also *Narouz v. Charter Commc'ns, Inc.*, 591 F.3d 1261, 1266–67 (9th Cir. 2010).

Here, the parties move for preliminary approval of a class settlement and preliminary class certification. Though Rule 23 does not explicitly provide for such a procedure, federal courts generally find preliminary approval of settlement and notice to the proposed class appropriate if the proposed settlement “appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls with the range of possible approval.” *Lounibos v. Keypoint Gov't Solutions Inc.*, No. 12-00636, 2014 WL 558675, at \*5 (N.D.

Cal. Feb. 10, 2014) (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)); see also *Newberg on Class Actions* § 13:13 (5th ed. 2011); *Dearauju v. Regis Corp.*, Nos. 2:14-cv-01408-KJM-AC, 2:14-cv-01411-KJM-AC, 2016 WL 3549473 (E.D. Cal. June 30, 2016) (“Rule 23 provides no guidance, and actually foresees no procedure, but federal courts have generally adopted [the process of preliminarily certifying a settlement class].”).

## ANALYSIS

### I. Class Certification under Rule 23(c)(1)

Plaintiff seeks preliminary certification of the following proposed settlement classes under Federal Civil Procedure Rule 23(c)(1):

The “California Rule 23 Class Member(s)” or “California Class” means all persons employed by Defendant in California in a Covered Position at any time during the period from October 18, 2008 through November 30, 2016. There are an estimated 353 members in this group, which includes current and former employees who performed work for Defendant solely in California, as well as employees who performed work for Defendant both in California as well as outside of California.

\*4 “Covered Position” means a drilling fluid specialist, mud engineer, mud man, mud man trainee, or consultant mud man, or equivalent title, as enumerated in Appendix No. 1 to this Agreement.

(Doc. No. 76-2 at 88.)<sup>2</sup>

Under Rule 23(c)(1), courts must determine by order whether an action should be maintained as a class action “[a]t an early practicable time after a person sues or is sued as a class representative.” Fed. R. Civ. P. 23(c)(1). Though the parties in this case have stipulated that a settlement class exists, the court must independently consider whether the proposed class meets the requirements of Rule 23 both at this stage and at the later fairness hearing.<sup>3</sup> See *Pointer v. Bank of Am. Nat'l Assoc.*, No. 2:14-cv-00525-KJM-CKD, 2016 WL 696582, at \*3 (E.D. Cal. Feb. 22, 2016) (citing *Amchem Prods., Inc.*, 521 U.S. at 622).

\*5 Certification requires satisfaction of the pre-requisites of Rule 23(a) and (b). *Id.* As noted above, courts analyzing a motion to certify a settlement class must pay “undiluted, even heightened attention” to Rule 23 requirements. See

*Amchem*, 521 U.S. at 620, n.16. A thorough Rule 23 analysis is especially important where a motion to certify a settlement class is unopposed, because in such circumstances “[t]here is no advocate to critique the proposal on behalf of absent class members.” *Kakani v. Oracle Corp.*, No. 06-06493, 2007 WL 1793774, at \*1 (N.D. Cal. June 19, 2007). “The problem is greater at this preliminary approval stage, where objectors are unlikely to have already appeared.” *Pointer*, 2016 WL 696582, at \*4.

On a motion for preliminary approval, plaintiff bears the burden of persuasion that the proposed class satisfies Rule 23 requirements. Even at the preliminary stage, “[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.” Advisory Committee 2003 Note on Fed. R. Civ. P. 23(c)(1).

#### A. Rule 23(a) Requirements

Rule 23(a) establishes four prerequisites for class action litigation: (i) numerosity, (ii) commonality, (iii) typicality, and (iv) adequacy of representation.” See *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). The court addresses each requirement below.

##### i. Numerosity

A proposed class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). The numerosity requirement demands “examination of the specific facts of each case and imposes no absolute limitations.” *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980). Courts have found the requirement satisfied when the class comprises of as few as thirty nine members, or where joining all class members would serve only to impose financial burdens and clog the court's docket. *Murillo v. Pac. Gas & Elec. Co.*, 266 F.R.D. 468, 474 (E.D. Cal. 2010) (citing *Jordan v. L.A. Cnty.*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810); *In re Intel Litig.*, 89 F.R.D. 104, 112 (N.D. Cal. 1981).

There are an estimated 353 putative California class members. (Doc. No. 76-1 at 29.) This number is sufficient to satisfy the numerosity requirement of Rule 23(a)(1).

##### i. Commonality

Rule 23(a) also requires “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). To satisfy the commonality requirement, the class representatives must demonstrate that common points of facts and law will drive or resolve the litigation. *Dukes*, 564 U.S. at 350 (“What matters to class certification ... is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.”) (internal citations omitted). “Commonality is generally satisfied where ... ‘the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.’ ” *Franco v. Ruiz Food Prods., Inc.*, No. CV 10-02354 SKO, 2012 WL 5941801, at \*5 (E.D. Cal. Nov. 27, 2012) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504–05 (2005)). The rule does not require all questions of law or fact to be common to every single class member. See *Hanlon*, 150 F.3d at 1019 (noting that commonality can be found through “[t]he existence of shared legal issues with divergent factual predicates”). However, the raising of merely any common question does not suffice. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (“[a]ny competently crafted class complaint literally raises common ‘questions.’ ”) (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–132 (2009)).

\*6 Here, plaintiffs allege defendant implemented and applied uniform employment policies and practices, which classified all “mud men” as exempt from the requirements of overtime compensation. (Doc. No. 76-1 at 29.) Federal courts have found similar questions concerning compliance with California Labor Code standards to meet the commonality requirements of Rule 23(a)(2). See *Rodriguez v. Kraft Foods Group, Inc.*, No. 1:14-cv-1137-LJO-EPG, 2016 WL 5844378, at \*4 (E.D. Cal. Oct. 5, 2016); *Palacios v. Penny Newman Grain, Inc.*, No. 1:14-cv-01804-KJM, 2015 WL 4078135, at \*4 (E.D. Cal. July 6, 2015); *Clesceri v. Beach City Investigations & Protective Services, Inc.*, No. CV-10-3873-JST (RZx), 2011 WL 320998, at \*5 (C.D. Cal. Jan. 27, 2011). “Minor factual differences ... do not defeat commonality.” *Lewis v. Starbucks Corp.*, No. 2:07-cv-00490-MCE-DAD, 2008 WL 4196690, at \*3 (E.D. Cal. 2008). Accordingly, plaintiff has met the commonality prerequisite for class certification under Rule 23.

##### ii. Typicality



[Rule 23\(a\)\(3\)](#) demands that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” [Fed. R. Civ. P. 23\(a\)\(3\)](#); [Armstrong v. Davis](#), 275 F.3d 849, 868 (9th Cir. 2001), abrogated on other grounds by [Johnson v. California](#), 543 U.S. 499, 504–05 (2005). Typicality is satisfied “when each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.” [Armstrong](#), 275 F.3d at 868; see also [Rodriguez v. Hayes](#), 591 F.3d 1105, 1124 (9th Cir. 2010); [Kayes v. Pac. Lumber Co.](#), 51 F.3d 1449, 1463 (9th Cir. 1995) (claims are typical where named plaintiffs have the same claims as other members of the class and are not subject to unique defenses). While representative claims must be “reasonably co-extensive with those of absent class members,” they “need not be substantially identical.” [Hanlon](#), 150 F.3d at 1020.

In their motion for preliminary class certification, plaintiffs contend that the typicality requirement is met because their claims and the putative class claims arise from a common source—M-I Swaco’s policy and practice of exempting from the requirements of overtime compensation all persons employed in a covered position as any time during the class period. (Doc. No. 76-1 at 29.) Furthermore, these claims are based upon identical legal theories. (*Id.* at 29–20.) Finally, plaintiff’s interests are aligned with those of the putative class. (*Id.* at 30.) The court finds that plaintiffs’ claims are reasonably co-extensive with those of absent class members, and that typicality is therefore satisfied.

### iii. Adequacy of Representation

The final [Rule 23\(a\)](#) prerequisite is satisfied if “the representative parties will fairly and adequately protect the interests of the class.” [Fed. R. Civ. P. 23\(a\)\(4\)](#). “The proper resolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” [In re Mego Fin. Corp. Sec. Litig.](#), 213 F.3d 454, 462 (9th Cir. 2000) (citing [Hanlon](#), 150 F.3d at 1020.); see also [Pierce v. County of Orange](#), 526 F.3d 1190, 1202 (9th Cir. 2008).

Plaintiff seeks appointment of plaintiffs’ attorneys as class counsel. (Doc. Nos. 29-1 at 17; 29-7 at 2–3, ¶ 7.) There is nothing in the record suggesting that plaintiff or counsel have any conflict of interest with other absent class members.

Plaintiff’s claims thus appear “completely aligned with [that] of the class,” and there is no conflict apparent at this stage. [Collins](#), 274 F.R.D. at 301. Plaintiff’s attorneys are experienced class action litigators, as reflected in declarations submitted with plaintiffs’ motion for preliminary class certification. (Doc. Nos. 76-2 at 2–7; 76-3; 76-4; 76-5.) Finally, the named plaintiffs have been involved in the litigation process, further supporting adequacy of representation. (Doc. Nos. 76-6 and 76-7.) See [Campbell v. PricewaterhouseCoopers, LLP](#), 253 F.R.D. 586, 596 (E.D. Cal. 2008). The court therefore finds that plaintiff satisfies the adequacy of representation requirement.

### B. [Rule 23\(b\)\(3\)](#) Requirements

\*7 The parties here seek certification under [Rule 23\(b\)\(3\)](#). (Doc. No. 29-1 at 16.) [Rule 23\(b\)\(3\)](#) requires: (i) “that the questions of law or fact common to class members predominate over any questions affecting only individual members”; and (ii) “that a class action is superior to other available method[s] for fairly and efficiently adjudicating the controversy.” The test of [Rule 23\(b\)\(3\)](#) is “far more demanding,” than that of [Rule 23\(a\)](#). [Wolin v. Jaguar Land Rover N. Am., LLC](#), 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting [Amchem](#), 521 U.S. at 623–24). The court will examine each requirement in turn.

#### i. Predominance

First, the common questions must “predominate” over any individual questions. While this requirement is similar to the [Rule 23\(a\)\(2\)](#) commonality requirement, the standard is much higher at this stage of the analysis. [Dukes](#), 564 U.S. at 359; [Amchem](#), 521 U.S. at 624–25; [Hanlon](#), 150 F.3d at 1022. While [Rule 23\(a\)\(2\)](#) can be satisfied by even a single question, [Rule 23\(b\)\(3\)](#) requires convincing proof the common questions “predominate.” [Amchem](#), 521 U.S. at 623–24; [Hanlon](#), 150 F.3d at 1022. “When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” [Hanlon](#), 150 F.3d at 1022; see also [Edwards v. First American Corp.](#), 798 F.3d 1172, 1182 (9th Cir. 2015).

Here, plaintiffs contend their claims and the putative class claims arise from a common source—M-I Swaco’s policy and practice of exempting from the requirements of overtime



compensation all persons employed in a covered position as any time during the class period. (Doc. No. 76-1 at 29.) Furthermore, these claims are based upon identical legal theories. (*Id.* at 29–20.) See generally *Hanlon*, 150 F.3d at 1022 (explaining that common questions involve a “common nucleus of facts and potential legal remedies”). The predominance requirement of Rule 23(b) has therefore been met here.

## ii. Superiority

Rule 23(b)(3) also requires a court to find “a class action is superior to other available methods for the fair adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3); see also *Edwards*, 798 F.3d at 1178. In resolving the Rule 23(b)(3) superiority inquiry, “the court should consider class members’ interests in pursuing separate actions individually, any litigation already in progress involving the same controversy, the desirability of concentrating in one forum, and potential difficulties in managing the class action—although the last two considerations are not relevant in the settlement context.” *Palacios*, 2015 WL 4078135, at \*6 (citing *Schiller v. David’s Bridal Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at \*10 (E.D. Cal. June 11, 2012)).

Here, plaintiffs contend class treatment is the superior method for resolving all claims in this case because a class action would (1) accomplish judicial economy by avoiding multiple suits, and (2) protect the rights of persons who might not be able to present claims on an individual basis. (Doc. No. 76-1 at 30.) There also appear to be no individual actions now pending, or any other impediments to managing the proposed class. In light of these factors, a class action is superior to individual resolution of the wage and hour claims of the proposed class members. See *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) (finding the Federal Civil Procedure Rule 23(b)(3) superiority requirement met given the evidence that potential class members’ claims would not be economical to litigate individually, the lack of similar pending actions, and the absence of any other obstacles to managing the class). The superiority requirement is thus satisfied here.

## II. Proposed Settlement

\*8 Plaintiff seeks approval of their proposed settlement agreement. (Doc. No. 76.) Under Rule 23(e), a court may

approve a class action settlement only if the settlement is fair, reasonable, and adequate. *Bluetooth*, 654 F.3d at 946. “[P]reliminary approval of a settlement has both a procedural and substantive component.” See, e.g., *In re Tableware Antitrust Litigation*, 484 F. Supp. 2d at 1079 (citing *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570 n.12 (E.D. Pa. 2001)). In particular, preliminary approval of a settlement and notice to the proposed class is appropriate if: (i) the proposed settlement appears to be the product of serious, informed, non-collusive negotiations; and (ii) the settlement falls within the range of possible approval, has no obvious deficiencies, and does not improperly grant preferential treatment to class representatives or segments of the class. *Id.*; see also *Ross v. Bar None Enterprises, Inc.*, No. 2:13-cv-00234-KJM-KJN, 2014 WL 4109592, at \*9 (E.D. Cal. Aug. 19, 2014). However, a district court reviewing a proposed settlement is not to “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute.” *Chem. Bank v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).<sup>4</sup>

### A. Procedural Adequacy

The first factor relevant to the court’s preliminary approval of settlement addresses the means by which the parties reached the proposed settlement. *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 1878918, at \*4 (N.D. Cal. 2013). The proposed settlement in the instant case resulted from non-collusive negotiation, after mediation on September 1, 2016, in Encino, California, with mediator Jeffrey Krivis. (Doc. No. 76-2 at 14.) Moreover, the parties agreed to settlement after conducting significant discovery in this action. (*Id.* at 10–14.) In particular, plaintiffs propounded their opening round of discovery on or about July 15, 2013, serving interrogatories, and requests for production of documents, and noticed defendant’s Rule 30(b)(6) deposition. (*Id.* at 12.) Defendant served its responses to all outstanding discovery on October 7, 2013. (*Id.*) On August 22, 2013, defendant served each plaintiff with separate requests for production of documents that each plaintiff responded to on October 22, 2013. (*Id.*) On January 6, 2014 class counsel took the deposition of Reginald Stanfield, the operation manager for defendant’s west coast district. (*Id.*) Depositions were also taken of plaintiffs Ashley Balfour and Sarmad Syed on January 7 and 8, 2014, and of FLSA class members Alan Crane and Adam Doherty on February 18, and 19, 2014. (*Id.*) Plaintiffs propounded a second set of document production requests on April 16, 2014, to which defendant responded on June 6, 2014. (*Id.* at 13.) On December 24,

2015, plaintiffs served a second set of interrogatories, to which defendant responded on February 16, 2016. (*Id.*) The parties further agreed to the settlement after the FLSA class was conditionally certified on November 26, 2014, and after the [Rule 23](#) motion for class certification had been filed. (*Id.* at 11.) Based on this history of the proceedings, and without any sign of collusion based on the current record, the court finds the parties have sufficiently shown the settlement was the product of informed, arm's length negotiations deserving of preliminary approval. See [Palacios, 2015 WL 4078135, at \\*8](#) (“[I]t appears that the settlement was arrived at for strategic reasons that benefitted the Classes, rather than Class Counsel's inability or unwillingness to pursue further litigation.”).

#### B. Substantive Adequacy

\*9 In conducting the preliminary fairness determination, the court must also consider whether the settlement itself is substantively fair, reasonable, and adequate. See [Bluetooth, 654 F.3d at 945](#). Several factors bear on the inquiry, including the size of the settlement award, the nature of the claims released, the amount of attorneys' fees awarded, and the size of the incentive payment to class representatives. See [Hanlon, 150 F.3d at 1026](#); [Villegas v. J.P. Morgan Chase & Co., No. CV 09–00261 SBA \(EMC\), 2012 WL 5878390, at \\*6–7 \(N.D. Cal. Nov. 21, 2012\)](#).

##### i. Adequacy of the Settlement Amount

To evaluate the fairness of the settlement award, the court should “compare the terms of the compromise with the likely rewards of litigation.” See [Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424–25 \(1968\)](#). “It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.” [In re Mego Fin. Corp. Secs. Litig., 213 F.3d at 459](#).

Here, the gross settlement amount is \$7,000,000 with an estimated \$4,505,166.67, less employer-sided payroll taxes, to be distributed to class members. (Doc. No. 76-2 at 14.) Based on a review of defendant's business and personnel records, there are an estimated 115 FLSA class members who worked an estimated 6,074 weeks during the FLSA class period, and 353 California class members who worked an estimated 23,880 weeks during the California class period. (*Id.* at 14–15.) To account for the greater value of the

California class members' claims for overtime wages,<sup>5</sup> the violation of the various California Labor Code claims, and the additional year of damages under [Business and Professions Code § 17200](#), the weeks worked by California Class members was multiplied by three. (*Id.* at 15.)<sup>6</sup> FLSA class members who worked for the duration of the FLSA class period of 261.4 weeks would receive an estimated \$14,437.12, less taxes. (*Id.*) California class members who worked for the duration of the California class period of 423.3 weeks would receive an estimated \$70,148.91. (*Id.*) Based upon the data exchanged, pay and work week information, the proposed settlement of \$7,000,000 is approximately 35% of the major class overtime claims. (*Id.* at 20.)<sup>7</sup> Plaintiffs represent that during mediation each side recognized the substantial risk of an adverse result and agreed to this compromise. (*Id.* at 14.) Plaintiffs note that pursuing further litigation risks (i) the court's denial of certification of their [Rule 23](#) proposed class; and (ii) an unfavorable result on the merits on summary judgment or at trial and/or on appeal, a process that can take several more years to litigate. (Doc. No. 76-1 at 21–22.) The court finds, based on the information provided by plaintiffs in their moving papers, that the settlement award in this case appears to be fair and reasonable.

##### ii. Attorneys' Fees

\*10 When a negotiated class action settlement includes an award of attorneys' fees, the fee award must be evaluated in the overall context of the settlement. See [Knisley v. Network Assocs., 312 F.3d 1123, 1126 \(9th Cir. 2002\)](#). At the same time, the court “ha[s] an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount.” [Bluetooth, 654 F.3d at 941](#); see also [Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1328–29 \(9th Cir. 1999\)](#). Where, as here, fees are to be paid from a common fund, the relationship between the class members and class counsel “turns adversarial.” [In re Mercury Interactive Corp. Securities Litigation, 618 F.3d 988, 994 \(9th Cir. 2010\)](#) (quoting [In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1302 \(9th Cir. 1994\)](#)). As a result, the district court must assume a fiduciary role for the class members in evaluating a request for an award of attorney fees from the common fund. *Id.*; [Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 968 \(9th Cir. 2009\)](#).

The Ninth Circuit has approved two methods for determining attorneys' fees in such cases where the attorneys' fee award is taken from the common fund set aside for the entire settlement: the "percentage of the fund" method and the "lodestar" method. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (citation omitted). The district court retains discretion in common fund cases to choose either method. *Id.*; *Vu*, 2016 WL 6211308, at \*5. Under either approach, "[r]easonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002).

Under the percentage of the fund method, the court may award class counsel a given percentage of the common fund recovered for the class. *Id.* In the Ninth Circuit, a twenty-five percent award is the "benchmark" amount of attorneys' fees, but courts may adjust this figure upwards or downwards if the record shows "special circumstances justifying a departure." *Id.* (quoting *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)).

To assess whether the percentage requested is reasonable, courts may consider a number of factors, including

[T]he extent to which class counsel achieved exceptional results for the class, whether the case was risky for class counsel, whether counsel's performance generated benefits beyond the cash settlement fund, the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis.

*In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954–55 (9th Cir. 2015) (internal quotation marks omitted). The Ninth Circuit has permitted courts to award attorneys' fees using this method "in lieu of the often more time-consuming task of calculating the lodestar." *Bluetooth*, 654 F.3d at 942.

\*11 In this case, in addition to the FLSA claims, plaintiff brings various California state law claims. Previously, under California law, "[t]he primary method for establishing the amount of reasonable attorney fees [was] the lodestar method." *In re Vitamin Cases*, 110 Cal. App. 4th 1041, 1053 (2003) (internal quotation marks and citations omitted). The court determines the lodestar amount by multiplying a reasonable hourly rate by the number of hours reasonably spent litigating the case. See *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 (9th Cir. 2001). The product of this

computation, the "lodestar" amount, yields a presumptively reasonable fee. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). However, the California Supreme Court recently also endorsed the percentage of the fund method for calculating reasonable attorneys' fees. See *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 486 (2016). Nonetheless, the Ninth Circuit has recommended that district courts apply one method but cross-check the appropriateness of the amount by employing the other, as well. See *Bluetooth*, 654 F.3d at 944.

Here, the settlement provides for attorneys' fees of not more than one-third of the gross settlement amount, for a total of not in excess of \$2,333,333.33. (Doc. No. 76-2 at 38.) Furthermore, "[i]n the event the Court awards less than the amounts requested by Class Counsel for the attorneys' fees and/or costs, the difference shall become part of the NSA and be available for distribution to Participating Class Members." (*Id.*) Plaintiffs have not yet explained why the court should depart from the twenty-five percent benchmark applicable in this circuit, but indicate in their motion that counsel ultimately intends to provide the court with details on the hours expended and the litigation expenses advanced. (Doc. No. 76-1.) The court approves the attorneys' fee request on a preliminary basis. However, the court will closely review the requested award of attorneys' fees at the final fairness hearing. The court will cross check with the lodestar amount based upon counsels' submission to determine whether an above-benchmark percentage is appropriate in this case and, if so, by how much. See *Powers v. Eichen*, 229 F.3d 1249, 1256–57 (9th Cir. 2000) (noting that an explanation is necessary when the district court departs from the twenty-five percent benchmark).

### iii. Class Member's Released Claims

As part of the settlement, all participating California class members release:

[A]ny and all claims and causes of action alleged in the Complaint in the Action for violation of any state or federal statute, rule or regulation, including state or federal wage and hour laws, whether for economic damages, non-economic damages, restitution, penalties, or liquidated damages including, without limitation, claims alleged in the Complaint for: (1) failure to pay minimum and/or overtime wages pursuant to California Labor Code ("LC")

§§ 510, 1194; (2) failure to provide meal periods and rest periods or compensation in lieu thereof in violation of LC §§ 226.7, 512; (3) failure to timely pay wages to terminated employees, LC §§ 201-203; (4) failure to comply with itemized employee wage statement provisions, LC §§ 226, 1174; (5) violation of California's UCL, [Business and Professions Code § 17200, et seq.](#), based on the claims alleged in the Complaint; and (6) violation of the Private Attorneys General Act of 2004 ("PAGA"), LC § 2698, et seq., based on the claims alleged in the Complaint ("California Released Claims"). The California Released Claims include all actions, causes of action, grievances, obligations, costs, expenses, damages, losses, claims, liabilities, suits, debts, demands, and benefits (including attorneys' fees and costs actually incurred), of whatever character, in law or in equity, known or unknown, asserted, whether in tort or contract, based on the claims and causes of action alleged in the Complaint. The California Released Claims exclude the release of any claims not permitted to be released by law, and exclude all claims and causes of actions for any type of discrimination, harassment, or retaliation as well as any type of employment termination. \*12 (Doc. No. 76-2 at 27–28.) Similarly, the participating FLSA class members' released claims are:

(1) the release to be given upon the endorsement and deposit of Settlement Payment checks by [California Rule 23](#) Class Members; and (2) the release to be given by the FLSA Collective Action Class Members. The FLSA Released Claims consist of claims for the alleged failure to pay minimum and overtime in violation of the FLSA, [29 U.S.C. §§ 201-219](#) ("FLSA Released Claims"). (*Id.* at 29.) Altogether, these released claims track those advanced by plaintiff in the action and the settlement does not release unrelated claims that class members may have against defendants. See [Williams v. Costco Wholesale Corp.](#), 2010 WL 761122, at \*2, 6 (S.D. Cal. Mar. 4, 2010) (finding a release with similar language to be fair and reasonable); cf. [Bond v. Ferguson Enter., Inc.](#), No. 1:09-cv-01662-OWW-MJS, 2011 WL 284962, at \*7 (E.D. Cal. Jan. 25, 2011) ("This form of release is overbroad by arguably releasing all unrelated claims up to the date of the Agreement.").

#### iv. Treatment of Class Representatives

The settlement agreement provides for a class representative payment of \$20,000 to plaintiff Sarmad Syed and \$15,000 to plaintiff Ashley Balfour. (Doc. No. 76-2 at 37–38.) The

settlement agreement further provides that "[i]n the event the court does not approve the entirety of the application for the Class Representative Service Payment and it is less than the amount requested, the difference shall become part of the NSA and be available for distribution to Participating Class Members." (*Id.* at 38.)

At its discretion, a district court may award incentive payments to named plaintiffs in class action cases. [Rodriguez v. West Publ'g Corp.](#), 563 F.3d 948, 958–59 (9th Cir. 2009). The purpose of incentive awards is to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaking in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." [Rodriguez](#), 563 F.3d at 958–59.

To justify an incentive award, a class representative must present "evidence demonstrating the quality of plaintiff's representative service," such as "substantial efforts taken as class representative to justify the discrepancy between [his] award and those of the unnamed plaintiffs." [Alberto v. GMRI, Inc.](#), 252 F.R.D. 652, 669 (E.D. Cal. 2008). Such incentive awards are particularly appropriate in wage-and-hour actions where a plaintiff undertakes a significant reputational risk by bringing suit against their former employers. [Rodriguez](#), 563 F.3d at 958–59.

The Ninth Circuit has emphasized that "district courts must be vigilant in scrutinizing all incentive awards." [Radcliffe v. Experian Info. Solutions, Inc.](#), 715 F.3d 1157, 1165 (9th Cir. 2013) (internal quotation marks and citation omitted). In particular, district courts have declined to approve incentive awards that represent an unreasonably high proportion of the overall settlement amount, or that are disproportionate relative to the recovery of other class members. See [Ontiveros](#), 303 F.R.D. at 365–66; see also [Ko v. Natura Pet Prods., Inc.](#), Civ. No. 09–2619 SBA, 2012 WL 3945541, at \*15 (N.D. Cal. Sept. 10, 2012) (holding that an incentive award of \$20,000, comprising one percent of the approximately \$2 million common fund was "excessive under the circumstances" and reducing the incentive award to \$5,000); [Wolph v. Acer America Corporation](#), No. C 09–01314 JSW, 2013 WL 5718440, at \*6 (N.D. Cal. Oct. 21, 2013) (reducing the incentive award to \$2,000 where class representatives did not demonstrate great risk to finances or reputation in bringing the class action). Courts have reasoned that overcompensation of class representatives could encourage collusion at the settlement stage of class actions by causing



a divergence between the interests of the named plaintiff and the absent class members, thus jeopardizing adequacy of class representatives. *See Staton*, 327 F.3d at 977–78; *see also Radcliffe*, 715 F.3d at 1165 (noting that unreasonably high incentive awards can destroy adequacy of class representatives).

**\*13** Here, the settlement agreement provides for a class representative payment of \$20,000 to plaintiff Sarmad Syed and \$15,000 to plaintiff Ashley Balfour, which represents approximately .3% and .2% of the gross settlement fund, respectively. (Doc. No. 76-2 at 37–38.) Plaintiff argues that the proposed incentive awards are reasonable in light of plaintiffs' "time, effort, risks undertaken for the payment of costs in the event this action had been unsuccessful, and stigma upon future employment opportunities for having initiated this action against a former, employer, and general release of all claims related to their employment." (Doc. No. 76-1 at 28.) Plaintiffs' have submitted declarations detailing their extensive involvement in this action. (Doc. Nos. 76-6 and 76-7.)

The court thus finds that the incentive award proposed by the parties is not excessive for purposes of preliminary approval. During the final fairness review, the court will determine whether the requested incentive award is appropriate in light of "the proportion of the payments relative to the settlement amount," "the size of the payment," "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions," "the amount of time and effort the plaintiff expended in pursuing the litigation," and any "reasonable fears of workplace retaliation." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *see also Deatricks*, 2016 WL 5394016, at \*8 (finding that while \$5,000 was a presumptively reasonable incentive award in the Ninth Circuit, such an award in that case was not warranted because plaintiff did not offer details regarding the actions the plaintiff had taken to protect the interests of the class).

#### v. PAGA Penalty Claims

The settlement of the claims for penalties under PAGA for civil penalties in the sum of \$75,000 (75% of \$100,000) will be paid to the Labor Workforce Development Agency and \$25,000 will be paid to the class. (Doc. Nos. 76-1 at 31 and 76-2 at 38.)

In one recent district court case, the LWDA provided some guidance regarding court approval of PAGA settlements. *See* California Labor and Workforce Development Agency's Comments on Proposed PAGA Settlement ("LWDA Comments"), *O'Connor v. Uber Techs., Inc.*, No. 3:13-cv-03826-EMC (N.D. Cal. Jul. 29, 2016), ECF No. 736 at 2–3.<sup>8</sup> In that case, where both class action and PAGA claims were covered by a proposed settlement, the LWDA stressed that

when a PAGA claim is settled, the relief provided for under the PAGA be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public and, in the context of a class action, the court evaluate whether the settlement meets the standards of being "fundamentally fair, reasonable, and adequate" with reference to the public policies underlying the PAGA.

*Id.*; *see also Salazar v. Sysco Central California, Inc.*, No. 1:15-cv-01758-DAD-SKO, slip op. at 4 (E.D. Cal. Feb. 2, 2017) (quoting the same with approval); *O'Connor v. Uber Techs., Inc.*, — F. Supp. 3d —, No. 3:13-cv-03826-EMC, 2016 WL 4398271, at \*17 (N.D. Cal. Aug. 18, 2016) (same).

Assuming thirty-five workweeks per year due to regular time off, counsel estimated a \$53,600,000 in potential PAGA exposure. (Doc. No. 80 at 4.) The \$100,000 penalty payment, however, represents 2.53% of the estimated \$3.95 million gross settlement amount allocated to the California class, for whom the PAGA claim applies. (*Id.*) This exceeds in percentage and in absolute number PAGA awards approved in other cases. *See Garcia v. Gordon Trucking, Inc.*, No. 1:10-cv-0324-AWI-SKO, 2012 WL 5364575, at \*7 (E.D. Cal. Oct. 31, 2012) (approving \$10,000 PAGA penalty for a California class with a \$3.7 million gross settlement payment). Having reviewed the parties' submission and the terms of the proposed settlement, for the purposes of preliminary approval, the court finds that the settlement amount related to plaintiffs' PAGA claims is fair, reasonable, and adequate in light of the public policy goals of PAGA.

### III. Proposed Class Notice and Administration

**\*14** For proposed settlements under [Rule 23](#), "the court must direct notice in a reasonable manner to all class members who would be bound by the proposal. [Fed. R. Civ. P. 23\(e\)\(1\)](#); *see also Hanlon*, 150 F.3d at 1025 ("Adequate notice is critical to court approval of a class settlement under [Rule 23\(e\)](#)."). A class action settlement notice "is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come



forward and be heard.” *Churchill Vill., LLC v. Gen. Elec.*, 561 F.3d 566, 575 (9th Cir. 2004) (internal quotations and citations omitted).

Here, plaintiff’s proposed notice describes what the case is about and the terms of the settlement, informs the class of the attorneys’ fee amount and the proposed distribution of the settlement amount, provides information concerning the time, place, and date of the final approval hearing, and informs absent class members that they may come to the hearing and how to obtain permission to speak at the hearing. (Doc. No. 76-2 at 67–80.) It also notifies absent class members about how they may object to the proposed settlement or opt out. (*Id.*)

The court finds that the notice and the manner of notice proposed by plaintiff meets the requirements of [Federal Civil Procedure Rule 23\(c\)\(2\)\(B\)](#) and that the proposed mail delivery is also appropriate in these circumstances.

## ORDER

For all of the reasons stated above:

1. Preliminary class certification is approved for settlement purposes for the following classes:

“FLSA Collective Action Class” means the 115 individuals employed by Defendant in a Covered Position during the period from August 5, 2010 through November 30, 2016, who previously consented to join the Federal Labor Standards Act Collective Action, pursuant to Section 16(b), [29 U.S.C. § 216\(b\)](#), (“FLSA”) and who have not performed work for Defendant in California during that time period.

The “[California Rule 23](#) Class Member(s)” or “California Class” means all persons employed by Defendant in California in a Covered Position at any time during the period from October 18, 2008 through November 30, 2016. There are an estimated 353 members in this group, which includes current and former employees who performed work for Defendant solely in California, as well as employees who performed work for Defendant both in California as well as outside of California.

“Covered Position” means a drilling fluid specialist, mud engineer, mud man, mud man trainee, or consultant mud

man, or equivalent title, as enumerated in Appendix No. 1 to the Agreement and attached to this Order.

2. The proposed settlement is approved on a preliminary basis as fair and adequate;
3. The court approves and appoints plaintiffs Sarmad Syed and Ashley Balfour as the class representatives;
4. The court approves and appoints the law firms of Spiro Law Corp., Blanchard Law Group, APC, the Holmes Law Group, APC and Cohelan, Khoury, & Singer as class counsel;
5. The court approves and appoints CPT Group, Inc., as the settlement administrator to administrate the settlement pursuant to the terms of the Agreement;
6. The proposed form of notice conforms with [Federal Rule of Civil Procedure 23](#) and is approved;
7. The hearing for final approval of the proposed settlement is set for Thursday, July 6, 2017, at 9:30 a.m.; and
8. Plaintiff’s counsel are directed to submit a proposed order for the court’s consideration setting calendar dates for a settlement implementation schedule now that this order has issued.

**\*15 IT IS SO ORDERED.**

## APPENDIX NO. 1

(Covered Positions/Titles Held by Class Members)  
Compliance Specialist

Compliance Specialist

Compliance Specialist Base

Compliance Specialist Base +

COMPLIANCE SPECIALIST G07

Compliance Specialist G07 Base+

Compliance Specialist I

Compliance Specialist I Base +

Compliance Specialist I+

Compliance Specialist II

|                                       |                                          |
|---------------------------------------|------------------------------------------|
| Compliance Specialist II Base +       | DRILLING FLUIDS SPECIALIST G09 BASE+     |
| Consultant                            | Drilling Fluids Specialist I             |
| CONSULTANT DRILLING FLUIDS SPECIALIST | Drilling Fluids Specialist II            |
| Contingent Worker                     | Drilling Fluids Specialist II +          |
| DFS III, Flying Squad Lead            | Drilling Fluids Specialist II+           |
| DFSIV                                 | Drilling Fluids Specialist III           |
| Drilling Fluids Engineer Trainee      | Drilling Fluids Specialist III +         |
| Drilling Fluids Specialist            | Drilling Fluids Specialist III+          |
| Drilling Fluids Specialist            | Drilling Fluids Specialist IV            |
| Drilling Fluid Engineer Trainee       | Drilling Fluids Specialist IV +          |
| Drilling Fluid Specialist             | Drilling Fluids Specialist IV+           |
| Drilling Fluid Specialist 1           | Drilling Fluids Specialist Manager       |
| Drilling Fluid Specialist 2           | Drilling Fluids Specialist Sr.           |
| Drilling Fluid Specialist Trainee     | Drilling Fluids Specialist Sr. +         |
| DRILLING FLUIDS /CONTIGENT            | Drilling Fluids Specialist Sr.           |
| Drilling Fluids Engineer              | Drilling Fluids Specialist Supervisor    |
| Drilling Fluids Engineer Base         | Drilling Fluids Specialist Trainee       |
| Drilling Fluids Engineer Trainee      | Drilling Fluids Specialist, DS—UK        |
| Drilling Fluids Spec I                | Drilling Fluids Specialist, Flying Squad |
| Drilling Fluids Specialist            | Drilling Fluids Specialist/Contingent    |
| Drilling Fluids Specialist SR         | Drilling Fluids Supervisor               |
| Drilling Fluids Specialist            | Drilling Fluids Supervisor               |
| Drilling Fluids Specialist            | Drilling Fluids Specialist               |
| Drilling Fluids Specialist (1)        | Drilling Fluids Specialist Sr.           |
| Drilling Fluids Specialist 1          | Drilling fluids Specialist               |
| Drilling Fluids Specialist 2          | Especialista De Fluidos Ii               |
| Drilling Fluids Specialist 3          | Sr. Drilling Fluids Specialist           |
| Drilling Fluids Specialist Base       | Sr. Drilling Fluids Specialist G11 Base+ |

|                                       |                                            |
|---------------------------------------|--------------------------------------------|
| Sr. Drilling Fluids Specialist Base + | WP Fluids Specialist 2                     |
| Sr. Drilling Fluids Specialist Base   | WP Fluids Specialist 3                     |
| Sr. Drilling Fluids Specialist        | WP Fluids Supervisor                       |
| SR. DRILLING FLUIDS SPECIALIST +      | WP Tool Specialist                         |
| Sr. Drilling Fluids Specialist Base   | WP Tool Specialist 2                       |
| Sr. Drilling Fluids Specialist Base + | WP Tools Specialist                        |
| SR. DRILLING FLUIDS SPECIALIST        | WP Tools Specialist 1                      |
| Tool Specialist                       | WP Tools Specialist 2                      |
| Tool Specialist Sr., WP—UK            | WP Tools Specialist 3                      |
| Tool Specialist, WP—UK                | WP Tools Specialist III                    |
| Tools Specialist                      | WP Tools Supervisor                        |
| Tools Specialist 2                    | <b>All Citations</b>                       |
| WP Fluids Specialist                  | Not Reported in Fed. Supp., 2017 WL 714367 |
| WP Fluids Specialist 1                |                                            |

## Footnotes

- 1 For a FLSA class member who worked the entire FLSA class period, this would amount to a payment of \$14,437.12 less taxes. For a California class member who worked the entire California class period, this would amount to a payment of \$70,148.91. (Doc. No. 76-2 at 15.)
- 2 Additionally, plaintiffs seek continued conditional certification of the following FLSA class for settlement purposes:  
  
“FLSA Collective Action Class” means the 115 individuals employed by Defendant in a Covered Position during the period from August 5, 2010 through November 30, 2016, who previously consented to join the Federal Labor Standards Act Collective Action, pursuant to Section 16(b), [29 U.S.C. § 216\(b\)](#), (“FLSA”) and who have not performed work for Defendant in California during that time period.  
  
(Doc. Nos. 76-2 at 88; 80 at 3.) Plaintiffs initially requested that this class period commence on November 26, 2011, but to comport with the FLSA class that the previously assigned district judge had already conditionally certified, plaintiffs changed this to August 5, 2010. (Doc. No. 80 at 3.) As defined, this class includes all members who were part of the FLSA class that the previously assigned district judge had conditionally certified.
- 3 The 2003 Amendments to [Federal Civil Procedure Rule 23](#) eliminated the provision stating that class certification orders “may be conditional,” and circuit courts have subsequently reached different conclusions about the continued viability of conditional or preliminary certification of settlement classes under the amended rule. Compare [Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of America](#), 453 F.3d 179, 186 n.8 (3d Cir. 2006) (“[T]he 2003 amendments to the Rule eliminated so-called “conditional” certifications—formerly available under [Rule 23\(c\)\(1\)\(C\)](#)”); with [Denney v. Deutsche Bank AG](#), 443 F.3d 253, 270 (2d Cir. 2006) (concluding that “conditional certification survives the 2003 amendment to [Rule 23\(c\)\(1\)](#)”). In the absence of Ninth Circuit guidance on the issue, this court will not depart from the procedure commonly employed by district courts in this circuit of certifying settlement classes on a preliminary basis for settlement purposes, and deferring final class certification until after the fairness hearing. See [Denney](#), 443 F.3d at 269 (noting that federal district courts “continue to employ this practice,” and that the process of “preliminary” certification is endorsed by the Manual for Complex

Litigation and Moore's Federal Practice). Before granting preliminary certification, the court nonetheless must carry out a searching, rather than a cursory, [Rule 23](#) analysis. See *Amchem Prods., Inc.*, 521 U.S. at 622 (requiring “undiluted, even heightened attention [to [Rule 23](#) requirements] in the settlement context”); cf. *Pointer*, 2016 WL 696582, at \*5 (“[D]espite the Supreme Court’s cautions in *Amchem*... a cursory approach appears the norm”).

- 4 The procedure for settling a FLSA collective action is less defined and generally less stringent than the procedure for settling a [Rule 23](#) class action. See *Tyson Foods, Inc. v. Bouaphakeo*, — U.S. —, 136 S. Ct. 1036, 1045 (2016) (“This opinion assumes, without deciding ... that the standard for certifying a collective action under the FLSA is no more stringent than the standard for certifying a class under [[Rule 23](#)].”).
- 5 Contrary to the parties' assertion, California law and the FLSA both provide an overtime rate of one and one-half times for each hour over forty worked. See [Cal. Labor Code § 510\(a\)](#) (West 2000); [29 C.F.R. § 778.409](#). California overtime provisions are, however, additionally triggered for non-exempt employees for each hour worked over eight hours in a day as well as for the first eight hours worked on the seventh consecutive day of work. See [Labor § 510\(a\)](#). California employers, with a few exceptions, must also pay double-time for twelve or more hours worked in a day, and for all hours worked over eight on the seventh day of work. (*Id.*)
- 6 Distributing the net settlement amount between the FLSA class and the California class this way is consistent with other hybrid settlements approved in this district. See *Millan v. Cascade Water Servs., Inc.*, No. 1:12-cv-01821-AWI-EPG, 2016 WL 3077710, at \*1 (E.D. Cal. May 31, 2016) (approving settlement agreement where FLSA settlement group received thirty-four percent of the net settlement and the [Rule 23](#) settlement group for California labor claims received sixty-six percent of the net settlement).
- 7 The Ninth Circuit has observed that “the very essence of a settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” *Officers for Justice v. Civil Serv. Commission*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted). When analyzing the amount offered in settlement, the court should examine “the complete package taken as a whole,” and the amount is “not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.” *Id.* at 625, 628.
- 8 See also *id.* at 3 (“The LWDA is not aware any existing case law establishing a specific benchmark for PAGA settlements, either on their own terms or in relation to the recovery on other claims in the action.”).\

# **EXHIBIT 28**



2017 WL 4390168

Only the Westlaw citation is currently available.

United States District Court, N.D. California.

William WALSH, Plaintiff,

v.

COREPOWER YOGA LLC, Defendant.

Case No. 16-cv-05610-MEJ

|

Signed 10/03/2017

#### Attorneys and Law Firms

[Juno E. Turner](#), Outten and Golden LLP, New York, NY, [Katrina Leigh Eiland](#), [Jahan C. Sagafi](#), Outten & Golden LLP, San Francisco, CA, for Plaintiff.

[Cheryl D. Orr](#), [Ramon Andres Miyar](#), Drinker Biddle & Reath LLP, San Francisco, CA, for Defendant.

#### ORDER RE: UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT; UNOPPOSED MOTION FOR ATTORNEYS' FEES AND COSTS

Dkt. Nos. 28, 29

[MARIA-ELENA JAMES](#), United States Magistrate Judge

#### INTRODUCTION

\*1 Plaintiff William Walsh ("Plaintiff") filed this putative class and collective action against Defendant CorePower Yoga LLC ("Defendant" or "CorePower") on October 3, 2016. *See* Compl., Dkt. No. 1. Pending before the Court are Plaintiff's unopposed (1) Motion for Certification of the Settlement Class, Final Approval of the Class Action Settlement, and Approval of the FLSA Settlement (Cert. Mot., Dkt. No. 28); and (2) Motion for Attorneys' Fees and Costs (Fees Mot., Dkt. No. 29). The Motions came on for hearing on July 13, 2017.

Having considered the parties' positions, the relevant legal authority, and the record in this case, the Court **GRANTS** the Certification Motion and **GRANTS IN PART** the Fees Motion for the reasons set forth below.

#### BACKGROUND

##### A. Background

CorePower owns and operates dozens of yoga studios nationwide. To maintain its facilities and until approximately 2015, CorePower created and operated a "Yoga for Trade" ("YFT") program at dozens of studios in California and around the country. Through the YFT program, CorePower Yoga customers (called "students") worked approximately two- to three-hour scheduled weekly shifts during which they cleaned and performed other project-based work at their local studio. In exchange, they received free yoga classes. CorePower did not pay these students ("YFT Cleaners") any wages for their work.

Beginning in late 2013, CorePower phased out the YFT program and replaced it with the Studio Experience Team ("SET"). Under the SET program, CorePower students continued to work regular weekly shifts of approximately one-and-a-half hours, but CorePower paid them an hourly wage for their work. Instead of receiving free yoga classes, however, Plaintiff alleges that SET Cleaners were required to apply a large portion of their wages towards the purchase of a discounted yoga membership at CorePower, which reduced their pay below the applicable minimum wage. Plaintiff worked for CorePower as both a YFT and SET Cleaner at one of CorePower's studios in Berkeley, California.

Plaintiff contends that CorePower violated wage and hour laws by: (1) failing to pay YFT Cleaners any wages for the hours they worked, in violation of California and the Fair Labor Standards Act ("FLSA") minimum wage provisions; and (2) paying California SET Cleaners subminimum wages by requiring them to purchase yoga memberships as a condition of work.

CorePower denies any wrongdoing, but agreed to settle these claims before Plaintiff filed suit. Plaintiff filed this action on behalf of the California Class and as a representative of the FLSA Collective.

The Court preliminarily approved the settlement, provisionally certified the proposed class and approved the FLSA Collective, and directed notice to Class and Collective members. *See* Prelim. Approval Order, Dkt. No. 21.

The Court held a final fairness hearing on July 13, 2017. *See* Dkt. No. 38 (minutes). As of the date of the hearing, four potential Class members objected to the settlement in writing, each on the ground that they had enjoyed the YFT and SET Programs and did not feel the lawsuit was warranted. *See* Turner Decl., Ex. G (Patton Decl.) ¶ 11 & Ex. B, Dkt. No. 30-7; Suppl. Patton Decl. ¶ 7, Dkt. No. 35. As of the date of the hearing, thirty-four potential class members requested they be excluded from the Class. Patton Decl. ¶ 10 & Ex. A; Suppl. Patton Decl. ¶ 5 & Ex. A.<sup>1</sup> No Class or Collective members appeared at the hearing.

## B. Settlement Terms

\*2 The terms of the Settlement Agreement are set out in full detail in the Preliminary Approval Order. *See* Prelim. Approval Order at 2-7. The Settlement Agreement and Amendment thereto are attached as Exhibits A and B to the Turner Declaration. After the hearing, the parties submitted by Joint Stipulation a second Amendment in response to the Court's concerns. *See* Suppl. Mem., Dkt. No. 43; Suppl. Patton Decl. ¶ 6 (Range of Payments); Minutes, Dkt. No. 49; Stip. with Proposed Order, Dkt. No. 50; Order on Stip., Dkt. No. 51. The Court summarizes the key terms of the amended Settlement Agreement here.

The Settlement Agreement defines the “California Class” as all individuals who rendered services to Defendant as YFT Cleaners or SET Cleaners in the State of California during the California Class Period. The Class Period applicable to the California Class is May 19, 2012 through February 14, 2017 (the date of the Preliminary Approval Order). The “FLSA Collective” is defined as “all individuals who rendered services to Defendant as YFT Cleaners during the FLSA Class Period.” Individuals within the FLSA Collective are referred to as “FLSA Collective Members.” The Class Period applicable to the FLSA Collective is May 19, 2013 through February 14, 2017. “YFT Cleaners” shall mean all individuals who worked for CorePower cleaning studios in exchange for yoga classes pursuant to its YFT program during the applicable Class Period. “SET Cleaners” shall mean all individuals who worked for CorePower cleaning studios in exchange for wages, pursuant to its SET program, during the California Class Period.

There are approximately 6,482 potential members of the FLSA Collective who participated in the YFT program, and 4,873 California Class members who participated in the YFT program at California CorePower studios. Turner Decl. ¶ 21;

Second Suppl. Turner Decl. ¶ 4, Dkt. No. 44. There are 3,519 California Class members who cleaned CorePower studios in California through the SET program, 653 of whom overlap with the individuals in California who worked in the YFT program. *Id.* (both)

Notice initially was distributed to Class and Collective members on March 28, 2017. Patton Decl. ¶ 4; *see also* Turner Decl., Exs. E-F. California Class members did not receive a separate FLSA Notice. Second Suppl. Turner Decl. ¶ 5. Notice was provided by both U.S. Mail and e-mail when that information was available; the Settlement Administrator made multiple mailings when mail was returned as undeliverable. Class members who received the initial mailing had until May 30, 2017 to exclude themselves from or object to the Settlement (or thirty days from any subsequent mailing if the original mail was returned as undeliverable). FLSA Collective members were required to opt in by May 30, 2017, or thirty days from any subsequent mailing if the original mail was returned as undeliverable.

Defendant agreed to pay a Total Settlement Amount of \$1,650,000.00. This was expected to represent a recovery of approximately 41% of the estimated unpaid minimum wages for California Class members' YFT workweeks, 8.6% for California Class members' SET workweeks, and 25% for the FLSA Collective members' workweeks. Turner Decl. ¶¶ 22, 25. At the conclusion of the opt-in period, only 16% of the FLSA Collective members had returned Consent to Join and Release Forms; under the distribution method contemplated by the Settlement Agreement, this participation rate meant “FLSA Collective Members would receive higher per-workweek payments than California Class Members, even though the YFT claims of the California Class are relatively stronger.” Suppl. Mem. at 3. The resulting payment differential between the Participating FLSA Collective members and the Participating California Class members would have been contrary to the parties' intent and caused the Court to question the fairness of the settlement. By stipulation, the parties agreed to amend the Settlement Agreement to redistribute to FLSA Collective and Class members the portion of the FLSA Collective Share of Net Settlement Fund that exceeds the sum total of the Estimated Settlement Shares of all Participating FLSA Collective members, consistent with their proportionate shares of the Net Settlement Fund. Order on Stip. at 2.

\*3 The Settlement Agreement authorizes Class Counsel to apply for an award of attorneys' fees in an amount not to

exceed one-third of the Total Settlement Amount, plus the costs incurred in litigating this case. In the separately filed Motion for Attorneys' Fees, Class Counsel requests \$550,000 in fees and \$11,917.39 in costs. *See* Fees Mot.; Second Suppl. Turner Decl. ¶ 8. Class Counsel also requests an incentive payment of \$10,000 to Plaintiff. *See id.* The Settlement Administrator requests costs in the amount of \$69,875. Fees Mot. Finally, \$7,500 will be paid to the California Labor and Workforce Development Agency, representing 75% of the total penalties allocated to the claims brought under the California Private Attorneys General Act ("PAGA"). *See* Settlement Agreement ¶ 3.1(A).<sup>2</sup>

After deducting the proposed fees and costs, the Net Settlement Fund is estimated to be approximately \$993,183. The Settlement Agreement originally contemplated allocating 65% of the Net Settlement Fund to California Class members and 35% to FLSA Collective members; the allocation has been changed to ensure FLSA Collective members will not receive an unfair proportion of the Net Settlement Fund. *See* Order on Stip. at 2 ("The portion of the FLSA Collective Share of Net Settlement Fund that exceeds the sum total of the Estimated Settlement Shares of all Participating FLSA Collective Members (i.e., an amount equal to the difference between the FLSA Collective Share of Net Settlement Fund and the sum total of the Estimated Settlement Shares of all Participating FLSA Collective Members) (the 'FLSA Redistribution Amount') will be distributed between the Participating FLSA Collective Members and the Participating California Class Members consistent with their proportionate shares of the Net Settlement Fund."). In addition, California Class members had the option of electing to receive a gift card with a face value of twice their settlement amount; as of the date of the hearing, 542 California Class members elected to receive a gift card. Patton Decl. ¶ 9; Order on Stip. at 2-3 (the value of the gift card will be increased by double the portion of the FLSA Redistribution Amount).

Participating Class members release Defendant from all California Labor Code and FLSA claims there were or could have been pleaded to the extent they are based on the same facts and circumstances as the claims brought here. *See* Settlement Agreement ¶ 3.6(A) (endorsement language on settlement checks). Participating Collective members release Defendant from all FLSA claims that were alleged, related to, or that reasonably could have arisen out of the same facts alleged here, and that arise out of services rendered as part of the YFT Program. *Id.* ¶ 3.6(A) & (B).

Unclaimed funds for the California Class are non-reversionary. Uncashed checks mailed to FLSA Collective members who opted in to the Settlement will revert to CorePower if they have not been cashed within 90 days.

## DISCUSSION—FINAL APPROVAL

### A. Legal Standard

The Ninth Circuit maintains a "strong judicial policy" that favors the settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Nonetheless, "[t]he claims, issues, or defenses of a certified class may be settled ... only with the court's approval." *Fed. R. Civ. P. 23(e)*. "The purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008) (citation omitted). "Adequate notice is critical to court approval of a class settlement under Rule 23(e)." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998).

\*4 Additionally, Rule 23(e) requires the Court to determine whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Id.* at 1026; *Fed. R. Civ. P. 23(e) (2)* ("If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."). To assess whether a settlement proposal is fair, adequate, and reasonable, the Court must generally balance a number of factors, including:

- (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the state of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

*In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (citations omitted). Where a settlement agreement is negotiated prior to formal class certification, it is subject to a higher level of scrutiny, and a court's approval order must ensure that the settlement is not the product of collusion among the negotiating parties. *Id.* at 946-47. But, "[g]enerally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Ching v. Siemens*

*Indus., Inc.*, 2014 WL 2926210, at \*4 (N.D. Cal. June 27, 2014).

## B. Class Certification

Final approval of a class action settlement requires, as a threshold, an assessment of whether the class satisfies the requirements of [Federal Rule of Civil Procedure 23\(a\) and \(b\)](#). See *Hanlon*, 150 F.3d at 1019, 1022. Because no new facts that would affect these requirements have arisen since the Court preliminarily approved the Class on February 14, 2017, this Order incorporates by reference its prior analysis under [Rules 23\(a\) and \(b\)\(3\)](#) as set forth in the Preliminary Approval Order. See Prelim. Approval Order at 12-15. The Court affirms its previous findings and certifies the California Class.

## C. Adequacy of Notice

[Rule 23\(e\)](#) requires that “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” [Fed. R. Civ. P. 23\(e\)\(1\)](#). The notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citations omitted); see also *Officers for Justice v. Civil Serv. Comm’n of City & Cty. of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982) (“The class must be notified of a proposed settlement in a manner that does not systematically leave any group without notice.” (citation omitted)). “[Rule 23\(e\)](#) requires notice that describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015) (internal quotation marks omitted). The Court’s role in reviewing a proposed settlement is to represent those class members who were not parties to the settlement negotiations and agreement. See, e.g., *S.F. NAACP v. S.F. Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1027 (N.D. Cal. 1999).

\*5 The Court approved the form and content of the revised proposed Class Notice which Claims Administrator SSI mailed to Class and Collective members. See Prelim. Approval Order. The Court also approved the Notice Plan as set forth in the Settlement Agreement. *Id.* SSI sent hard copy notices to a total of 14,873 Class and Collective members, and sent email notices to 13,689 Class and Collective members. Patton Decl. ¶ 4. The notice process described in the Patton Declaration comports with the Notice Plan.

Moreover, SSI employed several quality control measures to locate Potential Class and Collective members, including checking lists of addresses against the National Change of Address database and performing computerized locator traces to locate Potential Class and Collective members when USPS returned their Notice Packets as undeliverable. *Id.* ¶ 5. The Settlement Administrator represents 33 Class members and 18 FLSA Collective members did not receive any successful notice attempt. Patton Decl. ¶ 5; Suppl. Patton Decl. ¶ 12.

With respect to those California Class members whose Notice Packets were not delivered, [Rule 23](#) does not require actual notice of settlement to class members in time to opt out of the class; rather, due process requires notice be given in a manner “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane*, 339 U.S. at 314-15, 319 (“Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.”); see also *Silber v. Mabon*, 18 F.3d 1449, 1454-55 (9th Cir. 1994) (concluding, under *Mullane* and other precedent, that “the appropriate standard is the ‘best notice practicable’”—not actual notice). Under the circumstances, the Court finds SSI’s method of providing notice to Class members was the best practicable means of apprising Class members of the Settlement. See *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 680 (N.D. Cal. 2016) (finding notice by U.S. Mail best notice available under the circumstances). Consequently, notice was adequate as of May 16, 2016.<sup>3</sup>

## D. Fairness, Adequacy, and Reasonableness

The Court preliminarily found the Settlement “fair, reasonable, and adequate” under [Rule 23\(e\)\(2\)](#). Prelim. Approval Order. The preliminary approval stage is “an ‘initial evaluation’ of the fairness of the proposed settlement made by the court on the basis of written submissions and informal presentation from the settling parties.” *In re High-Tech Emp. Antitrust Litig.*, 2013 WL 6328811, at \*1 (N.D. Cal. Oct. 30, 2013) (citation omitted). The Court now examines the Settlement Agreement anew to ensure it is “fair, reasonable, and adequate” in light of the *In re Bluetooth* factors. 654 F.3d at 946. When settlement occurs before formal class certification, settlement approval requires a higher standard of fairness in order to ensure



that class representatives and their counsel do not secure a disproportionate benefit at the expense of the class. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

1. *In re Bluetooth Factors*

*The strength of Plaintiff's case.* Where plaintiffs face significant barriers to succeed on the merits, such as establishing the existence of an employer-employee relationship, the first *Bluetooth* factor favors settlement. *See Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010). Courts “may presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery.” *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, at \*9 (N.D. Cal. Apr. 22, 2010). “Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” *Ching*, 2014 WL 2926210, at \*4 (internal quotation marks omitted). The Court need not “ ‘reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.’ ” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 229 F. Supp. 3d 1052, 1064-65 (N.D. Cal. 2017) (quoting *Officers for Justice*, 688 F.2d at 625).

\*6 To prevail on the merits of this action, Plaintiffs would need to prove that CorePower employed both YFT and SET Cleaners, that CorePower's remuneration of the cleaners violated the FLSA and California wage and hour laws, and that requiring SET Cleaners to purchase yoga memberships resulted in subminimum wages under California wage and hour law. CorePower contends YFT Cleaners were properly classified as independent contractors, not employees, and that SET Cleaners voluntarily purchased discounted memberships because of their interest in yoga.<sup>4</sup> Because Plaintiff would face significant barriers to succeed on the merits, this factor favors final approval.

*The risk, expense, complexity, and likely duration of further litigation.* Difficulties and risks of litigating weigh in favor of approving a class settlement. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009). Should final approval be denied, CorePower will continue to deny liability, and Plaintiff will be forced to litigate the merits of his claims in a nation-wide FLSA Collective Action and a California

Class Action comprising two differently-situated groups. While there are no facts before the Court to suggest this litigation will be particularly expensive, complex, or lengthy, there is no doubt litigation would be hard fought and costly, and as indicated above, the outcome of the case on the merits is not clear. Even if Plaintiff ultimately prevailed on his claims, an appeal would delay recovery to Collective and Class members and might increase the fees Class Counsel would seek to recover from any ultimate award. This factor therefore also favors final approval.

*The risk of maintaining class action status throughout the trial.* Absent settlement, CorePower would oppose a motion for class certification. Plaintiff would need to overcome CorePower's argument that some of the threshold issues, such as whether SET Cleaners were coerced into buying memberships, present individualized questions that are not appropriately resolved on a class-wide basis. In its Preliminary Approval Order, the Court noted the material risks Plaintiff faced in proving liability on a class-wide basis. The bases for Class members' objections and exclusions to the Settlement underscore this risk. *See supra*; *see also* Certification Mot. at 19 (“[O]bjectors have taken issue with the premise of Plaintiff's lawsuit, as they wish to continue participating in CorePower's YFT and SET programs....”). This factor favors final approval.

*The amount offered in settlement.* At the Preliminary Approval stage, Class Counsel estimated that, before deducting for fees and costs, California Class members who were YFT Cleaners would receive \$9.34 per workweek, California Class members who were SET Cleaners would receive \$1.17 per workweek, and FLSA Collective members would receive \$4.60 per workweek. Sagafi Decl. ¶ 34, Dkt. No. 11. Counsel represented that, without factoring in liquidated damages, this recovery amounted to 41% of the estimated unpaid minimum wages for the California YFT Cleaner workweeks, 8.6% of the estimated unpaid minimum wages for the SET Cleaner workweeks, and 25% of the estimated unpaid minimum wages for the FLSA Collective workweeks. Prelim. Approval Mot. at 5, Dkt. No. 10; Sagafi Decl. ¶ 38.

Pursuant to the revised distribution framework (*see supra* at 3-5), Counsel estimates that California YFT Cleaners will receive \$7.00 per workweek, SET Cleaners will receive \$0.87 per workweek, and FLSA Collective members will receive \$2.78 per workweek. Suppl. Mem. at 4 & n.3. In addition, almost 550 California Class members elected to receive their



settlement amount in the form of a gift card, which doubles the amount of their settlement award. Patton Decl. ¶ 9.

\*7 “It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (citation omitted). In light of the significant risks of continued litigation, especially with respect to securing class certification, and based on Plaintiff’s Counsel’s endorsement of the settlement (*see below*), the Court does not find that the cash settlement in this instance renders the settlement inadequate or unfair. *Cf. Hunt v. VEP Healthcare, Inc.*, 2017 WL 3608297, at \*1 (N.D. Cal. Aug. 22, 2017) (denying preliminary approval of class and collective action settlement where workers would recover approximately 4% of amount allegedly owed to them: “If a defendant is to receive a discount of this magnitude, there must be good reasons why. And those reasons must be explained thoroughly....”).

*The extent of discovery completed and the state of the proceedings.* Courts often “look to the amount of exchanged information prior to settlement to determine whether the parties have made an informed decision to settle the case.” *Willner v. Manpower Inc.*, 2015 WL 3863625, at \*4 (N.D. Cal. June 22, 2015) (citation omitted). Although no formal discovery took place in this matter, Class Counsel spent significant time investigating the claims and interviewing Plaintiff and other Class members; the parties also exchanged information pre-filing and participated in private mediation. Turner Decl. ¶¶ 14-16. This factor also weighs in favor of final approval.

*The experience and views of counsel.* The experience of Class Counsel also weighs in favor of final approval. “Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Class Counsel are experienced class action attorneys who have been qualified as lead class counsel by other California courts, both in employment wage and hour litigation and in other types of cases. *See* Sagafi Decl. ¶¶ 5, 10. Based on their experience and their knowledge of the current case, Class Counsel endorses the Settlement as fair, adequate, and reasonable. This too weighs in favor of final approval.

*The presence of a governmental participant.* Although no governmental entity is a party to these proceedings, the United

States and California Attorneys General were notified of the settlement pursuant to the notice provisions of CAFA. *See* 28 U.S.C. § 1715. No federal or state official has objected to or raised concerns about the Settlement.

*The reaction of the class members to the proposed settlement.* “[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.” *In re Omnivision*, 559 F. Supp. 2d at 1043 (citation omitted). According to the Claims Administrator, four persons objected to the Settlement, and 34 requested to be excluded from the Settlement. Thus, while there were some dissenting voices, the objectors represent a small percentage of the Class. This factor favors final approval.

In summary, having considered the *In re Bluetooth* factors, the Court finds they weigh in favor of settlement.

## 2. Potential Collusion

Where a settlement is reached prior to class certification, courts must also consider whether the settlement is the product of collusion among the negotiating parties. *In re Bluetooth*, 654 F.3d at 947. The parties reached an agreement in principle when they participated in a formal private mediation, then spent several weeks negotiating the details of the Settlement Agreement and the class notice. The presence of a mediator strongly suggests the absence of collusion or bad faith by the parties or counsel. *See Chun-Hoon*, 716 F. Supp. 2d at 852; *Satchell v. Fed. Express Corp.*, 2007 WL 1114010, at \*4 (N.D. Cal. Apr. 13, 2007) (“The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.”). The Court previously found this type of arms-length negotiation weighed in favor of preliminary approval (Prelim. Approval Order at 16-17) and finds this to be the case again on final approval.

\*8 In addition to the procedure by which the parties arrived at their settlement, the Court must also look for other signs that may demonstrate collusion, including (1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded; (2) when the parties negotiate a “clear sailing” arrangement providing for the payment of attorneys’ fees separate and apart from class funds, which carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class; and (3) when the parties arrange for fees not awarded to revert

to defendants rather than be added to the class fund. *In re Bluetooth*, 654 F.3d at 947. As to the first factor, the monetary distribution to the Class constitutes approximately 60% of the Total Settlement Amount, while Class Counsel will receive up to one-third of the Total Settlement Amount. As discussed below, one-third is not necessarily disproportionate, though it does exceed the 25% benchmark in the Ninth Circuit. As to the second factor, the Settlement Agreement contains a clear sailing provision in which CorePower agrees not to object to Class Counsel's request for fees constituting up to one-third of the Total Settlement Amount. Nevertheless, because the fee will be awarded from the same common fund as the recovery to the Class, this particular clear sailing provision does not signal the possibility of collusion. See *In re High-Tech Emp.*, 2015 WL 5158730, at \*14 (where attorneys' fees will be awarded from the same common fund as the recovery to the class, where counsel did not negotiate fees separate and apart from class funds, and where no portion of the common fund would revert to defendant, clear sailing provision did not signal possibility of collusion). And as to the third factor, it only applies to a minimal degree. No money allocated to the Class will revert to Defendant; instead, any residual amount that is too small to be redistributed to Class members will be paid to a *cy pres* recipient, the National Employment Law Project ("NELP"). The Court previously found NELP has a "driving nexus" to the members of this wage and hour employment class. Prelim. Approval Order at 18-19. The only money that will revert to Defendant are checks that have been mailed to FLSA Collective members (who by definition have opted in to the Collective), which have not been cashed within 90 days of mailing.

In sum, the Court finds these facts do not raise an inference of collusion.

### 3. Summary

Given the foregoing analysis, the Court finds that even under heightened scrutiny, the Settlement Agreement is fair, reasonable, and adequate to warrant final approval.

## DISCUSSION—FLSA COLLECTIVE

The Court conditionally certified the FLSA collective action. Prelim. Approval Order at 23-24. The standard for certification of an FLSA collective action is "not as stringent a standard" as that for certification of a class under Rule 23. See *Tijero v. Aaron Bros., Inc.*, 301 F.R.D. 314, 323 (N.D. Cal.

2013) (citing *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1003 (N.D. Cal. 2010)). For the same reasons identified above, the Court finds the settlement of the FLSA Collective, as revised by the parties on September 27, 2017, "constitutes a 'fair and reasonable resolution of a bona fide dispute,' and approves it." *Sarkisov v. StoneMor Partners L.P.*, 2015 WL 5769621, at \*3 (N.D. Cal. Sept. 30, 2015) (quoting *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982)).

## DISCUSSION—ATTORNEYS' FEES AND COSTS

### A. Attorneys' Fees

Plaintiffs' counsel requests \$550,000 in fees. At the Preliminary Approval hearing, Class Counsel represented it expected its final lodestar to be approximately \$220,000, which would represent a multiplier of 2.3. The Court found this multiplier was within the range of reasonableness for purposes of preliminary approval but "expressed some concern that 33 and 1/3 % of the Total Settlement Fund represents an unwarranted upward departure from the norm." Prelim. Approval Order at 19. Since that time, Class Counsel performed additional work in responding to Class and Collective members, moving for final approval, and responding to inquiries from the Court. Class Counsel represents its current lodestar amounts to \$403,643 and its total costs are \$11,917.39; the requested fees now represent a multiplier of 1.36. Second Suppl. Turner Decl. ¶ 8.

#### 1. Legal Standard

Courts have discretion to award attorneys' fees to a prevailing plaintiff if: "(1) fee-shifting is expressly authorized by the governing statute; (2) the opponents acted in bad faith or willfully violated a court order; or (3) the successful litigants have created a common fund for recovery or extended a substantial benefit to a class." *In re Bluetooth*, 654 F.3d at 941. An award of attorneys' fees is authorized in this case by the governing statutes,<sup>5</sup> and because Plaintiff has created a common fund for recovery and extended a substantial benefit to the class. Nonetheless, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Id.* (citations omitted).

\*9 In this circuit, there are two primary methods used to calculate reasonable attorneys' fees: the lodestar method and the percentage-of-recovery method. *In re Online DVD-*

*Rental*, 779 F.3d at 949. Courts have the discretion to award fees employing either method. *In re Bluetooth*, 654 F.3d at 942 (citation omitted). Whichever method they choose to employ, courts should cross-check the fees awarded using the second method. *Id.* at 944-45. In evaluating the reasonableness of a percentage-of-fund award or a lodestar, courts consider the following factors:

(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

*Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). The most important factor is the benefit counsel obtained for the class. *In re Bluetooth*, 654 F.3d at 942. Finally, “the lack of objection from any Class Member supports the attorneys’ fees award.” *In re Immune Response*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007).

The Court analyzes Class Counsel’s request for fees under percentage-of-funds method and confirms the result by applying a lodestar analysis.

## 2. Percentage of Funds Analysis

In the Ninth Circuit, the “benchmark” percentage for an award of attorneys’ fees in a class action is 25%. *In re Bluetooth*, 654 F.3d at 942. This “benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.” *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). In this case, several factors balance each other out to suggest that the benchmark percentage is appropriate.

Class Counsel is experienced in this type of litigation and handled the matter on a purely contingent basis starting at the latest in January 2016 when it sent CorePower a letter notifying it of Plaintiff’s claims. Sagafi Decl. ¶ 25. The parties settled this case before filing suit. In all likelihood, this was a more economic approach than litigating the case aggressively before exploring pre-suit resolution; however, it also means

Class Counsel did not need to expend as many resources to resolve the action.

Class Counsel obtained monetary compensation for Class and Collective members in a case involving significant litigation risks and in which certification was not an obvious outcome. *See supra*. But it is not evident whether Collective and Class members believe the lawsuit was in their best interest: only 16% of potential FLSA Collective members who received notice by mail and/or email opted into the Settlement, and it remains to be seen how many Class members will cash their Settlement Checks. Indeed, one potential Class member requested to be excluded because the claims were “ridiculous” and another because cleaners had been “more than adequately compensated for” their services and “in no way feel entitled to monetary compensation.” Patton Decl., Ex. A at ECF pp. 14, 25. Others objected to the Settlement because they were “clearly told, both verbally and in writing, that [their] cleaning services would be compensated only in a trade for unlimited yoga classes in the week of [their] cleaning work ... [this] deal was fair and honestly [they feel they] got the better end of the bargain.” Patton Decl., Ex. B at ECF pp. 35-36. Others felt it was “unfortunate to see CPY being sued for something that was such a wonderful gift.” *Id.* at ECF p. 37; *see also* Suppl. Patton Decl., Ex. A at ECF pp. 32, 44; Suppl. Br., Dkt. No. 20.<sup>6</sup> Moreover, Plaintiff’s characterization of the recovery of \$0.87 per workweek for SET Class members<sup>7</sup> as “highly favorable” (Fees Mot. at 5) does not resonate loudly with the Court. *See also* Turner Decl. ¶ 22 (estimated recovery of \$1.17 per workweek for Class members who were SET Cleaners is 8.6% of estimated unpaid minimum wages, *before* deducting proposed fees and costs).

**\*10** No Class members objected specifically to the proposed fee award. Patton Decl.; Suppl. Patton Decl.

However, the Court was required to involve itself numerous times to obtain sufficient information and/or clarification from Plaintiff’s Counsel. *See, e.g.*, Order re: Hearing, Dkt. No. 17 (Plaintiff did not sufficiently address several factors relevant to preliminary approval, did not clearly explain gift card procedures, etc.); Suppl. Br., Dkt. No. 20 (addressing additional questions from Court regarding obvious deficiencies in settlement, preferential treatment, and reasonable range of approval); Order re: Motion for Final Class Cert., Dkt. No. 32 (addressing discrepancies between declarations); Suppl. Turner Decl. ¶ 4, Dkt. No. 34 (acknowledging errors); Suppl. Br. Order, Dkt. No. 42 (asking whether 16% participation rate for FLSA

Collective meant YFT Cleaners outside of California who were Participating FLSA Collective members would receive significantly greater settlement than California YFT Cleaners whose claims counsel generally considered more valuable, and questioning whether this was fair); Second Suppl. Turner Decl. ¶ 6 (responding to Court's questions raised during Fairness Hearing, but providing erroneous information re total number of exclusions); Order Setting Telephonic Hearing, Dkt. No. 45 (setting hearing to discuss mechanics of proposed change in "unclaimed funds," which Plaintiff did not address in the Suppl. Mem.).

For these reasons, the Court does not find it appropriate to award attorneys' fees in an amount greater than the 25% benchmark.

### 3. Lodestar Comparison

The lodestar represents a reasonable hourly fee multiplied by the number of hours reasonably expended on the litigation. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The lodestar figure is presumptively reasonable. *Clark v. City of L.A.*, 803 F.2d 987, 990 (9th Cir. 1986). The lodestar comparison in this case confirms 25%, rather than 33%, of the Total Settlement Amount is warranted for attorneys' fees.

#### a. Hourly Rate

To determine the appropriate lodestar amount, courts first assess the reasonableness of the hourly billing rate. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). To determine whether rates are reasonable, courts must identify the relevant community and assess the prevailing hourly rate in that community for similar services by lawyers of reasonably comparable skill, experience, and reputation. See *id.* at 979. "Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits." *Id.* Here, the relevant community is the San Francisco Bay Area, and the reasonableness of rates charges should therefore be determined by reference to the rates charged by Bay Area attorneys with commensurate skill, experience, and reputation.

Plaintiff seeks an hourly rate of between \$200 and \$775 per hour depending on the particular support staff, attorney, or partner. Second Suppl. Turner Decl. Ex. B. Class Counsel described the skill, experience, and reputation of the attorneys and support staff who worked on the matter. Sagafi Decl. ¶¶

6-19 (describing experience of Sagafi, Eiland, and Turner); Turner Decl. ¶¶ 4-13 (describing experience of Turner, Sagafi, Eiland, Schrum-Herrera, and Levinson). The range of rates requested for the attorneys and support staff identified in the declarations is in line with the overall range of market rates in this District for attorneys and for litigation support staff of similar abilities and experience. See *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (district court did not abuse its discretion in awarding 2008 hourly rates for Bay Area attorneys of up to \$875 for a partner, \$700 for an attorney with 23 years of experience, \$425 for an attorney with approximately five years of experience, and \$190 for paralegals); see also *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, at \*5 (N.D. Cal. May 21, 2015) (finding reasonable rates for Bay Area attorneys of between \$475-\$975 for partners, \$300-\$490 for associates, and \$150-\$430 for litigation support and paralegals). Under the circumstances, the Court is satisfied the hourly rates requested for the work performed by Sagafi, Eiland, Turner, Schrum-Herrera, and Levinson fall within the range of reasonable fees.

\*11 But Class Counsel also seeks to recover fees for the work performed by seven attorneys and eight support staff members whose experience was not described by Sagafi or Turner. See Second Suppl. Turner Decl., Ex. B. Counsel provided the biographical information for the attorneys and staff "with primary involvement in" the case, and offered to provide supplemental information to the Court. Turner Decl. ¶ 13 & n.2.<sup>8</sup> While this approach may have been appropriate if the unidentified staff performed minimal work, the work performed by the seven attorneys and eight support staff Counsel never described amounts to almost \$89,000. See Second Suppl. Turner Decl., Ex. B. Counsel should not place the onus upon the Court to ensure the Fees Motion is adequately supported. The lack of information about these individuals prevents the Court from ascertaining whether their experience warrants the fees charged, which range from \$230 for "Part-Time Paralegal" to \$650 for Nantiya Ruan.

#### b. Hours Expended

Beyond establishing a reasonable hourly rate, a party seeking attorneys' fees bears the burden to "document[ ] the appropriate hours expended." *Hensley*, 461 U.S. at 437. Such an applicant must exercise sound "billing judgment" as to the number of hours worked, eliminating excessive, redundant, or unnecessary hours, and provide billing records supporting



the time claimed. *Id.* at 433-34. Class Counsel “is not required to record in great detail how each minute of his time was expended,” but should “identify the general subject matter of his time expenditures.” *Id.* at 437 n.12; *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (quoting *id.*). From the inception of the matter until August 11, 2017, Class Counsel declares they have spent 1,163 hours litigating the case. Second Suppl. Turner Decl. ¶ 8 & Ex. B. Counsel declares staffing and billing were handled in a reasonable manner, but only “identif[ies] the general subject matter of [ ] time and expenditure” in the most abstract manner; Counsel does not provide any details as to how those hours were spent. *See* Turner Decl. ¶¶ 37-39, 43 & Ex. H; Second Suppl. Turner Decl. ¶ 8 & Ex. B. The Court has no reason to believe the reported hours are unreasonable under the circumstances, but again, Counsel's submissions do not permit the Court to make such a finding. To that end, Counsel's submissions do not support an upward modification from the 25% benchmark fee award.

#### c. Enhancement or Multiplier

Class Counsel calculates the lodestar fee for the work performed is \$403,643. Second Suppl. Turner Decl. ¶ 8 & Ex. B. Class Counsel's request for \$550,000 amounts to a multiplier of 1.36. *Id.* ¶ 8.

#### 4. Conclusion

The circumstances of this case do not warrant an upward departure from the 25% benchmark, and do not warrant a lodestar multiplier. The lodestar comparison—to the extent Counsel has provided sufficient information for the Court to perform it—confirms this amount is appropriate. The Court in its discretion accordingly grants Plaintiff's motion in part and awards it attorneys' fees in the amount of \$412,500, an amount just above Counsel's lodestar. The difference between this amount and the fees requested will be added to the Net Settlement Fund. Settlement Agreement ¶ 3.2(b).

#### B. Class Counsel Costs

Class Counsel seeks to recover \$11,917.39 in disbursed costs. *See* Turner Decl. ¶ 50 & Ex. I; Second Suppl. Turner Decl., Ex. B at ECF p. 3. The bulk of the requested costs are for mediation fees, computer research, court fees and travel. *Id.* (both). As with their attorneys' fees, Counsel provides no detail to support these requests. *Id.* (both). Counsel represents these costs were necessary and reasonable, and expended

solely for the benefit of the Class. Fees Mot. at 14. Class Counsel previously requested \$785 in “Court fees”; the Court asked counsel to explain what accounted for the \$80.00 that Counsel requested above the \$705 listed on the docket. *See* Order ¶ 7, Dkt. No. 32. Class Counsel provided that explanation. Suppl. Turner Decl. ¶ 6. Class Counsel now seeks a total of \$1,001.50 in Court fees, but again fails to provide any explanation for the additional \$216.05 fee request. Second Suppl. Turner Decl., Ex. B at ECF p. 3. Absent any reasons for the increased request, the Court cannot ascertain whether the costs were incidental and necessary to the representation, and therefore reimbursable. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *Millan v. Cascade Water Servs., Inc.*, 2016 WL 3077710, at \*12 (E.D. Cal. May 31, 2016). The request for costs is denied without prejudice; Class Counsel may submit a detailed explanation supporting its cost request within one week of the date of this Order.

#### C. Service Award

\*12 Courts have the discretion to approve service or “incentive” awards to representative plaintiffs in class actions as compensation for their time and effort for the benefit of others, and for having undertaken the risks inherent in serving as a named plaintiff. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). In evaluating the reasonableness of a requested award, courts should consider factors such as “the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, [and] the amount of time and effort the plaintiff expended in pursuing the litigation.” *Staton*, 327 F.3d at 977 (internal punctuation and citation omitted). Additionally, courts focus on the number of class representatives, the average incentive award permitted by courts, and the proportion of the entire settlement that is spent on the incentive award. *In re Online DVD-Rental*, 779 F.3d at 947 (approving a \$5,000 incentive award for each of nine class representatives even where each class member only received \$12). A \$5,000 service award is squarely within the range of what other courts in this District have approved. *See, e.g., In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 592 (N.D. Cal. 2015) (“[I]n this district, a \$5,000 incentive award is presumptively reasonable.”).

The terms of the Settlement Agreement provide that Plaintiff should receive a service award of \$10,000 to compensate him for his efforts on behalf of the Class and Collective. In granting preliminary approval, the Court noted the proposed award appeared excessive in light of how little Plaintiff had to do in this case, which settled before Plaintiff filed suit.



Prelim. Approval Order at 20. For purposes of preliminary approval, the Court nonetheless found this amount reasonable and noted Class Counsel would file a motion for attorneys' fees and costs to establish the reasonableness of the Service Award prior to final approval. Plaintiff argues he is entitled to a \$10,000 service award because he "provided Class Counsel with documents and information, assisted Class Counsel in understanding documents and data produced by CorePower, described CorePower's policies and practices regarding Class members' job duties, was available by phone and contributed to Class Counsel's arguments in the full-day mediation, and reviewed and approved the Settlement Agreement." Fees Mot. at 16. He also was in contact with Class Counsel about the progress of the case and strategic issues as they arose. *Id.* The Court does not find that this level of participation, without more, warrants doubling the standard fee award to a class representative.

But Plaintiff also "took on considerable reputational risk with respect to his current and future employers." *Id.*; *see also* Turner Decl. ¶ 35. Plaintiff declares that he "believe[s] other yoga studios may be reluctant to hire him because [he is] viewed as a 'troublemaker'" as a result of filing this lawsuit. Walsh Decl. ¶ 4, Dkt. No. 44-1. He declares his ability to find employment has already been adversely affected by his decision to lead this suit. For instance, a Google search of his name and "yoga" turns up several articles about the lawsuit: "Given that potential employers are likely to research new hires online, I suspect that my actions in this case are likely to have dimmed my prospects for employment just based on Google results alone." *Id.* ¶ 6. Another studio owner also told him that "the fact [he] had sued another yoga studio was a concern to her" and Walsh "feel[s] that the fact [he] was a plaintiff in a case against a yoga studio had a detrimental effect on my relationship with her studio." *Id.* ¶ 7. He "suspect[s]" the owner began to "unduly scrutinize[ ]" his conduct and "treat[ ] him differently" after learning of the fact. *Id.* ¶ 8. As the authorities Plaintiff cites in the Fees Motion demonstrate, courts recognize the "unique risks" named plaintiffs in employment class actions face with respect to future employment. *See* Fees Mot. at 16 n.7 (citing cases awarding fees between \$2,500 and \$25,000 based on contributions to lawsuit and risk of retaliation or potential impact on future employment).

**\*13** The Court accordingly approves a \$10,000 service award for Plaintiff.

#### D. SSI's Administrative Fees

Plaintiff requested, and the Court preliminarily approved, paying Claims Administrator SSI \$69,875 for administration costs. *See* Prelim. Approval Order at 6, 22-23. After Plaintiff filed his Fees Motion, the Court asked him to provide a declaration from SSI documenting the reasonableness of the fees requested. Suppl. Br. Order at 2, Dkt. No. 32. SSI provided the requested declaration; SSI also explained that due to a number of factors, the revised fee estimate for administering the case will be approximately \$121,966—almost 75% more than the amount the Court preliminarily approved. Suppl. Patton Decl. ¶¶ 8-11. Plaintiff asks the Court to approve the payment of the original \$69,875 requested to administer the Settlement. *See* Cert. Mot. at 22.

Based on Mr. Patton's Supplemental Declaration, the Court approves payment of \$69,875 to the Claims Administrator as reasonable.

#### CONCLUSION

In summary, the Court **GRANTS** the Certification Motion and certifies the California Class; grants final approval of the Settlement Agreement as amended on February 6, 2017 (Dkt. No. 30-2) and September 18, 2017 (Dkt. Nos. 50, 51); and certifies the FLSA Collective.

The Court also **GRANTS IN PART** the Fees Motion and approves payment of \$412,500 in attorneys' fees to Class Counsel; payment of \$10,000 as a service award to William Walsh; and payment of \$69,875 to SSI for the costs of administering the Settlement.

The Court **DENIES WITHOUT PREJUDICE** the requests for costs. No later than October 10, 2017, Class Counsel may submit a detailed explanation supporting its cost request.

The Court schedules a status conference for February 22, 2018 at 10:00 a.m. The parties shall file a joint status report a week before the status conference describing any issues they believe should be addressed at the status conference, outlining a proposed course of conduct for remedying such issues, and indicating the percentage of Class and Collective members who have cashed settlement checks up to that point.

**IT IS SO ORDERED.**

## All Citations

Not Reported in Fed. Supp., 2017 WL 4390168

## Footnotes

- 1 In a Declaration submitted after the hearing to update the Court about a number of matters, including whether potential Class and Collective members who had received notice later had submitted additional objections or requests for exclusion, Counsel for Plaintiffs stated the Claims Administrator had received no additional objections or exclusions, and had received one additional consent to join form. Second Suppl. Turner Decl. ¶ 6, Dkt. No. 44. Counsel also represented that, as of July 25, 2017, there were a total of 1,038 opt-ins, 20 exclusions, and 4 objections. *Id.* This latter representation conflicts with the Supplemental Declaration of the Claims Administrator, who declared there were 31 timely (and 3 untimely) requests for exclusions as of June 29, 2017. Suppl. Patton Decl. ¶ 5.
- 2 The Settlement Agreement also earmarked \$10,000 to cover any errors and omissions by the Claims Administrator. This amount will revert to the Net Settlement Funds if no claims are made.
- 3 During a telephonic hearing regarding the proposed Amendment to the Settlement Agreement, Counsel for Plaintiff argued it was not necessary to issue a second notice of settlement to inform Settlement Class and FLSA Collective members of the Amendment because all participating Class and Collective members would receive amounts greater than the approximate amounts indicated in their Notices. See Sept. 7, 2017 FTR at 11:05.
- 4 In fact, some of the Potential Class members who objected to and/or excluded themselves from the Settlement expressed both these viewpoints. Patton Decl., Ex. B at ECF pp. 35-39; Suppl. Patton Decl., Ex. A at ECF pp. 13, 29, 32, 44.
- 5 The California Labor Code provides for the recovery of reasonable attorneys' fees and costs in connection with the claims Plaintiff asserted in this action. See [Cal. Lab. Code § 1194\(a\)](#) (in actions to recover minimum wage or legal overtime compensation); *id.* § 2802(c) (in actions for reimbursement of necessary expenditures).
- 6 Plaintiff correctly notes that employers are not free to accept free labor, even from workers who are willing to work for no pay. Cert. Mot. at 19 (citing [Tony & Susan Alamo Found. v. Sec'y of Labor](#), 471 U.S. 290, 295 (1985)). But *Tony and Susan Alamo Foundation* is distinguishable. First, the volunteers in that case received food, shelter, clothing, transportation and medical benefits, which the Supreme Court described as "simply wages in another form" and used as a basis for finding the volunteers were employees. [Alamo Found.](#), 471 U.S. at 293-94. Here, it is not evident that purchasing discounted memberships would be earning "wages in another form." Second, and more important, there has been no finding that the SET and YFT Cleaners were employees of CorePower: CorePower denies all liability and wrongdoing, and agreed to settle the action only "to avoid the burden, expense, and uncertainty of continued litigation." Settlement Agreement at 1. CorePower asserts that YFT Cleaners were independent contractors and that SET Cleaners voluntarily purchased their memberships as a benefit. See Fees Mot. at 5; Suppl. Br. iso Prelim. Approval at 2-3, Dkt. No. 20.
- 7 This represents significantly less than 8.6% of their estimated unpaid minimum wages. Class Counsel represented this allocation was "fair and reasonable because it reflects the lower potential damages, weaker claims, and greater class certification risks for the SET claims. Whereas YFT Cleaners were not paid any wages for their work, SET Cleaners were paid at an hourly rate at or above the applicable minimum wage. Plaintiff alleges that SET Cleaners were required, as a condition of employment, to pay for discounted CorePower memberships that brought their pay below the minimum wage." Suppl. Br. iso Prelim. Approval at 2-3; see *also supra*.
- 8 Not only does Counsel fail to describe the experience of these individuals, but Counsel fails to even name some of them: Counsel seeks to recover \$9,432 in fees billed by "San Francisco Law Clerk" and \$1,725 in fees billed by "Part-Time Paralegal." Second Suppl. Turner Decl., Ex. B.

# **EXHIBIT 29**



KeyCite Yellow Flag - Negative Treatment

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2006 WL 1652598

Only the Westlaw citation is currently available.

United States District Court,  
E.D. California.Vicki WEST and Wendy Fagundes,  
individually and on behalf of  
others similarly situated, Plaintiffs,

v.

CIRCLE K STORES, INC., Defendant.

No. CIV. S-04-0438 WBS GGH.

I

June 13, 2006.

**Attorneys and Law Firms**[Kelly Mcinerney](#), [Kevin J. McInerney](#), [Charles A. Jones](#),  
Mcinerney & Jones, Reno, NV, for Plaintiffs.Jeffrey L. Kessler-Pro Hac Vice, Dewey Ballantine, New  
York, NY, [Matthew Walsh](#), Dewey Ballantine, Los Angeles,  
CA, for Defendant.**MEMORANDUM AND ORDER RE: PRELIMINARY  
MOTION TO APPROVE CLASS ACTION SETTLEMENT**[WILLIAM B. SHUBB](#), District Judge.

\*1 Plaintiffs Vicki West and Wendy Fagundes<sup>1</sup> seek to bring a class action suit against defendant Circle K Stores, Inc. for alleged violations of the California Labor Code, [Cal. Lab.Code §§ 226.7, 227.3](#), and California's Unfair Competition Law ("UCL"), [Cal. Bus. & Prof.Code §§ 17200-17210](#). Presently before the court is plaintiffs' motion for preliminary approval of settlement with defendants. For the following reasons, plaintiffs' motion is granted.

**I. Factual and Procedural Background**

On March 3, 2004, plaintiffs filed a class action complaint claiming that defendant failed to pay (1) overtime wages, (2) administrative leave wages, and (3) accrued but unused vacation wages, all in violation of state law. (Compl.¶ 17.)

On July 15, 2005, this court granted in part plaintiffs' motion to amend their complaint. (July 15, 2005 Order at 2-3.) The amendments dropped some of the claims of one proposed subclass (managers) and added Wendy Fagundes as a named plaintiff, representing an additional class of employees claiming that defendant failed to pay meal and break wages. (*Id.* at 3-4.)

On March 20, 2004, plaintiffs moved to certify two distinct classes based on their remaining claims: (1) a "meal period class" defined as "all hourly store employees employed by defendant in California since October 1, 2000, who did not receive off-duty meal periods" and (2) a "vacation class" defined as "all employees employed in California by defendant at any time since March 3, 2000, who forfeited accrued but unused vacation under defendant's vacation policy." (Pl.'s Mot. for Class Cert. 1.) However, before the court could hear that motion, the parties attended a day long mediation with Justice Richard Neal (retired) where they agreed to settlement terms. Accordingly, the parties now seek preliminary approval of their Joint Stipulation of Settlement and Release.

**II. Discussion****A. Legal Standard**

The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions. [Class Plaintiffs v. City of Seattle](#), 955 F.2d 1268, 1276 (9th Cir.1992). Nevertheless, where, as here, "parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." [Staton v. Boeing Co.](#), 327 F.3d 938, 952 (9th Cir.2003). In conducting the first inquiry, the court "must pay 'undiluted, even heightened, attention' to class certification requirements" because, unlike in a fully litigated class action suit, the court will not have future opportunities "to adjust the class, informed by the proceedings as they unfold." [Amchem Prods. Inc. v. Windsor](#), 521 U.S. 591, 620 (1997); [Hanlon v. Chrysler Corp.](#), 150 F.3d 1011, 1019 (9th Cir.1998) (quoting [Amchem](#), 521 U.S. at 620). "[T]he parties can[not] agree to certify a class that clearly leaves any one requirement unfulfilled" and consequently, the court cannot blindly rely on the fact that the parties have stipulated that a class exists for purposes of settlement. [Berry v. Baca](#), No. CV 01-02069, 2005 WL 1030248, at \*7 (C.D.Cal. May 2, 2005); see also [Amchem](#), 521 U.S. at 622 (observing that nowhere does Rule 23 say that certification is proper simply because the settlement

is fair). In the second part of its inquiry, the “ ‘court must carefully consider “whether a proposed settlement is fundamentally fair, adequate, and reasonable,” recognizing that “[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness....” ‘ ” *Staton*, 327 F.3d at 952 (quoting *Hanlon*, 150 F.3d at 1026); see also *Fed.R.Civ.P. 23(e)*.

\*2 Additionally, approval of a class action settlement takes place in two stages. See *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 556 (W.D.Wash.2004) (noting that in the first stage of the approval process “the court preliminarily approve[s] the Settlement pending a fairness hearing, temporarily certifie[s] the Class ..., and authorize[s] notice to be given to the Class”). Accordingly, in this first order the court will only “determine[ ] whether a proposed class action settlement deserves *preliminary* approval” and lay the ground work for a future fairness hearing (see schedule below). *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D.Cal.2004). At that subsequent hearing, after notice is given to class members, the court will entertain any objections by putative class members to (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement. *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir.1989) (holding that prior to approving the dismissal or compromise of claims containing class allegations, district courts must, pursuant to *Rule 23(e)*, hold a hearing to “inquire into the terms and circumstances of any dismissal or compromise to ensure that it is not collusive or prejudicial”).<sup>2</sup> Following that fairness hearing, the court will make a final determination as to whether the parties should be allowed to settle a class action pursuant to the terms agreed upon. *DIRECTV, Inc.*, 221 F.R.D. at 525.

#### B. Certification of the Class

A class action must meet four prerequisites identified in *Federal Rule of Civil Procedure 23(a)*, in addition to meeting the requirements of at least one of the three subdivisions of *Federal Rule of Civil Procedure 23(b)*. See *Fed.R.Civ.P. 23(a), (b)*. Additionally, although a district court has discretion in determining whether the moving party has satisfied each *Rule 23* requirement, see *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *Montgomery v. Rumsfeldo*, 572 F.2d 250, 255 (9th Cir.1978), the court must conduct a rigorous inquiry before certifying a class, see *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403-05 (1977). As noted above, although the parties have

stipulated that a class exists for purposes of settlement, this does not relieve the court of its duty to conduct this inquiry.

Typically, when parties settle before the class is certified, the court is denied adversarial briefs on the class certification issue. However, in this case the court is in a unique position, as the parties have already fully briefed a motion for class certification. Although defendant now agrees, at least for the purposes of settlement, that class treatment is appropriate, it composed a lengthy brief in opposition to plaintiffs' motion for certification. The court will therefore consider several of defendant's original arguments in deciding whether the issues in this case should be treated as class claims pursuant to *Federal Rule of Civil Procedure 23(a)* and *23(b)(3)*.

#### 1. *Rule 23(a)*

\*3 *Rule 23(a)* restricts class actions to cases where:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

*Fed.R.Civ.P. 23(a)*. These requirements are more commonly referred to as numerosity, commonality, typicality, and adequacy of representation. See *Fed.R.Civ.P. 23(a)*; *Hanlon*, 150 F.3d at 1019.

#### a. Numerosity

Courts have not established a precise threshold for determining numerosity. See *Gen. Tel. Co. v. E.E.O.C.*, 446 U.S. 318, 330 (1980). However, a class consisting of one thousand members “clearly satisfies the numerosity requirement.” *Sullivan v. Chase Inv. Servs., Inc.*, 79 F.R.D. 246, 257 (N.D.Cal.1978). To evidence the vacation class size, plaintiffs offer excerpts from the depositions of Linda Prince and Robert Crandall, which support their claim that 1,752 employees forfeited accrued but unused vacation during the class period. (Mar. 20, 2006 Jones Decl. Ex. C (Prince Dep. 10:9-17); Ex. E (Crandall Dep. 55:13-57:2).) However, before defendant agreed to settle, it contended that this figure is not accurate because it includes employees who were not actually terminated, but rather were transferred to defendant's affiliated company (ConocoPhillips) following a sale of defendant's stock. While this may be true, in order to eliminate this segment of the vacation class, the court would have to consider the merits of the parties' legal arguments,



which it cannot do at the class certification stage.<sup>3</sup> See *Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir.1975) (acknowledging that in accepting allegations regarding class size, the resulting class order may be “speculative in the sense that the plaintiff may be altogether unable to prove his allegations”). Therefore, accepting plaintiffs’ alleged class size as true, and recognizing that the joinder of 1,752 plaintiffs would be impracticable, the court holds that the numerosity requirement is satisfied as to the vacation class.

Likewise, numerosity is also satisfied for the meal period class—a fact that defendant has never disputed. Since March 3, 2000, defendant has employed up to 14,000 hourly employees who might have claims for wrongfully withheld meal breaks. (Rodriguez Decl. ¶ 1.) Again, although courts have not established a precise number for the numerosity requirement, joinder of 14,000 people in a single case would clearly be impracticable.

#### b. Commonality

**Rule 23(a)** also requires that “questions of law or fact [be] common to the class.” *Fed.R.Civ.P. 23(a)(2)*. The Ninth Circuit construes commonality liberally. See *Hanlon*, 150 F.3d at 1019. It is not necessary that *all* questions of law and fact be common. “The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.” *Id.*

\*4 Here, a significant common question exists as to whether the defendant, by policy or practice, failed to carry over accrued but unused vacation time from year to year on behalf of the class members. Had this case gone to trial, additional common legal issues would have included: 1) whether termination is necessary before the forfeiture of accrued but unused vacation time is unlawful; 2) whether, under *California Labor Code* § 227.3, transfer of ownership constitutes a termination of the employee relationship, requiring payment of all accrued but unused vacation; and 3) whether the defendant’s policy or practice of manually carrying over accrued but unused vacation time only upon request violates *California Labor Code* § 227.3 as a “use it or lose it policy.” Such commonality among the class members, in issues of both law and fact, is sufficient to meet requisites of **Rule 23(a)(2)**.

Commonality with respect to the meal period class presents a closer question. The purpose of this class is to recover

additional pay allegedly owed for missed meal breaks in violation of *California Labor Code* § 226.7. *Cal. Lab.Code* § 226.7(b) (requiring employers to pay employees “one additional hour of pay at the employee’s regular rate of compensation for each work day that [a] meal or rest period[, as required by subsection a,] is not provided”). However, the California Code of Regulations further provides that “[a]n ‘on duty’ meal period [is acceptable] when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement [must] state that the employee may, in writing, revoke the agreement at any time.” *Cal.Code Regs. tit. 8, § 11070(11)(C)*.

At all times during the proposed the class period, defendant required employees to sign some form of “meal period agreement” (or waiver) that included the nature of the work exception. Nevertheless, defendant originally argued that evaluating the enforceability of the waiver would require an individual inquiry into the nature of each employee’s work on every shift where that employee missed a meal break. Depending on the traffic in a given store on a given shift, defendant argued, the nature of the work may have precluded an off-duty meal break, and these individual inquiries defeat commonality.

However, this argument would again involve the court in a determination of the merits of the case. The parties have not provided the court with any authority establishing that the nature of the work exception applies on a case-by-case, shift-by-shift basis. Indeed, such a rule would potentially eviscerate the protections provided by *California Labor Code* § 226.7, as every employer would defend against a claim of missed meal periods by arguing that, because of the nature of the employee’s work on that day, he was too busy to take a break. Instead, the exception was more likely provided to allow employers some relief when the nature of the work in their business overall does not permit a mid-shift meal break. Significantly, the court is also not aware of any authority establishing that the nature of the work in a convenience store qualifies for the § 11070(11)(c) exception. Consequently, because the court cannot resolve this question without considering the merits of the case, the court must recognize that a potential and significant common question exists for the meal class.

#### c. Typicality

\*5 **Rule 23(a)** further requires that the “claims or defenses of the representative parties [be] typical of the claims or defenses

of the class.” [Fed.R.Civ.P. 23\(a\)\(3\)](#). Typicality requires that named plaintiffs have claims “reasonably coextensive with those of absent class members,” but their claims do not have to be “substantially identical.” [Hanlon](#), 150 F.3d at 1020. The test for typicality “is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” [Hanon v. Dataproducts Corp.](#), 976 F.2d 497, 508 (9th Cir.1992) (quoting [Schwartz v. Harp](#), 108 F.R.D. 279, 282 (C.D.Cal.1985)).

In this case, all putative vacation class members suffered the same injury when their accrued but unused vacation time was forfeited without compensation. The source of this injury arises from a similar policy or practice instituted by the defendant regarding the forfeiture of *accrued* but unused vacation.<sup>4</sup> Moreover, there is no indication of uniqueness as to either defendant's conduct toward the named plaintiff or the injury suffered as a result of that conduct (allegedly, lost vacation time). Therefore, the requirement of typicality has been met.

The analysis is again somewhat more strained with respect to the meal period class. Defendant originally challenged recognition of Fagundes as the class representative because as a supervisor and a long term employee (nearly 11 years) in a business with nearly 100% turnover, her claims are arguably not typical. In particular, Fagundes, who signed an outdated meal period agreement, has additional grounds on which to challenge defendant's practices because her agreement lacks the “revokable at will clause” that is presently required by [Cal.Code Regs. tit. 8, § 11070\(11\)\(C\)](#).

Nevertheless, “[w]hen the same unlawful conduct was directed at or affected both the named plaintiffs and the members of the putative class, the typicality requirement is usually met, irrespective of varying fact patterns that underlie individual claims.” [Stephenson v. Bell Atl. Corp.](#), 177 F.R.D. 279, 285 (D. N.J.1997) (citing [Baby Neal v. Casey](#), 43 F.3d 48, 58 (3d Cir.1994); [Herbert Newberg & Alba Conte, Newberg on Class Actions](#) § 3.13, at 3-76, 3-77 (3d ed.1992)). Here, like those that served under her, Fagundes allegedly was improperly denied earned meal breaks in violation of [Cal. Lab.Code § 226.7](#). Although she has an additional ground on which to attack defendant's policy, the court cannot say with certainty that this argument would succeed and that plaintiff would thus not need to “prove what others in the class must establish.” [Greeley v. KLM Royal Dutch Airlines](#),

85 F.R.D. 697, 701 (S.D.N.Y.1980). This is not a case where the proposed class representative's legal arguments are completely distinct from those of an identifiable subset of the class. Rather, Fagundes' legal arguments are coextensive with those of the class she proposes to represent. Therefore plaintiffs can satisfy the typicality requirement for the meal period class.

#### d. Adequacy of Representation

\*6 Finally, [rule 23\(a\)](#) requires representative parties who “will fairly and adequately protect the interests of the class.” [Fed.R.Civ.P. 23\(a\)\(4\)](#); see [Hanlon](#), 150 F.3d at 1020. To resolve the question of legal adequacy, the court must answer two questions: (1) do the named plaintiff and her counsel have any conflicts of interest with other class members and (2) will the named plaintiff and her counsel vigorously prosecute the action on behalf of the class? [Hanlon](#), 150 F.3d at 1020.

Defendant initially contended that the named plaintiff's duty to ensure some of the putative class members took their vacation days, while a supervisor in defendant's employ, represents a conflict of interest with non-supervisor class members. However, in those circumstances where a conflict of interest might exist, such a conflict will only bar certification when “the conflict is serious and irreconcilable.” [Mateo v. M/S Kiso](#), 805 F.Supp. 761, 772 (N.D. Cal 1992); see also [O'Connor v. Boeing N. Am., Inc.](#), 184 F. R.D. 311, 335 (C.D.Cal.1998) (“[O]nly a conflict that goes to the very subject matter of litigation will defeat a party's claim of representative status.” (quoting 10B [Charles Alan Wright et al., Federal Practice and Procedure](#) § 1768, at 327-28 (3d ed.1998))). Here, the possible conflict of interest must implicate the *forfeiture* of vacation time, and it does not. Instead, the named plaintiff's alleged duty pertained to the *accrual and use* of vacation time, a subject not in dispute.

Further, the fact that plaintiff's employment with defendant ended in 2003 has no bearing on her adequacy as a class representative. To prove the elements associated with her forfeiture of accrued vacation time claim, West must necessarily engage in a course of litigation that will prove the elements of injury as to the entire class, including those members who were injured in 2004 and beyond. Significantly, defendant has not argued that it changed its policy or practice with respect to the *forfeiture and carrying over* of vacation during the time subsequent to the named plaintiff's termination.

Additionally, West has shown that her counsel is adequately experienced in class actions. (See Mar. 20, 2006 Jones Decl. ¶ 4.) As such, the court can safely assume that her counsel has vigorously sought to maximize the return on its labor and to vindicate the injuries visited on the entire class. Therefore, the court holds that West is an adequate class representative.

Likewise, Fagundes does not have substantive conflicts with the proposed meal period class and therefore is an adequate representative for this group. Although in theory, as a supervisor in charge of scheduling meal breaks, Fagundes could be partially responsible for failing to provide meal breaks, the court is not aware of any source for such personal liability on the part of the employee with respect to Cal. Lab.Code § 226.7.<sup>5</sup> Cf. *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App. 4th 949, 962-63 (2005) (holding that an employer's "obligation to provide the plaintiffs with an adequate meal period is not satisfied by [shifting responsibility to employees to take their meal breaks], because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.' " (quoting Wage Order applicable to the transportation industry)). Significantly, plaintiff acted in accordance with defendant's well established policies that left little room for discretion. (See, e.g., Mar. 20, 2006 Jones Decl. Ex. B (Farthing Dep. 90:20-91:14 (describing defendant's meal break policy and noting that employees *could* take an off-duty meal break *only* after January, 2003 *and only* if "there were two or more employees working *and* the nature of the business allowed" (emphasis added))).) The claims of her fellow class members will not be that *she* denied them their meal breaks, but rather that their breaks were denied pursuant to defendant's policies. These facts distinguish this case from the discrimination cases originally relied on by defendant, where supervisors were held to be inadequate representatives because they played a part in discriminatory practices that could be attributed to their employer. See *Wagner v. Taylor*, 836 F.2d 578 (D.C.Cir.1987); *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558 (W.D.Wash.2001).

\*7 Moreover, as noted by defendants, the Ninth Circuit has declined to adopt a per se rule prohibiting the representation of a subset of non-supervisory employees by supervisory employees. "[W]hether employees at different levels of the internal hierarchy have potentially conflicting interests is context-specific and depends upon the particular claims alleged in a case." *Staton*, 327 F.3d at 958. As with typicality, the question boils down to whether the supervisor's claims are coextensive with those of the non-supervisory employees. *Id.* Because the court has already made this determination

in favor of plaintiffs, Fagundes can adequately represent the meal period class.

## 2. Rule 23(b)

An action that meets all the prerequisites of Rule 23(a) may be maintained as a class action only if it also meets the requirements of one of the three subdivisions of Rule 23(b). See *Eisen*, 417 U.S. at 163. In this case, plaintiff seeks certification of two independently represented classes under Rule 23(b)(3), "which is appropriate 'whenever the actual interests of the parties can be served best by settling their differences in a single action.'" *Hanlon*, 150 F.3d at 1022 (quoting 7A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1777 (2d ed.1986)). A class action may be maintained under Rule 23(b)(3) if (1) "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting individuals members," and (2) "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

### a. Predominance

Because the Rule 23(a)(3) already considers commonality, the focus of the Rule 23(b)(3) predominance inquiry is on the balance between individual and common issues. *Hanlon*, 150 F.3d at 1022. Here, defendant originally contended that differences among the class members in vacation accrual caps, vacation accrual rates, and the ability to take vacation days raise individual issues that predominate any common legal or factual issues. (Def.'s Opp'n to Class Cert. 37-39.) However, differences in accrual caps and rates are quantitative measures that are irrelevant to the appropriate overarching liability question: whether the defendant's employment agreements amount "to an impermissible 'use or lose it' policy or a valid 'no additional accrual' policy" under California Labor Code § 227.3. *Boothby v. Atlas Mech., Inc.*, 6 Cal.App. 4th 1595, 1603 (1992); Cal. Labor Code § 227.3. Because of the uniform language among the several vacation policies, and the alleged uniform implementation of these policies, common issues of law and fact would predominate if this case were to go to trial.<sup>6</sup> (See Farthing Decl. Exs. A-C.) Importantly, individual differences in accrual caps, accrual rates, and amount of vacation time accrued would have pertained to damages only and individual issues regarding damages will not, by themselves, defeat certification under Rule 23(b)(3). See *Blackie*, 524 F.2d at 905-09 ("Courts have generally declined to consider conflicts, particularly as they regard to damages, sufficient to defeat class action status at

the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit.”).

\*8 Likewise, assuming, as the court has, that the nature of the work exception is intended to apply to the nature of the work in general and not the circumstances on any given shift, common claims would have predominated in the meal period class action as well. Individual matters, such as whether a putative class member worked long enough to qualify for a meal break and whether she was permitted to take the earned break, as in the vacation class, would relate only to damages. The predominant issue, and one appropriate for class treatment, is whether defendant's policies, which routinely resulted in employees having to take on-duty meal “breaks,” were lawful.

b. *Superiority*

In addition to the predominance requirement, [Rule 23\(b\)\(3\)](#) provides a non-exhaustive list of matters pertinent to the court's determination that the class action device is superior to other methods of adjudication. *See* [Fed.R.Civ.P. 23\(b\)\(3\)\(A\)-\(D\)](#). These matters include:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.

*Id.* Some of these factors, namely (D) and perhaps (C), are irrelevant if the parties have agreed to a pre-certification settlement. [Amchem](#), 521 U.S. at 620. Additionally, the court is unaware of any concurrent litigation regarding the issues of the instant case. In the absence of competing lawsuits, it is also unlikely that other individuals have an interest in controlling the prosecution of this action or other actions, although objectors at the fairness hearing may reveal otherwise. As it stands today however, the class action device appears to be the superior method for adjudicating this controversy. As such, the vacation class is properly maintained under [Rule 23\(b\)\(3\)](#).

The superiority consideration also favors certification of the meal period class, despite the availability of an informal wage

claim processing service provided by the Division of Labor Standards Enforcement (“DLSE”) (especially in light of the fact that the parties have settled the case). The administrative hearing option (a “Berman hearing”) described by defendant in its opposition to class certification “is conducted ‘in an informal setting preserving the right [s] of the parties’ and ‘is designed to provide a speedy, informal, and affordable method of resolving wage claims.’” [Lolley v. Campbell](#), 28 Cal.4th 367, 372 (2002) (quoting Cal. Lab.Code § 98(a) and [Cuadra v. Millan](#), 17 Cal.4th 855, 858 (1998)). Claimants need only submit a form to initiate the process. Cal. Lab.Code § 98(a). However, the procedure is not necessarily as quick and easy as defendants describe it. Notably, successful claimants will need to participate in a hearing or mediation where their employer will undoubtedly be represented by counsel. *Id.* Additionally, the Commissioner has discretion to delay a proceeding and there is an appeals process that might further delay recovery. *Id.*; Cal. Lab.Code § 98.2 (requiring that appeals be taken to a California Superior Court).

\*9 While these procedures might nevertheless be preferable to a protracted class litigation, in light of the fact that the parties here have proposed a settlement procedure that will allow for virtually dispute-free claims to be processed in a matter of months with minimal involvement on the part of the claimant or the government, permitting the parties to proceed with class certification and settlement seems to be the superior approach. Additionally, the fact that claimants/class members might not be able to recover the exact number of meal breaks missed and will sacrifice some of their recovery to attorneys' fees must be weighed against the fact that the settlement reaches back farther than the DLSE proceedings would permit. Given these circumstances, a meal period class action presents a superior method for pursuing the claims at issue here and certification is proper under [Rule 23\(b\)\(3\)](#).

C. *Fairness, Adequacy, and Reasonableness of Proposed Settlement*

Having determined that class treatment appears to be warranted,<sup>7</sup> the court must now address whether the terms of the parties' settlement are fair, adequate, and reasonable. In conducting this analysis, the court must balance several factors including:

the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery



completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

*Hanlon*, 150 F.3d at 1026. *But see Molski v. Gleich*, 318 F.3d 937, 953-54 (9th Cir.2003) (noting that a district court need only consider *some* of these factors—namely those designed to protect absentees). Given that some of these factors cannot be fully assessed until the court conducts its fairness hearing, “a full fairness analysis is unnecessary at this stage....” *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, No. 04-2195, 2006 WL 1367414, at \*7 (E.D.N.Y. May 18, 2006). Accordingly, the court will simply conduct a cursory review of the terms of the parties’ settlement for the purpose of resolving any glaring deficiencies before ordering the parties to send the proposal to class members.

#### 1. Terms of the Settlement Agreement

The key terms of the stipulation and settlement are as follows:

1. Class Definitions: the meal period class is defined as “All hourly employees employed by Circle K Stores, Inc. in the state of California from October 1, 2000 through the date the Court grants preliminary approval of this Settlement.” The vacation class is defined as “All employees employed by Circle K Stores, Inc. in the state of California from March 3, 2000 through the date the Court grants preliminary approval of this Settlement who did not have all their accrued but unused vacation carried forward from year to year.” The agreement excludes from the class employees of franchises who do/did not actually work for defendant Circle K Stores, Inc. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶ 6).)

**\*10** 2. Settlement Amount: Defendant agrees to a “total payout” settlement of five million dollars (\$5,000,000). Of this amount, three million eight hundred thousand dollars (\$3,800,000) is allocated to the meal period class and one million two hundred thousand dollars (\$1,200,000) is allocated to the vacation class. (*Id.* ¶ 16.)

3. Deductions: attorneys’ fees (up to 30%), plaintiffs’ costs (up to \$25,000), “service payments” to the class representatives (up to \$15,000 each), and claims administration costs (up to \$150,000) will be deducted from defendant’s total liability of \$5,000,000. With the exception of the service payments, the meal period class will bear 76% of these costs and fees; the vacation class will bear the remainder. (*Id.* ¶ 15(d).)

4. Award Allocations: Meal period class members who file timely claims will receive a proportionate share of the \$3,800,000 class settlement amount, minus costs, fees, and service payments. A member’s share will be based on the number of weeks she worked for defendant during the class period and this number will be determined based on the total number of days worked divided by seven. (*Id.* ¶ 15(d)(i)(a).) The parties estimate that this approach will at a minimum yield an \$8 per week payment for each class member, resulting in payments in excess of \$2,600 for employees that worked throughout the entire class period. (P. & A. in Supp. of Mot. for Prelim. Approv. 8.) Vacation class members who file timely claims will likewise receive a proportionate share of the \$1,200,000 class settlement amount, minus costs, fees, and service payments. After all claims are filed, the vacation class award will be divided by the number of claimed vacation hours, yielding a per hour payment. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶ 15(d)(i)(b)).) The parties anticipate that this will result in at least a \$13 per hour payment for employees who, on average, were making \$7 per hour. (P. & A. in Supp. of Mot. for Prelim. Approv. 8-9.)

5. Claims Procedures: Members of each class will receive two forms sent out by the Claims Administrator, Rosenthal & Company LLC. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶¶ 15(d)(ix), 22(h)).) One will be a preprinted Class Claims Form that, based on defendant’s records, will establish either the number of weeks worked (for meal period class members) or the number of vacation days owed (for vacation class members). (*Id.* ¶ 15(d)(ix)(a)-(b).) Class members will also receive a Request for Exclusion Form that will advise them on how to opt out of the class action settlement. (*Id.*) These forms will be sent, along with a notice announcement detailing the history of this litigation and further explaining the terms of the settlement, no more than twenty (20) days from the date of this order. (*Id.* ¶ 18(c).) Class members will have sixty (60) days from the date that notice is mailed to submit a claim and forty-five (45) days to request exclusion (in other words, to opt out). (June 1, 2006 Jones Decl. Ex. D (Proposed Notice).) Payments to class claimants will be mailed by the claims administrator within twenty (20) days of the final approval of the settlement. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶ 20).)



\*11 6. Release: Class members who do not opt out of the class action, even if they do not file a claim, are forever barred from bringing claims for failure to provide meal or rest breaks from October 1, 2000 until this settlement is finally approved, and from bringing claims for failure to annually carry over accrued but unused vacation from March 3, 2000 until this settlement is finally approved. (June 1, 2006 Jones Decl. Ex. D (Proposed Notice).) The release does not cover employees who did not actually work for defendant, but rather worked for a franchisee. Additionally, the release does not apply to claims arising after December 2003 against ConocoPhillips (which sold defendant Circle K Stores, Inc. through a stock sale in December 2003 and absorbed some of defendant's existing employees through "migration"). (*Id.*; Apr. 7, 2006 Jones Decl. Ex. F (Prince Dep. 74:8-75:3).)

## 2. Preliminary Determination of Adequacy

Again, at this preliminary approval stage, the court need only "determine whether the proposed settlement is within the range of possible approval." *Gautreaux v. Pierce*, 690 F.2d 616, 621 n. 3 (7th Cir.1982) (quotation marks omitted). The court is really only concerned with "whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys...." *Tenuto v. Transworld Sys., Inc.*, No. CIV. 99-4228, 2001 WL 1347235, at \*1 (E.D. Pa. Oct. 31, 2001).

Accordingly, it is sufficient to note that the stipulation and settlement appear to be, for the most part, the result of vigorous, arms-length bargaining. Counsel for both parties have been actively engaged in this litigation for over two years and have diligently pursued the necessary discovery. Significantly though, despite having a factually well-developed case, both sides still face significant uncertainty because the claims (in particular the meal period class claim) encompass unsettled legal issues. These circumstances and attendant risks favor settlement. *Hanlon*, 150 F.3d at 1026.

Additionally, the terms of the settlement provide for significant recovery for class members<sup>8</sup> while at the same time offering a manageable approach to calculating awards. The proposed attorneys' fees, at no more than 30%, are also potentially within reason.<sup>9</sup> Likewise, the detailed notice proposed by the parties clearly explains to class

members what their options are and is more than adequate. See *Fed.R.Civ.P. 23(c)(2)* (requiring only "the best notice practicable under the circumstances" "[f]or any class certified under *Rule 23(b)(3)*"); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.2004) ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.' " (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir.1980))).

\*12 The only aspect of the settlement and notice that gives this court pause is the proposed "service payment" for the class representatives. In addition to the right to file claim forms, the settlement proposes a \$15,000 "enhancement award" for each named plaintiff. The court recognizes that "a class representative is entitled to some compensation for the expense he or she incurred on behalf of the class lest individuals find insufficient inducement to lend their names and services to the class action." *In re Oracle Secs. Litig.*, No. C-90-0931, 1994 WL 502054, at \*1 (N.D. Cal. June 18, 1994) (citing *In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 571 (7th Cir.1992)). "Such payments, however, must be reasonable in light of applicable circumstances, and not 'unfair' to other class members." *Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 368 (S.D.Miss.2003); see also *In re Oracle Secs. Litig.*, 1994 WL 502054 at \*1 (reducing requested payment of \$2,500 to \$500 for spending "between two and five hours undergoing depositions and ... respond[ing] to a few narrow document discovery requests").

The proposed payment is not particularly unfair to other class members, given that it will not significantly reduce the amount of settlement funds available to the rest of the class. However, the court has no way of knowing whether the payments are reasonable in light of applicable circumstances because plaintiffs have provided only general and largely conclusory statements about their involvement. They have failed to account for the number of hours spent on this case and have not described any personal sacrifices they made on behalf of the class. Cf. *Nilsen v. York County*, 382 F.Supp.2d 206, 215 (D.Me.2005) (awarding incentive payments of up to \$6,500 to class representatives who "sacrificed their privacy to vindicate the privacy rights of the class members" by revealing in court documents and to the media that they had been subjected to illegal strip searches). Significantly, although Fagundes, who remains in defendant's employ, may have risked retaliation by her employer, the same cannot be said for West, who left Circle K in 2003.

Moreover, prior to settlement, both named plaintiffs declared that they “seek nothing for [themselves] in addition to the relief [they] seek on behalf of the class as a whole.” (Mar. 20, 2006 Jones Decl. Ex. N (Fagundes Decl. ¶ 9), Ex. P (West Decl. ¶ 7).) This change in the relief sought by plaintiffs, and the fact that it is roughly six times the amount they would likely receive as ordinary class members pursuant to the terms of their own settlement, raises the specter that the named plaintiffs have been “bought out” to circumvent a more costly class action litigation. At the fairness hearing, based on detailed evidence of plaintiffs' involvement in this case, the court will determine what portion of this amount is actually justified.<sup>10</sup>

In all other respects, the court preliminarily finds that the stipulation and terms of parties' settlement are acceptable.

**\*13** IT IS THEREFORE ORDERED that plaintiffs' motion for preliminary approval of settlement be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that

(1) the following classes be provisionally certified for the purpose of settlement in accordance with the terms of the stipulation: (a) All hourly employees employed by Circle K Stores, Inc. in the state of California from October 1, 2000 through the date the Court grants preliminary approval of this Settlement; and (b) All employees employed by Circle K Stores, Inc. in the state of California from March 3, 2000 through the date the Court grants preliminary approval of this Settlement who did not have all their accrued but unused vacation carried forward from year to year.

(2) if the stipulation does not receive the court's final approval, should final approval be reversed on appeal, or should the stipulation otherwise fail to become effective for any reason (including any party's exercise of a right to terminate under the stipulation), the court's grant of certification of the class shall be vacated and become null and void without further action or order of the court.

(3) the stipulation and the settlement provided therein are preliminarily approved as fair, reasonable, and adequate within the meaning of [Federal Rule of Civil Procedure 23](#), subject to final consideration at the fairness hearing provided for below.

(4) for purposes of the stipulation and carrying out the terms of the settlement only:

a. Vicki West is appointed as the representative of the vacation class.

b. Wendy Fagundes is appointed as the representative of the meal period class.

c. the law firm of McInerney & Jones is appointed as lead counsel for the classes and shall be responsible for the acts and activities necessary or appropriate to present this stipulation and the proposed settlement to the court for approval and, if the settlement is finally approved, to implement the settlement in accordance with the terms of the stipulation and orders of the court.

(5) Rosenthal & Company LLC, 300 Bel Marin Keys Boulevard, Novato, California, is hereby approved and appointed as the Claims Administrator to carry out the duties of the Claims Administrator set forth in the stipulation.

(6) the form and content of the Notice of Settlement of Class Action (June 1, 2006 Jones Decl. Ex. D) is approved with the exception of section six, addressing scheduling matters related to the Final Settlement Approval Hearing. These provisions are modified as provided below in order line eleven.

(7) the form and content of the Class Claim Form (June 1, 2006 Jones Decl. Ex. E) is approved.

(8) the form and content of the Request for Exclusion Form (June 1, 2006 Jones Decl. Ex. F) is approved.

(9) no later than thirty (30)<sup>11</sup> days from the date of this order, the Claims Administrator shall cause a copy of the Notice, the Claim Form, and the Exclusion Form to be mailed by first class mail to all class members who can be identified through reasonable effort from defendant's records. Defendant is hereby ordered and directed to provide the Claims Administrator with class member information pursuant to the terms of the stipulation.

**\*14** (10) a hearing (the “Final Fairness Hearing”) shall be held before this court on October 16, 2006 at 1:30 p.m. in Courtroom 5 to determine whether the proposed settlement, on the terms and conditions set forth in the stipulation, is fair, reasonable, and adequate and should be approved by the court; to determine whether a judgment as provided in the stipulation should be entered finally approving the settlement;

and to consider class counsel's applications for attorneys' fees, reimbursement of costs, and service payments. The court may continue the Final Fairness Hearing without further notice to the members of the class.

(11) any person who has standing to object to the terms of the proposed settlement may appear at the Final Fairness Hearing in person or by counsel, if an appearance is filed as hereinafter provided, and be heard to the extent allowed by the court in support of, or in opposition to, (1) the fairness, reasonableness, and adequacy of the proposed settlement; (2) the requested award of attorneys' fees, reimbursement of costs, and service payments to class representatives; and/or (3) the propriety of class certification. To be heard in opposition, a person must, within forty-five (45) calendar days after notice is mailed, (a) serve by hand or through the mails written notice of his, her, or its intention to appear, stating the name and case number of this litigation and each objection and the basis therefor, together with copies of any papers and briefs, upon class counsel and upon counsel for defendant, and (b) file said appearance, objections, papers and briefs with the court, together with proof of service of all such documents upon counsel for the parties. Responses to any such objections and class counsel's application for attorneys' fees, reimbursement of costs, and class representative service payments shall be served by hand or through the mails on the

objectors (or on the objector's counsel if any there be) and filed with the Clerk of this Court no later than fourteen (14) calendar days before the Final Fairness Hearing. Objectors may file optional replies no later than one week before the Final Fairness Hearing in the same manner described above. Any settlement class member who does not make his, her, or its objection in the manner provided herein shall be deemed to have waived such objection and shall forever be foreclosed from objecting to the fairness or adequacy of the proposed settlement as memorialized in the stipulation, the judgment entered, and the award of attorneys' fees, expenses, and service payments unless otherwise ordered by the court.

(12) pending final determination of whether the settlement should be finally approved, the court preliminarily enjoins all class members (unless and until the class member has submitted a timely and valid Request for Exclusion Form) from filing or prosecuting any claims, suits or administrative proceedings (including but not limited to claims with the California DLSE) regarding claims to be released by the settlement.

#### All Citations

Not Reported in F.Supp.2d, 2006 WL 1652598

#### Footnotes

- 1 In their brief in support of their motion to certify the class, plaintiffs corrected the spelling of "Fagundes", which had previously been spelled "Fegundes."
- 2 Part of the reasoning in *Diaz* appears to have been overruled by the Supreme Court in *Amchem*. Namely, *Diaz* assumed that a court could approve settlement without certifying the class. See *Diaz*, 876 F.2d at 1408 ("Before certification, the dismissal is not res judicata against the absent class members and the court does not need to perform the kind of substantive oversight required when reviewing a settlement binding upon the class."). As the discussion above illustrates, however, this reasoning is incompatible with the Court's holding in *Amchem*.
- 3 In contesting the number of putative vacation class members, defendant originally argued that the law would not support plaintiff's claims. Namely, defendant contended that, under California law, forfeiture cannot occur absent a termination of employment and that a change in ownership does not effectively amount to termination. As noted above, these arguments speak directly to the merits of plaintiffs' claims. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir.1971))).
- 4 In opposing class certification prior to settlement, defendant originally argued that typicality is frustrated by the existence of four vacation policies encompassed by the class definition. (Def.'s Opp'n to Mot. for Class Cert. 35-36.) Specifically, defendant pointed out that two distinct vacation policies apply to store managers and two distinct vacation policies apply to store level employees. (Farthing Decl. ¶¶ 6-7.) However, a brief review of the policies suggests, at least as to the forfeiture or carrying over of *accrued* vacation time, that any differences among the policies are insignificant. (Compare Farthing Decl. Ex. A (Section V), with Farthing Decl. Ex. B (Section V) and Farthing Decl. Ex. C (Section V).) Distinctions

regarding how vacation was accrued, and how much time an employee could store up, have no bearing on the typicality inquiry here.

- 5 Moreover, to permit employers to hold supervisors responsible for not taking their own meal breaks simply because of the position they hold, as defendant originally argued, would effectively deny supervisors the protections afforded by § 226.7. The court has not been advised of any authority suggesting that the law should be applied in this way.
- 6 In their reply to the defendant's opposition to certification, plaintiffs abandoned their assertion that defendant's vacation policies were "unfair and unreasonable because workloads and chronic understaffing precluded employees from taking vacation." (Pl.'s Reply to Def.'s Opp'n to Class Cert. 24.) Therefore, to the extent that this argument raised individual issues, that concern is no longer relevant.
- 7 The court notes that it has conducted a full analysis of the class certification question at this stage to determine early on if all of the effort that will necessarily go into preparing for the fairness hearing is appropriate. This initial determination that class certification is warranted is not, however, binding on the court and the parties are discouraged from changing their positions on the terms of the settlement in reliance on this order. The court is not required to make a final determination that class treatment is appropriate until the final settlement approval, and it therefore does not herein make that final determination. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3d Cir.1995) (holding that while the trustworthiness of the negotiation process used to approve the settlement can be relied on to justify provisional certification of a settlement class, "final settlement approval depends on the finding that the class met all the requisites of Rule 23"). Moreover, because the analysis of the superiority component of the Rule 23(b)(3) requirements depends in part on the terms of the settlement, the parties cannot assume that the court's class certification analysis would necessarily be the same if circumstances changed.
- 8 In particular, the settlement creates an opportunity for class members to file claims that might otherwise be time-barred.
- 9 The stipulation recognizes that counsel must still submit an application for attorneys' fees, which it will do prior to the fairness hearing, and that the ultimate award will be determined by the court based on that application. Depending on the form of plaintiffs' counsel's application, the amount could be less than 30%. See *Staton*, 327 F.3d at 968 (discussing awards of attorneys' fees in the context of a pre-certification class action settlement and noting that "[t]his circuit has established 25% of the common fund as a benchmark award for attorney fees." (quoting *Hanlon*, 150 F.3d at 1029)).
- 10 The Ninth Circuit has warned district courts that "[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness," and consequently "[t]he settlement must stand or fall in its entirety." *Hanlon*, 150 F.3d at 1026. However, because the terms of the stipulation and settlement contemplate a service payment of "not more than", or "up to", \$15,000 per plaintiff "[s]ubject to [c]ourt approval", any modification of this award will be well within the terms of the agreement. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶¶ 15(d), (d)(xi)).)
- 11 The terms of the parties' stipulation and settlement provide for twenty (20) days. However, at oral argument the parties requested that the court provide the Claims Administrator with thirty (30) days to prepare and send out the appropriate forms.

# **EXHIBIT 30**



2006 WL 8458679

Only the Westlaw citation is currently available.

United States District Court, E.D. California.

Vicki WEST and Wendy Fagundes,

individually and on behalf of

others similarly situated, Plaintiffs,

v.

CIRCLE K STORES, INC., Defendant.

No. CIV. S-04-0438 WBS GGH

|

Signed 10/19/2006

|

Filed 10/20/2006

#### Attorneys and Law Firms

Kelly McInerney, Charles A. Jones, Jones Law Firm, Kevin J. McInerney, McInerney and Jones, Reno, NV, for Plaintiffs.

Jeffrey L. Kessler, Pro Hac vice, Dewey Ballantine, New York, NY, Matthew Walsh, Winston & Strawn, LLP, Los Angeles, CA, for Defendant.

#### MEMORANDUM AND ORDER RE: MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AWARD OF ATTORNEYS' FEES AND COSTS, AND ADDITIONAL COMPENSATION TO NAMED PLAINTIFFS

**WILLIAM B. SHUBB**, UNITED STATES DISTRICT JUDGE

\*1 Plaintiffs Vicki West and Wendy Fagundes<sup>1</sup> sought to bring a class action suit against defendant Circle K Stores, Inc. for alleged violations of the [California Labor Code sections 226.7, 227.3](#), and California's Unfair Competition Law ("UCL"), [Cal. Bus. & Prof. Code §§ 17200-17210](#). On June 13, 2006, this court entered an order preliminarily approving the settlement reached by the parties. Presently before the court are plaintiffs' applications for final approval of the class action settlement, attorneys' fees and costs, and additional compensation for named plaintiffs. For the following reasons, the court will grant final approval of the settlement, attorneys' fees and costs, and additional compensation.

#### I. Factual and Procedural Background

On March 3, 2004, plaintiffs filed a class action complaint claiming that defendant failed to pay (1) overtime wages, (2) administrative leave wages, and (3) accrued but unused vacation wages, all in violation of state law. (Compl. ¶ 17.) On July 15, 2005, this court granted in part plaintiffs' motion to amend their complaint. (July 15, 2005 Order at 2-3.) The amendments dropped some of the claims of one proposed subclass (managers) and added Wendy Fagundes as a named plaintiff, representing an additional class of employees claiming that defendant failed to pay meal and break wages. (*Id.* at 3-4.)

On March 20, 2006, plaintiffs moved to certify two distinct classes based on their remaining claims: (1) a "meal period class" defined as "all hourly store employees employed by defendant in California since October 1, 2000, who did not receive off-duty meal periods" and (2) a "vacation class" defined as "all employees employed in California by defendant at any time since March 3, 2000, who forfeited accrued but unused vacation under defendant's vacation policy." (Pl.'s Mot. for Class Cert. 1.) However, before the court could hear that motion, the parties attended a day long mediation with Justice Richard Neal (retired) where they agreed to settlement terms.

The court preliminarily approved this settlement in an order issued on June 13, 2006, and provisionally certified the two classes for the purpose of settlement. The court additionally appointed Vicki West as the representative of the vacation class, Wendy Fagundes as the representative of the meal period class, the law firm of McInerney & Jones as lead counsel, and Rosenthal & Company, LLC as the claims administrator. The court also approved the class claim form, the exclusion form, and the notice of settlement with minor modifications as to scheduling, and directed the claims administrator to send copies of these three documents to all identifiable class members within thirty days of the order's issuance. The court is unaware of any relevant factual or legal developments that would alter its previous analysis, and plaintiffs' counsel represented at oral argument that he did not encounter any such change. Finally, the court set the Final Fairness Hearing on October 16, 2006, at 1:30 p.m. After conducting the fairness hearing and carefully considering the settlement terms, the court now addresses whether the proposed settlement is fair, reasonable, and adequate, such that it should be approved by the court; whether a judgment as provided in the stipulation should be entered for final

approval of the settlement; and whether class counsel's applications for attorneys' fees and costs, as well as additional compensation for named plaintiffs, should be granted.

## II. Discussion

### A. Legal Standard

\*2 The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions. [Class Plaintiffs v. City of Seattle](#), 955 F.2d 1268, 1276 (9th Cir. 1992). "There is an overriding public interest in settling and quieting litigation" that is "particularly true in class action suits." [Van Bronkhorst v. Safeco Corp.](#), 529 F.2d 943, 950 (9th Cir. 1976). Nevertheless, where "parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." [Staton v. Boeing Co.](#), 327 F.3d 938, 952 (9th Cir. 2003). Having conducted the first inquiry regarding the propriety of certification, the "court must carefully consider 'whether a proposed settlement is fundamentally fair, adequate, and reasonable,' recognizing that '[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness ....' " [Id.](#) at 952 (quoting [Hanlon v. Chrysler Corp.](#), 150 F.3d 1011, 1026 (9th Cir. 1998)); see also [Fed. R. Civ. P. 23\(e\)](#).

At the fairness hearing, the court should entertain any objections by putative class members to: (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement. [Diaz v. Trust Territory of Pac. Islands](#), 876 F.2d 1401, 1408 (9th Cir. 1989) (holding that prior to approving the dismissal or compromise of claims containing class allegations, district courts must, pursuant to [Rule 23\(e\)](#), hold a hearing to "inquire into the terms and circumstances of any dismissal or compromise to ensure that it is not collusive or prejudicial"). Following the fairness hearing, the court will make a final determination as to whether the parties should be allowed to settle the class action pursuant to the terms agreed upon. [Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.](#), 221 F.R.D. 523, 525 (C.D. Cal. 2004).

In determining whether the terms of the parties' settlement are fair, adequate, and reasonable, the court must balance several factors, including:

the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial;

the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

[Hanlon](#), 150 F.3d at 1026. But see [Molski v. Gleich](#), 318 F.3d 937, 953-54 (9th Cir. 2003) (noting that a district court need only consider some of these factors--namely those designed to protect absentees).

### A. Terms of the Settlement Agreement

The key terms of the stipulation and settlement are as follows:

1. Class Definitions: the meal period class is defined as "All hourly employees employed by Circle K Stores, Inc. in the state of California from October 1, 2000 through the date the Court grants preliminary approval of this Settlement." The vacation class is defined as "All employees employed by Circle K Stores, Inc. in the state of California from March 3, 2000 through the date the Court grants preliminary approval of this Settlement who did not have all their accrued but unused vacation carried forward from year to year." The agreement excludes from the class employees of franchises who do/did not actually work for defendant Circle K Stores, Inc. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ("Settlement") ¶ 6).)
2. Settlement Amount: Defendant agrees to a "total payout" settlement of five million dollars (\$5,000,000). Of this amount, three million eight hundred thousand dollars (\$3,800,000) is allocated to the meal period class and one million two hundred thousand dollars (\$1,200,000) is allocated to the vacation class. ([Id.](#) ¶ 16.)
- \*3 3. Deductions: attorneys' fees (up to 30%), plaintiffs' costs (up to \$25,000), "service payments" to the class representatives (up to \$15,000 each), and claims administration costs (up to \$150,000) will be deducted from defendant's total liability of \$5,000,000. With the exception of the service payments, the meal period class will bear 76% of these costs and fees; the vacation class will bear the remainder. ([Id.](#) ¶ 15(d).)
4. Award Allocations: Meal period class members who file timely claims will receive a proportionate share of the \$3,800,000 class settlement amount, minus costs, fees, and service payments. A member's share will be based on the number of weeks she worked for defendant during the class period and this number will be determined

based on the total number of days worked divided by seven. (*Id.* ¶ 15(d)(i)(a).) The parties estimate that this approach will at a minimum yield an \$8 per week payment for each class member, resulting in payments in excess of \$2,600 for employees that worked throughout the entire class period. (P. & A. in Supp. of Mot. for Prelim. Approv. 8.) Vacation class members who file timely claims will likewise receive a proportionate share of the \$1,200,000 class settlement amount, minus costs, fees, and service payments. After all claims are filed, the vacation class award will be divided by the number of claimed vacation hours, yielding a per hour payment. (June 1, 2006 Jones Decl. Ex. A Settlement ¶ 15(d)(i)(b)).) The parties anticipate that this will result in at least a \$13 per hour payment for employees who, on average, were making \$7 per hour. (P. & A. in Supp. of Mot. for Prelim. Approval 8-9.)

5. Claims Procedures: Members of each class will receive two forms sent out by the Claims Administrator, Rosenthal & Company LLC. (June 1, 2006 Jones Decl. Ex. A Settlement ¶¶ 15(d)(ix), 22(h)).) One will be a preprinted Class Claims Form that, based on defendant's records, will establish either the number of weeks worked (for meal period class members) or the number of vacation days owed (for vacation class members). (*Id.* ¶ 15(d)(ix)(a)-(b).) Class members will also receive a Request for Exclusion Form that will advise them on how to opt out of the class action settlement. (*Id.*) These forms will be sent, along with a notice announcement detailing the history of this litigation and further explaining the terms of the settlement, no more than twenty (20) days from the date of this order. (*Id.* ¶ 18(c).) Class members will have sixty (60) days from the date that notice is mailed to submit a claim and forty-five (45) days to opt out. (June 1, 2006 Jones Decl. Ex. D (Proposed Notice).) Payments to class claimants will be mailed by the claims administrator within twenty (20) days of the final approval of the settlement. (*Id.* Ex. A (Settlement ¶ 20).)

6. Release: Class members who do not opt out of the class action, even if they do not file a claim, are forever barred from bringing claims for failure to provide meal or rest breaks from October 1, 2000, until this settlement is finally approved, and from bringing claims for failure to annually carry over accrued but unused vacation from March 3, 2000, until this settlement is finally approved. *Id.* Ex. D (Proposed Notice).) The release does not cover employees who did not actually work for defendant, but

rather worked for a franchisee. Additionally, the release does not apply to claims arising after December 2003 against ConocoPhillips (which sold defendant Circle K Stores, Inc. through a stock sale in December 2003 and absorbed some of defendant's existing employees through "migration"). (*Id.*; Apr. 7, 2006 Jones Decl. Ex. F (Prince Dep. 74:8-75:3).)

## B. Factor Analysis

### 1. Strength of the Plaintiff's Case

\*4 Counsel for both parties have been actively engaged in this litigation for over two years and have diligently pursued the necessary discovery. Certain aspects of plaintiffs' case were quite strong. From deposition testimony, it was clear that defendant had not carried forward accrued but unused vacation from year to year for a large number of employees. (Application for Final Approval of Settlement 6.) Moreover, defendant acknowledged that it had a blanket policy of preventing employees from taking meal periods because of the "nature of the work" in the convenience store industry. (*Id.*) Defendant has since changed its policy and now allows off-duty meal periods when more than one employee works on a given shift. (*Id.*)

### 2. Risk, Expense, Complexity, and Likely Duration of Further Litigation

Despite having significantly developed the facts in the case, both sides faced significant uncertainty because the claims (in particular the meal period class claim) encompass unsettled legal issues. The complexity and duration of further litigation was likely to be considerable. There were over 10,000 potential class members in this case. Completing discovery (in particular, depositions) in a case with such a large class would have been extremely costly. Additionally, plaintiffs were proceeding against a large and sophisticated defendant, who vigorously defended its position until settlement was reached. (*See* Apr. 3, 2006 Def.'s Opp'n to Mot. for Class Cert.; Def.'s Objections to Request for Judicial Notice; May 31, 2006 Stip. & Proposed Order for Prelim. Approval of Settlement.) The hotly-contested nature of this case prior to settlement further indicates that plaintiffs' counsel assumed some degree of risk by proceeding with this litigation. These circumstances and attendant risks favor settlement. [Hanlon, 150 F.3d at 1026.](#)

### 3. Risk of Maintaining Class Action Status Throughout the Trial

Further, it was not clear that the classes would remain intact if trial proceeded. The California Supreme Court is currently resolving a split amongst California Courts of Appeal that would affect the outcome of the case--namely, whether the remedy provided by [Labor Code § 226.7](#) should be considered a wage or a penalty. See [Murphy v. Kenneth Cole Prods., Inc.](#), 134 Cal. App. 4th 728, 751 (2005), review granted and opinion superseded by [Murphy v. Kenneth Cole Prods., Inc.](#), 40 Cal. Rptr. 3d 750 (2006). If the California Supreme Court determines that the remedy under this labor code section is appropriately considered a penalty, a one-year statute of limitations would apply to the meal break class, which would cut the length of the class period in half. It is additionally unclear whether the remedy provided by [California Business & Professions Code § 17203](#) provides a remedy that is a wage or a penalty. [Cortez v. Purolator Air Filtration Prods. Co.](#), 23 Cal.4th 163, 173 (2000). The resolution of this question would also affect what statute of limitations is applied to the claims in this case. (See Feb. 14, 2006 Order re: Motion for Summ. J. 4-7.) Further, the court has previously noted that defendant raised persuasive arguments regarding the commonality and typicality of the meal period class. (June 13, 2006 Order 7-12.) Thus, the settlement ensures that a more inclusive meal period class will obtain relief than may otherwise be the case, which counsels for settlement.

### 4. Amount Offered in Settlement

The total amount agreed to in the settlement is a “total payout” of \$5,000,000, regardless of how many claims are ultimately received. Subtracting the attorneys' fees, litigation costs, enhancement awards, and administrative costs, the net result is that the meal period class would be compensated with \$2,712,884.30 and the vacation class would be compensated with \$846,437.20. (Charles A. Jones Decl. ¶ 6.) The meal period class members with timely and valid claims contend that they worked approximately 197,468.64 weeks<sup>2</sup> without meal periods, which means that each claimant in this class stands to receive between \$12.93 and \$13.73 for omitted meal breaks per week of work. (*Id.* ¶ 8.) This means, in turn, that the average member of this class would receive between \$3,845.64 and \$4,083.58. (*Id.*) The members of the vacation class will receive between \$15.00 and \$17.74, depending

on how the claim administrator resolves disputes regarding work weeks, for every hour of vacation forfeited. (*Id.* ¶ 9.) The net recovery for plaintiffs is greater than originally anticipated, and is therefore greater than the amount plaintiffs were informed they would receive in the notice. (Jones Decl. Ex. B (Class Notice); Application for Final Approval of Settlement 9; Application for Attorneys' Fees & Costs 14.) Thus, because plaintiffs are ensured compensation for the injury they suffered, and the rate of compensation appears to be fair and reasonable, this factor weighs in favor of approving the settlement.

### 5. Extent of Discovery Completed and the Stage of the Proceedings

\*5 The complaint in this case was filed in March, 2004, and has been actively litigated since that time. During discovery, plaintiffs served on defendant thirty-nine interrogatories, seventy-four requests for production of documents, and fifteen requests for admissions. (Pls.' Application for Final Approval of Settlement 4.) Defendant produced more than 2,000 pages of documents in response to these discovery requests. (*Id.*) Defendant served on plaintiffs eighty requests for production of documents and twenty-seven interrogatories. (*Id.*) Finally, eight depositions have been conducted to date--plaintiffs deposed several of defendant's employees and defendant's designated expert, while defendant deposed both of the proposed class representatives. (*Id.*) Thus, substantial discovery had been conducted at the time the parties agreed to settle the case; additionally, the court had ruled on a motion for partial summary judgment and was considering a motion to certify the class. The advanced stage of the proceedings suggests that the parties had carefully investigated the claims before reaching resolution. Thus, this factor weighs in favor of approving the settlement.

### 6. Experience and Views of Counsel

The law firm of McNerney & Jones, counsel for plaintiffs in this action, has previously represented plaintiffs in more than thirty class actions over the past sixteen years, all of which involved labor and employment law. (June 1, 2006 Jones Decl. ¶ 4.) Many of these class actions have involved interpretation of California's labor code. (*Id.*) In fact, McNerney & Jones represent class action plaintiffs exclusively. (Application for Final Approval of Settlement



2.) McInerney & Jones has also settled more than fifteen class actions related to wage and hour disputes. (June 1, 2006 Jones Decl. ¶ 4.) Additionally, counsel in this case have tried more than ten class actions involving overtime pay through certification, and have lost certification in a few instances. (Pls.' Application for Final Approval of Settlement 3.) Thus, counsel are familiar with the attendant risks of representing plaintiffs in class action suits. (*Id.*)

Moreover, plaintiffs' counsel have indicated that they are pleased with the result obtained in this settlement, and that they believe it is fair and reasonable. With regard to class action settlements, the opinions of counsel should be given considerable weight both because of counsel's familiarity with this litigation and previous experience with cases such as these. [In re Wash. Public Power Supply System Sec. Litig.](#), 720 F. Supp. 1379, 1392 (D. Ariz. 1989) (citing [Officers for Justice v. Civil Service Com'n of City and County of S.F.](#), 688 F.2d 615, 625 (9th Cir. 1982)). The court has observed that the litigation has been appropriately characterized by aggressive and capable advocacy on both sides. As in the case of [In re Washington](#), "[t]here is likewise every reason to conclude that settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue influence." *Id.* at 1392. Thus, this factor supports approval of the settlement agreement.

#### 7. Presence of a Governmental Participant

This factor is irrelevant to the court's analysis, as no governmental entity participated in this class action.

#### 8. Reaction of the Class Members to the Proposed Settlement

Notice of the proposed settlement was mailed to each of the potential members of the settlement classes, along with a claim form and a request for exclusion form. (Oct. 2, 2006 Jones Decl. Ex. B, E, & F.) The notice complied with [Federal Rule of Civil Procedure 23\(e\)](#). It informed potential class members what the minimum amount of money was that they could expect to receive under the settlement, how settlement awards would be calculated, how to dispute defendant's data regarding work week hours, the procedure for objecting more generally or excluding oneself altogether from the settlement, the amount of fees and costs that would be paid out of the settlement, and the date of the final approval hearing. (*Id.* Ex. B.)

The deadline for objecting to the settlement was August 21, 2006, and class members did not file any objections to the terms of the settlement, the amount of fees and costs sought, or the service payments to the named plaintiffs. (Oct. 2, 2006 Jones Decl. ¶ 3; Keane Decl. ¶ 15.) Moreover, the settlement underestimated the amount of relief plaintiffs would obtain and overestimated the amount of attorneys' fees that counsel ultimately sought. (Application for Final Approval of Settlement 9-10.) In particular, the notice informed plaintiffs of the upper bound of attorneys' fees, and plaintiffs' counsel are now requesting \$250,000 less in attorneys' fees. (Jones Decl. Ex. B (Class Notice).) The lack of objections to the settlement is perhaps the most significant factor weighing in favor of settlement.<sup>3</sup>

#### C. Award of Attorneys' Fees

\*6 [Federal Rule of Civil Procedure 23\(h\)](#) provides that "[i]n an action certified as a class action, the court may award reasonable attorneys' fees and nontaxable costs authorized by law or by agreement of the parties ...." "In assessing attorneys' fees, courts typically apply either the percentage-of-recovery method or the lodestar method. The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." [In re Rite Aid Corp. Sec. Litig.](#), 396 F.3d 294, 300 (3rd Cir. 2005) (quotations and citation omitted).

The Ninth Circuit has noted that, in class actions, "fee awards range from 20 percent to 30 percent of the fund created." [Paul, Johnson, Alston & Hunt v. Graulity](#), 886 F.2d 268, 272 (9th Cir. 1989). The court additionally noted with approval "that one court has concluded that the 'bench mark' percentage for the fee award should be 25 percent." *Id.* That percentage may be adjusted in either direction "to account for any unusual circumstances involved in this case." *Id.* (emphasis added). "Courts may observe the following factors when determining whether the benchmark percentage should be adjusted: (1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's lodestar." [In re Heritage Bond Litig.](#), No. 02-1475, 2005 WL 1594403, at \*18 (C.D. Cal. 2005) (citations omitted).



The proposed settlement appropriately takes a percentage-of-recovery approach to calculate fees. Although the settlement allows for thirty percent of the settlement fund to be awarded as attorneys' fees, plaintiffs' counsel requests twenty-five percent of the fund. There are no unusual circumstances here that would justify a downward departure from this benchmark amount.

On the contrary, an application of the factors noted above demonstrates that the award is eminently reasonable. These factors overlap with the factors the court has already considered in evaluating the settlement itself, and the court has previously noted that factors one, three, five, six, and seven counsel in favor of approval of the settlement. With regard to the second factor, the effort expended by counsel in this case was considerable. Plaintiffs filed a motion to amend the complaint, which was opposed by defendants, and defendants filed a motion for summary judgment against the meal period claims, the resolution of which turned upon complex and divergent appellate opinions regarding state law. (See Feb. 14, 2006 Order re: Motion for Summ. J. 6-7.) Plaintiffs prevailed on both of these motions. Moreover, as to factor four, counsel's skill has been adequately demonstrated by their success in this litigation. Thus, these two factors suggest that the amount of attorneys' fees requested is appropriate.

The final factor is whether the amount counsel requests is consistent with what the lodestar amount would be. Plaintiffs' counsel has submitted a declaration indicating that he estimates he has spent 1,674 hours on this case over the course of two and a half years, and that he anticipates he will spend at least sixty more hours "resolving claim disputes, talking with class members and the claims administrator about pay outs, finalizing the claims administration process and the allocation of taxes, and providing a final accounting to the court." (Oct. 19, 2005 Jones Decl. ¶ 5.) Given that counsel seeks \$1,225,000 in attorneys' fees, this means that the settlement compensates counsel at an hourly rate of approximately \$706. There are three attorneys at the firm that has represented plaintiffs in this action. To date, Mr. Jones' rate has been approximately \$450 an hour, and the same billing rate applies for another attorney at his firm, Kelly McInerney. (*Id.*) The billing rate for the lead attorney at the firm, Kevin J. McInerney, is in excess of \$700 an hour. (*Id.*) Mr. Jones worked approximately seventy percent of the hours expended on this case, Ms. McInerney worked approximately twenty percent of those hours, and Mr. McInerney is responsible for the remainder of the work

(ten percent of the total hours). Thus, the lodestar calculation indicates that counsel is being compensated at rate elevated from his normal rate of pay, but not to an egregiously high level. Additionally, to the extent the hours expended are attributable to Mr. McInerney, the lodestar calculation is consistent with Mr. McInerney's standard billing rate.

\*7 Significantly, counsel simply seeks the benchmark percentage rate set by the Ninth Circuit. Although the percentage calculation is not a perfect approximation of what a lodestar calculation would be, excess compensation to this degree is not an "unusual circumstance" that would justify a downward departure from the benchmark. [Paul, Johnson, Alston, & Hunt](#), 886 F.2d at 272. Additionally, not all of the factors must be met to justify a fee award, and the rest of the factors clearly weigh in favor of granting a fee award of this amount. In sum, the factor analysis weighs in favor of granting plaintiffs' counsel twenty-five percent of the common fund for their attorneys' fees, and the court will therefore allow the award in the amount requested.

#### D. Costs

"There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." [In re Heritage Bond Litig.](#), 2005 WL 1594403, at \*23 (quoting [In re Gen. Instruments Sec. Litig.](#), 209 F. Supp. 2d 423, 434 (E.D. Pa. 2001) (omitting citations and alterations)). Class counsel has submitted its itemized costs relating to travel, mailing expenses, mediation, depositions/transcriptions, legal research, photocopies, filings, court call, and facsimiles. (Oct. 2, 2006 Jones Decl. Ex. D.) The court finds that these are reasonable litigation expenses that warrant compensation.

Additionally, the claims administrator, Rosenthal & Company, LLC, applies for costs incurred in administering the settlement in the amount of \$145,536.25. Rosenthal & Company has incurred \$96,836.25 in costs to date, and anticipates that it will yet incur an additional \$48,700 in administrative costs pertaining to the settlement. (Jones Decl. Ex. G (Keane Decl. ¶ 18.)) These additional costs will involve processing claims that are late, deficient, or disputed, sending denial letters, issuing checks, completing tax returns, and issuing tax documents. (*Id.*) Because this relief could not be dispersed to the class without the efforts of the class administrator, and the amount requested appears reasonable given the size of the class, the court will award reimbursement for expenses incurred to the claims administrator.

#### E. Enhancement Award for Class Representatives

The settlement proposes a \$15,000 “enhancement award” for each named plaintiff. The court recognizes that “a class representative is entitled to some compensation for the expense he or she incurred on behalf of the class lest individuals find insufficient inducement to lend their names and services to the class action.” [In re Oracle Secs. Litig.](#), No. C-90-0931, 1994 WL 502054, at \*1 (N.D. Cal. June 18, 1994) (citing [In re Continental Ill. Secs. Litig.](#), 962 F.2d 566, 571 (7th Cir. 1992)). “Such payments, however, must be reasonable in light of applicable circumstances, and not ‘unfair’ to other class members.” [Smith v. Tower Loan of Miss., Inc.](#), 216 F.R.D. 338, 368 (S.D. Miss. 2003) (citation omitted); see also [In re Oracle Secs. Litig.](#), 1994 WL 502054 at \*1 (reducing requested payment of \$2,500 to \$500 for spending “between two and five hours undergoing depositions and ... respond[ing] to a few narrow document discovery requests”).

The proposed payment is not particularly unfair to other class members, given that it will not significantly reduce the amount of settlement funds available to the rest of the class. None of the class members have objected to the amount of additional compensation sought by the named plaintiffs. Notably, Fagundes, who remains in the employ of defendant's franchisee, may have risked retaliation by her employer. The same, however, cannot be said for West, who left Circle K in 2003.

\*8 West and Fagundes have subordinated their individual claims to serve as named plaintiffs in this class action. Plaintiffs' counsel explains that Fagundes could have brought a claim against defendant for between \$11,896.80 and \$14,871, but is limited to recovery of between \$3,800 and \$4,000 under the terms of the settlement. (Application for Additional Compensation for Named Plaintiffs 3.) West has devoted over one hundred hours to assist counsel with this case, and Fagundes estimates that she has spent eighty hours assisting counsel. (Jones Decl. Ex I (West Decl. ¶ 2); Ex. H (Fagundes Decl. ¶ 2).)

Moreover, other courts have awarded comparable service payments to named plaintiffs. [In re Domestic Air Transp.](#), 148 F.R.D. 297, 357-58 (N.D. Ga. 1993) (awarding \$142,500 total to class representatives out of \$50 million fund); [In re Dun & Bradstreet](#), 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (awarding \$215,000 to several class representatives out of an \$18 million fund). Given the amount of time that named plaintiffs have invested in this case, and the fact that Fagundes

risked retaliation from her employer, the court finds plaintiffs' enhancement payments of \$15,000 each to be reasonable.

#### III. Conclusion

Based on the foregoing, the court approves the settlement set forth in the Settlement Agreement and finds that the settlement is fair, reasonable, adequate, and in the best interest of the settlement classes. In view of the diligent efforts of counsel in a complex area of law and the favorable outcome obtained for class members, the court finds an award of twenty-five percent (25%) of the \$5,000,000 common fund, to be an appropriate amount for attorneys' fees. The court also finds that the costs requested by counsel are reasonable and fair. Consummation of the settlement in accordance with the terms and provisions of the Settlement Agreement is therefore approved, and the definitions provided in the Settlement Agreement shall apply to the terms used herein. The Settlement Agreement shall be binding upon all members of the class who did not timely elect to be excluded from the classes.

IT IS THEREFORE ORDERED that plaintiffs' motion for final approval of settlement be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that:

(1) for the purpose of this settlement, as described in the court's order of June 12, 2006, good cause exists to certify two settlement classes of plaintiffs: (a) All hourly employees employed by Circle K Stores, Inc. in the state of California from October 1, 2000 through the date the Court grants preliminary approval of this Settlement; and (b) All employees employed by Circle K Stores, Inc. in the state of California from March 3, 2000 through the date the Court grants preliminary approval of this Settlement who did not have all their accrued but unused vacation carried forward from year to year. The court reaffirms its order certifying the classes, including its findings that:

(a) the settlement classes are so numerous as to make joinder of all class members impracticable.

(b) there are common questions of law and fact as to each settlement class.

(c) named plaintiffs' claims are typical of the claims of the members of the settlement classes.

(c) plaintiffs and class counsel will fairly and adequately represent and protect the interests of settlement classes, and have done so by entering into this Settlement Agreement.

(d) questions of law and fact common to the members of each settlement class predominate over any questions affecting any individual member, and a class action is the superior method for pursuing the claims at issue here.

**\*9** (2) the notice given to the classes of the settlement as described in the Settlement Agreement and the court's order of June 12, 2006, constituted the best notice practicable under the circumstances. The Notice program provided due and adequate notice of these proceedings and of the matters set forth in the notice, including the settlement set forth in the Settlement Agreement, to all persons and entities entitled to such notice, and said notice fully satisfied the requirements of due process and applicable law. The court further finds that the mailing of the notice of settlement to the putative class members was properly administered by Rosenthal & Company, LLC, pursuant to court order.

(3) defendant shall pay the total sum of \$5,000,000 to a gross settlement fund to be distributed in a manner more fully set forth below and as described in the court's June 12, 2006 order. This sum shall not be decreased or increased in any respect and shall represent the total consideration to be paid by defendant in connection with the settlement. Defendant shall have no further liability for costs, expenses, interest, attorney fees, or for any other charge, expense, or liability.

(4) as detailed below, the following payments shall be made from the settlement fund: payment of attorneys' fees and costs, payment of an enhancement award to the class representatives, and payment of costs and administrative fees to the claims administrator, Rosenthal & Company. Once all of the above payments have been made, all amounts remaining in the settlement fund shall be distributed to the class members who timely filed valid claim forms as described in the Settlement Agreement at ¶ 15 and by the court's June 12, 2006 preliminary approval order.

(5) plaintiffs' applications for attorneys' fees in the amount of \$1,225,000, litigation costs in the amount of \$15,142.39, and administrative costs in the amount of \$145,536.25 be, and the same hereby are, GRANTED, provided that seventy-six percent (76%) of the award for fees and costs shall be paid from the gross settlement fund for the meal period class, and

twenty-four percent (24%) of the award shall be paid from the gross settlement fund for the vacation class.

(6) named plaintiffs Vicki West and Wendy Fagundes be, and the same hereby are, awarded additional compensation in the amount of \$15,000 each, with the condition that West's compensation shall be paid from the gross settlement fund for the vacation class, and Fagundes' compensation shall be paid from the gross settlement fund for the meal period class.

(7) the claims administrator, Rosenthal & Company, shall calculate the amount of each class members' settlement check within fifteen (15) days of the entry of this order and provide an accounting to both plaintiffs' and defendant's counsel. The distribution and mailing of settlement awards will take place as provided in the Settlement Agreement at ¶ 15. Specifically, the claims administrator shall cause the settlement awards to be mailed to the class members who timely submitted valid claim forms within twenty (20) calendar days following the court's final approval of the settlement. At the same time the claims administrator causes the settlement awards to be mailed to the class members, the claims administrator shall also cause the attorneys' fees and costs awarded by this court to be mailed to class counsel, the administrative costs awarded to the claims administrator to be paid to Rosenthal & Company, and the enhancement awards ordered by the court to be mailed to the class representatives, Vicki West and Wendy Fagundes.

(8) proof of the payments outlined in the paragraphs above will be filed with the court by the claims administrator and provided to plaintiffs' and defendant's counsel. Within ten days after proof of payment has been filed with the court by the claims administrator, the parties shall execute and file a proposed final judgment and dismissal of this action.

**\*10** (9) any settlement checks returned as undeliverable or not cashed after ninety (90) days will be voided. Undeliverable or uncashed checks will be governed by ¶ 20 of the Settlement Agreement. Any residue remaining after all payments have been made shall be governed by ¶ 15(h) of the Settlement Agreement.

(10) with respect to any class members who file untimely claims, the court hereby finds that those claims shall not be allowed and that the claims administrator may notify them accordingly.

(11) as detailed in the release set forth in the Settlement Agreement and accompanying the notice to the class, entry of this Final Approval Order does hereby and is deemed to dismiss this action on the merits and with prejudice and shall constitute a full release and discharge by the respective classes and each member of those classes on behalf of himself/herself, and each of his/her descendants, dependants, heirs, executors, administrators, assigns, successors, agents and attorneys, of defendants or their present and former affiliated companies, agents, servants, attorneys, subsidiaries, affiliates, stockholders, heirs, executors, representatives, successors, or assigns (the “Releasees”), as to any individual or class claim that was asserted in this action, as well as any meal period claims, rest period claims, claims pertaining to forfeited vacation time, or other claims arising out of the events, acts, facts, transactions, occurrences, representations, or omissions alleged in the First Amended Complaint in this action (“Released Claims”), from the beginning of the respective class periods through the date the court enters this Final Approval Order.

(12) upon satisfaction of all payments and obligations hereunder, the court finds that each and every class member, including the class representatives, and all successors in interest shall be permanently enjoined and forever barred from prosecuting any and all Released Claims against the Releasees or any related entity or individual. Thus, subject to and in accordance with the Settlement Agreement, even if plaintiffs and/or the class members, or any of them, may hereafter discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of Released Claims, the plaintiffs and each class member shall be deemed to have, and by operation of the judgment in this case, shall have fully, finally, and forever settled and released any and all claims raised in this action, or any of the other Released Claims, whether known or unknown, suspected or unsuspected, contingent or non-

contingent, whether or not concealed or hidden, which now exist, as set forth in the Settlement Agreement.

(13) neither the fact of settlement, nor the Settlement Agreement (or any other mediation or settlement-related documents or data), nor any of the negotiations or proceedings connected with the settlement, nor any act performed or document executed pursuant to or in furtherance of the settlement, shall be construed as an admission or evidence of the truth of the allegations in this action, or of any liability, fault, or wrongdoing of any kind.

(14) the court enjoins all class members (unless and until the class member has submitted a timely and valid Request for Exclusion Form) from filing or prosecuting any claims, suits or administrative proceedings (including but not limited to claims with the California DLSE) regarding claims to be released by the settlement.

**\*11** (15) this order for final approval of the settlement agreement is intended to effectuate the settlement reached by the parties and more fully described in the Settlement Agreement.

(16) the court retains jurisdiction over this matter and over all parties to this litigation, including all members of the classes. The court will have continuing jurisdiction over this matter until all obligations outlined in the Settlement Agreement have been complied with and thereafter if any issues pertaining to this case and/or settlement arise.

(17) in the event the settlement does not become effective in accordance with the terms of the Settlement Agreement, this order shall be vacated.

#### All Citations

Not Reported in Fed. Supp., 2006 WL 8458679

#### Footnotes

- 1 In their brief in support of their motion to certify the class, plaintiffs corrected the spelling of “Fagundes,” which had previously been spelled “Fegundes.”
- 2 This number is somewhat in dispute, and may yet increase by approximately 12,296.09 weeks. (Jones Decl. Ex. G (John Keane Decl. ¶ 17).)
- 3 Although not one of the factors the court must consider, an additional consideration favoring settlement is that, after this lawsuit was filed, defendant changed some of its employment practices regarding the issues involved in this litigation. Notably, defendant has created a new policy allowing off-duty meal periods when multiple employees are working on

a particular shift. (Pls.' Application for Final Approval of Settlement 6.) Defendant has also corrected its practices by allowing employees to carry forward their accrued but unused vacation from year to year. (Oct. 19, 2006 Charles A. Jones Decl. ¶ 8.)

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[additional parties continued on next page]

**SUPERIOR COURT OF CALIFORNIA**

**FOR THE COUNTY OF FRESNO**

JESSE GIL and DANIEL AYALA,  
individually and on behalf of all other  
similarly situated employees,

Plaintiffs,

vs.

OUTBACK, INC., a California Corporation;  
and DOES 1 to 100, inclusive,

Defendants.

**Case No. 21CECG03273**

*Assigned for All Purposes to Hon. Jon M. Skiles  
Department 503*

**CLASS ACTION**

**EXHIBIT LIST AND EXHIBITS IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION AND PAGA SETTLEMENT**

Date: July 3, 2025

Time: 3:30 p.m.

Dept.: 503

Judge: Hon. Jon M. Skiles

Filed: November 3, 2021

FAC Filed: January 24, 2024

SAC Filed: November 20, 2024

Trial Date: None Set

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Daniel J. Hyun (State Bar No. 309184)  
2 Shaheen A. Etemadi (State Bar No. 319138)

**Torus LLP**

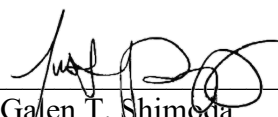
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| <b><u>EXHIBIT</u></b> | <b><u>DESCRIPTION</u></b>                                                |
|-----------------------|--------------------------------------------------------------------------|
| <b>A</b>              | Joint Stipulation Regarding Class Action and PAGA Settlement and Release |
| <b>B</b>              | Plaintiffs' Operative Complaint                                          |
| <b>C</b>              | Plaintiffs' Letters to the LWDA Regarding PAGA Claims                    |
| <b>D</b>              | ILYM Group, Inc., Bid                                                    |
| <b>E</b>              | Plaintiffs' Itemized Costs                                               |
| <b>F</b>              | Proposed Notice of Settlement                                            |
| <b>G</b>              | Proof of Submission of Proposed Settlement Agreement to LWDA             |
| <b>H</b>              | Summary of Shimoda & Rodriguez Law, PC's, Hours                          |

Dated: June 10, 2025

**Shimoda & Rodriguez Law, PC**

By:   
 Galen T. Shimoda  
 Justin P. Rodriguez  
 Renald Konini  
 Attorneys for Plaintiffs

# Exhibit A

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14 **SUPERIOR COURT OF CALIFORNIA**  
15 **FOR THE COUNTY OF FRESNO**

16 JESSE GIL and DANIEL AYALA,  
17 individually and on behalf of all other similarly  
18 situated employees,

19 Plaintiffs,

20 vs.

21 OUTBACK, INC., a California Corporation;  
and DOES 1 to 100, inclusive,

22 Defendant.  
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Case No.: 21CECG03273

**JOINT STIPULATION REGARDING CLASS  
ACTION AND PAGA SETTLEMENT AND  
RELEASE**

Filed: November 3, 2021  
FAC Filed: January 24, 2024  
SAC Filed: November 20, 2024  
Trial Date: None Set



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and on behalf of similarly situated employee  
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1 This Joint Stipulation Regarding Class Action and PAGA Settlement and Release is made and  
2 entered into between the Plaintiffs Jesse Gil and Daniel Ayala (“Plaintiffs”), on behalf of themselves, the  
3 Labor and Workforce Development Agency, Class Members, and Aggrieved Employees, and Defendant  
4 Outback, Inc. (“Defendant”). This Agreement is subject to the terms and conditions set forth below and the  
5 approval of the Court.

6 **1. DEFINITIONS**

7 The following terms, when used in this Agreement, have the following meanings:

8 1.1 “Action” means the above entitled lawsuit, *Gil v. Outback, Inc.*, Fresno County Superior  
9 Court Case No. 21CECG03273, filed on November 3, 2021, and includes the *Ayala Action*.

10 1.2 “Aggrieved Employee(s)” means all individuals who have, or continue to, perform work for  
11 Defendant in California as hourly, non-exempt employees at any time from October 21, 2020, up to either  
12 (1) the Preliminary Approval Date, or (2) December 10, 2024, whichever is earlier.

13 1.3 “Agreement” or “Settlement” or “Settlement Agreement” means this Joint Stipulation  
14 Regarding Class Action and PAGA Settlement and Release.

15 1.4 “*Ayala Action*” means the lawsuit *Ayala v. Outback, Inc.*, Fresno County Superior Court  
16 Case No. 23CECG04940, filed on November 29, 2023.

17 1.5 “Class Counsel” means Galen T. Shimoda, Justin P. Rodriguez, and Renald Konini of  
18 Shimoda & Rodriguez Law, PC, and David Alami, Daniel J. Hyun, and Shaheen A. Etemadi of Torus LLP.

19 1.6 “Class Member(s)” means all individuals who have, or continue to, perform work for  
20 Defendant in California as hourly, non-exempt employees from November 3, 2017, up to either (1) the  
21 Preliminary Approval Date, or (2) December 10, 2024, whichever is earlier.

22 1.7 “Class Period” means from November 3, 2017, up to either (1) the Preliminary Approval  
23 Date, or (2) December 10, 2024, whichever is earlier.

24 1.8 “Class Representatives” means Plaintiffs Jesse Gil and Daniel Ayala.

25 1.9 “Complaint” means the operative Complaint on file in the Action with the Court.

26 1.10 “Court” means the Fresno County Superior Court.

27 1.11 “Defendant” means Outback, Inc.

28 1.12 “Defendants’ Counsel” means Sagaser, Watkins & Wieland PC.

1           1.13   “Enhancement Payment” means the amount approved by the Court to be paid to the Class  
2 Representatives in recognition of the time and effort expended on behalf of Class Members for the benefit  
3 of Class Members, which is in addition to any Individual Settlement Amount paid to the Class  
4 Representatives as a Participating Class Member.

5           1.14   “Effective Date” means the Final Approval Date unless there is a timely objection lodged  
6 that has not later been withdrawn, in which case the Effective Date will be either (a) the 60th calendar day  
7 after a signed order approving this settlement has been filed provided no appellate proceeding having been  
8 filed; or (b) seventh (7th) calendar day after any appellate proceeding opposing the settlement has been  
9 finally dismissed with no material change to the terms of this settlement and there is no right to pursue  
10 further remedies or relief, whichever is later.

11           1.15   “Final Approval Date” means the date a signed order granting final approval of this  
12 Agreement is filed with the Court.

13           1.16   “Gross Settlement Amount” is the sum of Three Hundred Sixty Seven Thousand Five  
14 Hundred Dollars (\$367,500).

15           1.17   “Individual Settlement Amount” means an individual Class Member’s and Aggrieved  
16 Employee’s allocation of the Net Settlement Amount and PAGA Payment respectively, as defined in  
17 Sections 1.19, 1.23, 5.5, and 5.8.

18           1.18   “LWDA” means the California Labor and Workforce Development Agency.

19           1.19   “Net Settlement Amount” is the portion of the Gross Settlement Amount available for  
20 distribution to Class Members, as described in this Agreement, after deduction of Class Counsel’s  
21 attorneys’ fees and litigation costs, Settlement Administrator Costs, the PAGA Payment, and Enhancement  
22 Payment to the Class Representatives.

23           1.20   “Notice of Settlement” means the document substantially in the form attached hereto as  
24 Exhibit 1.

25           1.21   “Notice Period” means sixty (60) calendar days from the initial mailing of the Notice of  
26 Settlement to Class Members and Aggrieved Employees.

27           1.22   “PAGA” means Private Attorneys General Act.  
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1           1.23    “PAGA Payment” means the amount allocated from the Gross Settlement Amount towards  
2 resolving claims under the Private Attorneys General Act of 2004, California Labor Code §§ 2698 *et seq.*

3           1.24    “PAGA Claim Period” means October 21, 2020, up to either (1) the Preliminary Approval  
4 Date, or (2) December 10, 2024, whichever is earlier.

5           1.25    “Parties” mean Defendant and Plaintiffs.

6           1.26    “Participating Class Member” means any and all Class Members who have not made any  
7 timely request to opt-out of the Agreement.

8           1.27    “Preliminary Approval Date” means the date a signed order granting preliminary approval  
9 of this Agreement is filed with the Court.

10          1.28    “QSF” means a Qualified Settlement Fund set up by the Settlement Administrator for the  
11 benefit of the Participating Class Members and/or Aggrieved Employees and from which the payments  
12 under this Agreement shall be made. Any amounts Defendants have agreed to pay under this Agreement  
13 shall remain the property of Defendant until the payments required under the Agreement are made.

14          1.29    “Qualifying Workweeks” are weeks worked by Class Members and/or Aggrieved  
15 Employees during the Class Period and/or PAGA Claim Period, respectively, in California. For Class  
16 Members, workweeks shall be defined as the total length of service (in days) in California during the Class  
17 Period divided by seven. For Aggrieved Employees workweeks shall be defined as the total length of  
18 service (in days) in California during the PAGA Claim Period divided by seven. The calculation of a Class  
19 Member’s and/or Aggrieved Employee’s workweeks and a determination as to whether a Class Member  
20 and/or Aggrieved Employee was actively employed in California in a particular workweek shall be  
21 construed from Defendants’ records.

22          1.30    “Released Class Claims” means any and all class claims that are alleged in the Complaint,  
23 and any additional wage and hour claims that could have been brought based on the facts alleged in the  
24 operative Complaint, through the Class Period. This release excludes the release of claims not permitted  
25 by law. This release will cover all Class Members who do not opt out.

26          1.31    “Released PAGA Claims” means any and all claims that were brought under the Private  
27 Attorneys General Act, Labor Code §§ 2698 *et seq.*, contained in Plaintiffs’ notice letters to the LWDA  
28 and any additional wage and hour PAGA claims that could have been brought based on the facts alleged

1 in Plaintiffs' notice letter to the LWDA during the PAGA Claim Period. Aggrieved Employees cannot opt  
2 out of this waiver of claims.

3 1.32 "Released Parties" means Defendant, as well as Defendant's officers, shareholders,  
4 directors, agents, employees, attorneys, and insurers.

5 1.33 "Settlement Administrator" means and refers to ILYM Group, Inc., the third-party entity  
6 that will administer the Agreement as outlined in Sections 4 and 7, or any other third-party administrator  
7 agreed to by the Parties and approved by the Court for the purposes of administering this Agreement. The  
8 Parties each represent that they do not have any financial interest in the Settlement Administrator.

9 1.34 "Settlement Administrator Costs" means the fees and expenses reasonably incurred by the  
10 Settlement Administrator as a result of the procedures and processes expressly required by this Agreement,  
11 and shall include all costs of administering the Agreement, including, but not limited to, all tax document  
12 preparation, custodial fees, and accounting fees incurred by the Settlement Administrator; all costs and fees  
13 associated with preparing, issuing and mailing any and all notices and other correspondence to Class  
14 Members and/or Aggrieved Employees; all costs and fees associated with communicating with Class  
15 Members and/or Aggrieved Employees, Class Counsel, and Defendants' Counsel; all costs and fees  
16 associated with computing, processing, reviewing, and paying the Individual Settlement Amounts, and  
17 resolving disputes; all costs and fees associated with calculating tax withholdings and payroll taxes, if any,  
18 making related payment to federal and state tax authorities, if any, and issuing tax forms relating to  
19 payments made under the Agreement; all costs and fees associated with preparing any tax returns and any  
20 other filings required by any governmental taxing authority or agency; all costs and fees associated with  
21 preparing any other notices, reports, or filings to be prepared in the course of administering Individual  
22 Settlement Amounts; and any other costs and fees incurred and/or charged by the Settlement Administrator  
23 in connection with the execution of its duties under this Agreement.

## 24 **2. DESCRIPTION OF THE LITIGATION**

25 2.1 On or about October 21, 2021, Plaintiff Gil sent notice to the LWDA to exhaust  
26 administrative remedies under the PAGA for failure to pay overtime wages, failure to pay minimum wages,  
27 failure to provide meal periods or pay meal period premiums in lieu thereof, failure to provide rest periods  
28 or pay rest period premiums in lieu thereof, failure to provide accurate wage statements, failure to pay final



1 wages, failure to pay reimbursements for expenses, failure to maintain accurate records, failure to provide  
2 paid sick leave, and untimely payment of wages. On November 3, 2023, Plaintiff Ayala gave written notice  
3 to the LWDA to exhaust administrative remedies under the PAGA. The LWDA did not respond to the  
4 notices within the statutorily required time frame and, as such, Plaintiffs became authorized to act as a  
5 Private Attorneys General on all alleged PAGA claims.

6       2.2     On or about November 3, 2021, Plaintiff Gil filed this class action in Fresno County  
7 Superior Court on behalf of himself and Class Members alleging claims for failure to pay overtime wages,  
8 failure to pay minimum wages, failure to provide meal periods or pay meal period premiums in lieu thereof,  
9 failure to provide rest periods or pay rest period premiums in lieu thereof, failure to provide accurate wage  
10 statements, failure to pay final wages, failure to pay reimbursements for expenses, and engaging in unfair  
11 competition. The case was removed to the Federal District Court for the Eastern District of California on  
12 December 22, 2021. Plaintiff Gil filed a motion to remand the case back to state Court on January 21,  
13 2022. Plaintiff's motion was granted on December 5, 2023, and the matter was remanded back to Fresno  
14 County Superior Court on this date. Plaintiff Gil filed a First Amended Complaint on approximately  
15 January 24, 2024 to add a PAGA cause of action based on the violations alleged in the October 21, 2021,  
16 notice to the LWDA on behalf of himself and Aggrieved Employees. On or about November 29, 2023,  
17 Plaintiff Ayala filed a class action complaint in Fresno County Superior Court on behalf of himself and  
18 Class Members alleging claims for failure to pay all wages, failure to provide meal periods or pay meal  
19 period premiums in lieu thereof, failure to provide rest periods or pay rest period premiums in lieu thereof,  
20 failure to provide recovery periods, failure to provide accurate wage statements, failure to pay final wages,  
21 failure to pay reimbursements for expenses, and engaging in unfair competition (the *Ayala Action*).  
22 Plaintiff Ayala filed a First Amended Complaint on approximately January 11, 2024 to add a PAGA cause  
23 of action based on the violations alleged in the November 3, 2023, notice to the LWDA on behalf of himself  
24 and Aggrieved Employees. Both lawsuits alleged wage and hour violation and/or PAGA claims based on  
25 the alleged violations of the California Labor Code outlined above as well as derivate claims for unfair  
26 competition under the California Business and Professional Code sections 17200 *et seq.*

27       2.3     Through informal discovery, Defendant and Defendant's Counsel provided Class Counsel  
28 with copies of all applicable versions of its policies and procedures, employee handbooks, information on

1 Class Members including, but not limited to, Class Members' workweeks, dates of employment, total  
2 number of Class Members, their rates of pay, and pay periods as well as timecard data and payroll reports  
3 for a randomly selected sample of Class Members.

4 2.4 After Class Counsel received the data, the Parties participated in mediation on September  
5 10, 2024, with private mediator Hon. Howard R. Broadman (Ret.). At the conclusion of the mediation, the  
6 Parties were not able to come to a resolution. It was only after continued discussions facilitated by the  
7 mediator that the Parties were able to resolve all claims in this lawsuit and the *Ayala Action*. At all times,  
8 the Parties' settlement negotiations have been non-collusive, adversarial, and at arm's length.

9 2.5 On November 20, 2024, Plaintiffs filed a Second Amended Complaint in this lawsuit,  
10 consolidating all claims, causes of action, parties, and allegations from the *Ayala Action* into this lawsuit.

11 2.6 Discussions between Plaintiffs and Class Counsel, between counsel for the Parties,  
12 document productions, extensive legal analysis, the provision of information by Defendant to Plaintiffs and  
13 the detailed analysis of the records, have permitted each side to assess the relative merits of the claims and  
14 the defenses to those claims.

15 2.7 In the Action, Plaintiffs contend that Defendant violated California law by 1) failing to pay  
16 Plaintiffs and similarly situated employees all prevailing wages they were entitled to, 2) failing to properly  
17 incorporate the value of all non-discretionary remuneration into Plaintiffs' and similarly situated  
18 employees' regular rates of pay for the purpose of calculating premium wages such as overtime, meal and  
19 rest period premiums, and sick leave wages, 3) failing to pay Plaintiffs and similarly situated employees  
20 for all hours worked as a result of not paying for unauthorized overtime hours, attending meetings, taking  
21 trucks to repair shops, deducting time for meal periods not taken, and completing pre/post shift paperwork  
22 and inspections, 4) failing to provide legally compliant meal, rest, and recovery periods, 5) failing to  
23 reimburse Plaintiffs and similarly situated employees for all expenses they incurred for work, including the  
24 use of their personal cellphones, tools, and the costs of washing and maintain required work uniforms.  
25 Defendants have denied each of Plaintiffs' claims and Defendants have denied that this Action is  
26 appropriate for class certification for anything other than settlement purposes. The agreed upon Gross  
27 Settlement Amount was reached after evaluating the Parties' theories of potential exposure for the  
28 underlying claims and the class data supporting these claims. The Parties, with the assistance of the

mediator, also assessed appropriate discounts to the potential liability based on Defendants' factual and legal contentions and defenses.

2.8 The Parties agree that the above-described investigation and evaluation, as well as discovery and the information exchanged to date, are more than sufficient to assess the merits of the respective Parties' positions and to compromise the issues on a fair and equitable basis. Plaintiffs, Class Counsel, Defendant, and Defendants' Counsel have concluded that it is desirable that the Action be settled in a manner and upon such terms and conditions set forth herein in order to avoid further expense, inconvenience and distraction of further legal proceedings, and the risk of an adverse outcome each of the Parties potentially face in the Action. Therefore, the Parties desire to resolve the claims in the Action. Plaintiffs, Class Counsel, Defendant, and Defendants' Counsel are of the opinion that the Agreement for the consideration and terms set forth herein is fair, reasonable, and adequate in light of all known facts and circumstances.

### **3. THE CONDITIONAL NATURE OF THIS AGREEMENT**

3.1 This Agreement and all associated exhibits or attachments are made for the sole purpose of settling the Action. This Agreement and the settlement it evidences are made in compromise of disputed claims. Because the Action was pled as a class action, this Agreement must receive preliminary and final approval by the Court. Accordingly, the Parties enter into this Agreement and associated settlement on a conditional basis. If the Effective Date does not occur, or if the Court's approval of the settlement is reversed or materially modified on appellate review, this Agreement shall be deemed null and void; it shall be of no force or effect whatsoever; it shall not be referred to or utilized for any purpose whatsoever; and the negotiation, terms and entry of the Agreement shall remain subject to the provisions of California Evidence Code Sections 1119 and 1152, Federal Rule of Evidence 408, and any other analogous rules of evidence that may be applicable.

3.2 Defendants have denied all claims as to liability, damages, liquidated damages, penalties, interest, fees, restitution, injunctive relief and all other forms of relief asserted in the Action. Defendants have agreed to resolve the Action via this Agreement, but to the extent this Agreement is deemed void or the Effective Date does not occur, Defendant does not waive, but rather expressly reserve, all rights to challenge all such claims and allegations in the Action upon all procedural and factual grounds, including,

without limitation, the ability to challenge class or collective treatment on any grounds, as well as to assert any and all other potential defenses or privileges.

#### **4. SCOPE OF THE CLASS**

4.1 The scope of the class of individuals encompassed under the Agreement and subject to all obligations and duties required under the Agreement, shall include all Class Members as defined in Section 1.6 and all Aggrieved Employees as defined in Section 1.2. However, it shall not include any Class Members who submit valid and timely requests to opt-out of the Agreement and settlement, as set forth in Section 7.5.1.

4.2 Only Participating Class Members and Aggrieved Employees are entitled to recover under this Agreement.

4.3 Any person who believes that he or she is a Class Member or Aggrieved Employee and wishes to participate in the Agreement, but did not receive a Notice of Settlement because his or her name did not appear on the class list provided to the Settlement Administrator prior to mailing, may submit a data request to the Settlement Administrator. The data request must contain all of the following information: (a) the full name and, if applicable, Social Security Number of the individual making the request; (b) the name used by such employee as of the time his or her employment with Defendant ended; (c) the individual's dates of employment with Defendant; and (d) a return address to which a response may be sent. Every data request must be postmarked on or before the conclusion of the Notice Period or otherwise submitted to the Settlement Administrator such that it is received before the conclusion of the Notice Period. Upon receipt of any data requests, the Settlement Administrator shall promptly (in no event more than two business days) transmit the data requests to Defendant's Counsel and request that Defendant review its records.

4.4 If Defendant agrees that the person listed in a data request is a Class Member and/or Aggrieved Employee, the Settlement Administrator shall promptly mail a Notice of Settlement to the person who submitted the data request, at the address designated for that purpose in the data request. All provisions of this Agreement relating to the Notice of Settlement shall apply to Notice of Settlements sent in response to data requests, and any person who submits a data request and is sent a Notice of Settlement

in response shall be treated by the Settlement Administrator as a Class Member and/or Aggrieved Employee for all other purposes.

4.5 If Defendant does not agree that the person listed in a data request is a Class Member and/or Aggrieved Employee, Defendants' Counsel and Class Counsel shall attempt to resolve any such dispute in good faith within seven (7) calendar days of Class Counsel being advised in writing of the data request dispute. Defendants' records shall control unless the individual submitting the data request provides persuasive evidence to doubt the accuracy of those records. Each data request dispute that Defendants' Counsel and Class Counsel cannot timely resolve shall be resolved by the Settlement Administrator. The Settlement Administrator must accept and weigh all the evidence provided in a good faith attempt to resolve the dispute. The Settlement Administrator must resolve any dispute submitted to it within seven (7) calendar days after Defendants' Counsel and Class Counsel submit the dispute to the Settlement Administrator. The decision by the Settlement Administrator shall be final as between the parties, subject to Court review.

## **5. TERMS OF THE SETTLEMENT**

The Parties agree as follows:

5.1 Gross Settlement Amount: In consideration and exchange for the releases described in Section 6, Defendant shall pay the Gross Settlement Amount (\$367,500). Funding of the Gross Settlement Amount shall occur within 21 calendar days after the Effective Date to be held in trust in a QSF by the Settlement Administrator. The Gross Settlement Amount includes payments to Participating Class Members, Aggrieved Employees, all attorneys' fees, costs and litigation expenses related to the Action incurred to date, as well as all such fees and costs incurred in documenting the Agreement, administering the Agreement (including Settlement Administrator Costs), and obtaining final approval of the Agreement, the Enhancement Payment to the Class Representatives and the PAGA Payment. Any monies necessary to satisfy Defendants' tax obligations (*e.g.* employer FICA, FUTA and SDI contributions on wage payments) on any monies distributed to Participating Class Members will be paid in addition to the Gross Settlement Amount.

5.2 Attorneys' Fees and Costs: Class Counsel will apply to the Court for attorney's fees of 35% of the Gross Settlement Amount, which shall be paid from the Gross Settlement Amount. Defendants have



1 agreed to not oppose Class Counsel's application for attorneys' fees so long as it does not exceed the 35%  
2 threshold. Class Counsel will also be entitled to reimbursement for advanced litigation expenses not to  
3 exceed \$15,000, which shall be paid from the Gross Settlement Amount. Defendants have agreed to not  
4 oppose Class Counsel's request for reimbursement for advanced litigation expenses so long as they do not  
5 exceed the \$15,000 threshold. The Settlement Administrator will issue Class Counsel an IRS Form 1099  
6 for the attorneys' fees and costs paid under this Agreement. In the event that the Court awards less than  
7 the requested attorney's fees and/or costs, the portion of the requested amounts not awarded to Class  
8 Counsel shall be added to the Net Settlement Amount to be distributed to Participating Class Members on  
9 a pro rata basis.

10       5.3     Settlement Administrator Costs: The Settlement Administrator Costs shall be paid from the  
11 Gross Settlement Amount and shall not exceed \$12,500. The difference between any actual costs and the  
12 allocated \$12,500 shall be added to the Net Settlement Amount to be distributed to Participating Class  
13 Members on a pro rata basis.

14       5.4     Enhancement Payment: Class Counsel, on behalf of Plaintiffs, shall apply to the Court for  
15 an Enhancement Payment to each of the Class Representatives in an amount not to exceed Ten Thousand  
16 Dollars (\$10,000) to compensate for the risks, time, and expense of their involvement in the Action and  
17 securing the benefits of this Agreement for Class Members. The Enhancement Payment is in addition to  
18 the Individual Settlement Amount Plaintiffs would otherwise be due under the Agreement as a Participating  
19 Class Member. Defendants have agreed to not oppose Class Counsel's request for an Enhancement  
20 Payment to Plaintiffs so long as it does not exceed the amount stated herein. The Enhancement Payment  
21 will be designated as a non-wage payment and reported on an IRS Form 1099-MISC. In the event that the  
22 Court awards less than the Enhancement Payment amount requested, then any portion of the requested  
23 amount not awarded to the Class Representatives shall be added to the Net Settlement Amount to be  
24 distributed to Participating Class Members on a pro rata basis.

25       5.5     PAGA Payment: Twenty Thousand Dollars (\$20,000) of the Gross Settlement Amount  
26 shall be allocated to resolving claims under the PAGA. Seventy-Five percent (75%) of the PAGA Payment  
27 will be paid to the LWDA and Twenty-Five percent (25%) will be paid to Aggrieved Employees on a pro  
28 rata basis as described below in Section 5.8. Any amount not approved by the Court for the allocated

PAGA Payment shall be added to the Net Settlement Amount to be distributed to Participating Class Members on a pro rata basis.

5.6 Treatment of Residue and Cy Pres: For any portion of the Net Settlement Amount or PAGA Payment allocated to Participating Class Members and/or Aggrieved Employees that were not claimed by cashing their respective settlement checks before the deadline to do so, that remaining amount shall be donated equally, *i.e.* 50/50, to Capital Pro Bono, Inc., and the Center for Workers' Rights under the doctrine of *cy pres*. No portion of the Gross Settlement Amount will revert to Defendant for any reason.

5.7 No Additional Benefits Contributions: All Individual Settlement Amounts paid to Participating Class Members and Aggrieved Employees shall be deemed to be income solely in the year in which such amounts were actually received. It is expressly understood and agreed that the receipt of such Individual Settlement Amounts will not entitle any Participating Class Member or Aggrieved Employee to any new or additional compensation or benefits under any company bonus or other compensation or benefit plan or agreement in place during the period covered by the Agreement, nor will it entitle any Participating Class Member Aggrieved Employee to any increased retirement, 401(k) and/or 403(b) benefits or matching benefits, or deferred compensation benefits. It is the intent of this Agreement that the Individual Settlement Amounts provided for in this Agreement are the sole payments to be made by Defendant to the Participating Class Members and Aggrieved Employees in connection with this Agreement (notwithstanding any contrary language or agreement in any benefit or compensation plan document that might have been in effect during the period covered by this Agreement).

5.8 Pro Rata Distribution Formula: Payment to Participating Class Members and Aggrieved Employees of their Individual Settlement Amount will not require the submission of a claim form. A Net Settlement Amount will be determined by subtracting from the Gross Settlement Amount any amounts for approved attorneys' fees and costs, any Enhancement Payment to the Class Representatives, the Settlement Administrator Costs, and the PAGA Payment. Each Class Member's share will be initially determined by dividing their total Qualifying Workweeks within the Class Period by the total Qualifying Workweeks of all Class Members. That fraction will then be multiplied by the Net Settlement Amount to arrive at the Class Member's individual share of the Net Settlement Amount. Any funds allocated to Class Members under this formula who timely opt out of the Settlement will be redistributed to Participating Class

Members on a pro rata basis, *i.e.* each Participating Class Member's share will be determined by dividing their total Qualifying Workweeks within the Class Period by the total Qualifying Workweeks of all Participating Class Members and that fraction will then be multiplied by the Net Settlement Amount to arrive at the Participating Class Member's individual share of the Net Settlement Amount. Each Aggrieved Employee's share of the 25% portion of the PAGA Payment will be determined by dividing their total Qualifying Workweeks within the PAGA Claim Period by the total Qualifying Workweeks by all Aggrieved Employees within the PAGA Claim Period. That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the Aggrieved Employee's individual share.

5.9 Tax Allocation: The Parties recognize that the Individual Settlement Amounts to be paid to Participating Class Members and/or Aggrieved Employees reflect a settlement of a dispute over claimed penalties and wages. The Settlement Administrator shall calculate the employer's share of payroll taxes on the amounts paid to Participating Class Members as wages as well as calculating all required withholdings and deductions from said wage payments. The characterization of Individual Settlement Amounts to Participating Class Members and Aggrieved Employees are as follows:

5.9.1 One Third (1/3) of each Participating Class Members' share of the Net Settlement Amount shall be allocated for payment of disputed wages and shall be subject to required employer taxes. Participating Class Members shall receive an IRS Form W-2 for reporting of this portion of their Individual Settlement Amount.

5.9.2 Two Thirds (2/3) of each Participating Class Members' share of the Net Settlement Amount shall be allocated for disputed statutory penalties and interest, and no amount shall be deducted for any taxes. This portion of the Individual Settlement Amount consists of other income, not wages, for which the Participating Class Members shall receive IRS Forms 1099-MISC and 1099-INT and this payment shall be divided equally among the 1099-MISC and 1099-INT designations.

5.9.3 The entirety (100%) of each Aggrieved Employee's share of the 25% portion of the PAGA Payment shall be allocated for payment of disputed civil penalties, and no amount shall be deducted for any taxes. This portion of the Individual Settlement Amount consists of other income, not wages, for which the Aggrieved Employees shall receive an IRS Form 1099-MISC.

1           5.10 Participating Class Members and Aggrieved Employees shall be solely responsible for the  
2 reporting and payment of their share of any federal, state and/or municipal income or other taxes on  
3 payments made pursuant to this Agreement, and shall hold the Parties, Class Counsel, and Defendants'  
4 Counsel free and harmless from any claims resulting from treatment of such payments as non-taxable,  
5 including the treatment of such payments as not subject to withholding or deduction for payroll and  
6 employment taxes. No party has made any representation to any of the other Parties as to the taxability of  
7 any payments pursuant to this Agreement, including the payments to Participating Class Members, the  
8 payments to Aggrieved Employees, the payments to Class Counsel, the payments to the Class  
9 Representatives, the payroll tax liability of Defendant, or the allocation of the Net Settlement Amount or  
10 PAGA Payment to wage and non-wage income as provided in this Section, or otherwise as to tax  
11 implications of any provision of this Agreement.

12           5.11 No Additional Contribution by Defendant: Defendants' monetary obligation under this  
13 Agreement is limited to the Gross Settlement Amount and any employer side payroll taxes owed on  
14 amounts characterized as wages under this Agreement. All other costs and expenses arising out of or in  
15 connection with the performance of this Agreement shall be paid from the Gross Settlement Amount, unless  
16 expressly provided otherwise herein. However, in the event this agreement is deemed null and void as  
17 described in Section 3 because the Court, in its independent determination, finds that the Agreement does  
18 not meet the standards for settlement approval, then Defendant and Plaintiffs shall be equally responsible  
19 for the costs of the Settlement Administrator incurred between the date the Agreement was executed and  
20 the date of such event.

21           5.12 Certification For Settlement Purposes: The Parties agree that, for purposes of settlement  
22 only, certification of the class as defined in Section 1.6 and 4.1 is appropriate and the requisites for  
23 establishing class certification have been met and are met.

24           5.13 Adequacy of Class Counsel and Class Representatives: The Parties agree that, for purposes  
25 of settlement only, Class Counsel and Plaintiffs are adequate representatives for Class Members and  
26 Aggrieved Employees.  
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1 **6. RELEASE**

2 6.1 Release of Claims by Participating Class Members: Upon the Effective Date, all  
3 Participating Class Members will be deemed to fully, finally and forever release the Released Class Claims  
4 as to all Released Parties. In addition, on the Effective Date, all Participating Class Members and their  
5 successors in interest will be permanently enjoined and forever barred from prosecuting any of Released  
6 Class Claims against any of the Released Parties.

7 6.2 Release of Claims by Aggrieved Employees: Upon the Effective Date, all Aggrieved  
8 Employees will be deemed to fully, finally and forever release the Released PAGA Claims as to all  
9 Released Parties. In addition, on the Effective Date, all Aggrieved Employees and their successors in  
10 interest will be permanently enjoined and forever barred from prosecuting any of the Released PAGA  
11 Claims against any of the Released Parties.

12 **7. SETTLEMENT ADMINISTRATION**

13 7.1 Duties of Settlement Administrator: The Settlement Administrator shall be responsible for:  
14 1) receiving Class Member and Aggrieved Employee contact information and confirming addresses are  
15 valid; 2) calculating estimated Individual Settlement Amounts and any and all taxes associated with the  
16 Individual Settlement Amounts, including employer taxes; 3) taking appropriate steps to trace and locate  
17 any individual Class Members and Aggrieved Employee whose address or contact information as provided  
18 to the Settlement Administrator is inaccurate or outdated and mailing the Notice of Settlement to Class  
19 Members; 4) providing notification to the appropriate state and federal officials of this Agreement as  
20 required under the law; 5) receiving, independently reviewing, and resolving any challenges (in  
21 consultation with Class Counsel and Defendants' Counsel) from Class Members or Aggrieved Employees,  
22 including any associated documentation, regarding their Qualified Workweek calculations; 6) receiving  
23 and serving on Class Counsel, Defendants' Counsel, and the Court, copies of any written objections, and/or  
24 any opt out statements; 7) establishing a toll free telephone line and responding to inquiries and requests  
25 for information or assistance from Class Members and/or Aggrieved Employees; 8) maintaining a QSF; 9)  
26 determining and paying the final amounts due to be paid under the Agreement after resolution of all  
27 challenges, disputes, opt-outs, awarded attorneys' fees and costs, Settlement Administrator Costs, PAGA  
28 Payment, taxes, any Enhancement Payments, and for funds that cannot be distributed due to the inability



1 to locate Class Members or Aggrieved Employees; 10) determining the validity of any disputes or late opt-  
2 outs by previously unidentified Class Members or Aggrieved Employees; 11) paying any residual funds  
3 from uncashed checks; 12) reporting to Class Counsel and Defendants' Counsel regarding the statistics of  
4 the administration, including (a) the number of initial Notice of Settlements mailed; (b) the number of  
5 forwarded Notice of Settlements; (c) the number of re-mailed Notice of Settlements; (d) the number of  
6 total undeliverable Notice of Settlements; (e) the number of address traces performed for undeliverable  
7 Notice of Settlements; (f) the number of Notice of Settlements undeliverable from traced addresses; (g) the  
8 number of total objections received; (h) the number of opt-out requests received; (i) the number of disputes  
9 received; (j) the number of disputes resolved; 13) providing a declaration to the Court regarding the final  
10 statistics of the administration and compliance with all payment obligations under the Agreement; 14)  
11 completing all necessary tax reporting on the QSF and payment of the Individual Settlement Amounts to  
12 Participating Class Members and Aggrieved Employees; and 15) carrying out other related tasks as  
13 necessary to effectuate the terms of this Agreement and any Order of the Court. All disputes relating to  
14 the Settlement Administrator's ability and need to perform its duties shall be referred to the Court, if  
15 necessary, which will have continuing jurisdiction over the terms and conditions of this Agreement, until  
16 all payments and obligations contemplated by the Agreement have been fully executed.

17       7.2     Notice to Class Members and Aggrieved Employees: The Notice of Settlement will provide  
18 Class Members and Aggrieved Employees with a summary of the terms and conditions of the Agreement,  
19 how to participate in the settlement, how to object to the Agreement, how to dispute the individual's  
20 Qualifying Workweeks, and how to opt-out from the Agreement. The Notice of Settlement will also inform  
21 Class Members and Aggrieved Employees of the Gross Settlement Amount, Net Settlement Amount,  
22 proposed attorneys' fees and costs allocations, any proposed Enhancement Payments, proposed Settlement  
23 Administrator Cost allocations, proposed PAGA Payment allocations, the scope of the class, the nature and  
24 extent of the released claims, dates set for a fairness hearing and hearing on Class Counsels' motion for  
25 attorneys' fees and costs. The Notice of Settlement shall include information regarding Class Member's  
26 and Aggrieved Employee's estimated Individual Settlement Amount. The Notice of Settlement will  
27 provide information on how to access electronic copies online of the Notice of Settlement, any motions for  
28

1 approval of the Agreement, any motions for approval of attorneys' fees and costs, and any other documents  
2 as the Court directs. The Notice of Settlement will be sent to Class Members in English and Spanish.

3       7.3     Class Member Data and Mailing: No later than fourteen (14) calendar days after the  
4 Preliminary Approval Date, Defendant shall provide the Settlement Administrator with the first and last  
5 name, last known mailing address, last known telephone number, Social Security Number, start and end  
6 date (if any) of employment of each Class Member and Aggrieved Employee, and any other information  
7 the Settlement Administrator needs to effectuate notice to Class Members and Aggrieved Employees as  
8 outlined herein. The Settlement Administrator shall review the data to determine the number of Qualifying  
9 Workweeks for each Class Member and Aggrieved Employee. No later than fourteen (14) calendar days  
10 after receipt of such address information, the Settlement Administrator will perform a national change of  
11 address ("NCOA") search, update the addresses per the results of the NCOA search, and then mail the  
12 Notice of Settlement, substantially in the form attached as Exhibit 1, to each Class Member and Aggrieved  
13 Employee by first-class mail, postage prepaid. The Settlement Administrator shall maintain all information  
14 received from Defendant confidential to itself, and Defendants' Counsel. However, Class Counsel shall  
15 be able to review the breakdown of Qualified Workweeks and estimated Individual Settlement Amounts  
16 for Class Members and Aggrieved Employees prior to mailing for quality assurance provided the personal  
17 identifying information is redacted and/or omitted.

18       7.4     Returned and/or Re-mailed Notice of Settlements: In the event that a Notice of Settlement  
19 is returned to the Settlement Administrator as undeliverable on or before the conclusion of the Notice  
20 Period, the Notice of Settlement shall be sent to the forwarding address affixed thereto within five (5)  
21 calendar days. If no forwarding address is provided, then the Settlement Administrator shall promptly  
22 attempt to determine a correct address using a skip-trace, computer or other search using the name, address  
23 and/or Social Security number of the individual involved, and shall then perform a single re-mailing within  
24 five (5) calendar days to any more recent address found as a result of the search. Following each search  
25 that does not result in a corrected address, for those Class Members who appear to be current employees  
26 of Defendant at the time of the Preliminary Approval Date, the Settlement Administrator shall contact  
27 Defendants' Counsel for assistance and Defendant shall cooperate in good faith with the Settlement  
28 Administrator's reasonable efforts to obtain valid mailing addresses for Class Members to the extent they

1 are active employees of Defendant. In the event the Notice of Settlement is forwarded to a new address  
2 and/or re-mailed to a Class Member, the deadline for the Class Member to submit any request to opt-out,  
3 a dispute, or an objection shall be the end of the Notice Period or 10 days from the date of the re-  
4 mailing/forwarding to a new address, whichever is later. In the event the procedures in this Section are  
5 followed and the Class Member does not timely and properly request to opt-out, the Class Member shall  
6 be bound by all terms of the Agreement, including the releases contained in Section 6.

7       7.5     Responses to Notice of Settlement:

8               7.5.1 *Opt-Outs:* The Notice of Settlement shall provide that Class Members who wish to  
9 exclude themselves from the Agreement must submit a request to opt-out as provided in this Section. The  
10 request to opt-out must (a) state the Class Member's full name and date of birth; (b) a statement that he or  
11 she does not want to be a Class Member, does not want to participate in the settlement, and/or wants to be  
12 excluded from the settlement; (c) identify the case name and number (*i.e. Gil, et al. v. Outback, Inc., et al.*  
13 , Case No. 21CECG03273); (d) be signed; and (e) be post-marked no later than the conclusion of the Notice  
14 Period or the re-mailing timeline stated in Section 7.4. The Class Member must personally sign the request  
15 to opt-out. No request to opt-out may be made on behalf of a group of Class Members. The date of the  
16 postmark on the return-mailing envelope shall be the exclusive means used to determine whether a request  
17 to opt-out has been timely submitted. Any Class Member who requests to opt-out of the Agreement will  
18 not be entitled to any portion of the Net Settlement Amount nor will they have any right to object, appeal  
19 or comment thereon. The name of any Class Member who submits a valid and timely opt out request will  
20 be specifically identified in any proposed order granting final approval. Class Members who fail to submit  
21 a valid and timely request to opt-out shall be bound by all terms of the Agreement and any order or final  
22 judgment thereon. Regardless of whether an Aggrieved Employee opts out of being a Class Member, they  
23 will still receive their share of the PAGA Payment as Aggrieved Employees cannot opt out of this  
24 Agreement as it relates to the PAGA Payment or Released PAGA Claims.

25               7.5.2 *Objection Procedures:* Any Class Member who does not opt-out, but who wishes  
26 to object to this Agreement or otherwise to be heard concerning this Agreement, may submit a written  
27 objection to the Settlement Administrator, who will promptly provide copies of the objection to Class  
28 Counsel and Defendants' Counsel. The Notice of Settlement shall make clear that the Court can only

1 approve or deny the Agreement, not change the terms of the Agreement. The written objection should (a)  
2 state the Class Member's full name and date of birth; (b) provide evidence that the individual is, in fact, a  
3 Class Member; (c) state the reasons for the objection(s), including any supporting documentation; (d)  
4 identify the case name and number (*i.e. Gil, et al. v. Outback, Inc., et al.* , Case No. 21CECG03273); (e)  
5 be signed; and (f) be post-marked no later than the conclusion of the Notice Period or the re-mailing  
6 timeline stated in Section 7.4. Additionally, or in the alternative to sending a written objection to the  
7 Settlement Administrator, any Class Member may appear at the final approval hearing to state their  
8 objection.

9           7.5.3 *Dispute Procedures:* Any Class Member who disputes the number of Qualifying  
10 Workweeks on the Notice of Settlement shall contact the Settlement Administrator. The dispute must (a)  
11 identify the nature of the dispute; (b) provide any information or documentation supporting the dispute; (c)  
12 be signed; and (d) be post-marked no later than the conclusion of the Notice Period or the re-mailing  
13 timeline stated in Section 7.4. The Settlement Administrator shall promptly (in no event more than two  
14 business days) forward all such disputes to Defendants' Counsel and request that Defendant review the  
15 dispute. Defendants' records shall presumptively control unless the Class Member can produce  
16 documentation evidencing other periods of employment worked. If Defendant agrees with submitted  
17 information, the Class Member shall be credited or subtracted Qualifying Workweeks in accordance with  
18 their submitted dispute and that final number of Qualified Workweeks shall govern the calculation of that  
19 Class Member's Individual Settlement Amount. If Defendant disagrees with the submitted information,  
20 Defendants' Counsel will promptly advise Class Counsel of the dispute, which includes turning over any  
21 documentation submitted by the Class Member as part of the dispute. Defendants' Counsel and Class  
22 Counsel shall attempt in good faith to resolve any such dispute within five (5) calendar days of Class  
23 Counsel being advised of the dispute. Each dispute that Defendants' Counsel and Class Counsel cannot  
24 timely resolve shall be resolved by the Settlement Administrator, subject to Court review.

25           7.5.4 *Deficient Opt-Outs, Objections, or Disputes:* In the event that a deficient opt-out,  
26 objection, or dispute is received on or before the conclusion of the Notice Period, the Settlement  
27 Administrator shall mail a letter to the Class Member within five (5) calendar days informing them of the  
28 deficiency. If a deficiency letter is mailed to a Class Member, the deadline for the Class Member to cure

the deficiency shall be the end of the Notice Period or 10 calendar days from the date of the deficiency letter, whichever is later.

7.6 Due Process Acknowledgement: Compliance with the procedures set forth in Sections 7.1 to 7.5.4 shall constitute due and sufficient notice to Class Members of the Action and the Agreement and shall satisfy Class Members' due process rights. Nothing else shall be required of the Parties, Class Counsel or Defendants' Counsel to provide notice of the proposed Agreement.

7.7 Settlement Administrator Declaration Regarding Notice Period: Within fourteen (14) calendar days after the conclusion of the Notice Period, the Settlement Administrator shall provide Class Counsel and Defendants' Counsel with a signed declaration under penalty of perjury providing a complete and detailed report regarding the statistics and responses of settlement administration to date and all the Settlement Administrators' obligations under Sections 5.8 to 5.9.3 and 7.1 to 7.5.4.

7.8 Settlement Administrator Payments to Participating Class Members, Class Counsel and Plaintiffs: Within seven (7) calendar days after the Effective Date and the Court's determination of the amount of attorneys' fees and costs payable to Class Counsel, the Enhancement Payment payable to Plaintiffs, the PAGA Payment, and Settlement Administrator Costs, the Settlement Administrator shall calculate the final Net Settlement Amount, the final Individual Settlement Amounts for Participating Class Members and/or Aggrieved Employees, any applicable taxes thereon, and report the results of these calculations Class Counsel and Defendants' Counsel. Defendant shall wire the Gross Settlement Amount and applicable taxes necessary to fund the Settlement as described in Section 5.1 to the Settlement Administrator within twenty-one (21) calendar days after the Effective Date to be to be held in trust in a QSF. Within seven (7) calendar days after Defendant fund the settlement, the Settlement Administrator shall deliver payment of Class Counsels' attorney's fees and costs, the Enhancement Payment payable to Plaintiffs, the 75% portion of the PAGA Payment payable to the LWDA, Settlement Administrator Costs, and payment to Participating Class Members and/or Aggrieved Employees as required under this Agreement and approved by Court.

7.8.1 The Settlement Administrator shall wire the Court-approved attorneys' fees and costs to Class Counsel unless another method is requested by Class Counsel. Class Counsel shall provide



the Settlement Administrator with the pertinent taxpayer identification number and payment instructions after the Final Approval Date.

7.8.2 The Settlement Administrator shall send a check by mail for the Court-approved Enhancement Payment to the Class Representatives, care of Class Counsel unless another method is requested by Class Counsel.

7.8.3 Only Participating Class Members and Aggrieved Employees will receive their Individual Settlement Amount.

7.8.4 The Settlement Administrator shall remit and report the applicable portions of the payroll tax payment to the appropriate taxing authorities on a timely basis pursuant to its duties under this Agreement. Defendant agree to reasonably cooperate with the Settlement Administrator to the extent necessary to determine the amount of the payroll tax payment required.

7.9 Settlement Check Expiration and Uncashed Checks: The Settlement Administrator shall issue Individual Settlement Amounts to Participating Class Members and Aggrieved Employees in the form of a check, which shall become null and void if not deposited within one hundred eighty (180) calendar days of issuance. After one hundred eighty (180) calendar days of issuance, the checks shall be voided and funds from all uncashed checks shall be transmitted in accordance with Section 5.6. The Settlement Administrator shall deliver these funds within fourteen (14) calendar days after the check cashing deadline.

7.10 Settlement Administrator Declaration Regarding Compliance and Settlement Administration: Within twenty-one (21) calendar days after the last day for Participating Class Members and Aggrieved Employees to cash their settlement checks, the Settlement Administrator shall provide Class Counsel and Defendants' Counsel with a signed declaration under penalty of perjury providing a complete and detailed report regarding the settlement administration documenting that all payments under the Agreement have been made, that the Court's final approval order has been complied with, and that all the obligations of the Settlement Administrator have been completed.

## **8. PRELIMINARY SETTLEMENT ADMINISTRATION SCHEDULE**

8.1 The schedule may be modified depending on whether and when the Court grants necessary approvals, orders notice to Class Members and Aggrieved Employees, and sets further hearings. The

schedule may also be modified to correct clerical errors and to reflect the provisions in the Agreement as described above. In the event of such modification, the Parties shall cooperate to complete the settlement procedures as expeditiously as reasonably practicable. The preliminary schedule for notice, approval, and payment procedures carrying out the Agreement is as follows:

|                                                                                                                                                                                                                                                                                                             |                                                                                                                                      |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| Last day for Defendant to provide Settlement Administrator with Class Member and Aggrieved Employee information                                                                                                                                                                                             | Within 14 calendar days after the Preliminary Approval Date                                                                          |
| Last day for Settlement Administrator to complete NCOA search, update Class Member and Aggrieved Employee mailing information, and mail Notice of Settlement                                                                                                                                                | Within 14 calendar days after the Settlement Administrators' receipt of Class Members' information from Defendant                    |
| Last day for Class Members to opt-out, submit disputes, submit objections, and submit data requests                                                                                                                                                                                                         | 60 calendar days after mailing of Notice of Settlement or within 10 days after Notice of Settlement is re-mailed, whichever is later |
| Last day for Settlement Administrator to provide Parties with signed declaration reporting on settlement administration statistics                                                                                                                                                                          | Within 14 calendar days after end of the Notice Period                                                                               |
| Last day for Settlement Administrator to calculate the final Net Settlement Amount, the final Individual Settlement Amounts for Participating Class Members and/or Aggrieved Employees, any applicable taxes thereon, and report the results of these calculations to Class Counsel and Defendants' Counsel | Within 7 calendar days after the Effective Date                                                                                      |
| Last day for Defendant to fund settlement                                                                                                                                                                                                                                                                   | Within 21 calendar days after the Effective Date                                                                                     |
| Last day for Settlement Administrator to deliver payment of Class Counsel's attorney's fees and costs, Enhancement Payments, PAGA Payment, Settlement Administrator Costs, payment to Participating Class Members, and payment to Aggrieved Employees                                                       | Within 7 calendar days after Defendants have funded the settlement                                                                   |

|                                                                                                                      |                                                                                                   |
|----------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|
| Last day for Participating Class Members and Aggrieved Employees to cash settlement checks                           | 180 calendar days after issuance of checks to Participating Class Members and Aggrieved Employees |
| Last day for Settlement Administrator to deliver value of uncashed settlement checks to <i>cy pres</i> beneficiaries | Within 14 calendar days after settlement check cashing deadline                                   |
| Last day for Settlement Administrator to provide Parties with compliance declaration                                 | Within 21 calendar days after settlement check cashing deadline                                   |

## 9. DUTIES OF THE PARTIES

9.1 Preliminary Approval: The Parties will cooperate in obtaining, through an unopposed motion to be filed as soon as reasonably practicable, an order from the Court preliminarily approving this Agreement at the earliest possible date concurrently with the Court's certification of the Action as a class action for settlement purposes. The Parties further agree to fully cooperate in the drafting and/or filing of any further documents or filings reasonably necessary to be prepared or filed, shall take all steps that may be requested by the Court relating to, or that are otherwise necessary to the approval and implementation of this Agreement and shall otherwise use their respective best efforts to obtain certification for settlement purposes, approval of, and implementation of this Agreement. The Parties will submit this Agreement to the Court for preliminary approval of its terms and for approval of the steps to be taken to obtain its final approval. Within one week of signing this Agreement Class Counsel shall provide a draft of the Preliminary Approval Motion to Defendants' Counsel. Defendants' Counsel will provide comments and/or proposed revisions within two weeks after receipt of the draft Preliminary Approval Motion from Class Counsel. With regard to the final approval documents, a similar one-week maximum review and response time shall be observed by the Parties. The Parties will request that the Court's preliminary approval of this Agreement be embodied in an Order Granting Preliminary Approval of Class Action and PAGA Settlement.

9.1.1 Plaintiffs' motion shall seek an order: 1) Preliminarily approving the Agreement; 2) Approving as to form and content the proposed Notice of Settlement; 3) Directing the mailing of the Notice of Settlement by first class mail to Class Members and Aggrieved Employees; 4) Preliminarily appointing

1 Plaintiffs and Class Counsel as representatives of Class Members; 5) Preliminarily approving settlement  
2 administration services to be provided by the Settlement Administrator; 6) Preliminarily approving the  
3 proposed Enhancement Payment to Plaintiffs; 7) Preliminarily approving the application for payment of  
4 reasonable attorneys' fees and reimbursement of litigation-related expenses to Class Counsel; and 8)  
5 Scheduling a fairness hearing on the question of whether the proposed Agreement should be finally  
6 approved as fair, reasonable and adequate as to the Class Members.

7 9.1.2 Defendant shall not oppose Plaintiffs' motion for approval of the proposed  
8 Agreement.

9 9.1.3 The Parties shall cooperate with each other and the Settlement Administrator during  
10 the process of giving Class Members notice and opportunity to object to the Agreement, as necessary and  
11 appropriate to assure effective communication to individual Class Members of information about their  
12 rights and obligations under this Agreement.

13 9.2 Final Approval and Fairness Hearing: On a date approved by the Court and set forth in the  
14 Notice of Settlement, the Court shall hold the Final Approval and Fairness Hearing where objections, if  
15 any, may be heard. Class Counsel shall provide the Court as part of the motion for final approval of the  
16 Agreement, a declaration by the Settlement Administrator of due diligence and proof of mailing of the  
17 Notice of Settlement required to be mailed to Class Members by this Agreement, and of the delivery results  
18 of the Settlement Administrator's mailings including tracing and re-mailing efforts. The Settlement  
19 Administrator declaration shall identify, by name, any Class Member who submitted a timely and valid  
20 request to opt out during the Notice Period.

21 9.2.1 Class Counsel and Defendant shall work in good faith to draft a mutually agreeable  
22 Proposed Order Granting Final Approval of Class Action and PAGA Settlement and Final Judgment. The  
23 Proposed Order Granting Final Approval of Class Action and PAGA Settlement and Final Judgment shall  
24 include findings and orders: 1) Approving the Agreement, adjudging the terms thereof to be fair, reasonable  
25 and adequate, and directing that its terms and provisions be carried out; 2) Approving the payment of an  
26 Enhancement Payment to the Class Representatives; 3) Approving Class Counsel's application for an  
27 award of attorneys' fees and reimbursement of out-of-pocket litigation expenses; 4) Approving the  
28

Settlement Administrator Costs; and 5) Providing that the Court will retain jurisdiction to oversee administration and enforcement of the terms of the Agreement and the Court's orders.

9.2.2 Following entry of the Court's order granting final approval of the Agreement, the Parties will each act to ensure the fulfillment of all its provisions, including but not limited to the following: 1) Should an appeal be taken from the final approval of the Agreement or motion to set aside the judgement be filed, all parties will support the final approval order on appeal or otherwise; 2) Class Counsel will assist the Settlement Administrator as needed or requested in the process of identifying and locating Participating Class Members and Aggrieved Employees entitled to payments under the Agreement and assuring delivery of such payments; 3) Class Counsel and Defendants' Counsel will cooperate with each other and assist the Settlement Administrator as needed or requested in completing the distribution of any residual amounts, as specified above, to the *cy pres* beneficiaries; 4) Class Counsel, in conjunction with the Settlement Administrator, will certify to the Court completion of all payments required to be made by this Agreement.

9.3 Final Judgment: If the Court approves this Agreement at the final approval and fairness hearing, the Parties will request that the Court enter an Order Granting Final Approval of Class Action and PAGA Settlement and Final Judgment.

9.4 Notice to LWDA: Plaintiffs will provide notice to the Labor and Workforce Development Agency ("LWDA") of this settlement in accordance with Labor Code § 2699(1)(2).

## **10. MISCELLANEOUS TERMS**

10.1 Defendant's Right to Withdraw Based on Opt-Outs: If, prior to the Final Approval Date, 10% or more of the Class Members have submitted proper and timely requests to opt-out in accordance with the provisions of the Agreement, Defendant may rescind the Agreement and all actions taken in its furtherance will be thereby null and void. Defendant must exercise this right of rescission, in writing, to Class Counsel, within seven (7) calendar days after the Settlement Administrator notifies the Parties of the total number of opt-outs. If the option to rescind is exercised, then any Settlement Administrator Costs shall be paid by Defendant. Defendants have represented that there are no more than 29,327 workweeks during the Class Period. In the event the number of workweeks during the Class Period is more than 32,260 (*i.e.*, greater than 10% more than 29,327), then the Gross Settlement Amount shall be increased proportionally by the workweeks in excess of 29,327. For example, if there were 11,000 workweeks



1 represented to exist during the Class Period, but there are actually 12,500 workweeks in the Class Period,  
2 then Defendant would have to increase the Gross Settlement Amount by 13.6% (12,500 - 11,000  
3 workweeks = 1,250 excess workweeks. 1,250 divided by 11,000 = 13.6%). Alternatively, Defendant, in  
4 its sole discretion, may elect to reduce the end date of the Class Period to avoid this escalation of the  
5 Gross Settlement Amount. To the extent Defendant elects to reduce the end date of the Class Period as  
6 stated herein, the end date of the PAGA Claim Period shall also be reduced to end on the same day as  
7 the new Class Period end date.

8       10.2 Dismissal of *Ayala Action*: To the extent preliminary approval of the Settlement is granted,  
9 the Plaintiff Ayala and his counsel shall cause the *Ayala Action* to be dismissed without prejudice. A  
10 stipulation and proposed order effectuating this shall be filed withing twenty-one (21) calendar days after  
11 the Preliminary Approval Date.

12       10.3 Circular 230 Disclaimer: EACH PARTY TO THIS AGREEMENT (FOR PURPOSES OF  
13 THIS SECTION, THE “ACKNOWLEDGING PARTY” AND EACH PARTY TO THIS AGREEMENT  
14 OTHER THAN THE ACKNOWLEDGING PARTY, AN “OTHER PARTY”) ACKNOWLEDGES AND  
15 AGREES THAT (1) NO PROVISION OF THIS AGREEMENT, AND NO WRITTEN  
16 COMMUNICATION OR DISCLOSURE BETWEEN OR AMONG THE PARTIES OR THEIR  
17 ATTORNEYS AND OTHER ADVISERS, IS OR WAS INTENDED TO BE, NOR SHALL ANY SUCH  
18 COMMUNICATION OR DISCLOSURE CONSTITUTE OR BE CONSTRUED OR BE RELIED UPON  
19 AS, TAX ADVICE WITHIN THE MEANING OF UNITED STATES TREASURY DEPARTMENT  
20 CIRCULAR 230 (31 CFR PART 10, AS AMENDED); (2) THE ACKNOWLEDGING PARTY (A) HAS  
21 RELIED EXCLUSIVELY UPON HIS, HER OR ITS OWN, INDEPENDENT LEGAL AND TAX  
22 COUNSEL FOR ADVICE (INCLUDING TAX ADVICE) IN CONNECTION WITH THIS  
23 AGREEMENT, (B) HAS NOT ENTERED INTO THIS AGREEMENT BASED UPON THE  
24 RECOMMENDATION OF ANY OTHER PARTY OR ANY ATTORNEY OR ADVISOR TO ANY  
25 OTHER PARTY, AND (C) IS NOT ENTITLED TO RELY UPON ANY COMMUNICATION OR  
26 DISCLOSURE BY ANY ATTORNEY OR ADVISER TO ANY OTHER PARTY TO AVOID ANY TAX  
27 PENALTY THAT MAY BE IMPOSED ON THE ACKNOWLEDGING PARTY; AND (3) NO  
28 ATTORNEY OR ADVISER TO ANY OTHER PARTY HAS IMPOSED ANY LIMITATION THAT

1 PROTECTS THE CONFIDENTIALITY OF ANY SUCH ATTORNEY’S OR ADVISER’S TAX  
2 STRATEGIES (REGARDLESS OF WHETHER SUCH LIMITATION IS LEGALLY BINDING) UPON  
3 DISCLOSURE BY THE ACKNOWLEDGING PARTY OF THE TAX TREATMENT OR TAX  
4 STRUCTURE OF ANY TRANSACTION, INCLUDING ANY TRANSACTION CONTEMPLATED BY  
5 THIS AGREEMENT.

6 10.4 No Prior Assignments: The Parties represent, covenant, and warrant that they have not  
7 directly or indirectly assigned, transferred, encumbered, or purported to assign, transfer, or encumber to  
8 any person or entity any portion of any liability, claim, demand, action, cause of action or right released  
9 and discharged in this Agreement.

10 10.5 Waiver of Appeal and Ability to Opt Out: To the extent permitted by applicable law, by  
11 signing this Agreement Defendant is waiving any rights to appeal from the Court’s approval of the  
12 settlement unless the Court materially modifies the settlement. Furthermore, by signing this Agreement  
13 Plaintiffs are waiving any right or ability to opt out of this Agreement during the Notice Period or otherwise.

14 10.6 Exhibits Incorporated by Reference: The terms of this Agreement include the terms set  
15 forth in any attached Exhibits, which are incorporated by this reference as though fully set forth in this  
16 Agreement. Any Exhibits to this Agreement are an integral part of the Settlement.

17 10.7 Judgment and Retention of Jurisdiction to Enforce: Upon the Effective Date, judgment will  
18 be entered according to this Agreement. The Parties stipulate and agree that the Fresno County Superior  
19 Court shall have continuing jurisdiction to enforce the terms of the Agreement pursuant to Civil Procedure  
20 Code section 664.6 and that the prevailing party any action necessary to enforce the terms of the Agreement  
21 after default by the other party may recover reasonable attorney’s fees and costs related thereto.

22 10.8 Mutual Cooperation: The Parties agree to cooperate fully with one another to accomplish  
23 and implement the terms of this Agreement. Such cooperation shall include, but not be limited to, execution  
24 of such other documents and the taking of such other action as may reasonably be necessary to fulfill the  
25 terms of this Agreement. The Parties to this Agreement shall use their best efforts, including all efforts  
26 contemplated by this Agreement and any other efforts that may become necessary by Court order, or  
27 otherwise, to effectuate this Agreement and the terms set forth herein.

1           10.9 No Admission of Liability: Neither the acceptance nor the performance by Defendant of  
2 the terms of this Agreement, nor any of the related negotiations or proceedings, is or shall be claimed to  
3 be, construed as, or deemed to be, an admission by Defendant of the truth of any of the allegations in the  
4 Complaint, the representative character of the Action, the validity of any of the claims that were or could  
5 have been asserted by Plaintiffs and/or Class Members in the Action, or of any liability or guilt of  
6 Defendant in the Action. Nothing in this Agreement shall be construed to be or deemed an admission by  
7 Defendant of any liability, culpability, negligence, or wrongdoing toward Plaintiffs, the Class Members,  
8 or any other person, and Defendant specifically disclaim any liability, culpability, negligence, or  
9 wrongdoing toward Plaintiffs, the Class Members, or any other person. Each of the Parties has entered  
10 into this Stipulation with the intention to avoid further disputes and litigation.

11           10.10 Notices: Unless otherwise specifically provided herein, all notices, demands, or other  
12 communications given hereunder shall be in writing and shall be deemed to have been duly given as of the  
13 third business day after mailing by United States certified mail, return receipt requested, addressed as  
14 follows:

15           To Plaintiffs and the Class:

16           Galen T. Shimoda  
17           Justin P. Rodriguez  
18           Renald Konini  
19           Shimoda & Rodriguez Law, PC  
20           9401 East Stockton Blvd., Suite 120  
21           Elk Grove, CA 95624

22           David Alami  
23           Daniel J. Hyun  
24           Shaheen A. Etemadi  
25           **Torus LLP**  
26           2 Park Plaza, Suite 1260  
27           Irvine, CA 92614

28           To Defendant:

            William M. Woolman  
            Charles P. Hamamijan  
            Sagaser, Watkins & Wieland PC  
            5260 North Palm Avenue, Suite 400,  
            Fresno, California 93704

1           10.11 Mutual Drafting of Agreement: The Parties hereto agree that the terms and conditions of  
2 this Agreement are the result of lengthy, intensive, arm's-length negotiations between the Parties and that  
3 this Agreement shall not be construed in favor of or against any party by reason of the extent to which any  
4 party or its counsel participated in the drafting of this Agreement.

5           10.12 Attorneys' Fees and Costs Limitations: Neither Class Counsel nor any other attorneys  
6 acting for, or purporting to act for, the Class, Class Members, or Plaintiffs, may recover or seek to recover  
7 any amounts for fees, costs, or disbursements from the Releasees or the Gross Settlement Amount except  
8 as expressly provided in this Agreement.

9           10.13 No Modifications: This Agreement may be amended or modified only by a written  
10 instrument signed by counsel for all Parties or their successors-in-interest. This Agreement may not be  
11 discharged except by performance in accordance with its terms.

12           10.14 Authorization to Enter Into Settlement Agreement: Counsel for all Parties warrant and  
13 represent they are expressly authorized by the Parties whom they represent to negotiate this Agreement and  
14 to take all appropriate action required or permitted to be taken by such Parties pursuant to this Agreement  
15 to effectuate its terms and to execute any other documents required to effectuate the terms of this  
16 Agreement.

17           10.15 Class Member Signatories: Because the Action has not yet been certified, and the Class  
18 Members are so numerous, the Parties agree that it is impossible or impractical to have each Class Member  
19 sign this Agreement. It is agreed that, for purposes of seeking approval of the Agreement, this Agreement  
20 may be executed on behalf of all Class Members by the Class Representatives.

21           10.16 Counterparts: This Agreement shall become effective upon its execution by all of the  
22 undersigned. Plaintiffs, Class Counsel, Defendant and Defendants' Counsel may execute this Agreement  
23 in counterparts, and execution of counterparts shall have the same force and effect as if each had signed  
24 the same instrument. Facsimile, electronic, and/or scanned copies of signatures shall have the same force  
25 and effect of originals.

26           10.17 Choice of Law: The Agreement and any exhibits hereto shall be considered to have been  
27 negotiated, executed, and delivered, and to have been wholly performed, in the State of California, and the  
28 rights and obligations of the Parties to the Agreement shall be construed and enforced in accordance with,

1 and governed by, the substantive laws of the State of California without giving effect to that State's choice  
2 of law principles.

3 10.18 Headings and Captions: Section titles or captions contained in the Agreement are inserted  
4 as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of  
5 this Agreement, or any provision thereof.

6 10.19 No Retaliation or Discouragement: The Parties agree they will take no action that could be  
7 construed as retaliation against any Class Members for participating or seeking to participate in this class  
8 action settlement. The Parties will not discourage any class member from participating or seeking to  
9 participate in this class action settlement. This is a material term of the Agreement and non-breaching  
10 Parties will seek court intervention if this provision is breached.

11 10.20 Integrated Agreement: This Agreement sets forth the entire understanding between the  
12 Parties and supersedes any and all prior agreements, oral or written, pertaining to the subject matter hereof.  
13 Each party acknowledges that there is no representation, inducement, promise or agreement which has been  
14 made, orally or otherwise, by the other party, concerning the terms or conditions of this Agreement, which  
15 is not expressly embodied in this Agreement. In entering into this Agreement, the Parties represent that the  
16 terms of this Agreement are fully understood and voluntarily accepted by the Parties.

17 10.21 Binding on Successors and Assigns: This Agreement will be binding upon, and inure to the  
18 benefit of, the successors or assigns of the Parties to this Agreement, as previously defined.

19 10.22 Invalidity of Any Provision: Before declaring any provision of this Agreement invalid, the  
20 Court will first attempt to construe the provision as valid to the fullest extent possible consistent with  
21 applicable precedents so as to define all provisions of this Settlement Agreement valid and enforceable.

22 10.23 Waiver of Compliance: No waiver of any condition or covenant contained in this  
23 Agreement or failure to exercise a right or remedy by any of the Parties hereto will be considered to imply  
24 or constitute a further waiver by such party of the same or any other condition, covenant, right or remedy.

25 IN WITNESS WHEREOF, this Agreement is executed by the Parties and their duly authorized  
26 attorneys, as of the day and year herein set forth.  
27  
28



**For Plaintiffs:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Jesse Gil

Date: February 7, 2025

  
\_\_\_\_\_  
Daniel Ayala (Feb 7, 2025 08:43 PST)  
Daniel Ayala

**FOR Defendant:**

Date: \_\_\_\_\_

\_\_\_\_\_  
By:  
For Outback, Inc.

APPROVED AS TO FORM

**Shimoda & Rodriguez Law, PC**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Galen T. Shimoda, Justin P. Rodriguez and  
Renald Konini  
Attorney for Plaintiffs and Aggrieved  
Employees

**TORUS LLP**

Dated: February 7, 2025

By: David Alami  
\_\_\_\_\_  
David Alami, Daniel J. Hyun and  
Shaheen A. Etemadi  
Attorney for Plaintiffs and Aggrieved  
Employees

APPROVED AS TO FORM

**SAGASER, WATKINS & WIELAND PC**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
William M. Woolman  
Charles P. Hamamjian  
Attorney for Defendant

**For Plaintiffs:**

Date: 02/06/2025

  
See Gil (Feb 6, 2025 15:29 PST)

Jesse Gil

Date: \_\_\_\_\_

\_\_\_\_\_  
Daniel Ayala

**FOR Defendant:**

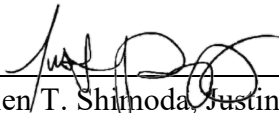
Date: \_\_\_\_\_

\_\_\_\_\_  
By:  
For Outback, Inc.

APPROVED AS TO FORM

**Shimoda & Rodriguez Law, PC**

Dated: February 6, 2025

By:   
Galen T. Shimoda, Justin P. Rodriguez and  
Renald Konini  
Attorney for Plaintiffs and Aggrieved  
Employees

**TORUS LLP**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
David Alami, Daniel J. Hyun and  
Shaheen A. Etemadi  
Attorney for Plaintiffs and Aggrieved  
Employees

APPROVED AS TO FORM

**SAGASER, WATKINS & WIELAND PC**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
William M. Woolman  
Charles P. Hamamjian  
Attorney for Defendant

**For Plaintiffs:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Jesse Gil

Date: \_\_\_\_\_

\_\_\_\_\_  
Daniel Ayala

**FOR Defendant:**

Date: 02/20/2025

  
\_\_\_\_\_  
Curtis Lovett (Feb 20, 2025 11:29 PST)  
By:  
For Outback, Inc.

APPROVED AS TO FORM

**Shimoda & Rodriguez Law, PC**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Galen T. Shimoda, Justin P. Rodriguez and  
Renald Konini  
Attorney for Plaintiffs and Aggrieved  
Employees

**TORUS LLP**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
David Alami, Daniel J. Hyun and  
Shaheen A. Etemadi  
Attorney for Plaintiffs and Aggrieved  
Employees

APPROVED AS TO FORM

**SAGASER, WATKINS & WIELAND PC**

Dated: February 20, 2025

By:   
\_\_\_\_\_  
William M. Woolman  
Charles P. Hamamjian  
Attorney for Defendant

# Exhibit 1

CALIFORNIA SUPERIOR COURT  
FOR THE COUNTY OF FRESNO

JESSE GIL and DANIEL AYALA, individually and on  
behalf of all other similarly situated employees,

Plaintiffs,

vs.

OUTBACK, INC., a California Corporation; and DOES 1  
to 100, inclusive,

Defendant.

Case No. 21CECG03273

**NOTICE OF PROPOSED CLASS ACTION AND  
PAGA SETTLEMENT, AND HEARING DATE FOR  
FINAL COURT APPROVAL OF SETTLEMENT**

**ATTENTION:** All individuals who have, or continue to, perform work for Defendant in California as hourly, non-exempt employees from November 3, 2017, to [REDACTED] (the "Class Members").

**PLEASE READ THIS NOTICE CAREFULLY. THIS NOTICE RELATES TO A PROPOSED SETTLEMENT OF CLASS ACTION LITIGATION AND POTENTIAL DISBURSEMENT OF SETTLEMENT FUNDS TO YOU. IF YOU ARE A CLASS MEMBER, IT CONTAINS IMPORTANT INFORMATION ABOUT YOUR RIGHT TO PARTICIPATE IN OR OPT OUT OF THE SETTLEMENT ACCORDING TO THE PROCEDURES DESCRIBED BELOW.**

You are receiving this notice pursuant to an order from the Fresno County Superior Court ("Court") granting Plaintiffs' motion for preliminary approval of a Joint Stipulation Regarding Class Action and PAGA Settlement and Release ("Agreement" or "Settlement") as fair, reasonable, and adequate. The Settlement was entered into between Plaintiffs Jesse Gil and Daniel Ayala ("Plaintiffs" or "Class Representatives"), and Defendant Outback, Inc. ("Defendant") on behalf of Class Members as defined above. The terms of the Settlement are outlined herein. You are receiving this notice because Defendants' records indicate you fall within the definition of "Class Member." Defendants' records also indicate that you worked [REDACTED] weeks during the applicable Class Period (as defined below), which means your total share of the settlement proceeds is estimated to be [REDACTED]. Your actual share of the settlement proceeds will vary depending on the total number of Class Members that choose to participate, and the resolution of any workweek disputes as described in this notice.

The terms of the Agreement and a description of the case are identified in this notice. Pursuant to the Court's order, YOU ARE HEREBY NOTIFIED AS FOLLOWS:

**I. BACKGROUND OF THE CASE**

On November 3, 2021, this lawsuit was filed against Defendant in the Fresno County Superior Court of California. The term "Action" means this putative class action pending in Fresno County Superior Court, Case No. 21CECG03273, and includes a related wage and hour class action filed against Defendant in Fresno County Superior Court, *Ayala v. Outback, Inc.*, Fresno County Superior Court Case No. 23CECG04940, filed on November 29, 2023. The Class Period is November 3, 2017, to [REDACTED] (the "Class Period").

In the Action, Plaintiffs sought to obtain unpaid wages, interest, statutory penalties, civil penalties, fees, and costs on behalf of himself, Class Members, and Aggrieved Employees. Plaintiffs alleged that Defendant violated California law by: (1) failing to pay overtime wages, (2) failing to pay minimum wages, (3) failing to provide meal periods or pay meal period premiums in lieu thereof, (4) failing to provide rest periods or pay rest period premiums in lieu thereof, (4) failing to provide accurate wage statements, (5) failing to pay final wages, (6) failing to pay reimbursements for expenses, (7) failing to maintain accurate records, (8) failing to provide paid sick leave, (9) untimely payment of wages (10) engaging in unfair competition, and (12) committing PAGA violations. Defendant has denied all of Plaintiffs' allegations. The Action has been actively litigated. There have been on-going investigations, and there has been an exchange of extensive documentation and information. Furthermore, the Parties have participated in a full day mediation facilitated by a neutral third party. Based upon the negotiations, and all known facts and circumstances, including the various risks and uncertainties related to legal actions, the Parties reached a class-wide settlement. By settling, the Parties will avoid the risks associated with a lengthy litigation process.



Despite agreeing to and supporting the Agreement, Defendant continue to deny all allegations and claims and contends all employees have been paid correctly. Defendant has entered into this Settlement to fully, finally, and forever resolve this Action, based on the terms set forth in the Agreement, in order to avoid the burden and expense associated with ongoing litigation.

The Agreement applies to any and all Class Members, as defined above. The Agreement also applies to Aggrieved Employees, which are defined as all individuals who have, or continue to, perform work for Defendant in California as hourly, non-exempt employees at any time from October 21, 2020, to [REDACTED]. If you are a Class Member, you have the opportunity to participate in the Settlement, or to exclude yourself (“opt out”) from the Settlement. This notice is to advise Class Members of how they can either participate in the Settlement or be excluded from the Settlement. As set forth below, Aggrieved Employees cannot opt out of this Agreement as it relates to the PAGA Payment or Released PAGA Claims regardless of whether they opt out of being a Class Member. Aggrieved Employees will receive their share of the PAGA Payment regardless of whether they opt out of being a Class Member.

## **II. SUMMARY OF THE PROPOSED SETTLEMENT**

### **A. The Amount of the Settlement**

Under the terms of the Agreement, Defendants have agreed to pay a total sum of Three Hundred Sixty-Seven Thousand Five Hundred Dollars (\$367,500) (“Gross Settlement Amount”). Deducted from this Gross Settlement Amount will be sums approved by the Court for attorney’s fees not to exceed 35% of the Gross Settlement Amount, attorney’s costs not to exceed \$15,000, Settlement Administrator Costs estimated not to exceed \$12,500, Class Representatives’ Enhancement Payment not to exceed \$10,000 each, and \$20,000 for alleged PAGA penalties (the “PAGA Payment”), which will result in a “Net Settlement Amount” for distribution to all Class Members. Any employer side taxes attributable to payments allocated as wages will be paid by Defendant in addition to the Gross Settlement Amount. As explained further below, the amount of each Class Member’s share of the Net Settlement Amount will depend on the number of weeks worked by Class Members during the Class Period. Of the \$20,000 allocated to resolving the PAGA claims, 75% of the PAGA Payment will be paid to the State of California Labor and Workforce Development Agency and 25% of the PAGA Payment will be divided among Aggrieved Employees.

The number of weeks you worked during the Class Period and your estimated total share of the Net Settlement Amount and PAGA Payment (“Individual Settlement Amount”) is stated on the first page of this notice. The actual amount received may be more or less than the amount stated depending on the actual number of weeks worked by Participating Class Members (*i.e.*, those who do not opt out of the Settlement), the resolution of any disputes regarding workweeks, and on the distributions finally approved and allocated by the Court. However, whether Class Members opt out will have no effect on Aggrieved Employees’ allocations for the PAGA claim.

### **B. Individual Settlement Amounts and Allocation Between Class Members and Aggrieved Employees**

Defendant will pay Individual Settlement Amounts through the Settlement Administrator, as described below, to each Participating Class Member and to Aggrieved Employees. All Individual Settlement Amounts will be subject to appropriate taxation. The Parties have agreed, based on the allegations in the Action that the amount payable to eligible Class Members from the Net Settlement Amount will be allocated and paid as 2/3 for disputed interest, statutory penalties, and other non-wage damages for which an IRS Forms 1099-MISC and 1099-INT will issue and 1/3 for disputed wages for which IRS Forms W-2 will issue. The PAGA Payment to Aggrieved employees will be paid as 100% for civil penalties.

Payment to Participating Class Members and Aggrieved Employees will not require the submission of a claim form. Each Participating Class Member’s share will be determined by dividing their total weeks worked within the Class Period by the total weeks worked by all Participating Class Members within the Class Period. That fraction will then be multiplied by the Net Settlement Amount to arrive at the Class Member’s individual share of the Net Settlement Amount. Each Aggrieved Employee’s share of the 25% portion of the PAGA Payment will be determined by dividing their total weeks worked within the PAGA Claim Period by the total weeks worked by all Aggrieved Employees within the PAGA Claim Period. That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the Aggrieved Employee’s individual share. The PAGA Claim Period is defined as October 21, 2020, to [REDACTED]. Defendants’ records indicate that you worked [REDACTED] weeks during the applicable PAGA Claim Period, which means your share of the PAGA Payment is estimated to be [REDACTED]. This amount is included in your estimated Individual Settlement Amount stated on the first page of this notice, not in addition to it. You will still receive your share of the PAGA Payment even if you opt out of being a Class Member. Receipt of the Individual Settlement Amounts will not entitle any Class Member or Aggrieved Employee to additional compensation or benefits under any compensation, retirement or benefit plan or agreement in place during the period covered by the

Settlement.

**C. Calculations to Be Based on Defendants' Records and Resolution of Workweek Disputes**

For each Class Member, the amount payable will be calculated by the Settlement Administrator from Defendants' records. Defendants' records will be presumed correct unless evidence to the contrary is provided to the Settlement Administrator. Defendants' records and any additional evidence will be reviewed by the Settlement Administrator in the event of a dispute about the number of workweeks worked by an individual Class Member. If a Class Member disputes the accuracy of Defendants' records, all supporting documents evidencing additional workweeks must be submitted by the Class Member. The dispute must (a) identify the nature of the dispute; (b) provide any information or documentation supporting the dispute; (c) be signed; and (d) be post-marked no later than [redacted]. The dispute will be resolved by the Settlement Administrator based on the records and evidence provided.

**D. Release of Claims**

For those Class Members who do not opt out and Aggrieved Employees, the Agreement contains the following releases:

Class members who do not opt out will be deemed to have released any and all class claims that are alleged in the Complaint, and any additional wage and hour claims that could have been brought based on the facts alleged in the operative Complaint, through the Class Period. This release excludes the release of claims not permitted by law.

Aggrieved Employees will be deemed to have released any and all claims that were brought under the Private Attorneys General Act, Labor Code §§ 2698 *et seq.*, contained in Plaintiffs' notice letter to the LWDA and any additional wage and hour PAGA claims that could have been brought based on the facts alleged in Plaintiffs' notice letter to the LWDA during the PAGA Claim Period. Aggrieved Employees cannot opt out of this waiver of claims.

The individuals released ("Released Parties") include Defendant, as well as Defendant's officers, shareholders, directors, agents, employees, attorneys, and insurers.

Class Members and/or Aggrieved Employees can talk to one of the lawyers appointed as Class Counsel (listed below) for free or talk to their own lawyer if they have questions about the released claims and what they mean.

**III. WHAT ARE YOUR RIGHTS AS A CLASS MEMBER**

**A. Participating in the Settlement as a Class Member**

If you wish to be a Participating Class Member and believe your workweek information is accurate, **you do not need to take any further action**. Payment will be automatically made to you consistent with the terms of the Agreement and Court Order. If you wish to dispute the workweek calculation, you may follow the procedures outlined in Section II.C above. California law protects Class Members from retaliation based on their decision to participate in the Settlement.

**B. Excluding Yourself from the Settlement as a Class Member**

The Court will exclude you from being a Class Member if you request this by [redacted]. If you do not wish to be bound by the Settlement as a Class Member, you may request to be excluded (*i.e.*, "opt out") by submitting a timely written request to the Settlement Administrator. The request to opt-out must (a) state your full name and date of birth; (b) a statement that you do not want to be a Class Member, do not want to participate in the Settlement, and/or wants to be excluded from this Settlement; (c) identify the case name and number (*i.e.* *Gil, et al. v. Outback, Inc., et al.*, 21CECG03273); (d) be signed; and (e) be post-marked no later than [redacted]. The request to opt out must be mailed by First Class U.S. Mail, or the equivalent, to:

[admin info]

If you submit a request to opt out which is not postmarked by [redacted], your request to opt out will be rejected, and you will be bound by the release and all other terms of the Agreement. Do not use a postage meter as that may not result in a postmark appearing on the envelope containing your request to opt out. Any Class Member who submits a complete and timely request to opt out shall, upon receipt by the Settlement Administrator, no longer be a Class Member and not receive their share of the Net Settlement Amount.

Aggrieved Employees cannot opt out of this Agreement and will receive their share of the PAGA Payment regardless of whether they opt out of being a Class Member.

### **C. Objection to Settlement**

If you do not opt out of the Settlement, you can object to the terms of the Settlement. However, if the Court rejects your objection, you will still be bound by the terms of the Settlement. You can ask the Court to deny approval by submitting an objection. You cannot ask the Court to order a larger settlement; the Court can only approve or deny the settlement. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue. You may submit a written objection, which should (a) state your full name and date of birth; (b) provide evidence that you are, in fact, a Class Member; (c) state the reasons for the objection(s), including supporting documentation; (d) identify the case name and number (*i.e. Gil, et al. v. Outback, Inc., et al.*, 21CECG03273); (e) be signed; and (f) be post-marked no later than [REDACTED]. Written objections must be sent to the Settlement Administrator at the address identified in Section III.B.

Additionally, or in the alternative to sending a written objection to the Settlement Administrator, you may appear at the final approval hearing to state your objection. Any Class Member who does not request exclusion may, if the Class Member so desires, enter an appearance through an attorney. If you appear through your own attorney, you are responsible for paying that attorney.

### **IV. EFFECT OF THE SETTLEMENT: RELEASED RIGHTS AND CLAIMS**

If the Court grants final approval of the Settlement, the Court will make and enter judgment consistent therewith. A notice of entry of judgment will be filed with the Court and available online at the Court's public portal website: <https://publicportal.fresno.courts.ca.gov/FRESNOPORTAL/Home/Dashboard/29>. The judgment, whether favorable or not, will bind all Class Members who do not request exclusion. After final approval, each and every Class Member who does not opt out of the Settlement and Aggrieved Employee, will release Defendant and the Released Parties from the Released Class Claims and the Released PAGA Claims described above. In other words, if you were employed as a Class Member by Defendant in California during the Class Period, and you do not exclude yourself from the Settlement, you will be deemed to have entered into these releases and to have released the above-described claims. In addition, you will be barred from ever suing Defendant and the Released Parties with respect to the claims covered by this Settlement. If the Settlement is not approved by the Court or does not become final for some other reason, the litigation will continue.

### **V. FINAL SETTLEMENT APPROVAL HEARING**

The Court will hold a hearing in Department \_\_\_, [address] on [REDACTED] at [REDACTED] to determine whether the Agreement should be finally approved as fair, reasonable and adequate. The Court will also be asked to approve Class Counsel's request for attorneys' fees and costs, the Settlement Administrator Costs, and the Class Representatives' Enhancement Payment. The hearing may be continued without further notice. It is not necessary for you to appear at this hearing.

### **VI. ADDITIONAL INFORMATION**

You may access the Complaint, Class Counsel's motion for preliminary approval, the Agreement, and any other documents required by the Court at <https://publicportal.fresno.courts.ca.gov/FRESNOPORTAL/Home/Dashboard/29>. Simply input the case number for this case (21CECG03273) in the appropriate field and click "submit." You can also contact Class Counsel or Defendant's Counsel as follows:

Galen T. Shimoda  
Justin P. Rodriguez  
Renald Konini  
Shimoda & Rodriguez Law, PC  
9401 East Stockton Blvd., Suite 120  
Elk Grove, CA 95624  
Telephone: (916) 525-0716  
**On behalf of Plaintiffs**

David Alami  
Daniel J. Hyun  
Shaheen A. Etemadi  
Torus LLP  
2 Park Plaza, Suite 1260  
Irvine, CA 92614  
Telephone: (949) 590-4122  
**On behalf of Plaintiffs**

William M. Woolman  
Charles P. Hamamjian  
Sagaser, Watkins & Wieland PC  
5260 North Palm Avenue, Suite 400  
Fresno, California 93704  
Telephone: 559-421-7000  
**On behalf of Defendant**

**PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS. IF YOU HAVE ANY QUESTIONS, CALL [number]**

**BY ORDER OF THE COURT**

# Exhibit B



Galen T. Shimoda (Cal. State Bar No. 226752)  
Justin P. Rodriguez (Cal. State Bar No. 278275)  
Renald Konini (Cal. State Bar No. 312080)  
**Shimoda & Rodriguez Law, PC**  
9401 East Stockton Boulevard, Suite 120  
Elk Grove, CA 95624  
Telephone: (916) 525-0716  
Facsimile: (916) 760-3733

Attorneys for Plaintiffs JESSE GIL,  
individually and on behalf of all other similarly situated employees

[additional counsel continued on next page]

E-FILED  
11/20/2024 3:36 PM  
Superior Court of California  
County of Fresno  
By: A. Sepeda, Deputy

**SUPERIOR COURT OF CALIFORNIA  
FOR THE COUNTY OF FRESNO**

JESSE GIL, and DANIEL AYALA,  
individually and on behalf of all other  
similarly situated employees,

Plaintiffs,

vs.

OUTBACK, INC., a California Corporation,  
an individual; and DOES 1 to 100, inclusive,

Defendants.

**Case No. 21CECG03273**

**CLASS ACTION**

**SECOND AMENDED COMPLAINT FOR  
DAMAGES:**

- 1. Failure to Pay Overtime Wages**
- 2. Failure to Pay Minimum Wages**
- 3. Meal Period Violations**
- 4. Rest Period Violations**
- 5. Wage Statement Violations**
- 6. Waiting Time Penalties**
- 7. Failure to Reimburse Expenses**
- 8. Unfair Competition**
- 9. Private Attorneys General Act**
- 10. Failure to Pay All Wages**
- 11. Failure to Provide Recovery Periods**

**DEMAND FOR JURY TRIAL**

David Alami (State Bar No. 314628)

david@torusllp.com

Daniel J. Hyun (State Bar No. 309184)

daniel@torusllp.com

**TORUS LLP**

23 Corporate Plaza Drive, Suite 150

Newport Beach, CA 92660

Telephone: (949) 590-4122

Facsimile: (949) 528-2596

Attorneys for Plaintiffs DANIEL AYALA

1 Plaintiffs JESSE GIL (“Plaintiff Gil”), and Plaintiffs Daniel Ayala (“Plaintiff Ayala”) (Plaintiff  
2 Gil and Plaintiff Ayala sometimes collectively referred to as “Plaintiffs”) on behalf of themselves and all  
3 other similarly situated employees, hereby file this Second Amended Complaint against Defendants  
4 OUTBACK, INC., a California Corporation; and DOES 1 to 100, inclusive (hereinafter all collectively  
5 referred to as “Defendants”). On information and belief, Plaintiffs allege the following:

### 6 **INTRODUCTION**

7 1. This is a class action and Private Attorneys General Act (“PAGA”) lawsuit brought by  
8 Plaintiffs for failure to pay minimum wages, failure to pay overtime wages, meal period violations, rest  
9 period violations, wage statement violations, failure to timely pay final wages, failure to reimburse  
10 expenses, failure to pay all wages, failure to provide recovery periods, and unfair competition.

11 2. This proposed class and representative action seeks, *inter alia*, unpaid wages (including  
12 sick pay, vacation pay, prevailing wage pay, minimum, regular, overtime, and double time wages),  
13 compensation for non-compliant meal periods, rest periods, recovery periods, waiting time penalties,  
14 itemized wage statement penalties, civil penalties, business expense reimbursements, liquidated damages,  
15 interest, reasonable attorneys’ fees, and costs. Plaintiff’s action is brought under, *inter alia*, the California  
16 Industrial Welfare Commission (“IWC”) Wage Orders and applicable provisions of the California Code  
17 of Regulations, California Business & Professions Code sections 17200 *et seq.*, California Civil Code  
18 section 3289, California Code of Civil Procedure section 1021.5, and California Labor Code (“Labor  
19 Code”) sections 200, 201, 202, 203, 204, 206, 210, 221, 223, 224, 226, 226.3, 226.7, 227.3, 233, 234, 246,  
20 510, 511, 512, 558, 558.1, 1171, 1774, 1174.5, 1811, 1815, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2800,  
21 2802, and 2804.

22 3. Under the California Unfair Competition Law, Business and Professions Code  
23 sections 17200 *et seq.* (“UCL”), and pursuant to the class action procedures provided for in this statute,  
24 Plaintiffs, on behalf of themselves and the proposed Class, seek declaratory relief, injunctive relief, and  
25 restitution of all benefits Defendants have received from their employees due to their unlawful business  
26 practices, including but not limited to, their failure to timely provide minimum, regular, overtime, and  
27 double time compensation due for all hours worked during and upon separation of employment, failure to  
28

1 reimburse business expenses, failure to provide compliant meal periods and rest breaks to their employees  
2 or compensation in lieu thereof, and failure to provide accurate itemized wage statements.

### 3 **JURISDICTION AND VENUE**

4 4. This Court has jurisdiction over all causes of action asserted herein pursuant to California  
5 Code of Civil Procedure section 410.10 to determine alleged violations of the California Labor Code,  
6 California Business and Professions Code, and Wage Order No. 16 and pursuant to the California  
7 Constitution, Article VI, section 10, which grants the Superior Court original jurisdiction in all cases  
8 except those given to other trial courts. All claims alleged herein arise under California law for which  
9 Plaintiffs seek relief authorized by California law. Further, this is a class action pursuant to California  
10 Code of Civil Procedure section 382 and representative action under PAGA. As such, the monetary  
11 damages, restitution, penalties, and other amounts sought by Plaintiffs exceed the minimal jurisdictional  
12 limits of the Superior Court and will be established according to proof at trial. The Court also has  
13 jurisdiction over certain causes of action pursuant to California Business & Professions Code sections  
14 17203 and 17204, which provide for exclusive jurisdiction for enforcement of this statute in any court of  
15 competent jurisdiction.

16 5. Venue is proper pursuant to Civil Procedure Code §§ 395 and 395.5, and under California  
17 Business & Professions Code section 17203 in that Defendants reside in Fresno County. In addition, some  
18 of the wrongful acts and violations of law asserted herein occurred within Fresno County, and Defendants'  
19 obligation to pay wages arose in Fresno County pursuant to *Madera Police Officers Assn. v. City of*  
20 *Madera*, 36 Cal.3d 403, 414 (1984).

21 6. Plaintiff Gil sought permission pursuant to California Labor Code section 2699 *et seq.* to  
22 pursue the claims set forth in this Complaint against Defendants as a Private Attorney General on behalf  
23 of himself and other similarly situated employees. Pursuant to California Labor Code section 2699.3,  
24 Plaintiff Gil gave written notice via online submission to the Labor and Workforce Development Agency  
25 ("LWDA") on approximately October 21, 2021. Plaintiff Gil provided facts and legal basis for his claims  
26 within the notice to the LWDA on all violations asserted under the Private Attorneys General Act cause  
27 of action. Plaintiff Gil also submitted the \$75.00 filing fee. The August 21, 2021, notice was also sent  
28 via certified mail to Defendant on the same day. To date, the LWDA has not provided any response to

1 Plaintiff Gil's notice correspondence. Accordingly, Plaintiff Gil has exhausted all administrative remedies  
2 pursuant to the PAGA and may bring this action on behalf of himself and all similarly situated employees,  
3 *i.e.* Aggrieved Employees. *See* Cal. Lab. Code § 2699.3(a)(2)(A), (c)(3); *Caliber Bodyworks, Inc., v. Sup.*  
4 *Ct.*, 134 Cal. App. 4th 365, 383 n.18, 385 n.19 (2005). Aggrieved Employees include, but are not limited  
5 to the following: all individuals who have, or continue to, perform work for Defendants in California as  
6 hourly, non-exempt employees at any time from October 21, 2020, to the present. On November 3, 2023,  
7 Plaintiff Ayala gave written notice of the specified provisions alleged to have been violated, including the  
8 facts and theories to support the alleged violations, as required by Labor Code section 2699.3. This written  
9 notice was provided via certified mail to Defendants and to the LWDA by electronically filing the notice  
10 via the Department of Industrial Relations' website. More than 65 days have passed since Plaintiff Ayala  
11 submitted his PAGA notice to the LWDA without notice from the LWDA about any intent to investigate  
12 the identified claims. Accordingly, Plaintiff Ayala has exhausted the procedural requirements under Labor  
13 Code section 2699.3 as to Defendants and is therefore able to pursue a claim for penalties individually  
14 and all other aggrieved employees under PAGA.

### 15 **PARTIES**

16 7. Plaintiff Gil is an individual over the age of eighteen (18) and is a resident of the State of  
17 California.

18 8. Plaintiff Ayala is an individual over the age of eighteen (18) and is a resident of the State  
19 of California.

20 9. On information and belief, Plaintiffs allege, OUTBACK, INC., is now and/or at all times  
21 mentioned in this Complaint was a California Corporation and the owner and operator of an industry,  
22 business and/or facility doing business in the State of California.

23 10. Defendants DOES 1 through 100 are affiliates, subsidiaries and related entities and the alter  
24 egos of each of the other Defendants named herein, corporate or otherwise, who participated in and are  
25 liable for the actions herein alleged. Plaintiffs are informed, believe and thereon alleges that at all relevant  
26 times each DOE Defendant was a parent, sister, or related corporate entity of defendants, or an owner,  
27 employee or agent of defendants, and each related entity, and was acting with the knowledge and  
28 authorization of each of the other Defendants. Plaintiffs are informed, believe and thereon allege that each



1 of the Defendants sued as DOES 1 through 100 participated in, received the benefit of, or was in some  
2 way responsible for one or more of the wrongful acts and omissions and some portion of the damages  
3 alleged herein. Plaintiffs will seek to amend this Complaint to allege the true names and capacities of  
4 these DOE Defendants when they are ascertained.

5 11. At all times mentioned herein, each Defendant was the agent or employee of each of the  
6 other Defendants and was acting within the course and scope of such agency or employment. The  
7 Defendants are jointly and severally liable to Plaintiff.

8 12. Defendants, and each of them, are now and/or at all times mentioned in this Complaint  
9 were members of and/or engaged in a joint employment, joint venture, partnership and common enterprise,  
10 and were acting within the course and scope of, and in pursuance of said joint employment, joint venture,  
11 partnership and common enterprise.

12 13. Defendants, and each of them, now and/or at all times mentioned in this Complaint  
13 approved, ratified, acquiesced, aided or abetted the acts and omissions alleged in this Complaint.

14 14. Plaintiffs is informed, believes and thereon alleges, that there exists a unity of interest in  
15 ownership between Defendants and DOES 1 through 50, inclusive, such that any individuality and  
16 separateness between the individual and the corporation does not exist, as Defendants, and DOES 1  
17 through 50, inclusive, are alter egos, in that: (1) Defendants are and at all times mentioned herein were  
18 mere shells, instrumentalities and conduits through which DOES 1 through 50, inclusive, carried out their  
19 business in the business name, exercising complete control and dominance over such business; (2) that  
20 Defendants were conceived, intended and used by DOES 1 through 50, inclusive, as devices to avoid  
21 individual liability and in place of Defendants, and DOES 1 through 50, inclusive, and were without the  
22 financial solvency and responsibility required by law; and (3) that all of the assets of the Defendants have  
23 been transferred to DOES 1 through 50, inclusive, or some other individual or entity which he or she owns  
24 or controls, with the intent to hinder, delay or defraud creditors of Defendants, leaving Defendants with  
25 no assets. Further, Plaintiffs is informed, believes and thereon alleges, that there exists a principal-agency  
26 relationship between and among Defendants.

27 15. Defendants proximately caused Plaintiffs to be subjected to the unlawful practices, wrongs,  
28 complaints, injuries and/or damages alleged in this Complaint.

**CLASS ALLEGATIONS**

16. Plaintiffs bring the First through Eighth and Tenth through Eleventh Causes of Action on behalf of themselves and all others similarly situated as a class action pursuant to California Code of Civil Procedure section 382. The class which Plaintiffs seek to represent is composed of, and defined, as follows:

All non-exempt employees who have or continue to work for Defendants from November 3, 2017, to the present.

17. This action has been brought and may be properly maintained as a class action, pursuant to the provision of California Code of Civil Procedure section 382, because there is a well-defined community of interests in the litigation and the proposed class is easily ascertainable.

(a) Numerosity: The putative class is so numerous that the individual joinder of all members is impracticable under the circumstances of this case. While the exact number of class members is unknown to Plaintiffs at this time, Plaintiffs is informed and believes that Defendants have employed as many as one hundred (100) individuals falling within the above stated class definition throughout the State of California during the applicable statute of limitations, who were subjected to the policies and practices outlined in this Complaint. As such, joinder of all members of the putative class is not practicable.

(b) Common Questions Predominate: Common questions of law and fact exist as to all members of the putative class and predominate over questions that affect only individual members of the class. These common questions of law and fact include, without limitation, the following:

- (1) Whether Defendants paid Plaintiffs and putative class members for all hours worked;
- (2) Whether Defendants paid Plaintiffs and putative class members all overtime wages they were owed;
- (3) Whether Defendants had a policy or practice of failing to take into account different rates of pay paid to Plaintiffs and putative class members, including shift differentials and prevailing wages, to calculate their regular rates of pay;

- 1 (4) Whether Defendants failed to authorize and permit Plaintiffs and putative class  
2 members to take meal periods;
- 3 (5) Whether Defendants failed to authorize and permit Plaintiffs and putative class  
4 members to take rest periods;
- 5 (6) Whether Defendants failed to authorize and permit second meal periods and third  
6 rest periods when Plaintiffs and putative class members worked over 10 hours in a  
7 day;
- 8 (7) Whether Defendants failed to authorize and permit Plaintiffs and putative class  
9 members to begin meal periods before the end of their fifth hour of work;
- 10 (8) Whether as a result of Defendants' policies and practices Plaintiffs and putative  
11 class members received all wages, due and owing, at the time of their termination  
12 or separation; and
- 13 (9) Whether Defendants provided Plaintiffs and putative class members with wage  
14 statements that complied with Labor Code section 226.
- 15 (c) Typicality: Plaintiff's claims are typical of the claims of the members of the putative class.  
16 The putative class also sustained damages arising out of Defendants' common course of  
17 conduct in violation of the law as complained of herein. Plaintiffs and all members of the  
18 putative class were non-exempt employees who were not paid for all hours worked and all  
19 overtime wages earned, did not receive all meal and rest periods, and were not reimbursed  
20 for the use of their personal cellphones. Additionally, Defendants issued Plaintiffs and all  
21 members of the putative class wage statements that did not comply with Labor Code  
22 section 226 and failed to timely pay them their final wages. As a result, Plaintiffs and each  
23 member of the putative class will have suffered the same type of harm and seek the same  
24 type of recovery based on the same legal theories.
- 25 (d) Adequacy: Plaintiffs will fairly and adequately protect the interests of the members of the  
26 putative class. For all relevant times, Plaintiffs resided in California and worked for  
27 Defendants in California. Moreover, Plaintiffs is an adequate representative of the putative  
28 class as Plaintiffs has no interests that are adverse to those of putative class members.

1 Additionally, Plaintiffs has retained counsel who has substantial experience in complex  
2 civil litigation and wage and hour matters.

- 3 (e) Superiority: A class action is superior to other available means for the fair and efficient  
4 adjudication of the controversy since individual joinder of all members of the putative class  
5 is impracticable. Class action treatment will permit a larger number of similarly situated  
6 persons to prosecute their common claims in a single forum simultaneously, efficiently,  
7 and without the unnecessary duplication of effort and expense that numerous individual  
8 actions would engender. Further, as damages suffered by each individual member of the  
9 class may be relatively small, the expenses and burden of the individual litigation would  
10 make it difficult or impossible for individual members of the class to redress the wrongs  
11 done to them, and an important public interest will be served by addressing the matter as a  
12 class action. The cost to the court system of adjudication of such individualized litigation  
13 would be substantial. Individualized litigation would also present the potential for  
14 inconsistent or contradictory judgments.

15 18. Plaintiffs reserve the right pursuant to California Rules of Court, Rule 3.764 and 3.765, to  
16 amend or modify the respective definitions of the Class and/or to provide greater specificity and/or further  
17 division into subclasses or limitation to particular issues based on further investigation and discovery.

18 19. Plaintiffs are unaware of any difficulties that are likely to be encountered in the  
19 management of this action that would preclude its maintenance as a class action.

### 20 GENERAL ALLEGATIONS

21 20. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 19 as though fully  
22 set forth herein.

23 21. Plaintiff Gil worked for Defendants from approximately December 2017 to September 1,  
24 2021, as hourly, non-exempt employee. Similarly situated employees also worked for Defendants as non-  
25 exempt, hourly employees. Plaintiffs and similarly situated employees performed work hauling and  
26 delivering concrete to and from public and private construction sites throughout central California.

27 22. Plaintiffs and similarly situated employees worked on prevailing wage jobs, as well as non-  
28 prevailing wage jobs for Defendants. Sometimes Plaintiffs and similarly situated employees would work

1 non-prevailing wage jobs and prevailing wage jobs in the same day and/or the same workweek. Although  
2 Defendants paid Plaintiffs and similarly situated employees some prevailing wages owed, Defendants  
3 failed to pay Plaintiffs and similarly situated employees all prevailing wages they were entitled to. There  
4 were also numerous instances where Defendants only paid Plaintiffs and similarly situated employees  
5 their non-prevailing wage rates rather than the correct prevailing wage rates even though Plaintiffs and  
6 similarly situated employees were working on government funded projects and construction worksites.  
7 Plaintiffs are informed and believe that Defendants were aware that the work performed was subject to  
8 prevailing wage law and that Defendants lacked any good faith basis for failing to pay the prevailing wage  
9 rates, including overtime based on the prevailing wage rates.

10 23. In addition to failing to pay the prevailing wage rate, Plaintiffs and similarly situated  
11 employees were not paid minimum or overtime wages for all hours worked. For instance, per company  
12 policy, Plaintiffs and similarly situated employees were required to arrive prior to the start of their shifts  
13 to clean and prepare their vehicles and were not paid for this time. Additionally, there were instances  
14 when Plaintiffs and similarly situated employees would have to attend mandatory meetings, drive trucks  
15 in need of repair to the repair shops, and complete post-shift paperwork and were, similarly, not paid for  
16 this time.

17 24. Plaintiffs and similarly situated employees worked over eight (8) hours and/or 10 hours in  
18 a day and/or forty (40) hours in a week and/or over eight (8) hours per workday on the seventh consecutive  
19 day of work on numerous occasions and were not properly paid overtime wages for this time. Defendants'  
20 practices and policies deprived Plaintiffs and similarly situated employees of minimum, regular, overtime,  
21 and/or double time wages for work they performed off the clock. Defendants required Plaintiffs and  
22 similarly situated employees to complete work- related tasks off the clock, such as communicating with  
23 Defendants and completing concrete preparation and application. Furthermore, Defendants rounded  
24 Plaintiffs' and similarly situated employees' hours worked, thereby depriving them of wages for all hours  
25 worked at the legally mandated rates. Further, Defendants failed to provide Plaintiffs and similarly situated  
26 employees with potable water. Defendants did not compensate Plaintiffs and similarly situated employees  
27 for all hours worked because Plaintiffs and similarly situated employees were regularly on-duty during  
28 their meal and/or rest periods. By failing to account for all hours worked, as described above, and by

1 failing to account for the value of all payments made when calculating the regular rate of pay, including  
2 blending prevailing wage and non-prevailing wage earnings in the same workweek, Defendants failed to  
3 pay Plaintiffs and similarly situated employees all overtime wages owed, all meal and rest period  
4 premiums owed, and sick leave wages due.

5 25. Similarly, when Plaintiffs and similarly situated employees were paid multiple different  
6 base wage rates, for instance, driving the Slider truck, Defendants failed to consistently incorporate this  
7 higher hourly wage rate into the regular rate of pay for the purposes of calculating overtime, meal and rest  
8 periods premiums, and sick leave pay.

9 26. In addition to not being correctly paid overtime and prevailing wages, Plaintiffs and  
10 similarly situated employees were sometimes not paid overtime wages when they worked more than eight  
11 (8) hours in a day at more than one project location. For instance, Defendants would often have Plaintiffs  
12 and similarly situated employees work on both a prevailing wage project and private project in a single  
13 day. Even though the second project would often run into overtime, Plaintiffs and similarly situated  
14 employees would, nonetheless, only be paid for the second project at their regular, base rate of pay. These  
15 hours were recorded on separate time sheets and not aggregated for daily or weekly overtime purposes.

16 27. Defendants, further, did not authorize and permit Plaintiffs and similarly situated  
17 employees to take a full, uninterrupted thirty (30) minute meal periods every five (5) hours and ten (10)  
18 minute rest periods every four (4) hours or major fraction thereof. Indeed, it was Defendants' policy not  
19 to provide drivers with ten (10) minute rest breaks, and the policy they did have for rest breaks was  
20 defective on its face because it only permitted rest breaks every four (4) hours for non-drivers.

21 28. In addition to missing a vast majority of their rest breaks, due to the demands of the job  
22 and directives of dispatchers and managers, Plaintiffs and similarly situated employees often missed their  
23 first lunch breaks, or, in this least, their lunch breaks were late and/or cut short. Specifically, Plaintiffs  
24 and similarly situated employees frequently had their meal periods shortened, interrupted, late, and/or  
25 missed altogether due to Defendants' practice of understaffing and prioritizing work demands over taking  
26 compliant breaks. In fact, Plaintiffs and similarly situated employees were directed by upper management  
27 and training personnel to log a meal break even when they were not able to take one. Not only did  
28 Defendants' end of year bonus payments penalize Plaintiffs and similarly situated employees for missed



breaks, Plaintiffs and similarly situated employees would get in trouble with management for not logging meal breaks even when they were unable to take them. Like first meal periods, Plaintiffs and similarly situated employees were also regularly deprived of the ability to take second meal periods or third rest periods when they work over ten (10) or twelve (12) hours in a day. Moreover, Defendants rounded Plaintiffs and similarly situated employees' time punches for meal periods. Further, Defendants failed to provide Plaintiffs and similarly situated employees with potable water, causing Plaintiffs and/or similarly situated employees to spend time obtaining potable water during their meal period. Also, Defendants failed to compensate Plaintiffs and similarly situated employees with an additional hour of pay at their regular rate of pay for every day in which they were denied a compliant meal period, in violation of the Labor Code and the applicable IWC Wage Orders.

29. Defendants never scheduled rest breaks for Plaintiffs and similarly situated employees and Plaintiffs and similarly situated employees were never authorized and permitted to take rest breaks. Further, Defendants failed to provide Plaintiffs and similarly situated employees with potable water, causing Plaintiffs and/or similarly situated employees to spend time obtaining potable water during their rest break. Defendants also failed to adopt and implement a practice of providing third rest breaks when Plaintiffs and similarly situated employees worked over 10 hours. Notwithstanding the above rest break violations, Defendants failed to compensate Plaintiffs and similarly situated employees with an additional hour of pay at their regular rate of pay for every day in which they suffered a rest period violation. Accordingly, Employer violated the Labor Code and the applicable IWC Wage Orders.

30. Plaintiffs are informed, believe, and thereon allege that Defendants failed to authorize or permit Plaintiffs and similarly situated employees from taking recovery periods. Specifically, Plaintiffs and similarly situated employees were required to work outdoors at various construction sites during hot days, including during summer, without access to shade or recovery periods to cool down and prevent heat illness. Defendants also failed to provide Plaintiffs and similarly situated employees with access to potable water at jobsites and suitable seating in violation of the Labor Code, IWC Wage Orders, and/or the California Occupational Safety and Health Act of 1973 ("OSHA").

31. Defendants also did not timely pay Plaintiffs and similarly situated employees all wages owed to them. Specifically, Defendants failed to pay Plaintiffs and similarly situated employees all wages

1 they earned between the 1st and 15th days of the month between the 16th and the 26th day of the month  
2 during which the work was performed, and all wages they earned between the 16th and the last day of the  
3 month between the 1st and 10th day of the following month.

4 32. Finally, Defendants failed to reimburse Plaintiffs and similarly situated employees for all  
5 expenses they incurred for work, including the use of their personal cellphones and tools required for  
6 work. For instance, Plaintiffs and similarly situated employees used their phones to clock in and out of  
7 work, to communicate with other staff and management during their shift, and for GPS to locate delivery  
8 sites. Despite this, Defendants failed to have any policy or practice to reimburse them for such use.  
9 Further, Plaintiffs and similarly situated employees were required to clean, wash, and iron their uniforms,  
10 which were the Defendants' property, without any reimbursement for the costs of cleaning, washing, and  
11 ironing. Also, Plaintiffs and similarly situated employees were required to purchase tools and/or other  
12 equipment without reimbursement in order to carry out their job duties.

13 33. As a result of these practices, Defendants failed to provide Plaintiffs and similarly situated  
14 employees with accurate wage statements. The wage statements did not accurately itemize Plaintiff's and  
15 similarly situated employees' total hours worked, all applicable hourly rates in effect during the pay period  
16 and the corresponding number of hours worked at each hourly rate, and the correct amount of gross and  
17 net wages.

18 34. At the time of Plaintiff's and similarly situated employees' termination and/or separation,  
19 Plaintiffs and similarly situated employees had regular and overtime, double time wages owing to them,  
20 meal and rest period premiums, vacation pay and paid sick time. To date, Defendants have not paid  
21 Plaintiffs and similarly situated employees these unpaid wages.

### 22 **PUBLIC POLICY CONSIDERATIONS**

23 35. Employers in the State of California violate employment and labor laws every day. Current  
24 employees are often afraid to assert their rights out of fear of direct or indirect retaliation. Former  
25 employees are fearful of bringing actions because they believe their former employers might damage their  
26 future endeavors through negative references and/or other means. Class actions provide similarly situated  
27 employees who are not named in the action with a type of anonymity that allows for the vindication of  
28 their rights while affording them privacy protections.

1 **CAUSES OF ACTION**

2 **FIRST CAUSE OF ACTION**  
3 **FAILURE TO PAY OVERTIME WAGES**  
4 **(As to all Defendants)**

5 36. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 35 as though fully  
6 set forth herein.

7 37. During the period Plaintiffs were employed by Defendants, Defendants were required to  
8 compensate Plaintiffs at one and one-half (1½) times the regular rate of pay for hours worked in excess of  
9 eight (8) hours per day and/or forty (40) hours per week, and two (2) times the regular rate of pay for  
10 hours worked in excess of twelve (12) hours per day. *See, e.g.,* IWC Wage Order No. 16, section (3)(A);  
11 Cal. Lab. Code §§ 510, 1194.

12 38. Plaintiffs and similarly situated employees worked in excess of eight (8) hours per day  
13 and/or forty (40) hours per week on several occasions while employed by Defendants. However,  
14 Defendants failed to compensate Plaintiffs and similarly situated employees for all overtime hours worked  
15 at their regular rate of pay.

16 39. Plaintiffs and similarly situated employees were not exempt from overtime protections  
17 employees under the California Wage Orders and Labor Code.

18 40. As a proximate result of Defendants' conduct, Plaintiffs and similarly situated employees  
19 have been damaged as stated in the section below entitled "DAMAGES," which is incorporated here to  
20 the extent pertinent as if set forth here in full.

21 **SECOND CAUSE OF ACTION**  
22 **FAILURE TO PAY MINIMUM WAGES**  
23 **(As to all Defendants)**

24 41. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 40 as though fully  
25 set forth herein.

26 42. For the period preceding the filing of this Complaint, Defendants were required to  
27 compensate Plaintiffs and similarly situated employees with at least California's applicable minimum for  
28 every hour worked. *See* MW-Order 2019; IWC Wage Order, No. 16, section 4(A); Cal. Lab. Code §  
1194.43. Plaintiffs were not exempt to the State's Minimum Wage Order. Defendants were aware of  
their obligation to pay the minimum wage for each hour worked but failed to do so.

43. As a proximate result of Defendants' conduct, Plaintiffs and similarly situated employees have been damaged as stated in the section below entitled "DAMAGES," which is incorporated here to the extent pertinent as if set forth here in full.

**THIRD CAUSE OF ACTION**  
**MEAL PERIOD VIOLATIONS**  
**(As to all Defendants)**

44. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 43 as though fully set forth herein.

45. An employer must provide an employee a meal period in accordance with the applicable Wage Order, and California Labor Code sections 226.7 and 512.

46. California Labor Code sections 226.7 and 512 and IWC Wage Order No. 16, section 11(A) require an employer to provide an uninterrupted meal period of not less than thirty (30) minutes for each work period of more than five (5) hours.

47. Section 11 of the applicable IWC Wage Orders state that “[u]nless the employee is relieved of all duty during a 30-minute meal period, the meal period shall be considered an ‘on duty’ meal period and counted as time worked.”

48. Labor Code section 226.7(b) and the IWC Wage Orders prohibit an employer from requiring any employee to work during a meal period mandated by any California statute, regulation, standard or order. If an employer fails to provide an employee with a meal period in accordance with state law, Labor Code section 226.7(c) and the IWC Wage Orders require that the employer pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal period is noncompliant.

49. California Labor Code section 512 and Wage Order No. 16 section 11(B) further provide that employers may not employ employees for a work period for more than ten (10) hours per day without providing the employee with a second meal period of at least thirty (30) minutes. However, if the total hours worked is no more than twelve (12) hours, the second meal period may be waived so long as there was no waiver as to the first meal period. Employees are entitled to one (1) hour of pay at their regular rate of compensation for each meal period not provided.

50. Defendants employed Plaintiffs and similarly situated employees for periods of more than

1 five (5) hours without providing meal breaks of at least thirty (30) minutes or a second meal period of at  
2 least thirty (30) minutes when Plaintiffs and similarly situated employees worked more than ten (10) hours  
3 in a day. Defendants also failed to allow Plaintiffs and similarly situated employees to take their first meal  
4 period before the completion of their fifth hour of work and failed to allow Plaintiffs and similarly situated  
5 employees to take their second meal period before the completion of their tenth hour of work. Plaintiffs  
6 and similarly situated employees did not waive their rights to all meal periods throughout their  
7 employment.

8 51. Defendants further failed to pay Plaintiffs and similarly situated employees the applicable  
9 meal period premiums for any such missed meal breaks.

10 52. Plaintiffs are informed, believe, and thereon allege that Class Members did not voluntarily  
11 waive their meal periods.

12 53. Plaintiffs are informed, believes, and thereon allege that Defendants, through their conduct  
13 described herein, have committed an “intentional theft of wages in an amount greater than nine hundred  
14 fifty dollars (\$950) from any one employee, or two thousand three hundred fifty dollars (\$2,350) in the  
15 aggregate from two or more employees...in any consecutive 12-month period” within the meaning of  
16 California Penal Code section 487m. Specifically, Defendants have intentionally deprived Plaintiffs and  
17 similarly situated employees of wages, as defined in Labor Code section 200, gratuities, as defined in  
18 Labor Code section 350, benefits, or other compensation, by unlawful means, with the knowledge that the  
19 wages, gratuities, benefits, or other compensation is due to Plaintiffs and similarly situated employees  
20 under the law Plaintiffs is informed, believe, and thereon allege that meal period premiums are wages,  
21 gratuities, benefits, or other compensation within the meaning of California Penal Code section 487m.  
22 Plaintiffs and the similarly situated employees he seeks to represent are thus entitled to recover from  
23 Defendants treble damages and costs, including reasonable attorneys’ fees, pursuant to California Penal  
24 Code section 496(c).

25 54. As a proximate result of Defendants’ conduct, Plaintiffs and similarly situated employees  
26 have been damaged as stated in the section below entitled “DAMAGES,” which is incorporated here to  
27 the extent pertinent as if set forth here in full.  
28

**FOURTH CAUSE OF ACTION**  
**REST PERIOD VIOLATIONS**  
**(As to all Defendants)**

55. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 54 as though fully set forth herein.

56. An employer must provide an employee a rest period in accordance with the applicable Wage Order and California Labor Code section 226.7.

57. California Labor Code section 226.7 and Wage Order No. 16, section 12(A) require an employer to provide a rest period of not less than ten (10) minutes for each work period of more than four (4) hours or a major fraction thereof.

58. Section 12 of the applicable IWC Wage Order provides in relevant part that:

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

59. Plaintiffs alleges that Defendants failed to authorize and permit Plaintiffs and similarly situated employees to take paid rest periods of at least ten (10) minutes for each work period that they worked more than four (4) hours or a major fraction thereof.

60. Defendants further failed to pay Plaintiffs and similarly situated employees the applicable rest period premiums for any such missed rest periods.

61. As a direct and proximate result of Defendants' unlawful conduct, as set forth herein, Plaintiffs and Class Members have sustained and continue to sustain damages, including loss of earnings, in an amount to be established at trial plus prejudgment interest pursuant to statute. To the extent such



unpaid premiums or rest period violations are deemed unpaid wages, Plaintiffs will also seek attorneys' fees and costs pursuant to statute.

62. Plaintiffs is informed, believes, and thereon alleges that Defendants, through their conduct described herein, have committed an "intentional theft of wages in an amount greater than nine hundred fifty dollars (\$950) from any one employee, or two thousand three hundred fifty dollars (\$2,350) in the aggregate from two or more employees...in any consecutive 12-month period" within the meaning of California Penal Code section 487m. Specifically, Defendants have intentionally deprived Plaintiffs and Class Members of wages, as defined in Labor Code section 200, gratuities, as defined in Labor Code section 350, benefits, or other compensation, by unlawful means, with the knowledge that the wages, gratuities, benefits, or other compensation is due to Plaintiffs and Class Members under the law Plaintiffs is informed, believes, and thereon alleges that rest period premiums are wages, gratuities, benefits, or other compensation within the meaning of California Penal Code section 487m. Plaintiffs and the Class Members he seeks to represent are thus entitled to recover from Defendants treble damages and costs, including reasonable attorneys' fees, pursuant to California Penal Code section 496(c).

63. As a proximate result of Defendants' conduct, Plaintiffs and similarly situated employees have been damaged as stated in the section below entitled "DAMAGES," which is incorporated here to the extent pertinent as if set forth here in full.

**FIFTH CAUSE OF ACTION**  
**WAGE STATEMENT VIOLATIONS**  
**(As to all Defendants)**

64. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 64 as though fully set forth herein.

65. Pursuant to California Labor Code section 226(a), an employer must provide an itemized statement to an employee, semimonthly or at the time of each payment of wages, showing:

*(1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and*

1 *the last four digits of his or her social security number or an employee*  
2 *identification number other than a social security number, (8) the name*  
3 *and address of the legal entity that is the employer and, if the employer is*  
4 *a farm labor contractor, as defined in subdivision (b) of Section 1682, the*  
5 *name and address of the legal entity that secured the services of the*  
6 *employer, and (9) all applicable hourly rates in effect during the pay*  
7 *period and the corresponding number of hours worked at each hourly rate*  
8 *by the employee. The deductions made from payment of wages shall be*  
9 *recorded in ink or other indelible form, properly dated, showing the*  
10 *month, day, and year, and a copy of the statement and the record of the*  
11 *deductions shall be kept on file by the employer for at least three years at*  
12 *the place of employment or at a central location within the State of*  
13 *California.*

14 66. Labor Code section 226(e)(1) authorizes an employee suffering injury as a result of a  
15 knowing and intentional failure by an employer to provide an accurate itemized wage statement to recover  
16 the greater of all actual damages or \$50 for the initial pay violation and \$100 for each violation in a  
17 subsequent pay period, not to exceed an aggregate penalty of \$4,000 per employee, in addition to an award  
18 of costs and attorneys' fees.

19 67. Section 7 of the IWC Wage Orders requires Defendants to maintain time records showing,  
20 among other things, when the employee begins and ends each work period, meal periods taken, and total  
21 daily hours worked in an itemized wage statement, and must show all deductions and reimbursements  
22 from payment of wages, and accurately report total hours worked by Plaintiffs and similarly situated  
23 employees. Plaintiffs are informed, believe, and thereon allege that Defendants have knowingly and  
24 intentionally failed to comply with the IWC Wage Orders.

25 68. Plaintiffs allege that Defendants intentionally and knowingly failed to provide an itemized  
26 statement or failed to provide an accurate and complete itemized statement showing the requirements set  
27 forth in California Labor Code section 226(a). Specifically, Defendants did not accurately itemize all  
28 applicable hourly rates in effect during the pay period, all regular, overtime and double time hours worked  
and corresponding rates of pay, gross and net wages earned, and the correct entity name and address on  
wage statements, among other things, making it difficult for Plaintiffs and similarly situated employees to  
determine whether they were paid correctly for all hours worked, which deductions were made, and the  
extent of any underpayment. Plaintiffs have had to file this lawsuit in order to determine the extent of the  
underpayment of wages, thereby causing Plaintiffs to incur expenses and lost time. Plaintiffs would not  
have had to engage in these efforts and incur these costs had Defendants provided the accurate wages

1 earned. This has also delayed Plaintiffs' ability to demand and recover the underpayment of wages from  
2 Defendants. Defendants' violations of Labor Code section 226(a) prevented Plaintiffs and similarly  
3 situated employees from knowing, understanding and disputing the wages paid to them, and resulted in  
4 an unjustified economic enrichment to Defendants.

5 69. Plaintiffs and similarly situated employees were not able to promptly and easily determine  
6 their total hours worked from their paystubs alone. Additionally, Plaintiffs and similarly situated  
7 employees suffered confusion over whether they received all wages owed and were prevented from  
8 effectively challenging information on their wage statements.

9 70. Plaintiffs and similarly situated employees are therefore entitled to the damages and  
10 penalties provided for under Labor Code section 226(e).

11 71. Plaintiffs and Class Members are also entitled to injunctive relief under Labor Code section  
12 226(h), compelling Defendants to comply with Labor Code section 226, and seek the recovery of  
13 attorneys' fees and costs incurred in obtaining this injunctive relief.

14 72. As a proximate result of Defendants' conduct, Plaintiffs and similarly situated employees  
15 have been damaged as stated in the section below entitled "DAMAGES," which is incorporated here to  
16 the extent pertinent as if set forth here in full.

17 **SIXTH CAUSE OF ACTION**  
18 **WAITING TIME PENALTIES**  
19 **(As to all Defendants)**

20 73. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 72 as though fully  
21 set forth herein.

22 74. An employer must pay an employee who is terminated all unpaid wages immediately upon  
23 termination. *See* Cal. Lab. Code § 201.

24 75. An employer must pay an employee who resigns all unpaid wages within seventy-two (72)  
25 hours of their resignation. *See* Cal. Lab. Code § 202.

26 76. At all relevant times, Defendants had a duty to comply with Labor Code sections 201, 202,  
27 and 203, and the applicable IWC Wage Orders and California Code of Regulations. Defendants failed to  
28 comply with these final paycheck requirements with respect to Plaintiffs and similarly situated employees.

1           77.     Plaintiffs and similarly situated employees did not receive all wages, including minimum  
2 and overtime wages, meal and rest period premiums, or all sick leave pay owed at their termination or  
3 within the required time after their separation from employment.

4           78.     An employer who willfully fails to pay an employee wages in accordance with California  
5 Labor Code sections 201 and/or 202 must pay the employee a waiting time penalty of up to thirty (30)  
6 days. *See* Cal. Lab. Code § 203.

7           79.     Defendants knew of their obligation to pay Plaintiff's and similarly situated employees'  
8 their final wages when their employment terminated. Indeed, Defendants had knowledge that Plaintiffs  
9 and similarly situated employees weren't paid all their final wages. Defendants had knowledge that their  
10 meal and rest period policies and practices failed to authorize and permit all meal and rest period owed,  
11 which resulted in missed meal and rest periods. Defendants also had knowledge that they were paying  
12 Plaintiffs' and similarly situated employees' multiple different rates of pay but failed to take them into  
13 account for the purpose of calculating Plaintiff's and similarly situated employees' regular rates of pay.  
14 Such conduct shows Defendants had knowledge of earned, but unpaid wages at the time of separation, yet  
15 Defendants still refused to pay the remaining wages owed.

16           80.     As a proximate result of Defendants' conduct, Plaintiffs and similarly situated employees  
17 have been damaged and deprived of their wages and thereby seek their daily rate of pay multiplied by  
18 thirty (30) days for Defendants' failure to pay all wages due.

19                                   **SEVENTH CAUSE OF ACTION**  
20                                   **FAILURE TO REIMBURSE EXPENSES**  
                                         **(As to all Defendants)**

21           81.     Plaintiffs incorporates by reference and re-alleges paragraphs 1 through 80 as though fully  
22 set forth herein.

23           82.     California Labor Code section 2802(a) states that "An employer shall indemnify his or her  
24 employee for all necessary expenditures or losses incurred by the employee in direct consequence of the  
25 discharge of his or her duties, or of his or her obedience to the directions of the employer, even though  
26 unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

27           83.     Labor Code section 2802(b) authorizes employees to recover in a court action interest  
28 which shall accrue from the date on which the employee incurred the necessary expenditure or loss. Labor

1 Code section 2802(c) authorizes employees, who to enforce their right to reimbursements under Labor  
2 Code section 2802, to also recover attorneys' fees and costs.

3 84. Defendants required Plaintiffs and similarly situated employees to use their personal  
4 phones and vehicles for work purposes but failed to reimburse them for such use. For example, Plaintiffs  
5 and similarly situated employees were required to use their personal cell phones to discuss work-related  
6 matters with Defendants' representatives, to download Defendants required timekeeping phone  
7 application, and for other work purposes without any reimbursement. Further, Plaintiffs and similarly  
8 situated employees were required to clean, wash, and iron their uniforms, which were the Defendants'  
9 property, without any reimbursement for the costs of cleaning, washing, and ironing. Also, Plaintiffs and  
10 similarly situated employees were required to purchase tools and/or other equipment without  
11 reimbursement in order to carry out their job duties.

12 85. As a proximate result of Defendants' conduct, Plaintiffs and similarly situated employees  
13 have been damaged as stated in the section below entitled "DAMAGES," which is incorporated here to  
14 the extent pertinent as if set forth here in full.

15 **EIGHTH CAUSE OF ACTION**  
16 **UNFAIR COMPETITION**  
**(As to OUTBACK, INC. and DOES 1 to 100)**

17 86. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 85 as though fully  
18 set forth herein.

19 87. Unfair competition shall mean and include any unlawful, unfair or fraudulent business act  
20 or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1  
21 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code. *See*  
22 California Business and Professions ("B&P") Code § 17200.

23 88. Defendants' conduct, as alleged herein, has been and continues to be unfair, unlawful and  
24 harmful to Plaintiffs, Class Members, and Defendants' competitors. Plaintiffs seeks to enforce important  
25 rights affecting the public interest within the meaning of California Code of Civil Procedure section  
26 1021.5.

1           89. Plaintiffs and similarly situated employees were not paid all wages owed, including  
2 minimum and overtime wages, and meal and rest period premiums, or reimbursed for business expenses,  
3 during their employment or any time thereafter.

4           90. Plaintiffs further allege that such actions and/or conduct constitute a violation of the  
5 California Unfair Competition Law (“UCL”) (Business and Professions Code 17200 *et seq.*) pursuant to  
6 *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000).

7           91. As a direct and legal result of the Defendants’ conduct, as alleged herein, pursuant to the  
8 UCL (including B&P Code §17203), Plaintiffs and similarly situated employees are entitled to restitution,  
9 including, but not limited to, interest and penalties pursuant to Business & Professions Code sections  
10 17203, 17208, violations of California Labor Code sections 204, 206, 210, 218, 221, 223, 224, 227.3,  
11 226.7, 246, 510, 512, 558, 1182.12, 1194, 1194.2, 1197, 1198, and the applicable IWC Wage Orders and  
12 California Code of Regulations, all in an amount as yet unascertained but subject to proof at trial, for four  
13 (4) years from the filing of this Action. Defendants also violated the law in the following respects:

- 14           a. Failing to provide compliant meal periods or compensation in lieu thereof in violation  
15           of Labor Code sections 226.7 and 512;
- 16           b. Failing to authorize or permit rest breaks and/or provide compensation in lieu thereof  
17           in violation of Labor Code section 226.7;
- 18           c. Failing to provide recovery periods without paying Plaintiffs and similarly situated  
19           employees premium wages for every day in which a recovery period was not authorized  
20           or permitted in violation of Labor Code section 226.7;
- 21           d. Failure to provide suitable seating and potable water in violation of Labor Code  
22           sections 1198, 2441, and IWC Wage Order 16-2001.
- 23           e. Intentionally failing to provide Plaintiffs and similarly situated employees with  
24           accurate itemized wage statements in violation of Labor Code section 226;
- 25           f. Failing to timely pay all earned wages to Plaintiffs and similarly situated employees  
26           upon separation of employment in violation of Labor Code sections 201, 202, and 203;
- 27           g. Failing to reimburse Plaintiffs and similarly situated employees all necessary business  
28           expenses in violation of Labor Code sections 2800 and 2802; and



1 h. Violations of the IWC Wage Orders for the same conduct above.

2 92. Defendants' course of conduct, acts, and practices in violation of California law mentioned  
3 above each constitute a separate and independent violation of the UCL. Defendants' conduct described  
4 herein violates the policy or spirit of such laws or otherwise significantly threatens or harms competition.  
5 The substantial harm to Plaintiffs and similarly situated employees in being wrongfully denied earned  
6 wages, meal and rest periods, premium pay, and reimbursements outweighs the utility, if any, of  
7 Defendants' policies or practices and, therefore, Defendants' actions described herein constitute an unfair  
8 business practices or acts within the meaning of the UCL.

9 93. Plaintiffs further brings this cause of action on behalf of the proposed Class, seeking  
10 statutory and injunctive relief to stop the misconduct of Defendants, as complained herein, and to compel  
11 restitution and disgorgement of all profits (i.e., unpaid wages, reimbursements, and premiums, etc.)  
12 obtained by Defendants through the unfair and unlawful business practices described herein pursuant to,  
13 *inter alia*, Business and Professions Code sections 17202, 17203, and 17208. Under the circumstances  
14 alleged, it would be inequitable and result in a miscarriage of justice for Defendants to continue to retain  
15 the property of Plaintiffs and similarly situated employees.

16 94. Defendants' failure to adopt and implement policies in accordance with and/or adhere to  
17 these laws, all of which are binding upon and burdensome to Defendants' competitors, engenders an unfair  
18 competitive advantage for Defendants against its competitors, thereby constituting an unfair business  
19 practice, as set forth in the UCL.

20 95. Pursuant to California Business and Professions Code section 17203, as a direct and  
21 proximate result of the unfair business practices of Defendants, Plaintiffs, individually, and on behalf of  
22 others similarly situated, are entitled to equitable and injunctive relief, against such unlawful practices in  
23 order to prevent future damage, for which there is no adequate remedy at law, and to avoid a multiplicity  
24 of lawsuits. Plaintiffs also seek an order enjoining Defendants to cease and desist from engaging in the  
25 practices described herein.

26 96. Plaintiffs and similarly situated employees also request any other such legal and equitable  
27 relief from Defendants' unlawful and willful conduct as the Court deems just and proper, including an  
28

injunction prohibiting Defendants from engaging in the unfair, unlawful, and/or fraudulent practices alleged in this Complaint.

97. As a result of Defendants' unlawful and unfair business practices, Plaintiffs and similarly situated employees are entitled to and seek other appropriate relief available under California Business & Professions Code sections 17200 *et seq.* Plaintiff, on behalf of himself and the Class, also seeks recovery of attorneys' fees and costs of this action to be paid by Defendants as provided by California Code of Civil Procedure section 1021.5.

98. Wherefore, Plaintiffs and the Class Members Plaintiffs seeks to represent request relief as described herein and below.

**NINTH CAUSE OF ACTION**  
**PRIVATE ATTORNEYS GENERAL ACT**  
**(As to all Defendants)**

99. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 98 as though fully set forth herein.

100. Plaintiffs have alleged to the Labor Commissioner that Defendants have violated the following provisions of the Labor Code in their dealings with him and other similarly situated current and former employees:

- Violation of Labor Code §§ 510, 1194; IWC Wage Order 16, § 3 (Failure to Pay Overtime Wages)
- Violation of Labor Code §§ 1194, 1197.1; IWC Wage Order 16, § 4 (Failure to Pay Minimum Wages)
- Violation of Labor Code §§ 226.7, 512 and Wage Order No. 16, §§ 11(A) and 11(B) (Failure to Provide Meal Periods or Pay Premiums in Lieu Thereof)
- Violation of Labor Code § 226.7 and Wage Order No. 16, § 12(A) (Failure to Provide Rest Periods or Pay Premiums in Lieu Thereof)
- Violation of Labor Code §§ 226, 226.3 (Failure to Provide Accurate Wage Statements)
- Violation of Labor Code §§ 201-203, 256 (Failure to Pay Final Wages)
- Violation of Labor Code § 2802 (Failure to Pay Reimbursements for Expenses)

- Violation of Labor Code §§ 558, 558.1 (Provisions Regulating Hours and Days of Work in Any Industrial Welfare Commission Order)
- Violation of Labor Code §§ 226.3, 1174 (Failure to Maintain Accurate Records)
- Violation of Labor Code §§ 246, 246.5, 248.5 (Failure to Provide Paid Sick Leave)
- Violation of Labor Code §§ 204, 210 (Untimely Payment of Wages)

101. Plaintiffs seeks civil penalties against Defendants as provided in the California Labor Code, or, if no civil penalty is provided, default penalties pursuant to California Labor Code section 2699(f)(2). Plaintiffs seeks civil penalties against Defendant pursuant to California Labor Code sections 2699(a) and 2699.3.

102. Pursuant to Labor Code sections 2699.3 and 2699.5, Plaintiffs may seek civil penalties for any alleged violation of the following provisions: subdivision (k) of section 96, sections 98.6, 201, 201.3, 201.5, 201.7, 202, 203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of section 213, sections 221, 222, 222.5, 223, and 224, paragraphs (1) to (5), inclusive, (7), and (9) of subdivision (a) of section 226, sections 226.7, 227, 227.3, 230, 230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of section 232, subdivision (c) of section 232.5, sections 233, 234, 351, 353, and 403, subdivision (b) of section 404, sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of section 1174, sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of section 1198.3, sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392, 1683, and 1695, subdivision (a) of section 1695.5, sections 1695.55, 1695.6, 1695.7, 1695.8, 1695.9, 1696, 1696.5, 1696.6, 1697.1, 1700.25, 1700.26, 1700.31, 1700.32, 1700.40, and 1700.47, sections 1735, 1771, 1774, 1776, 1777.5, 1811, 1815, 2651, and 2673, subdivision (a) of section 2673.1, sections 2695.2, 2800, 2801, 2802, 2806, and 2810, subdivision (b) of section 2929, and sections 3073.6, 6310, 6311, and 6399.7.

103. Defendants' conduct violates numerous Labor Code sections, including, but not limited to, the following:

- a. Violation of Labor Code sections 201-204, 206, 210, 221, 223, 227.3, 246, 510, 558, 1194, 1197, 1197.1, and 1198 for failure to timely pay all sick pay, vacation pay, and earned wages (including minimum, regular, overtime, and double time wages) owed to Plaintiffs and other similarly situated employees during employment and upon separation of employment;
- b. Violation of Labor Code sections 226.7 and 512 for failure to provide meal periods to Plaintiffs and/or other similarly situated employees and failure to pay premium wages for missed meal periods;
- c. Violation of Labor Code section 226.7 for failure to permit rest breaks to Plaintiffs and/or other similarly situated employees and failure to pay premium wages for missed rest periods;
- d. Violation of Labor Code sections 226 and 226.3 for failure to provide accurate itemized wage statements to Plaintiffs and/or other similarly situated employees;
- e. Violation of Labor Code sections 226, 226.3, 1174, and 1174.5 for failure to calculate sick pay at the regular rate of pay for the workweek in which Plaintiffs and/or other similarly situated employees used paid sick time, or by dividing the Plaintiffs and/or other similarly situated employees' total wages, not including overtime premium pay, by the Plaintiffs and/or other similarly situated employees' total hours worked in the full pay periods of the prior 90 days of employment, in violation of Labor Code Sections 246, 246.5, 247, 247.5, and 248.5 and the Healthy Workplaces, Healthy Families Act of 2014;
- f. Violation of Labor Code sections 233 and 234 for failure to permit Plaintiffs and/or similarly situated employees to use in any calendar year the employee's accrued and available sick leave entitlement;
- g. Violation of Labor Code sections 227.3 for failure to provide to Plaintiffs and/or similarly situated employees accrual of vacation wages and failure to pay to Plaintiffs and/or similarly situated employees vested vacation wages;
- h. Violation of Labor Code sections 221, 223, and 224 for secretly paying Plaintiffs and/or

1 similarly situated employees less than the statutory or contractual rate;

- 2 i. Violation of Labor Code sections 1174 and 1174.5 for failure to maintain accurate  
3 records regarding the employment of Plaintiffs and/or other similarly situated  
4 employees;
- 5 j. Violation of Labor Code sections 450, 2800, 2802, and 2804 for failure to reimburse  
6 business expenses to Plaintiffs and other similarly situated employees;
- 7 k. Violation of Labor Code section 432.5 for requiring Plaintiffs and/or other similarly  
8 situated employees or applicants for employment to agree, in writing, to terms or  
9 conditions which Defendants knew to be prohibited by law;
- 10 l. Violation of Labor Code sections 6400, 6401, 6401.7, 6402, and 6403 for failure to  
11 perform proper mold cleanup and remediation and water damage restoration after  
12 significant water intrusion at Defendants' worksite(s);
- 13 m. Violation of Labor Code Section 1198 and the applicable IWC Wage Order for failure  
14 to provide to Plaintiffs and/or other similarly situated employees an adequate supply of  
15 potable water, soap or other suitable cleansing agent, and single use towels for  
16 handwashing; and
- 17 n. Violation of Labor Code section 1199 for the foregoing Labor Code violations.

18 104. Labor Code section 226.3 provides: "[a]ny employer who violates subdivision (a) of  
19 Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per  
20 employee per violation in an initial citation and one thousand dollars (\$1,000) per employee for each  
21 violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction  
22 statement or fails to keep the records required in subdivision (a) of Section 226. The civil penalties  
23 provided for in this section are in addition to any other penalty provided by law."

24 105. Labor Code section 558(a) provides "[a]ny employer or other person acting on behalf of  
25 an employer who violates, or causes to be violated, a section of this chapter or any provision regulating  
26 hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil  
27 penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each  
28

1 pay period for which the employee was underpaid . . . (2) For each subsequent violation, one hundred  
2 dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid.”

3 106. Labor Code section 1174.5 provides a \$500 penalty for an employer’s failure to maintain  
4 accurate and complete payroll records showing the hours worked daily by and the wages paid to  
5 employees.

6 107. Labor Code section 1197.1 also provides “[a]ny employer or other person acting either  
7 individually or as an officer, agent, or employee of another person, who pays or causes to be paid to any  
8 employee a wage less than the minimum fixed by an applicable state or local law, or by an order of the  
9 commission shall be subject to a civil penalty . . . as follows: (1) For any initial violation that is  
10 intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for  
11 which the employee is underpaid . . . (2) For each subsequent violation for the same specific offense, two  
12 hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is  
13 underpaid regardless of whether the initial violation is intentionally committed.

14 108. As set forth above, Defendants have violated numerous provisions of the Labor Code  
15 regulating hours and days of work as well as the IWC Wage Orders. Accordingly, Plaintiffs also seeks  
16 the civil penalties set forth in Labor Code sections 226.3, 226.8, 558, 1174.5, and 1197.1 individually, on  
17 behalf of all aggrieved employees, and the State of California.

18 109. Plaintiffs are “aggrieved employees” because Plaintiffs were employed by the alleged  
19 violators and had one or more of the alleged violations committed against Plaintiffs, and therefore is  
20 properly suited to represent the interests of all other aggrieved employees.

21 110. Plaintiffs have exhausted the procedural requirements under Labor Code section 2699.3 as  
22 to Defendants and are therefore able to pursue a claim for penalties individually and on behalf of all other  
23 aggrieved employees under the PAGA. Plaintiffs are also entitled to attorneys’ fees and costs.

24 111. As a proximate result of Defendants’ conduct, Plaintiffs and similarly situated employees  
25 have been damaged as stated in the section below entitled “DAMAGES,” which is incorporated here to  
26 the extent pertinent as if set forth here in full.



**TENTH CAUSE OF ACTION**  
**FAILURE TO PAY ALL WAGES**  
**(As to All Defendants)**

112. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 111 as though fully set forth herein.

113. At all relevant times, Defendants had a duty to comply with Labor Code sections 204, 206, 210, 218, 221, 223, 224, 227.3, 246, 510, 558, 1182.12, 1194, 1194.2, 1197, 1198, 1811, 1815, and the applicable IWC Wage Orders and California Code of Regulations.

114. Labor Code section 204 and the IWC Wage Orders require timely payment of all wages owed on regularly scheduled paydays at least twice during each calendar month, on days designated in advance by the employer as the regular paydays. All wages earned in excess of the normal work period must be paid no later than the payday for the next regular payroll period.

115. Labor Code section 206 provides that in case of a dispute over wages, the employer shall pay, without condition and promptly under the Labor Code all wages conceded due, leaving to the employee all remedies he/she is otherwise entitled to as to any balance claimed.

116. Labor Code section 210 provides:

every person who fails to pay the wages of each employee as provided in Sections 201.3, 204, 204b, 204.1, 204.2, 204.11, 205, 205.5, and 1197.5, shall be subject to a penalty as follows: (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee. (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld. (b) The penalty shall either be recovered by the employee as a statutory penalty pursuant to Section 98 or by the Labor Commissioner as a civil penalty through the issuance of a citation or pursuant to Section 98.3.

117. Labor Code section 221 provides “[i]t shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.”

118. Labor Code section 223 provides “[w]here any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract.”

119. Labor Code section 224 prohibits any deduction from an employee’s wages which is not either authorized by the employee in writing or permitted by law.

1           120. Labor Code section 246 requires employers to provide and allow employees to use at least  
2 24 hours, or three days, of paid sick leave per year.

3           121. Labor Code section 227.3 requires employers to pay terminated employees for their unused  
4 paid vacation time at their final rate of pay.

5           122. At all times relevant, Labor Code section 510, and applicable sections of the California  
6 Code of Regulations and the IWC Wage Orders applied to Plaintiffs' work with Defendants and continue  
7 to apply to similarly situated employees' employment with Defendants. Labor Code section 510 and  
8 applicable provisions of the California Code of Regulations and IWC Wage Orders state that any work  
9 performed in excess of eight hours in a workday and/or 40 hours in a workweek must be paid at one and  
10 one-half times the employee's regular rate of pay. Any work performed in excess of 12 hours in a workday  
11 must be compensated at the rate of no less than twice the regular rate of pay for an employee.

12           123. Labor Code section 558 provides "[a]ny employer or other person acting on behalf of an  
13 employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours  
14 and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as  
15 follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period  
16 for which the employee was underpaid in addition to an amount to recover underpaid wages. (2) For each  
17 subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for  
18 which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (3)  
19 Wages recovered pursuant to this section shall be paid to the affected employee."

20           124. Labor Code section 1182.12 sets forth the minimum hourly wage that must be paid to all  
21 employees in California for all hours worked. Local minimum wage ordinances may provide for higher  
22 minimum wage rates that must be paid to employees for all hours worked in those locales where each  
23 local ordinance is in effect. Labor Code section 1197 affirms that it is unlawful to pay less than the state  
24 or local minimum wage, whichever is higher, for any hour of work.

25           125. Labor Code section 1194 provides that any employee receiving less than the legal  
26 minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a  
27 civil action the unpaid balance of the full amount of the minimum wage or overtime compensation,  
28 including interest thereon, reasonable attorney's fees, and costs of suit.

1           126. Labor Code section 1194.2 authorizes the recovery of liquidated damages in an amount  
2 equal to the wages unlawfully unpaid and interest thereon for unpaid wage violations.

3           127. Labor Code section 1197 provides that the minimum wage for employees fixed by the  
4 commission is the minimum wage to be paid to the employees, and the payment of a less wage than  
5 minimum so fixed is unlawful.

6           128. Labor Code section 1198 prohibits employers from employing for longer hours or less  
7 favorable conditions than those set forth in the Labor Code, IWC Wage Orders, or as otherwise set by the  
8 Labor Commissioner.

9           129. Labor Code Section 1811 provides: “The time of service of any workman employed upon  
10 public work is limited and restricted to 8 hours during any one calendar day, and 40 hours during any one  
11 calendar week, except as hereinafter provided for under Section 1815.”

12           130. Labor Code Section 1815 provides in relevant part: “work performed by employees of  
13 contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public  
14 work upon compensation for all hours worked in excess of 8 hours per day at not less than 1 1/2 times the  
15 basic rate of pay.”

16           131. The failure to pay at least minimum wages to Plaintiffs and similarly situated employees  
17 for each and every hour worked violates Labor Code sections 1182.11-1812.12, 1194, 1194.2, and 1197;  
18 the applicable IWC wage order section 4; and Business & Professions Code.

19           132. The failure to pay designated wages to Plaintiffs and similarly situated employees for each  
20 and every hour worked violates Labor Code sections 221 and 223; the applicable IWC wage order section  
21 3; and Business & Professions Code.

22           133. Plaintiffs are informed, believe, and thereon allege that Plaintiffs and similarly situated  
23 employees regularly worked in excess of eight (8), 10, and/or 12 hours per workday and over 40 hours  
24 per workweek and were not paid all wages at their proper rate of pay for overtime, double time, sick pay,  
25 vacation pay, and meal and rest period premiums, and off-the-clock work including due to rounding,  
26 among other things.

27           134. Plaintiffs are informed, believe, and thereon allege that during the Class Period, Defendant  
28 failed to pay Plaintiffs and Class Members all wages for hours worked (including sick pay, vacation pay,

1 prevailing wage pay, and minimum, regular, overtime, and double time wages) by failing to accurately  
2 record all time worked, time shaving, auto-deducting missed or short meal periods, rounding time and  
3 meal period punches, and requiring off-the-clock work without compensation, among other things.

4 135. As a direct and proximate result of Defendants' unlawful conduct, as set forth herein,  
5 Plaintiffs and similarly situated employees have sustained and continue to sustain damages, including loss  
6 of earnings from minimum, regular, overtime, and double time compensation due, in an amount to be  
7 established at trial, plus prejudgment interest, attorneys' fees, and costs pursuant to statute.

8 136. Plaintiffs are informed, believe, and thereon allege that Defendants, through their conduct  
9 described herein, have committed an "intentional theft of wages in an amount greater than nine hundred  
10 fifty dollars (\$950) from any one employee, or two thousand three hundred fifty dollars (\$2,350) in the  
11 aggregate from two or more employees...in any consecutive 12-month period" within the meaning of  
12 California Penal Code section 487m. Specifically, Defendants have intentionally deprived Plaintiffs and  
13 similarly situated employees of wages, as defined in Labor Code section 200, gratuities, as defined in  
14 Labor Code section 350, benefits, or other compensation, by unlawful means, with the knowledge that the  
15 wages, gratuities, benefits, or other compensation is due to Plaintiffs and similarly situated employees  
16 under the law. Plaintiffs and the similarly situated employees he seeks to represent are thus entitled to  
17 recover from Defendants treble damages and costs, including reasonable attorneys' fees, pursuant to  
18 California Penal Code section 496(c).

19 137. Wherefore, Plaintiffs and the similarly situated employees Plaintiffs seek to represent  
20 request relief as described herein and below.

21 **ELEVENTH CAUSE OF ACTION**  
22 **FAILURE TO PROVIDE RECOVERY PERIODS**  
23 **(As to All Defendants)**

24 138. Plaintiffs incorporate by reference and re-allege paragraphs 1 through 137 as though fully  
25 set forth herein.

26 139. At all relevant times, Defendants had a duty to comply with Labor Code sections 226.7.

27 140. Labor Code section 226.7 requires employers to provide employees with a "recovery  
28 period" which means a cooldown period afforded an employee to prevent heat illness. If an employer fails

1 to provide a recovery period, then “the employer shall pay the employee one additional hour of pay at the  
2 employee’s regular rate of compensation for each workday that the . . . recovery period is not provided.”

3 141. Defendants did not implement a compliant recovery period policy or practice. Specifically,  
4 access to shade and recovery periods were not provided to Plaintiffs and similarly situated employees who  
5 performed construction work outdoors for Defendants during extremely hot days, especially during the  
6 summer. Consequently, Plaintiffs and similarly situated employees did not receive paid recovery periods  
7 and did not receive compensation in lieu thereof.

8 142. Defendants failed to pay Plaintiffs and similarly situated employees recovery period  
9 premiums for noncompliant recovery periods pursuant to Labor Code section 226.7 and the applicable  
10 IWC Wage Order.

11 143. As a result of Defendants’ failure to provide compliant recovery periods and pay recovery  
12 period premiums to Plaintiffs and similarly situated employees in accordance with the IWC Wage Orders  
13 and Labor Code sections 226.7, Plaintiffs and similarly situated employees suffered and continue to suffer  
14 a loss of wages and compensation.

15 144. Because Plaintiffs and similarly situated employees were and/or are entitled to such  
16 recovery periods or “premium pay” in lieu thereof, they are entitled to such payment per shift in an amount  
17 according to proof. To the extent such unpaid premiums are deemed unpaid wages, Plaintiffs will also  
18 seek pre- and post-judgment interest as provided by law at 10% per annum, in an amount according to  
19 proof.

20 145. Plaintiffs are informed, believe, and thereon allege that Defendants, through their conduct  
21 described herein, have committed an “intentional theft of wages in an amount greater than nine hundred  
22 fifty dollars (\$950) from any one employee, or two thousand three hundred fifty dollars (\$2,350) in the  
23 aggregate from two or more employees...in any consecutive 12-month period” within the meaning of  
24 California Penal Code section 487m. Specifically, Defendants have intentionally deprived Plaintiffs and  
25 similarly situated employees of wages, as defined in Labor Code section 200, gratuities, as defined in  
26 Labor Code section 350, benefits, or other compensation, by unlawful means, with the knowledge that the  
27 wages, gratuities, benefits, or other compensation is due to Plaintiffs and similarly situated employees  
28 under the law. Plaintiffs and the similarly situated employees they seek to represent are thus entitled to

1 recover from Defendants treble damages and costs, including reasonable attorneys' fees, pursuant to  
2 California Penal Code section 496(c).

3 146. Pursuant to Code of Civil Procedure section 1021.5, Plaintiffs will seek attorneys' fees and  
4 costs from Defendants in an amount subject to proof and approved by the Court.

5 **DAMAGES**

6 WHEREFORE Plaintiffs requests relief as follows:

- 7 1. A jury trial;
  - 8 2. As to the First Cause of Action:
    - 9 a. Wages in an amount to be proven at trial;
    - 10 b. Interest for the wages due pursuant to California Labor Code section 1194;
    - 11 c. For reasonable attorney's fees and costs incurred pursuant to California Labor  
12 Code section 1194;
  - 13 3. As to the Second Cause of Action:
    - 14 a. Wages in an amount to be proven at trial;
    - 15 b. Interest for the wages due pursuant to California Labor Code section 1194;
    - 16 c. For reasonable attorney's fees and costs incurred pursuant to California Labor  
17 Code section 1194;
    - 18 d. Liquidated damages pursuant to California Labor Code section 1194.2;
  - 19 4. As to the Third Cause of Action:
    - 20 a. Wages in an amount to be proven at trial;
    - 21 b. Attorney's fees, costs and interest pursuant to California Code of Civil Procedure  
22 section 1021.5;
  - 23 5. As to the Fourth Cause of Action:
    - 24 a. Wages in an amount to be proven at trial;
    - 25 b. Attorney's fees, costs and interest pursuant to California Code of Civil Procedure  
26 section 1021.5;
  - 27 6. As to the Fifth Cause of Action:
- 28



- a. Penalties as provided for in Labor Code section 226, including the greater of all actual damages or fifty dollars (\$50.00) for the initial pay period in which the violation occurred and one hundred dollars (\$100.00) per employee for each violation in the subsequent pay periods, but not to exceed four thousand dollars (\$4,000.00);
  - b. For reasonable attorney's fees and costs incurred pursuant to Labor Code section 226(e);
7. As to the Seventh Cause of Action:
  - a. An amount to be proven at trial;
  - b. For attorney's fees, interest, and costs pursuant to Labor Code section 2802(c);
8. As to the Eighth Cause of Action:
  - a. For restitution to Plaintiffs and Class Members of all money and property unlawfully acquired by Defendants through unfair or unlawful business practices pursuant to Business and Professions Code sections 17200 *et seq.*;
  - b. For an order requiring Defendants to restore and disgorge all funds to each employee acquired by means of any act or practice declared by this Court to be unlawful, unfair or fraudulent and, therefore, constituting unfair competition under Business and Professions Code sections 17200, *et seq.*;
  - c. For permanent injunctive relief described in the UCL cause of action;
9. As to the Ninth Cause of Action:
  - a. For civil penalties as provided in the Labor Code for each enumerated violation;
  - b. For those Labor Code sections where there is no civil penalty provided for their violation, the default penalty provided in Labor Code section 2699(f): for any initial violation, one hundred dollars (\$100) for each aggrieved employee per pay period; For any subsequent violation, two hundred dollars (\$200) for each aggrieved employee per pay period;
  - c. Reasonable attorney's fees and costs pursuant to Labor Code section 2699;

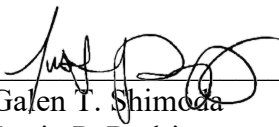
d. For any other remedies as allowed by law and/or deemed appropriate by the Court;

10. For such other and further relief as this Court may deem just and proper, including, but not limited to:

- a. Wages as proved at trial;
- b. Injunctive and Declaratory relief;
- c. Attorney's fees and costs as provided for by law; and for attorney's fees, costs of suit, including expert fees, and interest pursuant to Labor Code sections 218.6, 226, 1194, 2802 and California Code of Civil Procedure section 1021.5;
- d. Interest, and for prejudgment interest on all sums recovered pursuant to Labor Code section 218.6, California Civil Code sections 3287 and 3289, and applicable law.

Dated: November 7, 2024

**Shimoda & Rodriguez Law, PC**

By:   
Galen T. Shimoda  
Justin P. Rodriguez  
Renald Konini  
Attorneys for Plaintiff Gil

Dated: November 7, 2024

**Torres LLP**

By:   
David Alami  
Daniel J. Hyun  
Attorneys for Plaintiff Ayala

# Exhibit C



Shimoda Law Corp.  
9401 East Stockton Blvd.  
Suite #120  
Elk Grove, CA 95624  
Ph. (916) 525-0716  
Fax (916) 760-3733  
www.shimodalaw.com

October 21, 2021

**For Online Filing:**

Labor and Workforce Development Agency  
Attn. PAGA Administrator  
1515 Clay Street, Ste. 801  
Oakland, CA 94612

Re: *Jesse Gil v. Outback, Inc., et al.*

Dear Labor Commissioner,

As counsel for Jesse Gil ("Plaintiff"), I am writing to provide you and the following "employers" notice pursuant to California Labor Code section 2699.3:

Outback, Inc. (dba Outback Materials)  
4201 W. Shaw Avenue., Ste 106  
Fresno, CA 93722

David Curtis Lovett  
4201 W. Shaw Avenue., Ste 106  
Fresno, CA 93722

Jordan Lovett  
4201 W. Shaw Avenue., Ste 106  
Fresno, CA 93722

Mike Dunnagan  
4201 W. Shaw Avenue., Ste 106  
Fresno, CA 93722

We are setting forth the "facts and theories" to support each of the counts found within this complaint. Please notify us of your intent to investigate any or all of the claims alleged herein against Outback, Inc., David Curtis Lovett, Jordan Lovett, and Mike Dunnagan ("Defendants"). Should you decide not to investigate, we request that you allow us to bring the following action on behalf of Plaintiff and all Aggrieved Employees, pursuant to Labor Code section 2699(a). Specifically, Aggrieved Employees shall include, but are not limited to, the following: all individuals who have, or continue to, perform work for Defendants in California as hourly, non-exempt employees from one year prior to the date of this notice to the present. Plaintiff is clearly entitled to bring a Private Attorneys General Act ("PAGA") claim for civil penalties on behalf of these individuals pursuant to *Huff v. Securitas Security Services USA, Inc.*,



23 Cal.App.5th 745, 757 (2018) (finding a plaintiff has PAGA standing if affected by one of the alleged violations; the plaintiff need not have personally experienced all the violations pursued in PAGA action).

#### A. FACTS

Plaintiff worked for Defendants from approximately December 2017 to September 1, 2021, as hourly, non-exempt employee. Aggrieved Employees also worked for Defendants as non-exempt, hourly employees. Plaintiff and Aggrieved Employees performed work hauling and delivering concrete to and from public and private construction sites throughout central California.

Plaintiff and Aggrieved Employees worked on prevailing wage jobs, as well as non-prevailing wage jobs for Defendants. Sometimes Plaintiff and Aggrieved Employees would work non-prevailing wage jobs and prevailing wage jobs in the same day and/or the same workweek. Although Defendants paid Plaintiff and Aggrieved Employees some prevailing wages owed, Defendants failed to pay Plaintiff and Aggrieved Employees all prevailing wages they were entitled to. There were also numerous instances where Defendants only paid Plaintiff and Aggrieved Employees their non-prevailing wage rates rather than the correct prevailing wage rates even though Plaintiff and Aggrieved Employees were working on government funded projects and construction worksites. Plaintiff is informed and believes that Defendants were aware that the work performed was subject to prevailing wage law and that Defendants lacked any good faith basis for failing to pay the prevailing wage rates, including overtime based on the prevailing wage rates.

In addition to failing to pay the prevailing wage rate, Plaintiff and Aggrieved Employees were not paid minimum or overtime wages for all hours worked. For instance, per company policy, Plaintiff and Aggrieved Employees were required to arrive prior to the start of their shifts to clean and prepare their vehicles and were not paid for this time. Additionally, there were instances when Plaintiff and Aggrieved Employees would have to attend mandatory meetings, drive trucks in need of repair to the repair shops, and complete post-shift paperwork and were, similarly, not paid for this time.

Plaintiff and Aggrieved Employees worked over eight (8) hours in a day and/or forty (40) hours in a week on numerous occasions and were not properly paid overtime wages for this time. By failing to account for all hours worked, as described above, and by failing to account for the value of all payments made when calculating the regular rate of pay, including blending prevailing wage and non-prevailing wage earnings in the same workweek, Defendants failed to pay Plaintiff and Aggrieved Employees all overtime wages owed, all meal and rest period premiums owed, and sick leave wages due.



Similarly, when Plaintiff and Aggrieved Employees were paid multiple different base wage rates, for instance, driving the Slider truck, Defendants failed to consistently incorporate this higher hourly wage rate into the regular rate of pay for the purposes of calculating overtime, meal and rest periods premiums, and sick leave pay.

In addition to not being correctly paid overtime and prevailing wages, Plaintiff and Aggrieved Employees were sometimes not paid overtime wages when they worked more than eight (8) hours in a day at more than one project location. For instance, Defendants would often have Plaintiff and Aggrieved Employees work on both a prevailing wage project and private project in a single day. Even though the second project would often run into overtime, Plaintiff and Aggrieved Employees would, nonetheless, only be paid for the second project at their regular, base rate of pay. These hours were recorded on separate time sheets and not aggregated for daily or weekly overtime purposes.

Defendants, further, did not authorize and permit Plaintiff and Aggrieved Employees to take a full, uninterrupted thirty (30) minute meal periods every five (5) hours and ten (10) minute rest periods every four (4) hours or major fraction thereof. Indeed, it was Defendants' policy not to provide drivers with ten (10) minute rest breaks, and the policy they did have for rest breaks was defective on its face because it only permitted rest breaks every four (4) hours for non-drivers.

In addition to missing a vast majority of their rest breaks, due to the demands of the job and directives of dispatchers and managers, Plaintiff and Aggrieved Employees often missed their first lunch breaks, or, in this least, their lunch breaks were late and/or cut short. In fact, Plaintiff and Aggrieved Employees were directed by upper management and training personnel to log a meal break even when they were not able to take one. Not only did Defendants' end of year bonus payments penalize Plaintiff and Aggrieved Employees for missed breaks, Plaintiff and Aggrieved Employees would get in trouble with management for not logging meal breaks even when they were unable to take them. Like first meal periods, Plaintiff and Aggrieved Employees were also regularly deprived of the ability to take a second meal periods or third rest periods when they work over ten (10) or twelve (12) hours in a day.

Defendants also did not timely pay Plaintiff and Aggrieved Employees all wages owed to them. Specifically, Defendants failed to pay Plaintiff and Aggrieved Employees all wages they earned between the 1st and 15th days of the month between the 16th and the 26th day of the month during which the work was performed, and all wages they earned between the 16th and the last day of the month between the 1st and 10th day of the following month.

Finally, Defendants failed to reimburse Plaintiff and Aggrieved Employees for all expenses they incurred for work, including the use of their personal cellphones and tools required for work. For instance, Plaintiff and Aggrieved Employees used their phones to clock in and out of work, to communicate with other staff and management during their shift, and for





GPS to locate delivery sites. Despite this, Defendants failed to have any policy or practice to reimburse them for such use.

As a result of these practices, Defendants failed to provide Plaintiff and Aggrieved Employees with accurate wage statements. The wage statements did not accurately itemize Plaintiff's and Aggrieved Employees' total hours worked, all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate, and the correct amount of gross and net wages.

At the time of Plaintiff's and Aggrieved Employees' termination and/or separation, Plaintiff and Aggrieved Employees had regular and overtime wages owing to them, meal and rest period premiums, and paid sick time. To date, Defendants have not paid Plaintiff and Aggrieved Employees these unpaid wages.

David Curtis Lovett, Jordan Lovett, and Mike Dunnagan are the owners, directors, officers, and/or managing agents of Outback, Inc., and caused each and every one of the aforementioned Labor Code violations.

## **B. ALLEGATIONS AND CHARGES**

### **Count 1 – Violation of Labor Code §§ 510, 1194; IWC Wage Order 16, § 3 (Failure to Pay Overtime Wages)**

Labor Code sections 510 and 1194 require employers to pay employees 1 ½ times their regular rate of pay for any work in excess of eight (8) hours in one workday and any work in excess of forty (40) hours in any one workweek. Employers must also pay employees 1 ½ times their regular rate of pay for the first eight (8) hours worked on the seventh day of work in any one workweek. Finally, employers must pay employees 2 times their regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh day of work in any one workweek. As stated above, Plaintiff and Aggrieved Employees worked over eight (8) hours per day and forty (40) hours per week and were not paid all overtime wages owed. Plaintiff and all Aggrieved Employees are entitled to recover all unpaid overtime wages. Failure to pay such wages is against the law.

### **Count 2 – Violation of Labor Code §§ 1194, 1197.1; IWC Wage Order 16, § 4 (Failure to Pay Minimum Wages)**

During the period Plaintiff and Aggrieved Employees were employed by Defendants they were entitled to be paid at least the State's minimum wage rate for each hour that they worked. *See, e.g.*, IWC Wage Order MW-2019; IWC Wage Order No. 16, § (4); Cal. Lab. Code §§ 1194, 1197.1. For the reasons stated above, Defendants did not pay Plaintiff and Aggrieved



Employees for all hours worked. Thus, Plaintiff and Aggrieved Employees were not paid at least the applicable state minimum wage for those hours worked. This is against the law.

**Count 3 - Violation of Labor Code §§ 226.7, 512 and Wage Order No. 16, §§ 11(A) and 11(B) (Failure to Provide Meal Periods or Pay Premiums in Lieu Thereof)**

Labor Code section 226.7 and Wage Order No. 16, section 11(A) require employers to provide employees meal periods of thirty (30) minutes per five (5) hours worked, which is to be taken before the completion of the fifth hour. Labor Code section 512 and Wage Order No. 16, section 11(B) further provide that employers may not employ employees for a work period of more than ten (10) hours per day without providing the employee with a second meal period of thirty (30) minutes; however, if the total hours worked is no more than twelve (12) hours, the second meal period may be waived so long as there was no waiver as to the first meal period. For the reasons stated above, Plaintiff and Aggrieved Employees were not authorized and permitted to take legally compliant meal periods pursuant to California law. Defendants also failed to pay all meal period premiums owed for their failure to provide meal periods. This was in violation of the law.

**Count 4 – Violation of Labor Code § 226.7 and Wage Order No. 16, § 12(A) (Failure to Provide Rest Periods or Pay Premiums in Lieu Thereof)**

Labor Code section 226.7 and Wage Order No. 16, section 12(A) require employers to provide employees paid off-duty rest periods of ten (10) minutes per four (4) hours or major fraction thereof worked. For the reasons stated above, Plaintiff and Aggrieved Employees were not authorized and permitted to take legally compliant rest periods pursuant to California law. Defendants also failed to pay any rest period premiums for their failure to provide rest periods. This was in violation of the law.

**Count 5 – Violation of Labor Code §§ 226, 226.3 (Failure to Provide Accurate Wage Statements)**

Labor Code section 226 requires employers to furnish to employees with “an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, . . . (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer . . . and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee . . .” For



the reasons stated above, Defendants failed to comply with these requirements with respect to Plaintiff and Aggrieved Employees. This is in violation of the law.

**Count 6 – Violation of Labor Code §§ 201-203, 256 (Failure to Pay Final Wages)**

Labor Code sections 201-203 require that all wages, including minimum and overtime wages, meal and rest period premiums, and paid sick time, be paid to employees upon separation and/or termination of employment. Here, for the reasons stated above, Plaintiff and Aggrieved Employees did not receive all final wages due and owing to them at the time of termination or seventy-two (72) hours thereafter as required by Labor Code sections 201-203. This is in violation of the law.

**Count 7 – Violation of Labor Code § 2802 (Failure to Pay Reimbursements for Expenses)**

Labor Code section 2802(a) states that “An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.” Defendants failed to pay any reimbursements for cell phone use and the use of personal tools by Plaintiff and Aggrieved Employees. This was in violation of the law.

**Count 8 – Violation of Labor Code §§ 558, 558.1 (Provisions Regulating Hours and Days of Work in Any Industrial Welfare Commission Order)**

Labor Code section 558 states that it is unlawful for any employer, or other person acting on behalf of an employer, to violate or cause to be violated any of sections 500 to 558.1 of the Labor Code or any order of the Industrial Welfare Commission. Similarly, Labor Code section 558.1 states that it is unlawful for any employer or other person acting on behalf on an employer to violate, or cause to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, as well as Sections 203, 226, 226.7, 1193.6, 1194, or 2802 of the Labor Code. As described above, Defendants, by and through Defendants’ agents, violated Plaintiff and Aggrieved Employees’ rights provided for under Labor Code sections 558 and 558.1 as well as the incorporated Wage Orders and incorporated statutes therein. David Curtis Lovett, Jordan Lovett, and Mike Dunnagan were officers, directors, shareholders, and/or managing agents of Defendants responsible for the violations stated herein as they were in a position of authority with the power and responsibility to monitor, institute, and/or modify the unlawful practices, but chose to ratify them instead. This is against the law.



**Count 9 – Violation of Labor Code §§ 226.3, 1174 (Failure to Maintain Accurate Records)**

Labor Code section 226.3 provides that any employer who fails to maintain records required by Labor Code section 226(a) or provide records required by 226(a) shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial citation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation. Labor Code section 1174(d) provides that employers must keep and maintain accurate payroll records showing the hours worked daily by, and the wages paid to, employees. Defendants failed to maintain the accurate records required by law and, instead, maintained incomplete, inaccurate records regarding Plaintiff and Aggrieved Employees' wage records and hours worked. This was against the law.

**Count 10 – Violation of Labor Code §§ 246, 246.5, 248.5 (Failure to Provide Paid Sick Leave)**

Labor Code sections 246, *et seq.*, mandate that employers must provide California employees, who work thirty (30) or more days within a year for the employer, paid sick leave of at least one (1) hour for every thirty (30) hours worked that begins to accrue at the commencement of employment. An employer may use a different accrual method, other than providing one hour per every 30 hours worked, provided that the accrual is on a regular basis so that an employee has no less than twenty-four (24) hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12-month period. An employer may limit the use of sick leave to either twenty-four (24) hours or the equivalent of three (3) days, whichever is greater, during a year period. However, employers using an accrual method rather than a lump sum method must allow employees to accrue up to forty-eight (48) hours or the equivalent of six (6) days at any given time. Employers must authorize employees to take paid sick leave under the conditions set forth in the Healthy Workplaces, Healthy Families Act of 2014 ("HWHFA") for the diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member. Any sick leave taken must be paid at the employee's regular rate of pay. For the reasons state above, Defendants failed to provide Plaintiff and Aggrieved Employees with sick leave meeting the requirements set forth in HWHFA. Plaintiff will be seeking equitable, injunctive, and restitutionary relief to remedy these violations.

**Count 11 – Violation of Labor Code §§ 204, 210 (Untimely Payment of Wages)**

Labor Code section 204(a) provides that "all wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar



month, shall be paid for between the 1st and 10th day of the following month. As stated above, Defendants failed to comply with this provision by paying Plaintiff and Aggrieved Employees for wages earned between the 1<sup>st</sup> and 15<sup>th</sup> and between the 16<sup>th</sup> and last day of the month beyond the maximum time allowed under the statute. This was in violation of the law.

If you have any questions or require any further information regarding the facts and theories to support these claims, do not hesitate to contact our office.

Very truly yours,

**Shimoda Law Corp.**

By: \_\_\_\_\_

Justin P. Rodriguez

JPR/jlh

cc: Client via e-mail

1 *Jesse Gil v. Outback, Inc., et al.*

2 **PROOF OF SERVICE — CCP §§ 1013a and 2015.5**  
3 **and California Rules of Court, Rule 1.21 and Rule 2.150**

4 I, Caitlyn A. Lopez, declare that:

5 I am a citizen of the United States and am over the age of eighteen years and not a party to  
6 the within above-entitled action.

7 On October 21, 2021, I served the following documents on the party below:

- 8 • Private Attorney General Act Letter

|                                 |                                                                                            |                                                                          |
|---------------------------------|--------------------------------------------------------------------------------------------|--------------------------------------------------------------------------|
| 9<br>10<br>11<br>12<br>13<br>14 | Outback, Inc. (dba Outback Materials)<br>4201 W. Shaw Avenue., Ste 106<br>Fresno, CA 93722 | David Curtis Lovett<br>4201 W. Shaw Avenue., Ste 106<br>Fresno, CA 93722 |
|                                 | Jordan Lovett<br>4201 W. Shaw Avenue., Ste 106<br>Fresno, CA 93722                         | Mike Dunnagan<br>4201 W. Shaw Avenue., Ste 106<br>Fresno, CA 93722       |

15 [XXX] [By Certified Mail] I am familiar with my employer's practice for the collection  
16 and processing of correspondence for mailing with the United States Postal  
17 Service and that each day's mail is deposited with the United States Postal  
18 Service that same day in the ordinary course of business. On the date set forth  
19 above, I served the aforementioned document(s) on the parties in said action by  
placing a true copy thereof enclosed in a sealed envelope with postage thereon  
fully prepaid, for collection and mailing on this date, following ordinary business  
practices, at Elk Grove, California, addressed as set forth above.

20 [ ] [By Personal Service] By personally delivering a true copy thereof to the office  
of the addressee above.

21 [ ] [By Overnight Courier] By causing a true copy and/or original thereof to be  
22 personally delivered via the following overnight courier service: \_\_\_\_\_.

23 I declare under penalty of perjury under the laws of the State of California that the foregoing  
24 is true and correct, and that this declaration was executed on October 21, 2021, at Elk Grove,  
California.

25   
26 Caitlyn A. Lopez  
27  
28



November 3, 2023

**VIA ONLINE SUBMISSION**

California Labor and Workforce Development Agency  
Private Attorneys General Act – Filing

**VIA CERTIFIED MAIL (RETURN RECEIPT REQUESTED)**

Outback Inc. dba Outback Materials  
David Curtiss Lovett, Registered Agent for Service of Process  
4201 W. Shaw Avenue, Suite 106  
Fresno, CA 93722

**Re:        *Daniel Ayala v. Outback Inc. dba Outback Materials, et al.***

Dear California Labor and Workforce Development Agency and Outback, Inc.:

Please be advised that Alami Law Group and Law Office of Daniel J. Hyun represent Daniel Ayala (“Claimant”). Claimant intends to seek penalties, on behalf of herself and all other aggrieved employees, against his former employer Outback, Inc. dba Outback Materials, et al. (“Employer”) pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code Sections 2698 *et seq.* This correspondence serves as Claimant’s written notice by online filing with the Labor and Workforce Development Agency (“LWDA”) and by certified mail to the Employer of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violations, as required by Labor Code Section 2699.3(a)(1).

**Specific Provisions of the Labor Code Alleged to Have Been Violated**

Claimant alleges Employer has violated Labor Code Sections 200, 201, 202, 203, 204, 206, 210, 221, 223, 224, 226, 226.3, 226.7, 227.3, 233, 234, 246, 510, 511, 512, 558, 558.1, 1171, 1774, 1174, 1174.5, 1811, 1815, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2800, 2802, and 2804.

**Facts and Theories Supporting the Alleged Violations**

Employer employed Claimant as a non-exempt employee in California within the past year. Specifically, Employer employed Claimant as a general laborer whose job duties included, without limitation, driving concrete mixing trucks, hauling or delivering ready-mixed concrete, preparing and applying concrete for job sites, installing and moving construction equipment, and performing clean-up work at jobsites. Employer employed or currently employs other aggrieved

employees as non-exempt employees in California who participate in construction, alteration, demolition, installation, or repair work on public works projects. These aggrieved employees also haul or deliver ready-mixed concrete on public works projects. They also perform clean-up work on public works projects during the postconstruction phase of construction.

Employer employed and/or currently employs other aggrieved employees as exempt and non-exempt employees in California. The aggrieved employees consist of all employees employed by Employer during the "PAGA Period," which is defined as commencing from one year prior to the submission of this letter to the LWDA and certified mailing to Employer through the present.

During the PAGA Period, Employer failed to pay Claimant and/or other aggrieved employees minimum, regular, overtime, and/or double time wages for all hours worked at the legally mandated rates. During the PAGA Period, Claimant and/or other aggrieved employees regularly worked more than eight (8), 10, and/or 12 hours per workday and/or over 40 hours per workweek. Employer's practices and policies deprived Claimant and/or other aggrieved employees of minimum, regular, overtime, and/or double time wages for work they performed off the clock. Employer required Claimant and/or other aggrieved employees to complete work-related tasks off the clock, such as communicating with Employer and completing concrete preparation and application. Furthermore, Employer rounded Claimant and/or other aggrieved employees' hours worked, thereby depriving them of wages for all hours worked at the legally mandated rates. Further, Employers failed to provide Claimant and aggrieved employees with potable water. Employer also did not compensate Claimant and/or other aggrieved employees for all hours worked because Claimant and/or other aggrieved employees were regularly on-duty during their meal and/or rest periods. On public works projects, Employer also failed to compensate Claimant and/or aggrieved employees at the prevailing wage rate classification for the type of work performed by Claimant and/or the aggrieved employee on that project. Finally, Employer failed to accurately calculate the regular rate of pay by, among other things, failing to include a remuneration when calculating the rate of pay for overtime, double time, meal and rest period premiums, vacation pay, and sick pay. Accordingly, Employer failed to pay Claimant and/or other aggrieved employees the proper minimum, regular, overtime, and double time wages for all hours worked, sick pay, and vacation pay, in violation of Labor Code Sections 204, 206, 210, 227.3, 246, 510, 558, 1182.12, 1194, 1194.2, 1197, and 1198, 1171, 1774, 1811, and 1815 and the applicable IWC Wage Orders and California Code of Regulations.

During the PAGA Period, Employer failed to authorize and permit and/or make available to Claimant and/or other aggrieved employees timely off-duty 30-minute meal periods within the appropriate time intervals required by Labor Code Section 512 and Section 11 of the applicable IWC Wage Order(s). Specifically, Claimant and/or other aggrieved employees frequently had their meal periods shortened, interrupted, late, and/or missed altogether due to Employer's practice of understaffing and prioritizing work demands over taking compliant breaks. Employer also failed to authorize and permit and/or make available to Claimant and/or other aggrieved employees second meal periods when they worked more than 10 hours. Moreover, Employer rounded Claimant and/or other aggrieved employees' time punches for meal periods. Further,

Employers failed to provide Claimant and aggrieved employees with potable water, causing Claimant and/or aggrieved employees to spend time obtaining potable water during their meal period. Accordingly, Employer failed to authorize and permit and/or make available to Claimant and/or other aggrieved employees timely, uninterrupted off-duty meal periods for at least 30 minutes when they worked more than five (5) hours and/or 10 hours in a workday, and failed to compensate Claimant and/or other aggrieved employees with an additional hour of pay at their regular rate of pay for every day in which they were denied a compliant meal period, in violation of Labor Code Sections 226.7 and 512, and the applicable IWC Wage Orders.

During the PAGA Period, Employer failed to authorize and permit and/or make available ten-minute rest periods for every four (4) hours or major fraction thereof worked. Employer failed to implement a compliant rest break policy and/or practice, and failed to provide uninterrupted, off-duty 10-minute rest breaks. Claimant and/or other aggrieved employees regularly missed their rest breaks or had them interrupted. Specifically, Claimant and/or other aggrieved employees missed their rest periods or had them interrupted due to Employer's practice of understaffing and prioritizing work demands over taking compliant breaks. Employers failed to provide Claimant and aggrieved employees with potable water, causing Claimant and/or aggrieved employees to spend time obtaining potable water during their rest break. Employer also failed to adopt and implement a practice of providing third rest breaks when Claimant and/or other aggrieved employees worked over 10 hours. Notwithstanding the above rest break violations, Employer failed to compensate Claimant and/or other aggrieved employees with an additional hour of pay at their regular rate of pay for every day in which they suffered a rest period violation. Accordingly, Employer violated Labor Code Section 226.7 and the applicable IWC Wage Orders.

During the PAGA Period, Employer failed to reimburse Claimant and/or other aggrieved employees for all business expenses incurred for Employer's benefit. For example, Claimant and/or other aggrieved employees were required to use their personal cell phones to discuss work-related matters with Employer's representatives, to download Employer's required timekeeping phone application, and for other work purposes without any reimbursement. Further, Claimant and aggrieved employees were required to clean, wash, and iron their uniforms, which were the Employer's property, without any reimbursement for the costs of cleaning, washing, and ironing. Also, Claimant and aggrieved employees were required to purchase tools and/or other equipment without reimbursement in order to carry out their job duties. Accordingly, Employer violated Labor Code Sections 2800, 2802, and 2804.

During the PAGA Period, Employer failed to calculate and pay sick pay at the regular rate of pay for the workweek in which Claimant and/or other aggrieved employees used paid sick time, or by dividing the Claimant and/or other aggrieved employees' total wages, not including overtime premium pay, by the Claimant and/or other aggrieved employees' total hours worked in the full pay periods of the prior 90 days of employment, in violation of Labor Code Sections 246, 246.5, 247, 247.5, and 248.5 and the Healthy Workplaces, Healthy Families Act of 2014. Accordingly, Employer violated Labor Code Sections 226, 226.3, 1174, and 1174.5.

During the PAGA Period, Employer failed to permit Claimant and/or other aggrieved employees to use in any calendar year the employee's accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement, for the reasons specified in subdivision (a) of Section 246.5. Accordingly, Employer violated Labor Code Sections 233 and 234.

During the PAGA Period, Employer failed to provide to Claimant and/or other aggrieved employees accrual of vacation wages and failed to pay to Claimant and/or other aggrieved employees vested vacation wages. Accordingly, Employer violated Labor Code Section 227.3.

During the PAGA Period, as a result of, and in addition to, the foregoing Labor Code violations, Employer secretly paid Claimant and/or aggrieved employees less than the statutory or contractual rate. Accordingly, Employer violated Labor Code Sections 221, 223, and 234.

As a result of, and in addition to, the Labor Code violations, Employer failed to provide accurate itemized wage statements that accurately reported, among other things, the gross and net wages earned, the total hours worked, all applicable hourly rates in effect during the pay period, and the corresponding number of hours worked at each hourly rate. As a result, Employer violated Labor Code Sections 226 and 226.3. Similarly, Employer failed to maintain accurate and complete records showing the hours worked daily by and the wages paid to Claimant and/or aggrieved employees due to the violations described above. Accordingly, Employer violated Labor Code Sections 1174 and 1174.5.

Every employer violates Labor Code Section 1199 if it: (a) requires or causes any employee to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission; (b) pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission; or (c) violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission. As a result of, and in addition to, the foregoing Labor Code violations, Employer has violated Labor Code Section 1199 and the applicable IWC Wage Order.

As a result of, and in addition to, the foregoing Labor Code violations, Employer failed to timely pay all wages owed throughout Claimant and/or other aggrieved employees' employment and following the end of their employment. Accordingly, Employer violated Labor Code Sections 201-204, and 210.

Based on these violations, Claimant will seek attorneys' fees, costs, and penalties under the Labor Code on behalf of herself and all other aggrieved employees who were employed by Employer during the PAGA Period. Please advise if the Labor and Workforce Development Agency has any objection to Claimant alleging PAGA claims in a lawsuit against Employer. Should you have any questions, comments, or concerns, please do not hesitate to contact the undersigned.

Sincerely,

ALAMI LAW GROUP

A handwritten signature in blue ink, appearing to read 'David Alami', with a horizontal line underneath.

David Alami

CC: Daniel J. Hyun

# Exhibit D



DECLARATION OF LISA MULLINS

1  
2  
3       1.       I am a resident of the United States of America and am over the age of 21. I am the  
4 President for ILYM Group, Inc., (herein after referred to as “ILYM Group”), a professional class action  
5 services provider. I am preparing this declaration at the request of Plaintiff’s Counsel. I have personal  
6 knowledge of the facts herein, and, if called upon to testify, I could and would testify competently to such  
7 facts.

8       2.       ILYM Group has extensive experience in disseminating class action notices and  
9 administering class action settlements, including direct mail services, telephone, and web-based support,  
10 database management, opt-out processing, and settlement fund distribution services for class actions  
11 ranging in size from 26 to 4.5 million Class Members. Attached hereto, as **Exhibit A**, is a true and correct  
12 copy of ILYM Group’s current CV, reflecting our primary competencies as they relate to class action  
13 administration. ILYM Group maintains the highest level of confidentiality. The class data and all forms  
14 of communication received by ILYM Group, Inc. will be held in strict confidentiality and will not be  
15 disclosed. ILYM Group, will set up a login for Defense Counsel to transmit the class data through our  
16 encrypted secure portal. Attached hereto, as **Exhibit B** is ILYM Group’s Security Summary and Protocol.  
17 ILYM Group is insured with E&O and Cyber Insurance policies. ILYM Group is insured with E&O  
18 Insurance policies up to \$2,000,000 per incident and Cyber Insurance policies up to \$5,000,000 per  
19 incident.

20       3.       ILYM Group has never had any financial interests in nor affiliation with the parties or  
21 counsel in the *Gil, et al v. Outback Materials, Inc.* matter.

22       4.       If appointed by the Court to disseminate the class notice in this case, ILYM Group’s duties  
23 will include but not limited to: (a) conducting address traces to locate class member addresses as necessary;  
24 (b) mailing the class notice to the class members; (c) handling inquiries from class members concerning  
25 the class notice; and (d) performing other such duties as the parties and/or the Court may direct.

26       5.       Upon appointment, ILYM Group will provide a mailing address and toll-free telephone  
27 number to receive correspondence and inquiries from class members. After receiving the class data file  
28 from Defendant, which should contain the class members’ names, last known addresses, and social security

1 numbers, ILYM Group will upload the data into our database and check for duplicates and other possible  
2 discrepancies.

3 6. As part of the preparation for mailing the class notice, ILYM Group will process class  
4 members' names and addresses against the National Change of Address ("NCOA") database, maintained  
5 by the United States Postal Service ("USPS"), for the purpose of updating and confirming the mailing  
6 addresses of the class members before mailing of the class notice and opt-in form. To the extent an updated  
7 address is found in the NCOA database, ILYM Group will use the updated address for mailing the class  
8 notice. If ILYM Group does not locate an updated address in the NCOA database, it will use the original  
9 address provided by Defendant for mailing the class notice.

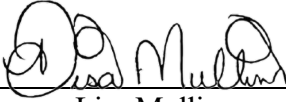
10 7. Should any class notices be returned to ILYM Group's office as undeliverable, ILYM  
11 Group will attempt to locate an updated address using the NCOA database and/or other skip trace efforts  
12 and will promptly remail the class notice.

13 8. Prior to sending out the notice in English & Spanish, ILYM Group will fill in the specific  
14 date for the deadline so that all class members will be apprised of exactly when all applicable forms will  
15 be due, depending on the deadlines set by the Court, i.e., 60-day Notice period to opt-out, dispute or file  
16 an objection. At the expiration of the deadline, ILYM Group will inform all parties as to the number and  
17 name of those individuals who filed a timely opt-opt, dispute or objection.

18 9. ILYM Group's Disbursement Process will include but not limited to; (a) applying for the  
19 case EIN; (b) establishing Qualified Settlement Fund (["QSF"] Escrow Account), with administering tasks  
20 including but not limited to overview and reconciliation of account; (c) calculating the individual  
21 settlement amounts; (d) preparing, administering and distributing settlement award checks to the  
22 Participating Class Members, including necessary tax forms (W2 and/or 1099); (e) calculating and  
23 withholding all applicable state and federal taxes; and (f) performing other such duties as the Parties and/or  
24 the Courts direct. The above services are included in ILYM Group's initial quote. Attached hereto, as  
25 **Exhibit C**, is a true and correct copy of ILYM Group's capped quote for this matter.

26 10. ILYM Group's fees are charged: hourly, fixed & per person. No additional charges will be  
27 incurred unless the class size increases, or additional services are requested. ILYM Group's fees associated  
28 with the administration of this settlement is: **\$8,450.00**.

1 I declare, under penalty of perjury under the laws of the United States of America and the State  
2 of California that the foregoing is true and correct. Executed this 12<sup>th</sup> day of September 2024, at Tustin,  
3 California.

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Lisa Mullins

# **EXHIBIT “A”**

# ILYM | GROUP, Inc.

SETTLEMENT ADMINISTRATION EXPERTS

## Overview of Our Firm:

ILYM Group, Inc is a class action administration, legal notification, and direct media outlets firm. With over 20 years of combined experience, our primary commitments are to client satisfaction, cutting edge technology and data management security, seamless case management and delivery of case expectations. Because, of our adherence to these commitments, ILYM Group, Inc is a one of the fastest growing, Woman Owned Business (NAPW), in the industry and has become the go-to firm for class action administration and legal notification. ILYM Group, Inc works with the top defense and plaintiff firms across the United States.

### AREAS OF EXPERTISE:

- Wage and Hour
- FLSA
- Insurance and Health Care
- Consumer
- Finance
- ERISA
- TCPA
- Antitrust
- Securities

#### Ramirez v JC Penney.

- ERISA Case with a class size of 26,000.

#### Kruger, et al. v. Novant Health

- ERISA Case with a class size of \$32 million.

#### Abbott, et al. v. Lockheed Martin Corp.

- ERISA Case with \$62 million.

#### Jacqueline Jones vs. I.Q. Data International, Inc.

- TCPA Case with a class size of 93,993. Performed a reverse look-up to obtain Class Member information. We were able to obtain contact information for 93.82% of the Class that did not have a name or address.

#### Reza Barani vs. Wells Fargo Bank, N.A.

- TCPA Case with a class size of 82,874. Performed a reverse look-up to obtain Class Member information. We were able to obtain contact information for 87.84% of the Class that did not have a name or address.

#### Kimberly Roberts, et al. v. T.J. Maxx of CA, LLC, et al.

- Wage & Hour Case with a class size of 82,549.

#### Robert Stone, et al. v. Universal Protection Services, LP, et al.

- Wage & Hour Case with a class size of 75,351.

# ILYM | GROUP, Inc.

SETTLEMENT ADMINISTRATION EXPERTS

ILYM Group, Inc. is operational 24/7 delivering true client and class member availability. Our call center is open 24/7/365 days a year, even holidays and is full digital, automated and multilingual. ILYM Group Inc.'s mail and media center is a state-of-the-art facility, fully digital and USPS integrated. We can accommodate cases of any size, from ten class members to multi-millions. ILYM Group, Inc. prides itself on its commitment to service, quality, value pricing and availability. We've committed ourselves to being the best Class Action Administration and Notification Company in our industry. Through our years of experience, ILYM Group, Inc. is dedicated to exceeding our client's expectations.

## PRE-SETTLEMENT CONSULTATION

- **Administration Consultation:** Meeting to determine objectives and expectations by both parties. All reporting and responsibilities will be agreed upon as will the seamless process to access data. We will also discuss the opportunities to identify class members with the proposed print and web-based media for optimum reach. Additionally, all expectations and delivery of those results will be planned for and mapped accordingly.

## MAILING AND NOTIFICATION

- **Fulfillment and Correspondence:** All provided settlement information will be published via United States Postal Service (USPS first class standards) to the proposed mailing class. Notifications will include a Claim ID and how to respond, or Opt-Out, based on the stipulations.
- **Reverse Lookup:** A confidential reverse phone or reverse cell lookup will provide; owner's name, location, address history, carrier, phone type (landline or cell phone) and more. Our reverse lookup is powered by an extensive database which includes hundreds of millions of cell phone, landline, residential and unlisted number. Our software collects data from multiple data sources and carriers across the US. Our average "hit ratio" ranges from 93% - 98%.
- **Creating Class Database:** All Data is verified and filtered to eliminate duplication against the United States Postal Service (USPS) National Change of Address (NCOA) database. ILYM Group, Inc. will also certify and validate with the Coding Accuracy Support System (CASS) and Track Your Class (TYC) for zone delivery.
- **Claim Forms:** ILYM Group, Inc. will email all claim forms, whenever possible, to have accurate reporting and tracking of all class requests. Emails will contain full text claim forms.
- **Translations:** When needed, ILYM Group, Inc. will translate notices to any language needed to reach Class members.
- **Remails:** Returned mail will be scanned, re-verified and re-mailed. All returned mail is data warehoused and reported to both parties' counsels in a weekly report.



# ILYM | GROUP, Inc.

SETTLEMENT ADMINISTRATION EXPERTS

## MEDIA & INTERNET BANNER ADS

### Notice Publication

- **Legal Notices:** ILYM Group, Inc. can provide a Media Proposal to maximize reach based on quantitative and qualitative methodologies.
- **Electronic Publication (Banner Ads):** ILYM Group, Inc. will utilize Internet Banner Noticing efforts and web technologies for maximum reach via the World Wide Web.
- **Electronic Mail Notices:** ILYM Group, Inc. can email an estimated number of class members a full text notice. We are compliant with all search engines and Internet Service Providers (ISP) so that our emails are always “White List” accepted with minimal returns.
- **Reach:** Every case has its own proposed reach and exposure percentage. We filter, verify and scrub the data to improve reach results.
- **Services Included:** Analysis, Documentation, Research and Methodologies, Execution and Reporting.

## PROJECT MANAGEMENT

- **Case Notification, Maintenance and Management:** ILYM Group, Inc.’s Senior Project Managers will provide all Account Management, Pre-Consultation to Case Conclusion, Reporting and Claims Processing. Design, negotiation and implementation, upon approval, of all forms and notices, all distribution reporting and filings with the court.
- **Claims Processing:** All claims can be submitted by USPS, Internet, Fax, and Email or Online submission. Claims will be processed and recorded with matching ILYM database ID's. E-claims will have corresponding records of intake. All deficient claims will be notified via USPS and make provisions for class member to re-submit claims.
- **Call Center:** ILYM Group, Inc. will support class members with a toll-free number to get the most up-to-date case settlement information. Customer service representatives will be available 24/7/365 as will recorded messages. All class members are given the options to best serve their needs and to receive case information.
- **Internet Support:** Class members can log on to a provided website and view, print or submit information and claim forms regarding the settlement. Frequently Asked Questions (FAQ's) will be provided as well. Class members may download the claim form with mailing and fax instructions provided on the form.
- **Objection and Request for Exclusion:** All objections and request for exclusion, opt-out, will be data warehoused, dated and reported. Postmarks will serve for exclusion dating and will be forwarded to both counsels' no more than 5 days post submission. Objection will be reviewed by ILYM Group, Inc. to determine the timeliness and basis of the objection. All information will be forwarded to both parties counsel, along with any representation information from the class member, within 5 days.

# ILYM | GROUP, Inc.

SETTLEMENT ADMINISTRATION EXPERTS

## DATA ADMINISTRATION AND NETWORK SECURITY

- **Network Security:** All provided data is encrypted, stored and hosted in a Tier 4, SAS70 certified environment.
- **Database Administration:** To be developed with all electronically provided data. Class members will be assigned ILYM Group, Inc. internal tracking ID's to ensure all collected member data coincides with all received claims.

## DISTRIBUTION AND SETTLEMENT FUNDING

- **Distribution and Management:** Upon receipt of settlement funds, ILYM Group, Inc. will open a QSF Account for proceeds of the Gross Settlement Payment. The deposited funds will then be managed per the Settlement Agreement. All funds will be settled with class members and counsel along with all federal and state income tax reporting.
- **Check Printing and Mailing:** Claims processed, quantified and approved by clients, will be processed for distribution. All checks will be printed and mailed via USPS first class standards. ILYM Group, Inc. will reissue checks in accordance with the Settlement Agreement.
- **Preparation, Filing and Reporting of Taxes:** ILYM Group, Inc. will ensure taxes are filed in accordance to all federal, state and local employment tax returns. All taxes associated with the settlement will be paid on time to tax authorities. All filings and returns (e.g., 1099s, W-2s, etc.) will be done properly and timely with the appropriate authorities. All QSF steps and obligations with federal, state and/or local law will be followed.

## CASE CONCLUSION

- **Data Manager Final Report:** All database and electronic documentation will be sent in reports weekly and at the conclusion of the Administration engagement. Call center activity, e-claims, mailed, and faxed claims will be included in all reporting.
- **Project Manager Final Report:** All case and class related information will be provided on a weekly basis and at the conclusion of the Administration engagement. Mailing and media final analysis, exclusions, objections, and all other claims processing outcomes, status reports and final court documentations will be included.
- **Affidavits:** ILYM Group, Inc. will provide all affidavits in support of analysis and media reach, final approvals and settlement. Expert Testimony and Media Methodologies will be determined.
- **Document Retention:** Unless otherwise directed, ILYM Group, Inc. will destroy all undeliverable notices on the effective date of the settlement or when the case is no longer subject to appeal. ILYM Group, Inc. will correspond for one year after the final distribution or until the case is no longer subject to appeal.

# **EXHIBIT “B”**

ILYM Group, Inc. (ILYM) in conjunction with our security and Information Technology (IT) vendor(s), maintains the highest level of confidentiality of class member data. The class data and all forms of communication received by ILYM, will be held in strict confidentiality and will not be disclosed. Data provided to the administrator for purposes of notice, settlement, or award administration will be used solely for settlement implementation and for no other purpose. ILYM will set up a login for Defense Counsel to transmit the class data through our encrypted secure portal. ILYM processes adhere to the Settlement Administration Data Protection Checklist in the Northern District of California and are summarized in the tables below.

## Technical Controls

|                                                              |     |
|--------------------------------------------------------------|-----|
| Firewalls and intrusion detection/prevention systems         | Yes |
| Endpoint Detection and Response (EDR) Systems                | Yes |
| Complex Password Requirements                                | Yes |
| MultiFactor Authentication for Access to Systems and Data    | Yes |
| Malware Protection and AntiVirus                             | Yes |
| Vulnerability Scanning/Pen Testing                           | Yes |
| Data Encryption                                              | Yes |
| Key Management for access to encrypted Data                  | Yes |
| Access only provided on need-to-know basis                   | Yes |
| Security Operations Center (SOC)                             | Yes |
| Managed Detection and Response (MDR)                         | Yes |
| Security Information and Event Management (SIEM)             | Yes |
| Software Defined Global Network (SGN) with next gen firewall | Yes |

## Administrative Policies

|                                                                                                                          |           |
|--------------------------------------------------------------------------------------------------------------------------|-----------|
| Personnel and support staff risk assessment and management, including pre-hire background checks and screening processes | Yes       |
| Personnel and support staff required to enter into non-disclosure and confidentiality agreements                         | Yes       |
| Access controls to systems and data, including guidance for granting, modifying, and reviewing access rights             |           |
| Information security and privacy policy training, including policy review, best practices, and data security             | Yes       |
| No remote access to systems for Employees                                                                                | No        |
| Exit interviews/confirmation that terminated/departed employees are immediately cut off from access                      | Yes       |
| Robust audits of data privacy policies by third-party vendors                                                            | Yes       |
| Accreditation in accordance with ISO 27001 and SOC2 (among the industry standards listed below)                          | Compliant |
| Disclosure of external certifications and any notice of expiration                                                       | Yes       |

## Crisis and Risk Management

|                                                                                                                                                                        |                                                                                               |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|
| Incident response/disaster plan for immediate response to security incidents such as data breach.                                                                      | Yes                                                                                           |
| Process and timing for notification to attorneys, claimants, and other stakeholders of a data breach and consideration of resources and/or remedies to provide thereto | Yes                                                                                           |
| Vendor management program that determines and defines requirements to manage risk associated with outsourcing                                                          | Core Vendors are limited and have been vetted. New program being implemented as part of SOC 2 |

## Physical Access Controls

|                                                                                                                                                                   |                                                                                  |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|
| Physical Access Security<br>Security Guards<br>Access Cards to facilities with assignment of identification card subject to approval and review<br>Logs of Access | Logs and “codes”<br>No cards – just codes<br>No security guards<br>Logs are kept |
| Alarm Systems                                                                                                                                                     | Yes                                                                              |
| CCTV recording Systems                                                                                                                                            | Yes                                                                              |

## Data Collection and Retention

|                                                                                                                                                                                                                                                                                                                 |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Minimization of collection of personally identifiable information, e.g., social security numbers and banking information                                                                                                                                                                                        | Yes |
| Data collection only required to extent necessary for settlement administration                                                                                                                                                                                                                                 | Yes |
| Various methods for ensuring data protection and security of Data classification (including implementation of appropriate safeguards to protect from theft, loss, and/or unauthorized disclosure, use, access, destruction)<br>Compliance with applicable laws and regulations (see below) Secure data transfer | Yes |

## Data Destruction

|                                                                                                                                                                    |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Preservation of data only for so long as required for administration of the settlement and any relevant reporting required following the payments or distributions | Yes |
| Secure data destruction (e.g., 6 months – 1 year or when no longer required)                                                                                       | Yes |
| Physical media (e.g., paper, CDs) shredded or destroyed to point where they cannot be reconstructed                                                                | Yes |
| Destruction of all derivative copies and/or back-ups                                                                                                               | Yes |

## Applicable Laws, Standards, and Other Regulation

|                                                                                                                                                                                  |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Industry standards: National Institute of Standards and Technology (NIST), HIPAA, FISMA, System and Organization Controls (SOC1 and SOC2) or more advanced assessment, ISO 27001 | Yes |
| Local, national, international privacy regulations (including CCPA)                                                                                                              | Yes |

## Ethical Rules

|                                                                                                                                                                                       |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Administrative policies and/or employee handbook incorporating commitment to ethical rules (e.g., company, court ethical rules) setting forth standards of ethical and legal behavior | Yes |
| Enforcement clauses, violation resulting in disciplinary action including and up to termination of employment                                                                         | Yes |

## Customer Service Measures

|                                                                                                                                                                                            |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Description of settlement website and posting thereto of relevant privacy policies or statements (including portal for reporting suspected loss of confidential data submitted with claim) | Yes |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|



|                                                                                                                                                                                                                                        |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Explanation of role of claims administrator and how to prevent phishing (e.g., clear indication that administrator will not request confidential information by e-mail and how to identify a valid e-mail sent from the administrator) | Yes |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|

# **EXHIBIT “C”**

**Case Name: Gil, et al v. Outback Materials, Inc.**

**Thursday, September 12, 2024**

|                            |                        |
|----------------------------|------------------------|
| Requesting Attorneys Name: | Renald Konini          |
| E-Mail:                    | rkonini@shimodalaw.com |
| ILYM Contact:              | Lisa Mullins           |
| E-Mail:                    | Lisa@ilymgroup.com     |
| Contact Number:            | 714.878.8836           |

**Estimate For Administrative Solutions: Class & PAGA**

| KEY ASSUMPTIONS                 |     |
|---------------------------------|-----|
| Total Number of Class Members   | 376 |
| Estimated Percentage of Remails | 15% |
| Certified Spanish Translation   | Yes |
| ILYM Group Static Website       | No  |
| Case Duration (Years)           | 1   |

**Summary Estimate: ILYM Group Fees & Expenses**

|                                                      |            |
|------------------------------------------------------|------------|
| Case Startup:                                        | \$650.00   |
| Project Management & Noticing:                       | \$2,280.00 |
| Notification & Mailing:                              | \$1,042.00 |
| Distribution (Includes EIN, Bank Acct * /QSF Setup): | \$3,463.00 |
| Case Conclusion:                                     | \$1,015.00 |

**Capped ILYM Fees & Expenses:     \$8,450.00**

# ILYM | GROUP, Inc.

SETTLEMENT ADMINISTRATION EXPERTS

## Case Name: Gil, et al v. Outback Materials, Inc.

Thursday, September 12, 2024

Requesting Attorneys Name: Renald Konini

| Activity                                       | Rate Type | Unit Cost | Volume | Amount   |
|------------------------------------------------|-----------|-----------|--------|----------|
| <b>CASE STARTUP</b>                            |           |           |        |          |
| Initial Setup - Import and Formatting of Data* | Hourly    | \$150.00  | 2      | \$300.00 |
| Programming of Class Database                  | Hourly    | \$175.00  | 2      | \$350.00 |

\*ILYM assumes that data will be in a standard format. Client will be notified immediately if not in standard format to correct data or ILYM can convert to standard format @ \$150.00 per hour.

**Subtotal \$650.00**

|                                                              |           |            |   |            |
|--------------------------------------------------------------|-----------|------------|---|------------|
| <b>PROJECT MANAGEMENT &amp; NOTICING</b>                     |           |            |   |            |
| Project Manager (Case notification and maintenance)          | Hourly    | \$120.00   | 3 | \$360.00   |
| Staff Hours for Processing Returned Mail                     | Hourly    | \$70.00    | 2 | \$140.00   |
| Staff Hours for Processing Opt-Outs, Disputes & Objection(s) | Hourly    | \$70.00    | 2 | \$140.00   |
| Report Processing                                            | Hourly    | \$70.00    | 2 | \$140.00   |
| Certified Spanish Translation                                | Flat Fee  | \$1,250.00 | 1 | \$1,250.00 |
| NCOA                                                         | Flat Rate | \$100.00   | 1 | \$100.00   |
| Toll Free Customer Service Representative                    | Flat Fee  | \$150.00   | 1 | \$150.00   |
| Weekly Reports                                               | Flat Rate | \$750.00   | 1 | Waived     |

**Subtotal \$2,280.00**

|                                              |           |          |     |          |
|----------------------------------------------|-----------|----------|-----|----------|
| <b>NOTIFICATION/MAILING</b>                  |           |          |     |          |
| Fulfillment of Notice, English & Spanish     | Per Piece | \$1.50   | 376 | \$564.00 |
| USPS First Class Postage                     | Per Piece | \$0.70   | 376 | \$263.20 |
| Re-Mails (Forward/Skip trace Undeliverables) | Per Piece | \$2.00   | 56  | \$112.80 |
| Storage, Photocopies, Deliveries             | Flat Fee  | \$102.00 | 1   | \$102.00 |

**Subtotal \$1,042.00**

# ILYM | GROUP, Inc.

SETTLEMENT ADMINISTRATION EXPERTS

## Case Name: Gil, et al v. Outback Materials, Inc.

Thursday, September 12, 2024

Requesting Attorneys Name: Renald Konini

| Activity                                                   | Rate Type | Unit Cost  | Volume | Amount     |
|------------------------------------------------------------|-----------|------------|--------|------------|
| <b>DISTRIBUTION (Includes EIN, Bank Acct * /QSF Setup)</b> |           |            |        |            |
| Distribution Setup & Management                            | Hourly    | \$150.00   | 3      | \$450.00   |
| Account Reconciliation & Distribution Reporting            | Hourly    | \$125.00   | 3      | \$375.00   |
| Check, Stub & Release - Print & Mail (W-2/1099)            | Per Check | \$1.00     | 376    | \$376.00   |
| USPS First Class Postage                                   | Per Piece | \$0.60     | 376    | \$225.60   |
| Re-Mails (Forward/Skip trace Undeliverables up to 10%)     | Per Piece | \$1.50     | 38     | \$56.40    |
| Preparation of Taxes                                       | Hourly    | \$120.00   | 4      | \$480.00   |
| Annual Filing of Tax Return                                | Per Year  | \$1,500.00 | 1      | \$1,500.00 |

\*Additional Bank fees may apply

**Subtotal \$3,463.00**

|                                    |          |          |   |          |
|------------------------------------|----------|----------|---|----------|
| <b>CASE CONCLUSION</b>             |          |          |   |          |
| Data Manager Final Reporting       | Hourly   | \$100.00 | 1 | \$100.00 |
| Project Manager Final Reporting    | Hourly   | \$120.00 | 2 | \$240.00 |
| Process Unclaimed Funds to cy pres | Flat Fee | \$550.00 | 1 | \$550.00 |
| Declaration                        | Hourly   | \$125.00 | 1 | \$125.00 |

**Subtotal \$1,015.00**

**Capped ILYM Fees & Expenses: \$8,450.00**

# Terms and Conditions

All services to be provided by ILYM Group, Inc. (hereinafter, "ILYM") to Client shall be subject to the following terms and conditions:

**Services:** Subject to the terms hereof, ILYM agrees to provide the Client with Administration Services (hereinafter, "services") as specified in the Proposal provided to Client to which these Terms and Conditions are attached. The estimate is in good faith and does not cover any applicable taxes and fees. The estimate does not make provision for any services or class members/size not delineated in the request for proposal or stipulations. Such services do not in any way constitute legal services or advice. ILYM is performing its services as an Independent Contractor and neither it nor its employees shall be deemed to be employees of the Client.

**Mailing and Data Conversion:** ILYM's database administration assumes the Client will provide complete data that includes all information required to send notifications and complete the administration process. Data must be provided in a complete, consistent, standardized electronic format. ILYM's standard format is Microsoft Excel, however, ILYM may accept other formats at its discretion. Further developments or enhancements to non-standardized data will be billed to Client by ILYM on a time and materials basis, according to ILYM's Standard Rates.

**Charges for Services:** Charges to the Client for services shall be on a time and materials basis at our prevailing rates, as the same may change from time to time. Any fee estimates set forth in the proposal are estimates only, based on information provided by Client to ILYM. Actual fees charged by ILYM to Client may be greater or less than such estimate, and Client shall be responsible for the payment of all such charges and expenses in accordance with Section 5 hereof. Charges incurred related to resolving post distribution withholdings and related corrective files due to voids and re-issues of payments and related correspondence with state and federal taxing authorities will not be charged to the Client to the extent that funds are received from the taxing authorities offset these charges. ILYM may derive financial benefits from financial institutions in connection with the deposit and investment of settlement funds with such institutions, including without limitation, discounts on eligible banking services and fees, and loans at favorable rates.

**Indemnification:** Client will indemnify and hold ILYM (and the officers, employees, affiliates and agents harmless against any Losses incurred by ILYM, arising out of, in connection with, or related to (i) any breach of the terms by Client; (ii) the processing and handling of any payment by ILYM in accordance with Client's instructions, including without limitation, the imposition of any stop payment or void payment on any check or the wrongful dishonor of a check by ILYM pursuant to Client's instructions.

**Payment of Charges:** ILYM reserves the right to request payment of postage charges and 50% of the final administration charges at the start of the case. ILYM bills are due upon receipt unless otherwise negotiated and agreed to with the Client. In the event settlement terms provide that ILYM is to be paid out of the Settlement Fund, ILYM will request that Counsel endeavor to make alternate payment arrangements for ILYM charges that are due at the onset of the case. The entire remaining balance is due and payable at the time the Settlement Account is funded by, or no later than the time of disbursement. Decisions of the court and actions of the parties, including disapproval or withdrawal of a settlement, do not affect the Client's liability to ILYM for payment of services. Services are not provided on a contingency fee basis.

**Confidentiality:** ILYM maintain reasonable and appropriate security measures and safeguards to protect the security and confidentiality of Client data provided to ILYM by Client in connection herewith. Should ILYM ever be notified of any judicial order or other proceedings in which a third party seeks to obtain access to the confidential data created by or for the Client, ILYM will promptly notify the Client, unless prohibited by applicable law. The Client shall have the option to (1) provide legal representation at the Client's expense to avoid such access or (2) promptly reimburse ILYM for any of its costs, including attorneys' fees, reasonably incurred in avoiding, attempting to avoid or providing such access and not paid by the entity seeking the data. If ILYM is required, pursuant to a court order, to produce documents, disclose data, or otherwise act in contravention of the obligations imposed by this Agreement, or otherwise, with respect to maintaining the confidentiality, proprietary nature and secrecy of the produced documents or disclosed data, ILYM will not be liable for breach of said obligation.

**Data Rights:** ILYM does not convey nor does the Client obtain any right in the programs, system data, or materials utilized or provided by ILYM in the ordinary course of business in the performance of this Agreement.

**Document Retention:** Unless directed otherwise in writing by Client, ILYM will destroy undeliverable mail on the effective date of the settlement or the date that the disposition of the case is no longer subject to appeal or review, whichever is later. ILYM will maintain claim forms and other correspondence for one year after final distribution of funds or benefits, or until the date that the disposition of the case is no longer subject to appeal or review, whichever is later.

**Limitation of damages:** ILYM is not responsible to the Client for any special, consequential or incidental damages incurred by Client. Any liability of ILYM to the Client shall not exceed the total amount billed to the Client for the particular services that give rise to any loss.

**Termination:** The services to be provided under this Agreement may be terminated, at will by the Client upon at least 30 calendar days' prior written notice to ILYM. The Client's obligation to pay for services or projects in progress at the time of notice of withdrawal shall continue throughout that 30 day period. ILYM may terminate this Agreement (i) with 10 calendar days' prior written notice, if the Client is not current in payment of charges or (ii) in any event, upon at least 3 months' prior written notice to the Client.

**Notice:** Any notice required or permitted hereunder shall be in writing and shall be delivered personally, or sent by registered mail, postage prepaid, or overnight courier service to the responsible officer or principal of ILYM or the Client, as applicable, and shall be deemed given when so delivered personally, or, if mailed, five days after the date of deposit in United States mail, or, if sent by courier, one business day after delivery to such courier service.

**Force Majeure:** To the extent performance by ILYM of any of its obligations hereunder is substantially prevented by reason of any act of God or by reason of any other matter beyond ILYM's reasonable control, then such performance shall be excused and this Agreement, at ILYM's option, be deemed suspended during the continuation of such condition and for a reasonable time thereafter.

**Waiver of Rights:** No failure or delay on the part of a party in exercising any right hereunder will operate as a waiver of, or impair, any such right. No single or partial exercise of any such right will preclude any other or further exercise thereof or the exercise of any other right. No waiver of any such right will be effective unless given in a signed writing.

**Jurisdiction:** The parties hereto submit to the jurisdiction of the Court of the applicable case for purposes of any suit, action or proceeding to enforce any provision of, or based on any right arising out of, this Agreement. The parties hereto hereby waive any objection to the laying of venue of any such suit, action or proceeding in the Court.

**Entire Agreement:** These terms and conditions and the proposal embody the entire agreement between the parties with respect to the subject matter hereof, and cancels and supersedes all prior negotiations, representations, and agreements related thereto, either written or oral, except to the extent they are expressly incorporated herein. No changes in, additions to, or waivers of, the terms and conditions set forth herein will be binding upon any party, unless approved in writing by such party's authorized representative.



# Exhibit E

Gil v. Outback, Inc. - Shimoda & Rodriguez Law, PC Costs

| Date        | Description                                                                                                     | Amount     |
|-------------|-----------------------------------------------------------------------------------------------------------------|------------|
| 9/22/2021   | Administration/Copy Fee - Phone, Fax, Scan, Copying, Non-Certified/Courier Postage, Westlaw Legal Research Fees | \$500.00   |
| 10/19/2021  | Payment to LWDA - PAGA Filing Fee                                                                               | \$75.00    |
| 10/19/2021  | Certified Mail - PAGA Letters to Employers                                                                      | \$17.92    |
| 11/3/2021   | Payment to Court - Complaint Fee Superior Court                                                                 | \$435.00   |
| 11/3/2021   | One Legal Filing/Service Fee - Complaint                                                                        | \$18.12    |
| 11/29/2021  | One Legal Filing/Service Fee - Proof of Service of Summons to Court                                             | \$29.05    |
| 1/14/2022   | One Legal Filing/Service Fee - Notice of Disassociation of Counsel                                              | \$18.12    |
| 2/8/2022    | One Legal Filing/Service Fee - Notice Re: Name Change/Service Update                                            | \$18.12    |
| 1/16/2024   | One Legal Filing/Service Fee - CMC Statement                                                                    | \$17.55    |
| 1/23/2024   | One Legal Filing/Service Fee -Stipulation & Order Re: FAC                                                       | \$38.71    |
| 1/29/2024   | One Legal Filing/Service Fee - FAC                                                                              | \$17.55    |
| 1/30/2024   | Court Call Appearance - Case Management Conference                                                              | \$72.00    |
| 8/26/2024   | One Legal Filing/Service Fee - CMC Statement                                                                    | \$13.85    |
| 8/26/2024   | One Legal Filing/Service Fee - CMC Statement                                                                    | \$38.30    |
| 9/12/2024   | Mediation - Mediator Fee                                                                                        | \$7,500.00 |
| 10/23/2024  | One Legal Filing/Service Fee - CMC Statement                                                                    | \$17.76    |
| 11/4/2024   | One Legal Service Fee - Proposed Order Re Remote Appearance                                                     | \$17.76    |
| 11/8/2024   | One Legal Service Fee - Stipulation & Proposed Order Re: SAC                                                    | \$39.44    |
| 12/3/2024   | One Legal Service Fee - SAC                                                                                     | \$17.76    |
| 2/20/2025   | One Legal Filing/Service Fee - CMC Statement                                                                    | \$21.11    |
| 4/18/2025   | One Legal Service/Filing Fee - Motion for Preliminary Approval                                                  | \$85.69    |
| 4/23/2025   | One Legal Service/Filing Fee - Case Management Statement                                                        | \$21.88    |
| ANTICIPATED | Motion for Preliminary Approval                                                                                 | \$100.00   |
| ANTICIPATED | Motion for Final Approval                                                                                       | \$100.00   |
| ANTICIPATED | Notice of Entry of Judgment                                                                                     | \$21.11    |
| ANTICIPATED | Compliance Declaration                                                                                          | \$25.00    |

**Total: \$9,276.80**

# Exhibit F

CALIFORNIA SUPERIOR COURT  
FOR THE COUNTY OF FRESNO

JESSE GIL and DANIEL AYALA, individually and on  
behalf of all other similarly situated employees,

Plaintiffs,

vs.

OUTBACK, INC., a California Corporation; and DOES 1  
to 100, inclusive,

Defendant.

Case No. 21CECG03273

**NOTICE OF PROPOSED CLASS ACTION AND  
PAGA SETTLEMENT, AND HEARING DATE FOR  
FINAL COURT APPROVAL OF SETTLEMENT**

**ATTENTION:** All individuals who have, or continue to, perform work for Defendant in California as hourly, non-exempt employees from November 3, 2017, to [REDACTED] (the "Class Members").

**PLEASE READ THIS NOTICE CAREFULLY. THIS NOTICE RELATES TO A PROPOSED SETTLEMENT OF CLASS ACTION LITIGATION AND POTENTIAL DISBURSEMENT OF SETTLEMENT FUNDS TO YOU. IF YOU ARE A CLASS MEMBER, IT CONTAINS IMPORTANT INFORMATION ABOUT YOUR RIGHT TO PARTICIPATE IN OR OPT OUT OF THE SETTLEMENT ACCORDING TO THE PROCEDURES DESCRIBED BELOW.**

You are receiving this notice pursuant to an order from the Fresno County Superior Court ("Court") granting Plaintiffs' motion for preliminary approval of a Joint Stipulation Regarding Class Action and PAGA Settlement and Release ("Agreement" or "Settlement") as fair, reasonable, and adequate. The Settlement was entered into between Plaintiffs Jesse Gil and Daniel Ayala ("Plaintiffs" or "Class Representatives"), and Defendant Outback, Inc. ("Defendant") on behalf of Class Members as defined above. The terms of the Settlement are outlined herein. You are receiving this notice because Defendants' records indicate you fall within the definition of "Class Member." Defendants' records also indicate that you worked [REDACTED] weeks during the applicable Class Period (as defined below), which means your total share of the settlement proceeds is estimated to be [REDACTED]. Your actual share of the settlement proceeds will vary depending on the total number of Class Members that choose to participate, and the resolution of any workweek disputes as described in this notice.

The terms of the Agreement and a description of the case are identified in this notice. Pursuant to the Court's order, YOU ARE HEREBY NOTIFIED AS FOLLOWS:

**I. BACKGROUND OF THE CASE**

On November 3, 2021, this lawsuit was filed against Defendant in the Fresno County Superior Court of California. The term "Action" means this putative class action pending in Fresno County Superior Court, Case No. 21CECG03273, and includes a related wage and hour class action filed against Defendant in Fresno County Superior Court, *Ayala v. Outback, Inc.*, Fresno County Superior Court Case No. 23CECG04940, filed on November 29, 2023. The Class Period is November 3, 2017, to [REDACTED] (the "Class Period").

In the Action, Plaintiffs sought to obtain unpaid wages, interest, statutory penalties, civil penalties, fees, and costs on behalf of himself, Class Members, and Aggrieved Employees. Plaintiffs alleged that Defendant violated California law by: (1) failing to pay overtime wages, (2) failing to pay minimum wages, (3) failing to provide meal periods or pay meal period premiums in lieu thereof, (4) failing to provide rest periods or pay rest period premiums in lieu thereof, (5) failing to provide accurate wage statements, (6) failing to pay reimbursements for expenses, (7) failing to maintain accurate records, (8) failing to provide paid sick leave, (9) untimely payment of wages (10) engaging in unfair competition, and (12) committing PAGA violations. Defendant has denied all of Plaintiffs' allegations. The Action has been actively litigated. There have been on-going investigations, and there has been an exchange of extensive documentation and information. Furthermore, the Parties have participated in a full day mediation facilitated by a neutral third party. Based upon the negotiations, and all known facts and circumstances, including the various risks and uncertainties related to legal actions, the Parties reached a class-wide settlement. By settling, the Parties will avoid the risks associated with a lengthy litigation process.

Despite agreeing to and supporting the Agreement, Defendant continue to deny all allegations and claims and contends all employees have been paid correctly. Defendant has entered into this Settlement to fully, finally, and forever resolve this Action, based on the terms set forth in the Agreement, in order to avoid the burden and expense associated with ongoing litigation.

The Agreement applies to any and all Class Members, as defined above. The Agreement also applies to Aggrieved Employees, which are defined as all individuals who have, or continue to, perform work for Defendant in California as hourly, non-exempt employees at any time from October 21, 2020, to [REDACTED]. If you are a Class Member, you have the opportunity to participate in the Settlement, or to exclude yourself (“opt out”) from the Settlement. This notice is to advise Class Members of how they can either participate in the Settlement or be excluded from the Settlement. As set forth below, Aggrieved Employees cannot opt out of this Agreement as it relates to the PAGA Payment or Released PAGA Claims regardless of whether they opt out of being a Class Member. Aggrieved Employees will receive their share of the PAGA Payment regardless of whether they opt out of being a Class Member.

## **II. SUMMARY OF THE PROPOSED SETTLEMENT**

### **A. The Amount of the Settlement**

Under the terms of the Agreement, Defendants have agreed to pay a total sum of Three Hundred Sixty-Seven Thousand Five Hundred Dollars (\$367,500) (“Gross Settlement Amount”). Deducted from this Gross Settlement Amount will be sums approved by the Court for attorney’s fees not to exceed 35% of the Gross Settlement Amount, attorney’s costs not to exceed \$15,000, Settlement Administrator Costs estimated not to exceed \$12,500, Class Representatives’ Enhancement Payment not to exceed \$10,000 each, and \$20,000 for alleged PAGA penalties (the “PAGA Payment”), which will result in a “Net Settlement Amount” for distribution to all Class Members. Any employer side taxes attributable to payments allocated as wages will be paid by Defendant in addition to the Gross Settlement Amount. As explained further below, the amount of each Class Member’s share of the Net Settlement Amount will depend on the number of weeks worked by Class Members during the Class Period. Of the \$20,000 allocated to resolving the PAGA claims, 75% of the PAGA Payment will be paid to the State of California Labor and Workforce Development Agency and 25% of the PAGA Payment will be divided among Aggrieved Employees.

The number of weeks you worked during the Class Period and your estimated total share of the Net Settlement Amount and PAGA Payment (“Individual Settlement Amount”) is stated on the first page of this notice. The actual amount received may be more or less than the amount stated depending on the actual number of weeks worked by Participating Class Members (*i.e.*, those who do not opt out of the Settlement), the resolution of any disputes regarding workweeks, and on the distributions finally approved and allocated by the Court. However, whether Class Members opt out will have no effect on Aggrieved Employees’ allocations for the PAGA claim.

### **B. Individual Settlement Amounts and Allocation Between Class Members and Aggrieved Employees**

Defendant will pay Individual Settlement Amounts through the Settlement Administrator, as described below, to each Participating Class Member and to Aggrieved Employees. All Individual Settlement Amounts will be subject to appropriate taxation. The Parties have agreed, based on the allegations in the Action that the amount payable to eligible Class Members from the Net Settlement Amount will be allocated and paid as 2/3 for disputed interest, statutory penalties, and other non-wage damages for which an IRS Forms 1099-MISC and 1099-INT will issue and 1/3 for disputed wages for which IRS Forms W-2 will issue. The PAGA Payment to Aggrieved employees will be paid as 100% for civil penalties.

Payment to Participating Class Members and Aggrieved Employees will not require the submission of a claim form. Each Participating Class Member’s share will be determined by dividing their total weeks worked within the Class Period by the total weeks worked by all Participating Class Members within the Class Period. That fraction will then be multiplied by the Net Settlement Amount to arrive at the Class Member’s individual share of the Net Settlement Amount. Each Aggrieved Employee’s share of the 25% portion of the PAGA Payment will be determined by dividing their total weeks worked within the PAGA Claim Period by the total weeks worked by all Aggrieved Employees within the PAGA Claim Period. That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the Aggrieved Employee’s individual share. The PAGA Claim Period is defined as October 21, 2020, to [REDACTED]. Defendants’ records indicate that you worked [REDACTED] weeks during the applicable PAGA Claim Period, which means your share of the PAGA Payment is estimated to be [REDACTED]. This amount is included in your estimated Individual Settlement Amount stated on the first page of this notice, not in addition to it. You will still receive your share of the PAGA Payment even if you opt out of being a Class Member. Receipt of the Individual Settlement Amounts will not entitle any Class Member or Aggrieved Employee to additional compensation or benefits under any compensation, retirement or benefit plan or agreement in place during the period covered by the

Settlement.

**C. Calculations to Be Based on Defendants' Records and Resolution of Workweek Disputes**

For each Class Member, the amount payable will be calculated by the Settlement Administrator from Defendants' records. Defendants' records will be presumed correct unless evidence to the contrary is provided to the Settlement Administrator. Defendants' records and any additional evidence will be reviewed by the Settlement Administrator in the event of a dispute about the number of workweeks worked by an individual Class Member. If a Class Member disputes the accuracy of Defendants' records, all supporting documents evidencing additional workweeks must be submitted by the Class Member. The dispute must (a) identify the nature of the dispute; (b) provide any information or documentation supporting the dispute; (c) be signed; and (d) be post-marked no later than [redacted]. The dispute will be resolved by the Settlement Administrator based on the records and evidence provided.

**D. Release of Claims**

For those Class Members who do not opt out and Aggrieved Employees, the Agreement contains the following releases:

Class members who do not opt out will be deemed to have released any and all class claims that are alleged in the Complaint, and any additional wage and hour claims that could have been brought based on the facts alleged in the operative Complaint, through the Class Period. This release excludes the release of claims not permitted by law.

Aggrieved Employees will be deemed to have released any and all claims that were brought under the Private Attorneys General Act, Labor Code §§ 2698 *et seq.*, contained in Plaintiffs' notice letter to the LWDA and any additional wage and hour PAGA claims that could have been brought based on the facts alleged in Plaintiffs' notice letter to the LWDA during the PAGA Claim Period. Aggrieved Employees cannot opt out of this waiver of claims.

The individuals released ("Released Parties") include Defendant, as well as Defendant's officers, shareholders, directors, agents, employees, attorneys, and insurers.

Class Members and/or Aggrieved Employees can talk to one of the lawyers appointed as Class Counsel (listed below) for free or talk to their own lawyer if they have questions about the released claims and what they mean.

**III. WHAT ARE YOUR RIGHTS AS A CLASS MEMBER**

**A. Participating in the Settlement as a Class Member**

If you wish to be a Participating Class Member and believe your workweek information is accurate, **you do not need to take any further action**. Payment will be automatically made to you consistent with the terms of the Agreement and Court Order. If you wish to dispute the workweek calculation, you may follow the procedures outlined in Section II.C above. California law protects Class Members from retaliation based on their decision to participate in the Settlement.

**B. Excluding Yourself from the Settlement as a Class Member**

The Court will exclude you from being a Class Member if you request this by [redacted]. If you do not wish to be bound by the Settlement as a Class Member, you may request to be excluded (*i.e.*, "opt out") by submitting a timely written request to the Settlement Administrator. The request to opt-out must (a) state your full name and date of birth; (b) a statement that you do not want to be a Class Member, do not want to participate in the Settlement, and/or wants to be excluded from this Settlement; (c) identify the case name and number (*i.e.* *Gil, et al. v. Outback, Inc., et al.*, 21CECG03273); (d) be signed; and (e) be post-marked no later than [redacted]. The request to opt out must be mailed by First Class U.S. Mail, or the equivalent, to:

[admin info]

If you submit a request to opt out which is not postmarked by [redacted], your request to opt out will be rejected, and you will be bound by the release and all other terms of the Agreement. Do not use a postage meter as that may not result in a postmark appearing on the envelope containing your request to opt out. Any Class Member who submits a complete and timely request to opt out shall, upon receipt by the Settlement Administrator, no longer be a Class Member and not receive their share of the Net Settlement Amount.



Aggrieved Employees cannot opt out of this Agreement and will receive their share of the PAGA Payment regardless of whether they opt out of being a Class Member.

### **C. Objection to Settlement**

If you do not opt out of the Settlement, you can object to the terms of the Settlement. However, if the Court rejects your objection, you will still be bound by the terms of the Settlement. You can ask the Court to deny approval by submitting an objection. You cannot ask the Court to order a larger settlement; the Court can only approve or deny the settlement. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue. You may submit a written objection, which should (a) state your full name and date of birth; (b) provide evidence that you are, in fact, a Class Member; (c) state the reasons for the objection(s), including supporting documentation; (d) identify the case name and number (i.e. *Gil, et al. v. Outback, Inc., et al.*, 21CECG03273); (e) be signed; and (f) be post-marked no later than [REDACTED]. Written objections must be sent to the Settlement Administrator at the address identified in Section III.B.

Additionally, or in the alternative to sending a written objection to the Settlement Administrator, you may appear at the final approval hearing to state your objection. Any Class Member who does not request exclusion may, if the Class Member so desires, enter an appearance through an attorney. If you appear through your own attorney, you are responsible for paying that attorney.

### **IV. EFFECT OF THE SETTLEMENT: RELEASED RIGHTS AND CLAIMS**

If the Court grants final approval of the Settlement, the Court will make and enter judgment consistent therewith. A notice of entry of judgment will be filed with the Court and available online at the Court's public portal website: <https://publicportal.fresno.courts.ca.gov/FRESNOPORTAL/Home/Dashboard/29>. The judgment, whether favorable or not, will bind all Class Members who do not request exclusion. After final approval, each and every Class Member who does not opt out of the Settlement and Aggrieved Employee, will release Defendant and the Released Parties from the Released Class Claims and the Released PAGA Claims described above. In other words, if you were employed as a Class Member by Defendant in California during the Class Period, and you do not exclude yourself from the Settlement, you will be deemed to have entered into these releases and to have released the above-described claims. In addition, you will be barred from ever suing Defendant and the Released Parties with respect to the claims covered by this Settlement. If the Settlement is not approved by the Court or does not become final for some other reason, the litigation will continue.

### **V. FINAL SETTLEMENT APPROVAL HEARING**

The Court will hold a hearing in Department \_\_\_\_, [address] on [REDACTED] at [REDACTED] to determine whether the Agreement should be finally approved as fair, reasonable and adequate. The Court will also be asked to approve Class Counsel's request for attorneys' fees and costs, the Settlement Administrator Costs, and the Class Representatives' Enhancement Payment. The hearing may be continued without further notice. It is not necessary for you to appear at this hearing.

### **VI. ADDITIONAL INFORMATION**

You may access the Complaint, Class Counsel's motion for preliminary approval, the Agreement, and any other documents required by the Court at <https://publicportal.fresno.courts.ca.gov/FRESNOPORTAL/Home/Dashboard/29>. Simply input the case number for this case (21CECG03273) in the appropriate field and click "submit." You can also contact Class Counsel or Defendant's Counsel as follows:

Galen T. Shimoda  
Justin P. Rodriguez  
Renald Konini  
Shimoda & Rodriguez Law, PC  
9401 East Stockton Blvd., Suite 120  
Elk Grove, CA 95624  
Telephone: (916) 525-0716  
**On behalf of Plaintiffs**

David Alami  
Daniel J. Hyun  
Shaheen A. Etemadi  
Torus LLP  
2 Park Plaza, Suite 1260  
Irvine, CA 92614  
Telephone: (949) 590-4122  
**On behalf of Plaintiffs**

William M. Woolman  
Charles P. Hamamjian  
Sagaser, Watkins & Wieland PC  
5260 North Palm Avenue, Suite 400  
Fresno, California 93704  
Telephone: 559-421-7000  
**On behalf of Defendant**

**PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS. IF YOU HAVE ANY QUESTIONS, CALL [number]**

**BY ORDER OF THE COURT**

# Exhibit G

# **Exhibit H**

| <b>TASK CATEGORY</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |  |  |  |  | <b>GTS</b> | <b>JPR</b> | <b>JH</b> | <b>RK</b> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|--|--|------------|------------|-----------|-----------|
| <b><u>Pre-filing investigation, Pleadings, Admin Exhaustion, and Related Law &amp; Motion.</u></b> Includes time spent during initial client meetings and review of claims and documents; Pre-filing investigation/research; Review of payroll records and prior filings against Defendant; Drafting pleadings, notices, administrative filings; Reviewing and responding to pleadings and court filings; Legal research and law and motion related to motion to remand; Communications with opposing counsel regarding same, internal communications regarding same, and communications with clients regarding same.                                                                                                         |  |  |  |  | 18.2       | 19.8       | 35.1      | 10.1      |
| <b><u>Case Review, Management, Strategy Meetings, Dispositive Motions.</u></b> Includes time spent discussing general plan of action updates and strategies in weekly meetings; Research and analysis regarding claim elements and issues affecting representative litigation; Preparing for case management conferences and related meet/confer, drafting of statements, and attendance for hearings; Reviewing minute orders and general correspondence from the Court regarding case management and assignments; Research regarding certification; Research regarding trial plan; Communications with opposing counsel regarding same, internal communications regarding same, communications with clients regarding same. |  |  |  |  | 13.9       | 22.6       | 6.4       | 5.8       |
| <b><u>Discovery (Pre-Mediation/Non-Mediation Related), Related Law &amp; Motion, and Hearings.</u></b> Includes time spent preparing discovery requests and meet and confer efforts with opposing counsel regarding those discovery requests; Research regarding discovery issues and anticipated objections; Document review and analysis; Witness interviews and drafting declarations; Review public records requests regarding prior labor commissioner filings and prior wage and hour lawsuits; Communications with opposing counsel regarding same, internal communications regarding same, communications with clients regarding same.                                                                                |  |  |  |  | 2.6        | 12.3       | 8.5       | 6.2       |
| <b><u>Discovery / Investigation for Mediation.</u></b> Includes time spent preparing informal discovery specifically geared towards mediation; reviewing informal mediation productions, including data, analyses, documents, and public records; Analyzing sample; Perform damages analysis and calculations; Communications with opposing counsel regarding same, internal communications regarding same, communications with clients regarding same.                                                                                                                                                                                                                                                                       |  |  |  |  | 1.5        | 33.1       | -         | 8.3       |
| <b><u>Mediation / Settlement Conference / Direct Negotiations.</u></b> Includes time spent drafting/revising mediation brief and accompanying exhibits; Drafting pocket briefs; Review documents productions for potential exhibits; Preparing for and attending mediation; Pre/Post mediation calls with mediator and follow up settlement discussions; Legal research relating to issues on day of mediation; Direct negotiations with opposing counsel both before and after mediations; Preparing working draft of MOU; Communications with opposing counsel regarding same, internal communications regarding same, communications with clients regarding same.                                                          |  |  |  |  | 1.1        | 18.7       | -         | 5.9       |
| <b><u>Drafting Settlement Agreements.</u></b> Includes time spent preparing long form agreement and exhibits, revisions relating thereto; Drafting Addendums to Agreement and modified notice; Research regarding any approval procedures or issues regarding disputed terms; Solicit and review settlement administrator bids; Communications with opposing counsel regarding same, internal communications regarding same, communications with clients regarding same.                                                                                                                                                                                                                                                      |  |  |  |  | 2.4        | 13.2       | -         | -         |
| <b><u>Settlement Approval.</u></b> Includes time spent drafting motions for preliminary approval, supporting declarations and order; Drafting supplemental briefing and declarations for continued approval hearings; Preparing for and attending approval hearings; Legal research regarding approval issues. Communications with opposing counsel regarding same, internal communications regarding same, communications with clients regarding same.                                                                                                                                                                                                                                                                       |  |  |  |  | 3.8        | 17.9       | -         | 27        |
| <b>TOTAL:</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |  |  |  |  | 43.5       | 137.6      | 50        | 63.3      |

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7 Attorneys for Plaintiff JESSE GIL individually  
and on behalf of similarly situated employees

8 [additional parties continued on next page]  
9

10 **SUPERIOR COURT OF CALIFORNIA**

11 **FOR THE COUNTY OF FRESNO**

12 JESSE GIL and DANIEL AYALA,  
13 individually and on behalf of all other  
14 similarly situated employees,

15 Plaintiffs,

16 vs.

17 OUTBACK, INC., a California Corporation;  
and DOES 1 to 100, inclusive,

18 Defendants.  
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**Case No. 21CECG03273**

*Assigned for All Purposes to Hon. Jon M. Skiles  
Department 503*

**CLASS ACTION**

**DECLARATION OF JUSTIN P. RODRIGUEZ  
IN SUPPORT OF PLAINTIFFS' MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION AND PAGA SETTLEMENT**

Date: July 3, 2025

Time: 3:30 p.m.

Dept.: 503

Judge: Hon. Jon M. Skiles

Filed: November 3, 2021

FAC Filed: January 24, 2024

SAC Filed: November 20, 2024

Trial Date: None Set



1 David Alami (State Bar No. 314628)  
2 Daniel J. Hyun (State Bar No. 309184)  
3 Shaheen A. Etemadi (State Bar No. 319138)

**Torus LLP**

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8 Attorneys for Plaintiff DANIEL AYALA individually  
9 and on behalf of similarly situated employee  
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1 I, Justin P. Rodriguez, declare:

2 1. I am an attorney at law duly admitted to practice before all the courts of the State of  
3 California and an attorney of record for Plaintiff Jesse Gil. I am making this declaration on behalf of  
4 the named Plaintiffs Jesse Gil and Daniel Ayala (“Plaintiffs”), the putative class members, and in  
5 support of Plaintiffs’ Motion for Preliminary Approval of Class Action and PAGA Settlement  
6 (“Motion”). A true and correct copy of the Joint Stipulation Regarding Class Action and PAGA  
7 Settlement and Release (“Agreement”) in this matter is filed with this Motion as Exhibit A. I have met  
8 and conferred with William M. Woolman, Esq., counsel for Defendant Outback, Inc. (“Defendant”)  
9 (Plaintiffs and Defendant sometimes collectively referred to as the “Parties”) who agreed to electronic  
10 service of the Motion being deemed effective as personal service for purposes of any additional notice  
11 required based on the manner of service under the California Code of Civil Procedure. *See Chapman v.*  
12 *Gipson*, 103 Cal.App.2d 585, 587 (1951); *Daiki Otsuka v. Balangue*, 92 Cal.App.2d 788, 792 (1949).

13 2. This lawsuit was brought as a wage and hour class action based on the contention that  
14 Defendant Outback, Inc. (“Defendant”) (Plaintiffs and Defendant sometimes collectively referred to as  
15 the “Parties”), committed numerous violations of the California Labor Code and Wage Orders against  
16 its employees. The operative Complaint alleges causes of action against Defendant for failure to pay  
17 overtime wages, failure to pay minimum wages, meal period violations, rest period violations, wage  
18 statement violations, waiting time penalties, failure to reimburse expenses, failure to pay all wages, and  
19 failure to provide recovery periods. The operative Complaint also alleges that these violations support  
20 further claims for unfair competition and for civil penalties under the Private Attorneys General Act  
21 (“PAGA”). A true and correct copy of Plaintiffs’ operative Second Amended Complaint is filed with  
22 this Motion as Exhibit B.

23 3. We began investigating the claims on September 1, 2021, which included interviewing  
24 Plaintiff Jesse Gil, reviewing his documents, and seeking out potential witnesses to corroborate the  
25 claims. From our initial investigations of the claims and documents, we believed the lawsuit had merit  
26 and could be maintained as a class action. Plaintiff Jesse Gil submitted a notice with the Labor and  
27 Workforce Development Agency (“LWDA”) on October 21, 2021, to exhaust administrative remedies  
28 and bring a claim for civil penalties under the PAGA. Plaintiff Jesse Gil filed a wage and hour class

1 action lawsuit in Fresno County Superior Court, Case No. 21CECG03273, on November 3, 2021 (“*Gil*  
2 Action”). The *Gil* Action asserted claims for failure to pay overtime wages, failure to pay minimum  
3 wages, failure to provide meal periods or pay meal period premiums in lieu thereof, failure to provide  
4 rest periods or pay rest period premiums in lieu thereof, failure to provide accurate wage statements,  
5 failure to pay final wages, failure to pay reimbursements for expenses, and engaging in unfair  
6 competition. Defendant removed the case to the Federal District Court for the Eastern District of  
7 California on December 22, 2021. Our office filed a motion to remand the matter back to state Court  
8 on January 21, 2022. While the motion to remand was pending Plaintiff Jesse Gil and Defendant  
9 entered into an agreement to toll the statute of limitations with respect to any PAGA claims asserted by  
10 Plaintiff while the motion to remand was pending rather than having Plaintiff separately file a PAGA  
11 only lawsuit in state court. The Federal District Court for the Eastern District of California granted our  
12 motion to remand on December 5, 2023. We filed a First Amended Complaint on January 24, 2024, in  
13 the *Gil* Action to add a PAGA cause of action based on the violations alleged in the October 21, 2021,  
14 notice to the LWDA. A true and correct copy of the October 21, 2021, notice filed with the LWDA by  
15 Plaintiff Jesse Gil is being filed with this Motion in Exhibit C.

16 4. Plaintiff Daniel Ayala submitted a notice with the LWDA on November 3, 2023, to  
17 exhaust administrative remedies and bring a claim for civil penalties under the PAGA. Plaintiff Daniel  
18 Ayala filed a wage and hour class action in Fresno County Superior Court, Case No. 23CECG04940,  
19 on November 29, 2023 (“*Ayala* Action”). The *Ayala* Action asserted claims for failure to pay all  
20 wages, failure to provide meal periods or pay meal period premiums in lieu thereof, failure to provide  
21 rest periods or pay rest period premiums in lieu thereof, failure to provide recovery periods, failure to  
22 provide accurate wage statements, failure to pay final wages, failure to pay reimbursements for  
23 expenses, and engaging in unfair competition. Plaintiff Daniel Ayala filed a First Amended Complaint  
24 in the *Ayala* Action on January 11, 2024, adding a PAGA cause of action based on the violations  
25 asserted in the November 3, 2023, notice to the LWDA. A true and correct copy of the November 3,  
26 2023, notice filed with the LWDA by Plaintiff Daniel Ayala is being filed with this Motion in Exhibit  
27 C.  
28

1           5.       A copy of the LWDA notices filed by Plaintiffs were sent to Defendant via certified  
2 mail and Plaintiffs paid the \$75.00 filing fee at the time the notices were filed. There was no response  
3 by the LWDA regarding its intent to investigate the claims alleged in either of Plaintiffs' notices for  
4 more than 65 days from the date of filing. As such, Plaintiffs are authorized to act as Private Attorneys  
5 General and bring a civil action under the PAGA.

6           6.       The Parties agreed to attend a global mediation and attempt to resolve the claims asserted  
7 in the *Gil* Action and the *Ayala* Action, on September 10, 2024, using an experienced mediator, Hon.  
8 Howard Broadman (Ret.). Throughout this litigation our office had numerous communications with  
9 Defendant's Counsel discussing our respective positions. It was only after approximately three (3) years  
10 of litigation involving two separate lawsuits that the Parties were able to resolve all claims asserted in  
11 the *Gil* Action and the *Ayala* Action. The proposed settlement is the result of extensive, arm's length  
12 negotiations, which only occurred after a full-day mediation and post mediation negotiations after  
13 Plaintiffs rejected a mediator's proposal. The negotiations were, at all times, contentious, adversarial,  
14 and at arms-length, though still professional in nature. In order to facilitate the review and approval  
15 process of the proposed settlement, the Parties stipulated to amending the complaint in the *Gil* Action to  
16 effectively consolidate all the claims, parties, and causes of action from the *Ayala* Action into the *Gil*  
17 Action. The Court granted Plaintiffs' request to file the amended complaint, and the operative Second  
18 Amended Complaint (Exhibit B) was filed on November 20, 2024. A copy of the operative Complaint  
19 was uploaded to the LWDA on December 3, 2024, after we received an endorsed copy back from Court.

20           7.       Currently, there is no date set for a motion to certify the class and there is no trial date.

21           8.       Defendant is represented in this matter by Sagaser, Watkins & Wieland PC. From the  
22 beginning, Defendant has contested the merits of this case, the suitability of the case for class action  
23 and/or representative treatment, the manageability of the case at trial, and Plaintiffs' ability to prove a  
24 violation in each pay period for each employee among other defenses and contentions they made  
25 challenging the propriety of this action. Defendant further contended, even assuming there was a  
26 finding supporting the imposition of PAGA penalties, that the Court would likely exercise its discretion  
27 to substantially reduce any such penalties owed based on evidence of Defendant's good faith attempts  
28 to comply with California Labor Code obligations and good faith disputes regarding the alleged

1 violations. Notwithstanding the agreement to settle this matter, Defendant believes the practices  
2 Plaintiffs are contending are unlawful either do not exist or, to the extent they do exist, fully comply  
3 with all state and federal employment laws with respect to Plaintiffs and Class Members. Also,  
4 Defendant has contended that this matter is not appropriate for class certification outside of this  
5 proposed class settlement.

6 9. We have reviewed a substantial number of documents and informal discovery during our  
7 investigation of the claims. Based on the expected testimony from Plaintiffs and Class Members, a  
8 review of Defendant's policies and procedures and other documents relating to the alleged claims,  
9 information on the number of Class Members, Class Members' total workweeks within the Class Period,  
10 pay periods within the one (1) year penalty statute of limitations, the number of Class Members who  
11 separated employment within three (3) years of this case being filed, and a representative sample of  
12 Class Members' time and payroll data, the scope of the potential damages in light of the claims alleged,  
13 the uncertainty in the law with regard to certification, and the negotiations that have taken place, I am  
14 convinced that the proposed settlement is in the best interest of the class. The length and risk of  
15 continued litigation and trial, as well as other normal perils of complex litigation that impact the value of  
16 the claims, were also considered and weighed in reaching the Agreement. In addition, I carefully  
17 considered the prospects of class certification and maintaining class certification through trial  
18 notwithstanding the numerous challenges raised by Defendant. I further considered the fact that  
19 penalties under the PAGA could be substantially cut at the discretion of the Court even if Plaintiffs were  
20 successful on proving those claims and there was risk that a Court could find no willfulness in the failure  
21 to pay wages at separation or the existence of a good faith dispute, which would eliminate the value of  
22 several claims entirely. Overall, I believe it is more beneficial to secure a guaranteed benefit to the class  
23 now rather than to proceed with litigation and potentially obtain zero funds for the class due to legal or  
24 factual issues in the case.

25 10. My office, including myself, my partner, Galen T. Shimoda, and my associate, Renald  
26 Konini, along with our co-counsel's and Plaintiffs' assistance, thoroughly investigated the merits of the  
27 claims and potential damages for such claims. The parties engaged in informal discovery and exchange  
28 of documents that included, but was not limited to, a representative sampling of employee data,

1 including, but not limited to, time records, paystubs, a list of all prevailing wage jobs during the Class  
2 Period, and payroll summaries, and relevant handbooks and memoranda containing Defendant's policies  
3 for the entirety of the statute of limitations applicable to the alleged claims. The representative sample  
4 included 68 Class Members (approximately 20% of all Class Members). Spreadsheets produced by  
5 Defendant included more than 120,000 rows of data across six different spreadsheets that had to be cross  
6 referenced using 37 unique pay codes and 1,178 unique project job codes to perform a damages analysis.  
7 From this production we were able to determine information critical to a reliable damages analysis such  
8 as the average hourly rate, average daily hours worked, shifts eligible for meal and rest periods and the  
9 number of potential shifts that correspond to liability under our theories of liability, average number of  
10 workweeks and pay periods that had potential violations based on the asserted claims, the frequency  
11 with which violations occurred in a given week and/or pay period, and the number of former employees.  
12 This information allowed Plaintiffs to assess both liability and damages and create an accurate damages  
13 model. Plaintiffs assisted in all aspects of this litigation including providing factual information relating  
14 to Plaintiffs' and Class Members' employment conditions, providing a substantial number of documents  
15 and potential witnesses, and answering questions regarding Defendant's factual contentions in this  
16 matter. This was important because it directly related to our ability to maintain this case as a class  
17 action and our ability to obtain a favorable settlement for the class.

18       11. Based on my office's analysis of the payroll sample and the informal discovery outlined  
19 above, there are approximately 341 Class Members who worked 27,946 weeks in the Class Period, 254  
20 Aggrieved Employees who worked 8,210 pay periods during the PAGA Claim Period, an average base  
21 hourly rate of approximately \$26.22, and an average overtime rate of approximately \$39.33. We did  
22 not find any prior Labor Commissioner or Court decisions stating Defendant's practices and/or policies  
23 were improper. As such, a "subsequent violation" may not be found for penalty calculation purposes,  
24 and the penalty exposure analysis herein is based on an "initial violation" valuation being adopted by  
25 any fact finder if this matter went to trial. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157,  
26 1207-1209 (2008). We also interviewed several employees, covering their work experiences in relation  
27 to the asserted claims and incorporated that information into the damages analysis. The following  
28



1 represents the maximum recovery as well as the more realistic range of recovery for each of Plaintiffs'  
2 claims:

3 a) Failure to Pay Minimum Wages: This claim is based on allegations that Defendant failed  
4 to pay Class Members for all hours worked as Class Members were required to work  
5 off-the-clock before their shift, after their shift, and during meal periods. Plaintiffs  
6 alleged that the off-the-clock work experienced by Class Members included time spent  
7 performing vehicle inspections, prepping jobsites before the start of their scheduled  
8 shifts, taking work vehicles to repair shops as needed, attending mandatory meetings  
9 outside regular working hours, performing daily call-ins to check their schedule the  
10 following day, completing pre- and post-shift paperwork, and time Defendant  
11 automatically deducted from employees' actual hours worked due to rounding  
12 employee's time card entries. On average, Class Members worked approximately four  
13 (4) days per workweek. Although there was a range of off-the-clock hours worked by  
14 Class Members, Class Members' combined total of off-the-clock work averaged  
15 approximately two (2) hours per week. The average minimum wage rate over the Class  
16 Period was approximately \$13.38. Based on the 27,496 workweeks in the Class Period,  
17 the maximum damages for this claim are approximately \$735,792.96 ( $[27,496 \times 2] \times$   
18  $\$13.38 = \$735,792.96$ ). Because Class Members' recorded hours worked show an  
19 average of 8.41 hours per day, the damages analysis assumed that all off-the-clock hours  
20 would be overtime hours. Thus, only liquidated damages are being claimed under this  
21 theory of liability to avoid double recovery of substantive wage loss. Defendant heavily  
22 disputed this theory of liability. First, Defendant produced written policies prohibiting  
23 off-the-clock work, prohibiting anyone from authorizing off-the-clock work, and  
24 requiring employees to record all of their hours worked accurately. Defendants also  
25 produced written policies regarding reporting any timecard errors and requiring Class  
26 Members review their records for accuracy. Second, Defendant argued it maintained,  
27 and strictly enforced, its policies against off-the-clock work and that any general  
28 statements it communicated to employees about being ready to work on time were not

1 tantamount to a direction to work off-the-clock. Defendant contends that because  
2 employees verified that their hours were correct, it had no knowledge of any off-the-  
3 clock work to the extent any was performed. Furthermore, in reviewing the sample time  
4 records, there did not appear to be any rounding of hours worked for an employee's  
5 clock-in to start the day or of their final clock out. Rather, any rounding appeared  
6 limited to clock in/out entries associated with meal periods, which would reduce the  
7 total off-the-clock hours to approximately 1.25 to 1.5 per week on average. Finally, the  
8 presence of a good faith dispute would eliminate liability for liquidated damages for  
9 unpaid minimum wages. *See* Cal. Lab. Code § 1194.2(b); *Ridgeway v. Walmart Inc.*, 946  
10 F.3d 1066, 1089-1090 (9th Cir. 2020). Taking all these factors into account, I believe it  
11 is likely a good faith dispute would be found and there would be no recovery for this  
12 claim;

13 b) Failure to Pay Overtime & Prevailing Wages (Off-the-Clock/Failure to Aggregate): The  
14 off-the-clock theory of overtime liability is based on the same factual allegations that  
15 formed the basis for the minimum wage claims, which are stated above. The maximum  
16 damages for this claim are \$2,180,731.97. This includes unpaid overtime on non-  
17 prevailing wage jobs (\$1,185,233.15) and unpaid overtime on prevailing wage jobs  
18 (\$995,498.82) due to off-the-clock work and failure to aggregate the total hours worked  
19 for overtime purposes. Based on the payroll sample, the maximum off-the-clock hours  
20 worked by Class Members over the entire Class Period was approximately 54,992  
21 (27,496 x 2 hours per week). However, approximately 45.2% of the 13,748 pay periods  
22 included prevailing wage overtime, which would have resulted in approximately  
23 24,856.4 of the total off-the-clock hours worked being attributable to prevailing wage  
24 overtime, and 30,135.6 of the total off-the-clock hours worked being attributable to non-  
25 prevailing wage overtime. The average non-prevailing wage overtime rate at the base  
26 rate of pay was approximately \$39.33, equaling \$1,185,233.15 in unpaid overtime. The  
27 average prevailing wage overtime rate at the base rate of pay was approximately \$40.05,  
28 equaling \$1,185,233.15 in unpaid overtime. Because this theory of liability is based on

1 the same facts supporting the minimum wage claim, it is subject to the same risks  
2 identified above. The total off-the-clock hours per week would be reduced to a range of  
3 1.25 to 1.5 hours per week on average because there did not appear to be any rounding  
4 of hours worked for an employee's clock-in to start the day or of their final clock out.  
5 Any rounding appeared limited to clock in/out entries associated with meal periods.  
6 Assuming Plaintiffs were able to establish at least 1.38 unpaid overtime hours per week  
7 (mid-point of the average range of off-the-clock hours), this would reduce off-the-clock  
8 hours attributable to prevailing overtime to 17,150.91 (37,944.48 total hours x .452),  
9 equaling \$686,893.95 in unpaid overtime wages. This would also reduce off-the-clock  
10 hours attributable to non-prevailing wage overtime to 27,993.57 (37,944.48 –  
11 17,150.91), equaling \$1,100,987.11 in unpaid overtime wages. Thus, at an average of  
12 1.38 unpaid overtime hours per week, the maximum damages would be reduced to a  
13 total of \$1,787,881.05. This amount does not take into account any potential risks with  
14 respect to Plaintiffs certifying the claim, proving the merits, or proving damages.  
15 Plaintiffs have assumed that all unpaid hours qualified as overtime. Because this theory  
16 of liability is based on the same facts supporting the minimum wage claim, it is subject  
17 to the same risks identified above. Defendant also contended that Plaintiffs and Class  
18 Members are exempt from overtime under Section 3(L)(1) Wage Order No. 9-2001,  
19 arguing that Plaintiff and Class Members were subject to the hours of service regulations  
20 promulgated by the Department of Transportation. The crux of this dispute centered  
21 around the applicability of the short haul exemption from the hours of service  
22 regulations and its impact on whether or not an exemption for the overtime was  
23 applicable. *Compare* 49 C.F.R. § 395.1(t); *Espinoza v. Hepta Run, Inc.*, 74 Cal.App.5th  
24 44, 57 (2022) *with* 49 C.F.R. § 395.1(e); *Delgado v. Lincoln Transportation Service.,*  
25 *Inc.*, 2019 WL 7208416, \*4 (C.D. Cal. 2019); *Sobaszkievicz v. FedEx Corporation*,  
26 2022 WL 4004773, \*7 (N.D. Cal. 2022). Taking this into account and assuming  
27 Plaintiffs were able to establish at least 1.38 unpaid overtime hours per week (mid-point  
28 of the average range of off-the-clock hours), I believe a more realistic range of recovery

for this claim is between \$577,284.43 to \$921,220.61 (60%-85% reduction to the non-prevailing wage overtime damages and a 30%-40% reduction to the prevailing wage overtime calculations account for potential risk);

c) Failure to Pay Overtime (Regular Rate of Pay): This theory of liability for unpaid overtime is based on allegations that Defendant failed to pay prevailing wages and/or recalculate the regular rate of pay for the applicable overtime rate of pay when Plaintiffs and similarly situated employees earned prevailing wages and non-prevailing wage overtime in the same workweek. For this theory of liability to trigger, the overtime must be worked on non-prevailing wage jobs in the same week that prevailing wages are earned in order for the weighted average regular rate of pay calculation to be applicable. The maximum damages for this claim are \$28,320.88. Based on informal discovery, approximately 41.20% of the approximately 13,748 total pay periods during the Class Period included overtime in the same periods that prevailing wage payments were earned. Based on the average number of total hours worked in these periods, the average total earnings during these periods, and the average overtime and/or double time hours on non-prevailing wage jobs during these periods, there was an average underpayment of approximately \$5.00 per occurrence. Thus, the total unpaid overtime under the regular rate of pay theory of liability was \$28,320.88. Defendant heavily disputed this claim on the basis that Plaintiffs and Class Members were exempt, as stated above. Although the maximum damages number does not take into account the potential risks associated with the claim, this category of damages was more relevant for its impact on derivative penalties like waiting time penalties and wage statement violation penalties. Thus, the full claim value (\$28,320.88) is being used for purposes of the *Kullar* analysis;

d) Failure to Provide Meal Periods: This claim is based on allegations that Defendant failed to authorize and permit uninterrupted thirty (30) minute meal periods every five (5) hours and regularly deprived Plaintiffs and Class Members of the ability to take a second meal period duty-free. The maximum damages for this claim are \$205,685.64. This

1 amount was calculated based on an average hourly rate of \$26.22, an average of 4 shifts  
2 per week with 95.1% of these shifts being over five hours, and a unique violation rate of  
3 approximately 7.5% per shift after accounting for meal period premiums already paid  
4 for violations appearing in the time records. The unique violations included shifts that  
5 had either no meal period punch, a late meal period punch, a meal period lasting less  
6 than thirty (30) minutes, a rounded meal period time entry, and/or a shift of more than  
7 ten (10) hours without a second meal period. This amount does not take into account  
8 any potential risks with respect to Plaintiffs certifying the claim, proving the merits, or  
9 proving damages. Defendant contended that its meal period policy provided Class  
10 Members with an opportunity to take meal periods and that to the extent they were not  
11 taken or were taken late it was due to employee choice. Defendant produced its meal  
12 period policy and pointed out its meal period policy authorized and provided employees  
13 with a thirty (30) minute duty free meal period for every five (5) hours of work and a  
14 second meal period for shifts of ten (10) hours or longer. Defendant also produced  
15 records that showed records of meal periods that employees had taken, and meal period  
16 premiums paid to employees, arguing that this undermined any contention there was a  
17 systematic practice and/or policy of failing to authorize meal periods. Finally,  
18 Defendant contended that Plaintiffs and Class Members' meal and rest period claims  
19 were preempted based on a determination made by the Federal Motor Carrier Safety  
20 Administration ("FMCSA"). *See, e.g. Gutierrez v. J.M. Distrib., Inc.*, 2020 WL  
21 5356668, \*5 (C.D. Cal. 2020) (granting motion to dismiss meal and rest break claims  
22 based on FMCSA Determination of Preemption). This implicated the same short haul  
23 driver exemption issue discussed above, which presented substantial risks to the claim.  
24 While Plaintiffs can utilize the rebuttable presumption of meal period violations based  
25 on the time records under *Donohue v. AMN Servs., LLC*, 11 Cal.5th 58, 78 (2021),  
26 Plaintiffs would still have to demonstrate the claims are not preempted based on the  
27 short haul exemption. Taking these factors into account, I believe a more realistic range  
28

of recovery for this claim is between \$30,852.85 to \$82,274.26 (60%-85% reduction to account for potential risk);

- e) Failure to Provide Rest and Recovery Periods: This claim was based on the same allegations as the meal period claim as the circumstances preventing a lawful meal period from being taken would reasonably also prevent a lawful rest period from being taken. Based on the sample time and pay records, approximately 36.99% of shifts equal to or over 3.5 hours had a rest period violation. The 36.99% violation rate is equal to the meal period violation rate, but no reduction in the percentage is given because no rest period premiums were paid. At an average of 4 shifts per week, 98.4% of shifts being equal to or greater than 3.5 hours, and a 36.99% violation rate, this equated to a total of approximately \$1,049,643.03 based on the average \$26.22 hourly rate. This amount does not take into account any potential risks with respect to Plaintiffs certifying the claim, proving the merits, or proving damages. Because this claim is based on the same factual basis as the meal period claims, it is also subject to the same risks as detailed above. However, there is no requirement that an employer keep records of rest periods, so this claim does not benefit from any presumptive violation based on time records under the law like meal period claims do. This presented an even greater risk for Plaintiffs' rest period claims than is present for the meal period claims. Taking these factors into account, I believe a more realistic range of recovery for this claim would be between \$104,964.30 to \$262,410.76 (75%-90% reduction to account for potential risk;
- f) Failure to Pay Reimbursement: This claim was based on Plaintiffs' contention that Class Members were required to use their personal cell phones to clock in and out, to communicate with other staff and management during their shift, and Defendant required employees to turn on their GPS location on their phones so the timekeeping app could track not only when they would clock in or out, but also where they were without being reimbursed. This is based on a monthly cell phone bill of approximately \$100 and 65% work usage rate, which equates to approximately \$15 owed per week. The maximum exposure for this claim is \$412,440. This amount does not take into account



any potential risks with respect to Plaintiffs certifying the claim, proving the merits, or proving damages. Defendant heavily disputed whether use of personal cell phones was required given the presence of company tablets available on each truck and computer stations and tablets in each plant. Defendant produced the reimbursement policy and time keeping policy which stated that have the option to voluntarily access the Paylocity Application to clock in and out via their smart phone or tablet, but Defendant provided tablets in trucks and in its plants. Defendant contended that the use of any applications on a personal device or using cell phones to communicate with supervisory employees and/or clients was, at most, a personal choice of convenience by Class Members. Based on these risks, I believe a more realistic range of recovery for this claim would be between \$247,464 to \$309,330 (25%-40% reduction to account for potential risk);

g) Failure to Provide Sick Leave: This claim is based on allegations that Defendant failed to provide Plaintiffs and Class Members with all their earned sick pay based on the hours worked because Defendants failed to incorporate the value of prevailing wages into the regular rate of pay for sick leave premium purposes. Only 4% of pay periods had sick leave paid in the same period where prevailing wages were earned. The average difference in the hourly rate for non-prevailing wages and prevailing wages was nominal (\$26.22 vs. \$26.70, respectively). At an average of 8 hours of sick leave per occurrence, this amounted to approximately \$2,111.69 in unpaid sick leave ([ $\$0.48$  per hour x 8 hours] x 549.92 pay periods). The amount does not take into account any potential risks with respect to Plaintiffs proving the merits or damages. However, because the amount of damages is nominal, this claim did not have a substantial impact on the negotiations. Instead, this claim had more of an impact in terms of the potential derivative waiting time penalties, wage statement penalties it triggered, as well as the PAGA penalties. Thus, the full claim value (\$2,111.69) is being used for purposes of the *Kullar* analysis;

h) Failure to Pay All Wages (Vacation): This claim is derivative of Plaintiffs' regular rate of pay theory of liability, *i.e.* payment of vacation wages at termination must be made at

an employee's regular rate of pay pursuant to California Labor Code section 227.3. However, in the time and payroll sample, there were no instances where prevailing wages or other non-discretionary remuneration were paid in addition to the base rate of pay. As such, no value was attributed to this claim due to lack of evidence in the records;

i) Wage Statement Violations: This claim is derivative of Plaintiffs' overtime, minimum wage, prevailing wage, meal and rest period, and sick leave claims. The maximum exposure for this claim is \$410,500, which is calculated based on an initial violation of \$50 per pay period per employee and assumes a violation in each of the 8,210 pay periods within the one (1) year penalty statute of limitations. This amount does not take into account any potential risks with respect to Plaintiffs certifying the claim, proving the merits, or proving damages. Because this claim is derivative of Plaintiffs' other claims, the same risks identified above for the minimum wage, overtime, prevailing wage, meal period, rest period, and sick leave claims apply here as well, substantially affecting the potential value of this claim. Furthermore, under the recent California Supreme Court case, *Naranjo v. Spectrum Sec. Servs., Inc.*, 15 Cal.5th 1056 (2024), employers now have a good faith dispute defense against wage statement claims. Given the factual and legal disputes presented in this fact, I believe it is likely that a Court would find a good faith dispute exists. Thus, I believe it is more realistic that there would be no recovery for this claim;

j) Waiting Time Penalties: This claim is derivative of the overtime, minimum wage, prevailing wage, meal and rest period, and sick leave claims. The maximum damages for this claim are \$1,395,971.15. This amount does not take into account any potential risks with respect to Plaintiffs certifying the claim, proving the merits, or proving damages. The maximum damages were calculated based on the \$26.22 average hourly rate, 206 former employees within the three (3) year penalty statute of limitations, and an average of 8.41 hours worked per shift. Plaintiffs utilized the full 30 days to calculate the total amount due for each formerly employed Class Member. Because it is

1 derivative of Plaintiffs' claims asserted above, it carries all the same risks. Similar to  
2 claims for liquidated damages for minimum wages and wage statement violations,  
3 waiting time penalties are subject to a good faith dispute defense. *See Diaz v. Grill*  
4 *Concepts Servs., Inc.*, 23 Cal.App.5th 859, 868 (2018). For the same reasons as stated  
5 above, it is likely that a good faith dispute would be found and the value associated with  
6 this claim would be eliminated entirely;

7 k) PAGA: This claim is derivative of the Labor Code violations identified above and would  
8 be subject to all the same risks as the underlying claims it is based on. Again, we did  
9 not find any prior Labor Commissioner or court decisions that stated Defendant's  
10 practices and/or policies were improper, so the exposure analysis is based on an "initial  
11 violation" valuation being adopted by any fact finder if this matter went to trial. *See*  
12 *Amaral*, 163 Cal.App.4th at 1207-1209. Based on Class Members' payroll data, the  
13 maximum exposure for this claim was calculated per violation as follows:

- 14 • *Failure to Pay Minimum Wages*: \$821,000 (8,210 pay periods x default \$100 per  
15 pay period per Labor Code section 2699);
- 16 • *Failure to Pay Overtime*: \$410,500 (8,210 pay periods x \$50 per pay period per  
17 Labor Code section 558);
- 18 • *Failure to Provide Meal Periods*: \$410,500 (8,210 pay periods x \$50 per pay  
19 period per Labor Code section 558);
- 20 • *Failure to Provide Rest and Recovery Periods*: \$821,000 (8,210 pay periods x  
21 default \$100 per pay period per Labor Code section 2699);
- 22 • *Failure to Pay Reimbursement*: \$821,000 (8,210 pay periods x default \$100 per  
23 pay period per Labor Code section 2699(f));
- 24 • *Failure to Pay Prevailing Wages*: \$371,092 (3,711 pay periods [45.2% of pay  
25 periods affected] x default \$100 per pay period per Labor Code section 2699);
- 26 • *Failure to Provide Paid Sick Leave*: \$32,840 (328 pay periods [4% of pay  
27 periods affected] x default \$100 per pay period per Labor Code section 2699(f));

- *Failure to Provide Accurate Wage Statements*: \$821,000 (8,210 pay periods x default \$100 per pay period per Labor Code section 2699);
- *Failure to Pay Final Wages*: \$1,009,707.29 (149 former employees within the penalty statute of limitations. Calculated the same as waiting time penalties pursuant to Labor Code section 256 [\$26.22 average hourly rate x 8.41-hour day x 30 days = \$6,776.56. 149 former employees within PAGA Claim Period x \$6,776.56 = \$1,009,707.29]);
- *Failure to Maintain Accurate Records*: \$127,000 (\$500 x 254 employees within the penalty statute of limitations per Labor Code section 1174.5);

These amounts do not take into account any of the risks in proving the merits of the underlying claims that the PAGA damages are based on. Applying the same discount as stated for Plaintiffs' overtime, meal and rest period, reimbursement, prevailing wage, and waiting time penalty claims to account for the risks on the merits, the maximum PAGA damages calculation would be reduced from \$5,645,639.29 to a range of \$2,311,845.20 to \$2,800,504.40. In addition to the risks on the merits, I believe the Court may exercise its discretion to reduce PAGA penalties in this case because a majority of the civil penalties sought would be in addition to amounts owed for substantive violations, some of the violations are due to technical non-compliance with the Labor Code, such as derivative wage statement violations, and several of the violations under different statutes arise from the same, singular conduct *e.g.* off-the-clock work and meal and rest period violations. Defendant produced wage and hour policies and other documents related to attempts at complying with the California Labor Code that a Court may find demonstrates a good faith attempt at compliance, and there were several instances where the actual substantive loss experienced by Aggrieved Employees was substantially less per pay period than the potential maximum penalty that could be imposed. Courts are statutorily authorized to use discretion to reduce penalties and the range of discretion used varies substantially. *See Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (30% reduction); *Fleming v.*

1 *Covidien Inc.*, 2011 WL 7563047, \*3–4 (C.D. Cal. 2011) (82% reduction); *Magadia v.*  
2 *Wal-Mart Associates, Inc.*, 384 F.Supp.3d 1058, 1104 (N.D. Cal. 2019) (80% reduction);  
3 *Hamilton v. Juul Labs, Inc.*, 2021 WL 5331451, \*9-\*10 (N.D. Cal. 2021). The 82%  
4 reduction equates to roughly \$9-\$18 worth of civil penalties per pay period per  
5 employee depending on the total potential value of the civil penalty (*i.e.* \$50-\$100),  
6 which is more in line with actual awards based on my experience and review of awards  
7 in other cases. Thus, the more realistic exposure after accounting for the risks on the  
8 merits and a potential discretionary reduction in civil penalties by the Court, is  
9 approximately \$416,132.14 (82% reduction from \$2,311,845.20) to \$1,960,353.08 (30%  
10 reduction from \$2,800,504.40). Given the substantial risks associated with the claims, I  
11 believe the amount that might ultimately be awarded under this claim would be  
12 significantly lower than the maximum civil penalties available. I believe allocating  
13 \$20,000 to the PAGA claims in this case is appropriate, especially in light of amounts  
14 that Courts have approved as reasonable valuations in other cases. *See Nordstrom Com.*  
15 *Cases*, 186 Cal.App.4th 576, 589 (2010) (approving \$0 allocation to the resolution of  
16 PAGA claims based on their being disputed and being part of a class settlement which  
17 was evaluated based on the terms of the agreement overall); *Junkersfeld v. Med. Staffing*  
18 *Sols., Inc.*, 2022 WL 2318173, \*8 n.2 (E.D. Cal. 2022) (collecting cases with PAGA  
19 settlement values ranging from .037%-1%); *Jennings v. Open Door Marketing, LLC*,  
20 2018 WL 4773057, \*9 (N.D. Cal. 2018) (approving settlement of PAGA claims at 0.6%  
21 of total estimated value due to risk of no recovery); *Ruch v. AM Retail Grp., Inc.*, 2016  
22 WL 5462451, \*7 (N.D. Cal. 2016) (approving \$10,000 PAGA settlement allocation  
23 where total PAGA penalty exposure was approximately \$5.2 million, or 0.2% of total  
24 estimated value); *Davis v. Cox Commc'ns California, LLC*, 2017 WL 1496407, \*1 (S.D.  
25 Cal. 2017) (preliminarily approving \$4,000 PAGA allocation in \$275,000 settlement);  
26 *Moore v. Fitness Int'l, LLC*, 2014 WL 12571448, \*5 (S.D. Cal. 2014) (approving \$2,500  
27 PAGA allocation when attorneys' fees award alone amounted to \$200,000); *Jack v.*  
28 *Hartford Fire Ins. Co.*, 2011 WL 4899942, \*6 (S.D. Cal. 2011) (approving \$3,000

1           PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, 2010  
2           WL 2196104, \*2 (S.D. Cal. 2010); *Hopson v. Hanesbrands Inc.*, 2009 WL 928133, \*1,  
3           \*9 (N.D. Cal. 2009) (approving \$1,500 PAGA allocation in \$1,026,000 settlement);  
4           *Syed v. M-I, L.L.C.*, 2017 WL 714367, \*13 (E.D. Cal. 2017) (approving \$100,000  
5           PAGA allocation in \$3,950,000 gross settlement amount allocated to California class  
6           even though PAGA exposure was calculated at \$53,600,000, or 0.2% of total estimated  
7           potential value); *Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575, \*6-\*7 (E.D. Cal.  
8           2012) (approving \$10,000 PAGA allocation in a \$3,700,000 settlement); *Franco v. Ruiz*  
9           *Food Prod., Inc.*, 2012 WL 5941801, \*14 (E.D. Cal. 2012) (\$10,000 PAGA allocation  
10          from \$2,500,000 settlement fund); *Chu v. Wells Fargo Investments, LLC*, 2011 WL  
11          672645, \*1 (N.D. Cal. 2011) (\$10,000 PAGA allocation from \$6,900,000 settlement  
12          fund).

13          12.     In summary, Plaintiffs' gross recovery of \$367,500 under the Agreement equals  
14          approximately 3% of the maximum value of the claims in this matter (\$12,066,836.62) and between  
15          10.3% and 26.1% of the more realistic maximum range of recovery (\$1,407,130.29 to \$3,566,021.27).  
16          After deducting the proposed allocations for attorneys' fees and costs, any Enhancement Payments,  
17          Settlement Administrator Costs, and the PAGA Payment from the Gross Settlement Amount, the net  
18          recovery under the Agreement, \$171,375, represents between 4.8% and 12.2% of the more realistic  
19          maximum range of recovery. The average net award is approximately \$502.57. I believe the  
20          Agreement is fair, reasonable, and adequate, representing a reasonable compromise of claims based on  
21          the legal and factual disputes in this case. The ability to secure a guaranteed settlement now and ensure  
22          Class Members receive some compensation, rather than proceed to further litigation and potentially  
23          recover nothing, was a motivating factor in reaching this Agreement. The ability to secure a guaranteed  
24          settlement now and ensure Class Members receive some compensation, rather than proceed to further  
25          litigation and potentially recover nothing, was a motivating factor in reaching this Agreement.

26          13.     In agreeing to take on the case for all Class Members, our office agreed to take this case  
27          on a contingency basis, meaning that we would take a percentage of any settlement or judgment should  
28          we recover a monetary amount. We took a risk that we would not recover any money in this matter if



1 we were unsuccessful at trial. We also took on the risk that the case may be subject to an unfavorable  
2 summary judgment ruling. However, we believe it is important to make sure employees are able to  
3 find affordable representation in order to ensure that employers are complying with all their legal  
4 obligations towards employees and paying employees all their hard-earned wages. There have been  
5 many class cases we have litigated where, ultimately, we get zero for our time because we are unable to  
6 meet certification requirements or the company becomes financially insolvent. Additionally, there are  
7 numerous occasions, like in this case, where the fee recovered actually results in a negative multiplier  
8 of our lodestar as the amount of work required to obtain a good result for the class is usually more than  
9 the 35% common fund request we make to compensate our time.

10 14. I am a shareholder at Shimoda & Rodriguez Law, PC. My law firm is a boutique law  
11 practice that focuses primarily on employment litigation, emphasizing wage and hour litigation. I  
12 attended and graduated college from U.C. Davis, receiving a Bachelor of Arts in Philosophy and the  
13 Departmental Citation for Academic Achievement in the Philosophy program. I was one of only two  
14 recipients of this award out of the entire Philosophy Department. After U.C. Davis, I attended the  
15 University of the Pacific, McGeorge School of Law, graduating in 2011 and receiving a Juris  
16 Doctorate. I graduated in the top 20% of my class and was a member of the Traynor Honor Society at  
17 McGeorge. Other academic achievements of mine include receiving a Witkin Award (top grade) in my  
18 legal research and writing course, a Witkin Award in complex civil litigation, being a member of the  
19 Dean's List from 2008 to 2011, being a Legislative Staff Writer for the *McGeorge Law Review* from  
20 2009–2010, being an Associate Comment Editor for the *Pacific McGeorge Global Business &*  
21 *Development Law Journal* from 2010–2011, and being selected as a Sacramento County Bar  
22 Association Diversity Fellow in 2009. I was also a member of the Employment and Labor Law Society  
23 and an officer for the Latino Law Students Association from 2009 to 2010.

24 15. I have been practicing law since 2011. From 2011 to 2016, I worked with the Shimoda  
25 Law Corp. as an Associate. I became a Shareholder/Partner in the firm in 2017. Shimoda Law Corp.  
26 became Shimoda & Rodriguez Law, PC, in 2022. Since 2017, I have received an AV Preeminent  
27 rating from Martindale-Hubbell for my legal ability and ethical standards. From 2018 to present, I have  
28 been recognized as a Super Lawyer (Rising Star). I have been a panel speaker and presented a number

1 of seminars covering issues in wage and hour litigation in general and complex class and PAGA  
2 litigation in particular. These engagements include the following: (1) *Epic Systems*, PAGA, and the  
3 Future of Employment Arbitration in California (Sacramento County Bar Assoc., Sept. 2018); (2) Class  
4 Actions and PAGA Claims (Assoc. of Defense Counsel of Northern California & Nevada, Jul. 2020);  
5 (3) Mediation: The Experienced Trial Lawyers Perspective (Sacramento County Bar Assoc., Sept.  
6 2020); (4) How to Become a Pivotal Part of Any Wage and Hour Practice Group (Sacramento County  
7 Bar Assoc., Mar. 2021); (5) Emerging Trends and Issues Relating to Arbitration and PAGA Claims in a  
8 Post-*Viking River Cruises* World (Sacramento County Bar Assoc., Nov. 2022). I was elected to the  
9 Sacramento County Bar Association Labor and Employment Law Section's executive committee in  
10 2019 and was the Chair of the executive committee for 2022. I have also been a member of the  
11 Presiding Judge Civil Law Advisory Committee for Sacramento County Superior Court since August  
12 2020. My practice focuses on complex civil litigation, including wage and hour class actions, PAGA  
13 claims, and Fair Labor Standards Act ("FLSA") claims. I am actively involved in most all of the  
14 complex litigation handled by our firm. Class and/or PAGA actions I have litigated or am currently  
15 litigating, including the instant case, includes, but is not limited to, the following:

- 16 • *Aanerud v. Neumann Ltd., et al.*, Case No. 34-2014-00169324 (Sac. Sup. Ct.);
- 17 • *Adams-Angway v. Placer Title Company, et al.*, Case No. SCV0040845 (Placer Sup. Ct.);
- 18 • *Adewumi v. GHS Interactive Security, LLC*, Case No. 34-2017-00210768 (Sac. Sup. Ct.);
- 19 • *Arrington v. Capital Express Lines, Inc., et al.*, Case No. 34-2012-00134195 (Sac. Sup. Ct.);
- 20 • *Aslam v. American Custom Private Security, Inc.*, Case No. STK-CV-UOE-2018-0012080  
21 (San Joaquin Sup. Ct.);
- 22 • *Aslam v. Cypress Security, LLC*, Case No. 34-2017-00220143 (Sac. Sup. Ct.);
- 23 • *Aslam v. Surveillance, Security, Inc.*, Case No. 34-2017-00220142 (Sac. Sup. Ct.);
- 24 • *Azzolino v. Brake Masters of Sacramento, LLC, et al.*, Case No. 34-2017-00218293 (Sac.  
25 Sup. Ct.);
- 26 • *Barkhausen v. Bank of Stockton*, Case No. STK-CV-UOE-2019-17145 (San Joaquin Sup.  
27 Ct.);
- 28 • *Benak v. MDStat Urgent Care, Inc.*, Case No. 34-2015-00188181 (Sac. Sup. Ct.);

- 1 • *Bigornia v. Quest Diagnostics Clinical Laboratories, Inc., et al.*, Case No. 34-2019-
- 2 00271174 (Sac. Sup. Ct.);
- 3 • *Blig v. Medical Management International, Inc.*, Case No. 34-2017-00213906 (Sac. Sup.
- 4 Ct.);
- 5 • *Caguioa, et al. v. Fortune Senior Enterprises, et al.*, Case No. 34-2014-00171831 (Sac. Sup.
- 6 Ct.);
- 7 • *Camacho, et al. v. Z Street, Inc., d.b.a. Tower Café, et al.*, Case No. 34-2014-00163880 (Sac.
- 8 Sup. Ct.);
- 9 • *Castorena v. Flowmaster, Inc.*, Case No. CV18-2191 (Yolo Sup. Ct.);
- 10 • *Cannon v. Miller Event Management, Inc., et al.*, Case No. 34-2014-00168103 (Sac. Sup.
- 11 Ct.);
- 12 • *Carr, et al. v. CableCom, LLC*, Case No. 34-2017-00212739 (Sac. Sup. Ct.);
- 13 • *Chace v. Daisy Holdings, LLC, dba Pine Creek Care Center, et al.*, Case No. 34-2017-
- 14 00209613 (Sac. Sup. Ct.);
- 15 • *Clamens-Hollenback v. Atterro, Inc.*, Case No. 17-CV-305535 (Santa Clara Sup. Ct.);
- 16 • *Cress, et al. v. Mitsubishi Chemical Carbon Fiber and Composites, Inc.*, Case No. 34-2017-
- 17 00222101 (Sac. Sup. Ct.);
- 18 • *De Arcos v. Amware Pallet Services, LLC*, Case No. CV-17-629 (Yolo Sup. Ct.);
- 19 • *Ferreyra v. Point Digital Finance, Inc., et al.*, Case No. 20CV373776 (Santa Clara Sup. Ct.);
- 20 • *Foye v. The Golden 1 Credit Union*, Case No. 34-2018-00235003 (Sac. Sup. Ct.);
- 21 • *Garcia v. A-L Financial Corp.*, Case No. 34-2014-00171831 (Sac. Sup. Ct.);
- 22 • *Garcia v. Royal Plywood Company, LLC, et al.*, Case No. 34-2017-00221627 (Sac. Sup. Ct.);
- 23 • *Gomes v. Progressive Casualty Insurance Company*, Case No. 34-2018-00241979 (Sac. Sup.
- 24 Ct.);
- 25 • *Gomez v. Mayflower Farms Incorporated, et al.*, Case No. CV24157 (Colusa Sup. Ct.);
- 26 • *Gilliam v. Matrix Energy Services, Inc.* Case No. RG 11592345 (Alameda Sup. Court);
- 27 • *Gonzalez v. Northcentral Pizza, LLC, et al.*, Case No. 34-2019-00252018 (Sac Sup. Ct.);
- 28 • *Gordon, et al. v. Hospice Source, LLC, et al.*, Case No. 34-2019-00250022 (Sac. Sup. Ct.);

- *Gotts v. John L. Sullivan Chevrolet, Inc.*, Case No. 34-2018-00231576 (Sac Sup. Ct.);
- *Hartwell v. Techforce Telecom, Inc.*, Case No. 39-2014-00307197 (San Joaquin Sup. Ct.);
- *Hellum v. AI Protective Services, LLC, et al.*, Case No. 34-2018-00234449 (Sac. Sup. Ct.);
- *Hercules v. Maximus Services, LLC, et al.*, Case No. 34-2019-00268385 (Sac Sup. Ct.);
- *Hernandez v. Snyir, Inc.*, Case No. 34-2017-00207641 (Sac. Sup. Ct.);
- *Heinz v. Wright Tree Services*, Case No. 34-2012-00131949 (Sac. Sup. Ct.);
- *Hoover v. Mom365*, Case No. 2:17-cv-01328-TLN-CKD (E.D. Cal.);
- *Insixiengmay v. Hyatt Corporation, et al.*, Case No. 2:18-cv-02993-TLN-DB (E.D. Cal.);
- *Josol v. Dial Medical Corp.*, Case No. 34-2008-00010040 (Sac. Sup. Ct.);
- *McMahon v. Airco Mechanical, Inc.*, Case No. 34-2019-00259269 (Sac. Sup. Ct.);
- *Muhieddine v. KBA Docusys, Inc.*, Case No. 34-2014-00164720 (Sac. Sup. Ct.);
- *Nguyen v. Cardinal Health Pharmacy Services, LLC, et al.*, Case No. 2:19-cv-01939-KJM-EFB (E.D. Cal.);
- *Prasad v. D. G. Smith Enterprises, Inc.*, Case No. 34-2017-00215046 (Sac. Sup. Ct.);
- *Ralston v. JMJ Incorporated, Inc. et al.*, Case No. 34-2017-00217047 (Sac. Sup. Ct.);
- *Roberts v. CableCom, LLC*, Case No. 34-2017-00212739 (Sac. Sup. Ct.);
- *Robinson v. West of Chicago Restaurants, Inc., dba Chicago Fire*, Case No. 34-2010-00082201 (Sac Sup. Ct.);
- *Salas, et al. v. Joint Ventures, LLC, et al.*, Case No. 34-2018-00227493 (Sac. Sup. Ct.);
- *Salmon v. Ovarions Fanfare, L.P., et al.*, Case No. 34-2018-00244749 (Sac. Sup. Ct.);
- *Scarano v. J.R. Putman, Inc.*, Case No. 34-2018-00244753 (Sac. Sup. Ct.);
- *Smith v. Greyhound Lines, Inc.*, Case No. 34-2017-00219188 (Sac. Sup. Ct.);
- *Sullivan v. National Response Corporation*, Case No. 34-2018-00244757 (Sac. Sup. Ct.);
- *Talent v. Leslie's Poolmart, Inc.*, Case No. 34-2012-00128539 (Sac. Sup. Ct.);
- *Thornton v. McConnell Jones Lanier & Murphy LLP*, Case No. No. 34-2017-00211553 (Sac. Sup. Ct.);
- *Watson v. Quarter At A Time, LLC*, Case No. 34-2017-00217570 (Sac. Sup. Ct.); and
- *Willis v. Premier Pools, Incorporated*, Case No. 34-2017-00211710 (Sac. Sup. Ct.).

1           16.     The preceding list does not include those cases where, for various reasons, the case was  
2 filed as a class action and/or PAGA action, but did not maintain that status through the end of the case.

3           17.     My partner, Galen T. Shimoda, Esq., worked with me on this matter and was critical in  
4 assisting with all aspects of the litigation of this case. Mr. Shimoda and I are some of only a handful of  
5 plaintiff attorneys located in Sacramento who handle wage and hour class actions. Mr. Shimoda  
6 attended and graduated from the University of Utah in 2000 with a B.S. in Business Management and a  
7 B.A. in Asian Studies, with a minor in Japanese language. He then attended and graduated from the  
8 University of the Pacific, McGeorge School of Law and received his J.D. degree in 2003. He  
9 graduated from McGeorge in the top 5% of his class and was a member of the Order of the Coif and  
10 Traynor Honor Society. Since graduating from McGeorge, Mr. Shimoda has authored a number of  
11 employment law articles for journals and our firm regularly publishes articles on our firm's website.  
12 Mr. Shimoda has been a regular panel speaker for the CEB (Continuing Education of the Bar)  
13 Employment Review seminars from 2014 to the present. His speaking engagements include the  
14 following: 1) Lorman Military Leave Law Speaker; 2) Restaurant Association Speaker at Annual  
15 Seminar (Los Angeles); 3) Federal Bar Association, Sacramento Chapter: 2015 Amendments to the  
16 Federal Rules of Civil Procedure (Mar. 30, 2016); 4) CEB – Employment Law Practice: 2016 Year in  
17 Review (Jan. 20, 2017); 5) CEB – Employment Law Practice: 2015 Year in Review (Jan. 22, 2016); 6)  
18 CEB – Employment Law Practice: Year in Review (2014) (Jan. 9, 2015); 7) CEB - Employment Law  
19 Practice: Year in Review (2013) (Jan. 10, 2014); 8) Sacramento County Bar Association - Class  
20 Actions from the Trenches: Real World Experiences from the Plaintiff and Defense Bar (Feb. 21,  
21 2012); 9) Sacramento Employer Advisory Council – Wage and Hour Workshop: Going Beyond the  
22 Exemption Discussion (Apr. 7, 2016); 10) Sacramento Employer Advisory Council - Wage & Hour  
23 Panel and AB 1825 Training: Updates on California's New Wage Laws and Manager Compliance  
24 Training (Apr. 25, 2017); 11) Sacramento County Bar Association, Labor and Employment Section –  
25 PAGA Representative Litigation: Emerging Trends and Issues (May 17, 2016); 12) Sacramento  
26 Business Journal Panel – Overtime Rules (Jun. 23, 2016); 13) Association of Defense Counsel of  
27 Norther California & Nevada - Employment Law Update – Do the Math: Calculation Exposure and  
28 Damages in Wage and Hour Cases (Aug. 12, 2016); 14) California Employment Lawyers Association -

PAGA Today and PAGA Tomorrow: Moderate-Advanced Issues In PAGA Litigation (Oct. 20, 2017); 15) California Employment Lawyers Association Advanced Wage and Hour Seminar – Better Know a Venue Roundup (May 17, 2019). Mr. Shimoda has been AV rated by Martindale Hubbell since 2013, was recognized as a Super Lawyer (Rising Star) from approximately 2009 to 2013 and was recognized as a Super Lawyer from 2014 to present.

18. Mr. Shimoda has practiced law in California since being admitted to the State Bar in 2003, litigating wage and hour class actions and individual wage and hour litigation among other cases. Mr. Shimoda began practicing class action law on the defense side at the firm of Orrick, Herrington & Sutcliffe LLP. He then switched to plaintiff class action work in 2005. His class action experience is in wage and hour law. Mr. Shimoda has litigated several class action cases in California State and Federal Courts, including up to certification, settlement, preliminary and final approval, and disbursement of monies, and has been found to be satisfy the adequacy requirements for class counsel. Some of the class action and/or PAGA cases he is litigating and/or has litigated as lead or co-counsel include the following:

- *Aanerud v. Neumann Ltd., et al.*, Case No. 34-2014-00169324 (Sac. Sup. Ct.);
- *Acosta v. Acosta Sales, LLC, et al.*, Case No. 2:11-CV-01796 (C.D. Cal.);
- *Atchley v. Blaggs Food Service, LLC*, 34-2017-0215930 (Sac. Sup. Ct.);
- *Adewumi v. GHS Interactive Security, LLC*, Case No. 34-2017-00210768 (Sac. Sup. Ct.);
- *Arnall v. North American Merchandising Service Inc.*, Case No. 06AS01439 (Sac. Sup. Ct.);
- *Arrington v. Capital Express Lines, Inc., et al.*, Case No. 34-2012-00134195 (Sac. Sup. Ct.);
- *Aslam v. Cypress Security, LLC*, Case No. 34-2017-00220143 (Sac. Sup. Ct.);
- *Aslam v. Surveillance, Security, Inc.*, Case No. 34-2017-00220142 (Sac. Sup. Ct.);
- *Azzolino v. Brake Masters of Sacramento, LLC, et al.*, Case No. 34-2017-00218293 (Sac. Sup. Ct.);
- *Benak v. MDStat Urgent Care, Inc.*, No. 34-2015-00188181 (Sac. Sup. Ct.);
- *Blig v. Medical Management International, Inc.*, Case No. 34-2017-00213906 (Sac. Sup. Ct.);
- *Caguioa, et al. v. Fortune Senior Enterprises, et al.*, Case No. 34-2014-00171831 (Sac. Sup.



- Ct.);
- *Camacho, et al. v. Z Street, Inc., d.b.a. Tower Café, et al.*, Case No. 34-2014-00163880 (Sac. Sup. Ct.);
  - *Carlos v. Abel Mendoza, Inc., et al.*, Case No. 34-2016-00195806 (Sac. Sup. Ct.);
  - *Cannon v. Miller Event Management, Inc., et al.*, Case No. 34-2014-00168103 (Sac. Sup. Ct.);
  - *Carr et al. v. CableCom, LLC*, Case No. 34-2017-00212739 (Sac. Sup. Ct.);
  - *Chace v. Daisy Holdings, LLC, dba Pine Creek Care Center, et al.*, Case No. 34-2017-00209613 (Sac. Sup. Ct.);
  - *Clamens-Hollenback v. Atterro, Inc.*, Case No. 17-CV-305535 (Santa Clara Sup. Ct.);
  - *Colbert v. American Home Craft Inc.*, Case No. 05AS05012 (Sac. Sup. Ct.);
  - *De Arcos v. Amware Pallet Services, LLC*, Case No. CV-17-629 (Yolo Sup. Ct.)
  - *Diosdado v. Nor-Cal Venture Group, Inc., et al.*, Case No. STK-CV-UOE-2020-0008242 (San Joaquin Sup. Ct.);
  - *Dugue v. Sierra Forever Families, et al.*, Case No. 34-2017-00210770 (Sac. Sup. Ct.);
  - *Fadhl v. Siemens Healthcare Diagnostics, Inc., et al.*, Case No. 34-2017-00209518 (Sac. Sup. Ct.);
  - *Fujimoto v. Nabe-Ya, Inc., et al.*, Case No. 20CV01255 (Butte Sup. Ct.);
  - *Garcia v. A-L Financial Corp.*, Case No. 34-2014-00171831 (Sac. Sup. Ct.);
  - *Gerard v. Les Schwab Tires Center of California, Inc.*, Case No. 34-2007-30000003 (Sac. Sup. Ct.);
  - *Gomez v. Mayflower Farms Incorporated, et al.*, Case No. CV24157 (Colusa Sup. Ct.);
  - *Gilliam v. Matrix Energy Services, Inc.* Case No. RG 11592345 (Alameda Sup. Court);
  - *Hartwell v. Techforce Telecom, Inc.*, Case No. 39-2014-00307197 (San Joaquin Sup. Ct.);
  - *Hernandez et al. v. MP Nexlevel, LLC et al*, Case No. 3 :16-cv-03015-JCS (N.D. Cal.);
  - *Hernandez v. Snyir, Inc.*, Case No. 34-2017-00207641 (Sac Sup. Ct.);
  - *Heinz v. Wright Tree Services*, Case No. 34-2012-00131949 (Sac. Sup. Ct.);
  - *Hoover v. Mom365*, Case No. 2:17-cv-01328-TLN-CKD (E.D. Cal.);

- *James v. Language World Services, Inc., et al.*, Case No. 34-2020-00279929 (Sac. Sup. Ct.);
- *Josol v. Dial Medical Corp.*, Case No. 34-2008-00010040 (Sac. Sup. Ct.);
- *Koretsky v. Furniture USA, Inc.*, Case No. 34-2014-00172142 (Sac. Sup. Ct.);
- *Muhieddine v. KBA Docusys, Inc.*, Case No. 34-2014-00164720 (Sac. Sup. Ct.);
- *Massey v. V3 Electric, Inc., et al.*, Case No. 34-2019-00263666 (Sac. Sup. Ct.);
- *Miller v. Caldwell Transportation Company, LLC, et al.*, Case No. 34-2018-00234954 (Sac. Sup. Ct.);
- *Miller v. Leaders in Community Alternatives*, Case No. FCSO47249 (Solano Sup. Ct.);
- *Pickens v. Elica Health Centers*, Case No. 34-2016-00200382 (Sac. Sup. Ct.);
- *Prasad v. D. G. Smith Enterprises, Inc.*, Case No. 34-2017-00215046 (Sac. Sup. Ct.);
- *Ralston v. JMJ Incorporated, Inc. et al.*, Case No. 34-2017-00217047 (Sac. Sup. Ct.);
- *Rickwalt v. Direct Reconditioning, LLC, et al.*, Case No. 34-2015-00175642 (Sac. Sup. Ct.);
- *Robinson v. West of Chicago Restaurants, Inc., dba Chicago Fire*, Case No. 34-2010-00082201 (Sac Sup. Ct.);
- *Rogers v. Les Scwhab Tires Center of California, Inc.*, Case No. 34-2009-00066320 (Sac. Sup. Ct.);
- *Schechter et al. v. Isys Solutions, Inc.*, Case No. RG10550517 (Alameda Sup. Ct.);
- *Smith v. Greyhound Lines, Inc.*, Case No. 34-2017-00219188 (Sac. Sup. Ct.);
- *Talent v. Leslie's Poolmart, Inc.*, Case No. 34-2012-00128539 (Sac. Sup. Ct.);
- *Thornton v. McConnell Jones Lanier & Murphy LLP*, Case No. No. 34-2017-00211553 (Sac. Sup. Ct.);
- *Valencia v. Lowbrau Bier Garten, LLC, et al.*, Case No. 34-2019-00258038 (Sac Sup. Ct.);
- *Watson v. Quarter At A Time, LLC*, Case No. 34-2017-00217570 (Sac. Sup. Ct.);
- *Williams v. Civic Development Group*, Case No. 06AS00267 (Sac. Sup. Ct.); and
- *Willis v. Premier Pools, Incorporated*, Case No. 34-2017-00211710 (Sac. Sup. Ct.).

19. The preceding list of cases does not include those where, for a variety of reasons, the case was initially filed as a class and/or PAGA action, but did not maintain that status through the end of the case.

20. My associate, Renald Konini, Esq., also worked with me on this case. In May 2011, Mr. Konini graduated from Seton Hall University School of Law. Prior to moving to California, he practiced law in New Jersey. While working for my firm, Mr. Konini has worked on a variety of individual and class action cases, including those involving wage and hour claims, Private Attorney General Act claims, wrongful termination claims, discrimination claims, retaliation claims, and harassment claims. Mr. Konini passed the July 2016 California Bar Examination and started practicing as an associate at my firm from approximately April 2019 to February 2021. He rejoined my firm in September 2022. Mr. Konini has experience drafting written discovery, taking and defending depositions, calculating class-wide damages, interviewing putative class members, drafting motions and briefs on complex class action procedures, negotiating class and individual damages claims, and communicating with opposing counsel regarding these items in navigating the litigation. Mr. Konini has also worked on other class and/or PAGA wage and hour actions that my firm has filed, namely *Bertelli v. Air Products and Chemicals, Inc.*, Case No. 34-2018-00236898 (Sac. Sup. Ct.), *Carr v. Howroyd-Wright Employment Agency, Inc.*, Case No. 34-2018-00228290 (Sac. Sup. Ct.), *Gomez v. Vander Schaaf Dairy, et al.*, Case No. STK-CV-UOE-2020-0003954 (San Joaquin Sup. Ct.), *Haggins v. Kelly Services, Inc.*, Case No. 34-2017-00220473 (Sac. Sup. Ct.), *Hussaini v. Integrated Resources, Inc.*, et al, Case No. 34-2021-00297152 (Sac. Sup. Ct.), *Kee, et al. v. Dr. Jeffrey A. Saladin, Dental Corporation (D/B/A Children's Choice Pediatric Dental Care), et al.*, Case No. 34-2020-00290072 (Sac. Sup. Ct.), *Lear v. Raxium, Inc.*, Case No. 21CV004358 (Alameda Sup. Ct.), *Serrano v. Cool Time, LLC*, Case No. 34-2021-00312356 (Sac. Sup. Ct.), *Grebe v. Mary Ann's Baking Co., Inc.*, Case No. 34-2020-00285254-CU-OE-GDS (Sac. Sup. Ct.), *Fujimoto v. Nabe-Ya, Inc., et al.*, Case No. 20CV01255 (Butte Sup. Ct.), *Massey v. V3 Electric, Inc., et al.*, Case No. 34-2019-00263666 (Sac. Sup. Ct.), *Miller v. Caldwell Transportation Company, LLC, et al.*, Case No. 34-2018-00234954 (Sac. Sup. Ct.), *Pek, et al v. Varris Management, Inc.*, Case No. STK-CV-UOE-2020-3954 (San Joaquin Sup. Ct.), *Valencia v. Lowbrau Bier Garten, LLC, et al.*, Case No. 34-2019-00258038 (Sac Sup. Ct). Mr. Konini's practice largely revolves around wage and hour matters, including class and PAGA claims.

21. My former associate, Jessica L. Hart, Esq., also worked with me on this matter. Ms. Hart graduated from the University of California Davis School of Law. Prior to joining Shimoda &

Rodriguez Law, PC, Ms. Hart worked alongside a number of attorneys in the Sacramento area focusing almost exclusively on plaintiff's side litigation and employment law for several years prior to becoming licensed in 2020. While with my firm, Ms. Hart worked on a variety of individual, class action, and Private Attorneys General Act cases involving wage and hour claims. As an associate, some of the class action and/or PAGA cases Ms. Hart litigated include the following:

- *Afoa v. Milestone Retirement Communities, LLC., et al.*, Case No. 34-2020-00282555 (Sac. Sup. Ct.);
- *Cota v. Milestone Management (CA) – Meadows, LLC.*, Case No. 34-2020-00280648 (Sac. Sup. Ct.);
- *Coy v. Southern Home Care Services, Inc., et al.*, Case. No. 2:21-CV-00067-JAM-CKD (E.D. Cal.);
- *Dreyer v. Automation Anywhere, Inc.* Case. No 20CV372730 (Santa Clara Sup. Ct.);
- *Diosdado v. Nor-Cal Venture Group, Inc., et al.*, Case No. STK-CV-UOE-2020-0008242 (San Joaquin Sup. Ct.);
- *Fang v. Interpress Technologies, Inc.* Case. No. 34-2021-00292937 (Sac. Sup. Ct.);
- *Fujimoto v. Nabe-Ya, Inc., et al.*, Case No. 20CV01255 (Butte Sup. Ct.);
- *Garcia v. Aquality Water Management, Inc.* Case No. 34-2021-00292794 (Sac. Sup. Ct.);
- *Hawkins v. Twitch Interactive, Inc.*, Case No. 34-2020-00281761 (Sac. Sup. Ct.);
- *Hussaini v. Integrated Resources, Inc, et al.*, Case. No. 34-2021-00297152 (Sac. Sup. Ct.);
- *Leon v Golden Bay Fence Plus Iron Works, Inc., et al.*, Case No. STK-CV-UOE-2021-0000543 (San Joaquin Sup. Ct.);
- *Massey v. V3 Electric, Inc., et al.*, Case No. 34-2019-00263666 (Sac. Sup. Ct.);
- *Miller v. Caldwell Transportation Company, LLC, et al.*, Case No. 34-2018-00234954 (Sac. Sup. Ct);
- *Madrigal Vargas v. Mary Ann's Baking Co., Inc.*, Case No. 2:21-CV-00320-JAM-JDP (E.D. Cal.);
- *Pek, et al v. Varris Management, Inc.*, Case No. STK-CV-UOE-2020-3954 (San Joaquin Sup. Ct.);

- *Perez v. Too Infinity Management, LLC, et al.*, Case No. 34-2020-00285276 (Sac. Sup. Ct.);
  - *Valencia v. Lowbrau Bier Garten, LLC, et al.*, Case No. 34-2019-00258038 (Sac Sup. Ct.);
  - *Valentin v Sacramento Laundry Company, Inc.* Case.No. 34-2019-00270987 (Sac. Sup. Ct.);
- and
- *Whiteside v. SPSG Partners, et al.*, Case. No. 2:20-cv-01643-TLN-DMC (Sac. Sup. Ct.).

22. The preceding list of cases does not include those where, for a variety of reasons, the case was initially filed as a class and/or PAGA action, but did not maintain that status through the end of the case.

23. In connection with any final approval hearing, we will be seeking attorneys' fees and costs, an Enhancement Payment to the Class Representatives, and Settlement Administrator Costs as set forth in the Agreement. We will be requesting attorneys' fees and costs pursuant to the common fund doctrine as I believe it to be applicable to the present case pursuant to *Serrano v. Priest*, 20 Cal.3d 25, 34-35 (1977), *Laffitte v. Robert Half Internat. Inc.*, 1 Cal.5th 480 (2016), and *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268, 271 (9th Cir. 1989). Plaintiffs have been able to secure an identifiable benefit on behalf of Class Members and equity counsels that the cost of the representation should be born equally amongst all Class Members receiving these benefits. The settlement recovery provides a good result and is the product of substantial time and effort in analyzing the facts and law applicable to this case. There was substantial risk in agreeing to take this case on a contingency basis and as a class action with the possibility that our firm would not receive any compensation for our time and efforts due to issues regarding the merits and/or certification. We have carried that risk over the course of the case. In my experience, the attorney's fee request of thirty-five percent (35%) of the common fund is within ranges typically approved in wage and hour class action litigation. This includes awards in neighboring Sacramento, San Joaquin, and Stanislaus County Superior Courts. For example, in November 2022, the Sacramento County Superior Court approved a fee request of 35% and the same hourly rates for Mr. Shimoda and myself in connection with a motion for final approval of a wage and hour class action settlement in *Strawn v. Bridgestone Retail Operations, LLC*, Case No. 34-2018-00242049 (Sac. Sup. Ct.). More recently, our firm was also awarded attorney's fees at 35% of the common fund and at the same hourly rates in the United States District Court for the Eastern

1 District of California, which includes Fresno County as part of its territorial jurisdiction. *See*  
2 *Insixiengmay v. Hyatt Corporation*, 2024 WL 4454035, \*1-\*2 (E.D. Cal. 2024). Awarding fees at the  
3 hourly rate in effect at the time of the fee request is an appropriate and judicially approved method. *See*  
4 *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283 (1989).

5       24. I believe a lodestar cross check supports finding a 35% fee award is appropriate in this  
6 case. The total lodestar for Shimoda & Rodriguez Law, PC (“SRL”), and Torus LLP (“Torus”) is  
7 approximately \$210,615 (\$165,690 by SRL and \$44,925 by Torus) based on approximately 354.3 total  
8 hours (294.4 by SRL and 59.9 by Torus). Assuming the Court grants preliminary approval of the  
9 Settlement, there will still be a substantial amount of work to do, which includes supervising settlement  
10 administration and discussions with the Settlement Administrator to ensure compliance with the  
11 Court’s approval order, communicating with Class Members and addressing any Class Member  
12 responses and questions regarding the Settlement, law and motion relating to the final approval hearing,  
13 overseeing the distribution of funds consistent with the final approval order, and working with the  
14 Settlement Administrator to ensure the appropriate compliance declarations are filed with the Court. I  
15 have reviewed our firm’s billing records with Mr. Shimoda and Mr. Konini. Ms. Hart is no longer  
16 employed at our firm, so I was not able to review Ms. Hart’s billing records with her. However, I have  
17 independently reviewed her entries. I have created a summary chart showing the task categories and  
18 hours worked by each billing attorney in our firm in each category. A true and correct copy of the  
19 summary chart is being filed with this Motion as Exhibit H. In reviewing the entries, I believe the  
20 hours reported are accurate. To the extent we believe it appropriate to do so in any given assignment,  
21 we attempt to assign tasks to the billing attorney with the lower rate in order to reduce costs that  
22 otherwise might inhibit the likelihood a case will resolve. Our firm uses billing software, which tracks  
23 the entries by day and time. Our billing software also records time in 1/10 of an hour increments. A  
24 summary of the entries in Exhibit H by timekeeper is as follows:



| <u><b>Timekeeper</b></u> | <u><b>Hours</b></u> | <u><b>Rate</b></u> | <u><b>Lodestar</b></u> |
|--------------------------|---------------------|--------------------|------------------------|
| Galen T. Shimoda         | 43.5                | \$725              | \$31,537.50            |
| Justin P. Rodriguez      | 137.6               | \$625              | \$86,000               |
| Jessica L. Hart          | 50                  | \$425              | \$21,250               |
| Renald Konini            | 63.3                | \$425              | \$26,902.50            |
| <b>Total:</b>            | <b>294.4</b>        | <b>--</b>          | <b>\$165,690</b>       |

25. I believe our requested rates are within the prevailing market rates for Fresno County. Although we have not previously had the reasonableness of our hourly rates assessed by Fresno County Superior Court, the Eastern District, in which Fresno County sits, has found our requested rates to be reasonable and within prevailing market rates within the Eastern District. *See Insixiengmay*, 2024 WL 4454035, \*1-\*2. Mr. Konini, myself, and Mr. Shimoda have approximately 8 years, 13 years, and 20 years of experience, respectively, litigating complex wage and hour class and PAGA actions. Ms. Hart had a similar level of experience and skill as Mr. Konini at the time she was working on this case as an Associate. Awarding fees at the hourly rate in effect at the time of the fee request is an appropriate and judicially approved method. *See Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283 (1989). I believe the request of \$128,625 (approximately 35%) for attorneys' fees is justified given the results obtained on behalf of the class. Such an award would actually result in a negative multiplier of approximately 0.61x of our lodestar, which is substantially less than a typical 2x-4x multiplier applied in other cases. *See Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001) ("Multipliers can range from 2 to 4 or even higher"). Plaintiffs will provide updated information in connection with final approval to enable the court to assess the reasonableness of the requested attorney's fees, quantifying the amount of time spent by Plaintiffs on this case and any further risks and/or burdens incurred as a result of acting as Class Representatives, an updated declaration in support of actual litigation costs and itemized cost spreadsheet, and declaration from the Settlement Administrator detailing the work performed and Settlement Administrator Costs incurred. Class Counsel's expected costs through final approval are not expected to exceed \$15,000. A true and correct copy of our costs incurred to date and our expected

costs through final approval and compliance hearing is being filed with the Motion as Exhibit E. Costs incurred by Torus LLP are attached as Exhibit B to the declaration of David Alami. Any difference in the awarded fees and costs, Class Representatives' Enhancement Payment, and Settlement Administrator Costs and the amounts allocated for each under the Agreement will be added back to the Net Settlement Amount and distributed pro rata to Class Members.

26. I have used several settlement administrator companies in the wage and hour class actions I have resolved in the past and believe ILYM Group, Inc. will provide the best service to administer the proposed class settlement. ILYM Group, Inc. has provided a quote for the estimated maximum cost of administering the class settlement of approximately \$8,450. A true and correct copy of a cost estimate provided by ILYM Group, Inc. is filed with this Motion as Exhibit D. This is only an estimate, and final pricing may vary depending on the issues, if any, that arise during the administration of the settlement. The difference between the actual, lesser costs and the maximum \$12,500 allocated under the Agreement, if any, will be paid to the Participating Class Members on a pro rata basis. It is not expected that the Settlement Administrator Costs will exceed \$8,450. The reason that \$12,500 is stated as the maximum amount that could be charged is that the \$12,500 number was utilized by our firm when negotiating and memorializing the material terms of the Settlement in a short form Memorandum of Understanding. We utilized our recent experience with several settlement administrators in other cases where there was a similar number of class members and/or aggrieved employees and a similar anticipated notice process (*e.g.* form of notice, mailings, skip traces, weekly reporting requirements, anticipated annual tax reporting for QSF account, etc.). Based on this experience and what was charged in those other cases, we estimated the amount a reasonable settlement administration should be able to be completed under (approximately \$10,000) in this case and added an additional amount (\$2,500) as a buffer to account for potential unforeseen issues that might arise during settlement administration, but was outside the scope of a settlement administrator's bid. These potential unforeseen issues would largely revolve around additional notice procedures ordered by the Court beyond the scope of work accounted for in the bid. For example, if the Court required a settlement website to be maintained or ordered a second round of notice be sent to the class, that would be outside the scope of the original bid, making settlement administration cost more than \$8,450. It is

1 important to maintain a sufficient buffer for potential additional costs that can arise during the  
2 settlement notice period. Courts have stated that where the amounts or terms in a settlement agreement  
3 change in a way that benefits the class members, no additional notice to Class Members is required.  
4 *See Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 56 (2008) (“We are satisfied that these changes  
5 improved the settlement, and that no notice of them was therefore required”). Thus, the use of the  
6 buffer will not cause any due process issues because any unused amounts will be redistributed to Class  
7 Members as part of the Net Settlement Amount during the accounting that will take place in connection  
8 with a final approval hearing, which *increases* Class Members’ Individual Settlement Amounts.  
9 Without a sufficient buffer, however, an unforeseen increase in settlement administration costs beyond  
10 the amount stated in the notice to Class Members will invite due process challenges because it would  
11 cause the amounts paid to Class Members to *decrease* without advance notice of that decrease in  
12 payment. It is better to eliminate this possibility by retaining a sufficient buffer between the Settlement  
13 Administrator’s anticipated actual costs and the maximum amount that could be charged stated in the  
14 Notice of Settlement.

15 27. A copy of the Agreement and the entire Motion was submitted to the LWDA for review  
16 at the same time the Motion was submitted to the Court pursuant to California Labor Code section  
17 2699(1)(2). A true and correct copy of documents demonstrating the settlement documents were  
18 provided to the LWDA and that the LWDA has confirmed receipt are being filed with this Motion as  
19 Exhibit G.

20 28. A true and correct copy of the proposed Notice of Settlement is being filed with this  
21 Motion as Exhibit F. The Notice of Settlement will direct Class Members to the Court’s public access  
22 web portal and provide instructions on how to search for the case to find electronic copies of all filed  
23 documents in this case and other pertinent case information found on the Court’s public access web  
24 portal. I believe utilizing the public access web portal is a superior method for online/electronic notice  
25 to Class Members for several reasons. First, the case information and relevant settlement documents  
26 will remain available for much longer on the public access web portal than on an administrator’s  
27 website. Generally, case web pages created by administrators are taken down shortly after any  
28 compliance hearing whereas the case information on the public access web portal will remain available

1 for several years after any compliance hearing. Second, there are no added costs to Class Members in  
2 utilizing the public access web portal. To the extent a Class Member has the means to access an  
3 administrator web page (*e.g.* phone/computer & internet service), they will also be able to access the  
4 public access web portal. There is no charge on the public access web portal for searches utilizing case  
5 numbers and the Notice of Settlement will provide instructions for searching by case number. Third,  
6 utilizing the public access web portal will result in fewer costs associated with settlement  
7 administration, resulting in more funds to distribute to Class Members. Fourth, utilizing the public  
8 access web portal will give Class Members a greater ability to keep apprised of the case status heading  
9 into any final approval hearing(s) and/or compliance hearing(s). Finally, it will also help in  
10 effectuating notice of final judgment to Class Members. To the extent final approval is granted, we  
11 will file a notice of entry of judgement. For the reasons already stated above, the ease of access and  
12 longevity of records on the public access web portal will make it easier for Class Members to obtain  
13 and review the notice of judgment well into the future.

14 29. The designated *cy pres* beneficiaries in this case are Capital Pro Bono, Inc. (“CPB”) and  
15 The Center For Workers Rights (“CFWR”). Only those funds that remain from uncashed settlement  
16 checks will be sent to the *cy pres* beneficiaries pursuant to section 5.6 of the Agreement.

17 30. CPB is a 501(c)(3) nonprofit in good standing with the State of California that was  
18 established in 1981 and incorporated in 1986 to provide free civil legal services to the indigent,  
19 primarily through the use of volunteer attorneys. The formal service area includes Sacramento, Yolo,  
20 San Joaquin, El Dorado and Placer counties, however it also regularly provides assistance, whether in  
21 person or by phone, to individuals residing outside those counties, including Solano, Nevada, Merced,  
22 Sutter, Yuba, and Stanislaus counties. CPB changed its name in 2020 from Voluntary Legal Services  
23 Program of Northern California (“VLSP”) to Capital Pro Bono, Inc. CPB has been the recipient of *cy*  
24 *pres* funds from several jurisdictions in the State of California, including from Sacramento County  
25 Superior Court.

26 31. If CPB is approved as a *cy pres* beneficiary, any funds received will be dedicated to the  
27 Employment Law Clinic and Advice Line project, which assists the indigent with legal matters related to  
28 their current or former employment. This assistance regularly includes, but is not limited to, free legal

1 advice regarding claims for unpaid wages, failure to provide meal and rest periods, failure to pay  
2 reimbursement, and waiting time penalty claims. CPB provides legal advice, assistance with legal  
3 forms, and direct representation in administrative hearings, including administrative hearings in front of  
4 the California Labor Commissioner for unpaid wages. CPB has a staff attorney and clinic coordinator  
5 who provide assistance, along with experienced employment law attorney volunteers. These services  
6 have been a focus of the Employment Law Clinic and Advice Line project since its inception with VLSP  
7 and continuing through today under CPB.

8 32. CFWR is also a qualified *cy pres* designee in class actions, under section 384, as it is a  
9 501(c)(3) nonprofit in good standing with the State of California providing free civil legal services to the  
10 indigent. Since its inception in 2014 and in partnership with Legal Aid at Work, the CFWR offers one-  
11 on-one legal consultations for low-wage workers. The CFWR discusses employment issues with  
12 workers and advises them as to the available legal remedies. In addition to individual counseling on  
13 employment issues, the CFWR educates workers, unions, and community members about workplace  
14 laws and remedies through “Know-Your-Rights” trainings conducted by the CFWR staff and volunteers.

15 33. The CFWR provides limited representation for low-wage workers in wage claims before  
16 the California Labor Commissioner. The CFWR has provided services to low-wage workers in a variety  
17 of industries across the entire state of California. CFWR primarily focuses on the enforcement of basic  
18 workplace protections, including claims for unpaid wages, minimum wage violations, failure to pay  
19 overtime, failure to pay reimbursement, waiting time penalties, and meal and rest period violations. The  
20 CFWR helps workers navigate the wage claim process before the California Labor Commissioner  
21 through advice given at its legal consultation clinics and/or, in some cases, through representing workers  
22 in these claims. If the CFWR is approved as a *cy pres* beneficiary, the funds received will be dedicated  
23 towards assisting low-wage workers with wage claims and enforcing the California Labor Code with  
24 respect to those wage claims.

25 34. I believe the services provided by CPB and the CFWR promote the law consistent with  
26 the objective of wage and hour class actions in general and in this case specifically.

27 35. I have spoken with every other attorney at my firm to determine whether they have any  
28 relationship with either of the proposed *cy pres* beneficiaries.

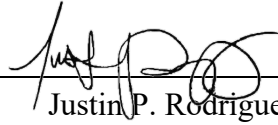
1           36.     I have volunteered for both organizations numerous times over the past several years,  
2 either directly in the advice clinics or by presenting seminars on wage and hour laws for law students  
3 seeking to also volunteer at advice clinics. I have also volunteered by sitting on CPB's advisory  
4 committee. These organizations are non-profits that assist low-income workers throughout California,  
5 giving free legal advice regarding employment law issues and representing employees with wage claims  
6 before the California Labor Commissioner. I have witnessed firsthand the quality service and attention  
7 these entities provide to individuals in need of employment law advice and representation at the  
8 California Labor Commissioner.

9           37.     Galen T. Shimoda has volunteered for both organizations on and off over the past several  
10 years through either presenting wage and hour seminars to law students who staff the free advice clinics  
11 or helping at the advice clinics themselves. However, Mr. Shimoda has not performed any volunteer  
12 work with either organization since approximately March 2020. Mr. Shimoda has never received  
13 payment or compensation of any kind in connection with any work he's done with either of the proposed  
14 *cy pres* beneficiaries. Renald Konini has volunteered for Capital Pro Bono, Inc., in March 2025, by  
15 assisting at a free advice clinic for low wage workers who needed advice regarding potential disputes  
16 with their employers. Ms. Konini has never volunteered for the Center For Workers' Rights. Neither  
17 my firm, myself, Mr. Konini, nor Mr. Shimoda have ever received any compensation, direct or indirect,  
18 for designating CFWR or CPB as *cy pres* beneficiaries or in connection with any of the volunteer work  
19 we have done with the organizations.

20           38.     Plaintiffs' Counsel have entered into a joint prosecution and fee share agreement.  
21 Plaintiffs' Counsel gave written notice to Plaintiffs about the joint prosecution and fee share agreement  
22 and received written consent pursuant to California Rules of Professional Conduct 1.5.1. Specifically,  
23 Plaintiffs' Counsel has agreed to divide the requested fee as follows: (1) Shimoda & Rodriguez Law,  
24 PC, will be paid 90% of any total attorney's fee award; and (2) Torus, LLP will be paid 10% of any total  
25 attorney's fee award. To the extent less than the total fee request is awarded, then each office shall have  
26 their respective share reduced such that the proportional share of the total fee award will remain the  
27 same.



1 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
2 true and correct. Executed on June 10, 2025, in Elk Grove, California.

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5 Justin P. Rodriguez  
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1 Galen T. Shimoda (Cal. State Bar No. 226752)  
Justin P. Rodriguez (Cal. State Bar No. 278275)  
2 Renald Konini (Cal. State Bar No. 312080)  
**Shimoda & Rodriguez Law, PC**  
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jrodriguez@shimodalaw.com  
6 rkonini@shimodalaw.com

7 Attorneys for Plaintiff JESSE GIL individually  
and on behalf of similarly situated employees

8 [additional parties continued on next page]  
9

10 **SUPERIOR COURT OF CALIFORNIA**

11 **FOR THE COUNTY OF FRESNO**

12 JESSE GIL and DANIEL AYALA,  
13 individually and on behalf of all other  
14 similarly situated employees,

15 Plaintiffs,

16 vs.

17 OUTBACK, INC., a California Corporation;  
and DOES 1 to 100, inclusive,

18 Defendants.  
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**Case No. 21CECG03273**

*Assigned for All Purposes to Hon. Jon M. Skiles  
Department 503*

**CLASS ACTION**

**DECLARATION OF DAVID ALAMI IN  
SUPPORT OF PLAINTIFFS' MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION AND PAGA SETTLEMENT**

Date: July 3, 2025

Time: 3:30 p.m.

Dept.: 503

Judge: Hon. Jon M. Skiles

Filed: November 3, 2021

FAC Filed: January 24, 2024

SAC Filed: November 20, 2024

Trial Date: None Set

David Alami (State Bar No. 314628)  
Daniel J. Hyun (State Bar No. 309184)  
Shaheen A. Etemadi (State Bar No. 319138)

**Torus LLP**

2 Park Plaza, Suite 1260  
Irvine, CA 92614  
Telephone: (949) 590-4122  
Facsimile: (949) 528-2596

Attorneys for Plaintiff DANIEL AYALA individually  
and on behalf of similarly situated employee

1 I, David Alami, declare:

2 1. I am an attorney at law duly admitted to practice before all the courts of the State of  
3 California and an attorney of record for Plaintiff Daniel Ayala. I am making this declaration on behalf  
4 of the named Plaintiffs Jesse Gil and Daniel Ayala (“Plaintiffs”), the putative class members, and in  
5 support of Plaintiffs’ Motion for Preliminary Approval of Class Action and PAGA Settlement  
6 (“Motion”). I have personal knowledge of the matters set forth herein, and, if called as a witness, could  
7 competently testify thereto.

8 2. I am currently a partner at Torus LLP. The Firm primarily prosecutes wage and hour  
9 cases, including class and Private Attorneys General Act of 2004 (“PAGA”) actions on behalf of  
10 employees and others who have had their labor rights violated. The Firm and its attorneys, currently  
11 serves as plaintiffs’ counsel of record in over 100 wage and hour class and/or PAGA actions pending  
12 throughout the State of California.

13 3. I was previously the founder and managing attorney at Alami Law Group, APC from  
14 2020 to 2024 where I primarily handled wage and hour class and representative actions. Prior to  
15 founding Alami Law Group, APC, I worked at the Am 100 rated law firms of Jones Day and Nixon  
16 Peabody LLP where I gained extensive experience in most phases of litigation. At both firms, I handled  
17 and obtained resolution of numerous consumer and commercial litigation focused matters

18 4. The attorneys working on this case have been appointed class counsel in many cases,  
19 through both contested motions and settlement approval motions.

20 5. I have been appointed class counsel and/or had my attorney’s fees approved in dozens of  
21 class actions and/or representative PAGA actions.

22 6. I also serve as plaintiffs’ counsel of record in several active employment class actions  
23 and/or representative actions, including but not limited to: *Arellano v. Vision Scenery Corp., Inc.*, Case  
24 No. 21STCV35878 (Los Angeles County Superior Court); *Arnold v. Loma Linda Health University*, et  
25 al., Case No. CIVSB2313303 (San Bernardino Superior Court); *Barron v. LA Apparel, Inc., et al.*, Case  
26 No. 23STCV15452 (LA Superior Court); *Bermudez v. Rose Meat Services, Inc., et al.*, Case No.  
27 23NWCV02948 (Los Angeles County Superior Court); *Broadnax v. Highgate Hotels, L.P., Case No.*  
28 *23STCV14561* (Los Angeles County Superior Court); *Bustillos v. California Wood Recycling, Inc., et*

1 *al.*, Case No. 37-2023-00043737-CU-OE-NC (San Diego County Superior Court); *Camarena v. Alex*  
2 *G. Gladkov Dental Corporation, et al.*, Case No. 23STCV15144 (Los Angeles County Superior Court);  
3 *Carrillo v. Southwind Foods, LLC, et al.*, Case No. 23CMCV00878 (Los Angeles County Superior  
4 Court); *Corona v. Exquisite Apparel Corp, et al.*, Case No. 21STCV02421 (Los Angeles County  
5 Superior Court); *De Herrera v. Vision Media Management & Fulfillment, LLC*, Case No.  
6 23CHCV01640 (Los Angeles County Superior Court); *Garcia v. RN Restaurants LLC*, Case No.  
7 CVRI2301574 (San Bernardino County); *Ghamrawi v. Boys & Girls Clubs of Silicon Valley*, Case No.  
8 23CV419591 (Santa Clara County Superior Court); *Graham v. Global Customer Services, Inc., et al.*,  
9 Case No. 23VECV03731 (Los Angeles County Superior Court); *Lopez v. Spectrum Restaurant*  
10 *Management Group, LLC, et al.*, Case No. 30-2022-01249896-CU-OE-CXC (Orange County Superior  
11 Court); *Marron v. Imperial CFS, Inc.*, Case No. 23STCV08329 (LA Superior Court); *Mayen v. Elsa*  
12 *Logistics LLC, et al.*, Case No. 22STCV40437 (Los Angeles Superior Court); *Myers v. American*  
13 *Automobile Association of Northern California, Nevada & Utah*, Case No. 23CV040857 (Alameda  
14 County Superior Court); *Perez v. Red Hot Chilis, Inc., et al.*, Case No. 22STCV02369 (Los Angeles  
15 County Superior Court); *Ramirez v. J.J. Gourmet Food Corporation, et al.*, Case No. 23STCV24732  
16 (Los Angeles County Superior Court); *Rodriguez v. Goodwill Industries of San Diego County*, Case No.  
17 37-2023-00026630 (San Diego County Superior Court); *Saenz v. Class Leasing LLC, et al.*, Case No.  
18 CVRI2205259 (Riverside County Superior Court); *Segoviano v. Villa Del Rio, Inc.*, Case No.  
19 23STCV22612 (Los Angeles County Superior Court); *Vega v. Essel Technology Services, Inc., et al.*,  
20 Case No. 23CV039446 (Alameda County Superior Court); *Villa v. Cal Door and Drawer, Inc., et al.*,  
21 Case No. 23CV422688 (Santa Clara County Superior Court); *Wood v. Lyons Security Service, Inc., et*  
22 *al.*, Case No. 23NWCV02283 (Los Angeles County Superior Court); and *Zepeda vs TMI Automotive*  
23 *Products Inc.*, Case No. CVRI2305081 (Riverside County Superior Court).

24 7. Torus LLP has expended considerable time and effort on this case and will continue to  
25 do so through final approval of the class action settlement. A summary chart showing the categories  
26 of tasks I performed, and the hours worked for each category, is attached to this declaration as Exhibit  
27 A. I regularly bill \$750 per hour for my time and have recently been judicially approved at this rate  
28 since June 2, 2025. I have been approved at this rate in Ventura County Superior Court. Based on the

1 number of hours spent (59.9) and my judicially approved hourly rate (\$750), the lodestar for my firm  
2 to date is approximately \$44,925. I expect this will increase as the case progresses through settlement  
3 administration, final approval filings, and compliance hearings.

4 8. Plaintiff Daniel Ayala filed a wage and hour class action in Fresno County Superior Court,  
5 Case No. 23CECG04940 ("*Ayala* Action"), on November 29, 2023, against Defendant Outback, Inc.  
6 ("Defendant"). Plaintiff Daniel Ayala exhausted administrative remedies through the Labor and  
7 Workforce Development Agency ("LWDA") by filing a notice alleging facts and theories of liability  
8 regarding several violations of the California Labor Code committed by Defendant. A true and correct  
9 copy of the notice Plaintiff Daniel Ayala filed with the LWDA is being filed with this Motion in Exhibit  
10 C. A copy of the notice was also sent to the employers identified therein via certified mail and the \$75.00  
11 filing fee was remitted to the LWDA at that time. There was no response by the LWDA regarding its  
12 intent to investigate the claims alleged in the notice for more than 65 days. As such, Plaintiff Daniel  
13 Ayala became authorized to commence a civil action under the PAGA and a First Amended Complaint  
14 was filed on January 11, 2024, adding a PAGA cause of action. On November 7, 2024, Plaintiffs and  
15 Defendant agreed to file an amended complaint in this action that consolidated all claims, parties, and  
16 causes of action from the *Ayala* Action into this case. A true and correct copy of the operative complaint  
17 is being filed with this Motion as Exhibit B.

18 9. My office has been actively engaged in litigating this matter on behalf of Class Members.  
19 During the course of this litigation, we have reviewed and analyzed numerous policy and pay documents,  
20 including records and information produced by Defendant and worked to develop information on liability  
21 and potential damages. Our investigations covered all aspects of the asserted claims, including  
22 certification issues, merits issues, damages, the scope and configuration of Class Members, the content  
23 and implementation of the wage and hour policies at issue, issues relating to manageability concerns at  
24 trial, among other relevant areas. In addition, I participated in the mediation. Based on the expected  
25 testimony from Plaintiffs and Class Members, a review of Defendant's policies and procedures and other  
26 documents relating to the alleged claims, information on the number of Class Members, Class Members'  
27 workweeks and pay periods, and a representative sample of Class Members' payroll data, the scope of  
28 the potential damages to Plaintiffs and Class Members in light of the claims alleged, the uncertainty in



1 the law with regard to certification, and the negotiations that have taken place, I am convinced that the  
2 proposed settlement is in the best interest of the class. Potential class certification issues, the uncertainty  
3 of class certification, difficulties of complex litigation, the length process of establishing specific  
4 damages and the possibility of appeals were carefully considered in reaching this agreement.

5 10. I have reviewed the Declaration of Justin P. Rodriguez and agree with his statements  
6 regarding the case history, the assessment of the value of Plaintiffs' claims, the mediation that took place,  
7 and the discovery and investigations performed.

8 11. Class Counsel have advanced all costs in this litigation. Attached as Exhibit B to this  
9 declaration is a true and correct copy of costs incurred by Torus LLP in this Action.

10 12. The intended *cy pres* beneficiaries in this case are Capital Pro Bono, Inc. ("CPB") and The  
11 Center For Workers Rights ("CFWR"). Only those funds that remain from uncashed settlement checks  
12 will be sent to the *cy pres* beneficiaries pursuant to the Agreement. I believe the services provided by  
13 CPB and the CFWR promote the law consistent with the objective of wage and hour class actions in  
14 general and in this case specifically.

15 13. I have spoken to every other attorney at my firm to determine whether they have any  
16 relationship with either of the proposed *cy pres* beneficiaries. Neither I nor anyone at my firm have any  
17 prior relationship with the beneficiaries and we have no interest in their governance, whether financial or  
18 otherwise.

19 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
20 true and correct. Executed on June 8, 2025, in Irvine, California.

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24 David Alami  
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# **EXHIBIT A**

**TORUS LLP (ATTORNEY: DAVID ALAMI)**

**CASE: *Gil; Ayala v. Outback, Inc., et al.***

**Hourly Rate: \$750**

| <b>TASKS (November 2023 to Present)</b>                                                                                                                                                                                                                                                                                                                                               | <b>TIME</b> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <b>Case Initiation</b> - Communicate with client; review client employment records; research claims and case law; confer internally; draft/revise PAGA notice and Complaint, summons; prepare for service/filing;                                                                                                                                                                     | 13.6        |
| <b>Status Conference Hearings</b> - plan and prepare for attendance; draft/revise CMC Statements; confer internally, attend hearings.                                                                                                                                                                                                                                                 | 3.3         |
| <b>Correspondences</b> - Written communications with opposing counsel regarding case status, service, Plaintiff's claims and Defendants' defenses, discovery, resolution, mediation, Defendants' financials, settlement, settlement approval requirements.                                                                                                                            | 7.4         |
| <b>Written Discovery</b> - Draft/revise special interrogatories and requests for production of documents to all seven Defendants; confer internally; review Defendants' responses.                                                                                                                                                                                                    | 6.6         |
| <b>Mediation (Preparation, Attendance, and Subsequent Negotiations)</b> - Review mediation brief and supporting exhibits; Contact and interview witnesses; confer internally; review and analyze documents and data produced by Defendants; review damages analysis; appear for and attend mediation; communicate with opposing counsel; conduct legal research re defense arguments. | 9.6         |
| <b>Settlement &amp; Approval</b> - Review MOU, Settlement Agreement, motion for approval of settlement, proposed order, declarations; confer with client and internally; conduct legal research re approval procedure and requirements; communicate and confer with opposing counsel.                                                                                                 | 15.4        |
| <b>Case Management</b> - Review deadlines, case status, case docket, assignments, court orders and rulings; Update case status and tasks sheet; Update client re case status; calendaring deadlines; Confer internally re case management and disposition.                                                                                                                            | 17.6        |

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**TOTAL HOURS****59.9**

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**TOTAL LODESTAR****\$44,925.00**

# **EXHIBIT B**

**TORUS LLP RE:*****Gil;Ayala v. Outback, Inc., et al.***

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**ITEM**

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**AMOUNT**

|                                                                  |          |
|------------------------------------------------------------------|----------|
| PAGA Notice Filing Fee                                           | \$75.00  |
| First Legal - Filing Fees                                        | \$1,618  |
| First Legal - Filing Fees                                        | \$41.55  |
| First Legal - Filing Fees                                        | \$15.55  |
| First Legal - Filing Fees                                        | \$15.55  |
| First Legal - Filing Fees                                        | \$15.55  |
| First Legal - Filing Fees                                        | \$15.55  |
| Cumulative mileage, postage, print & copy fees                   | \$292.19 |
| First Legal - Additional anticipated filing and maintenance fees | \$75     |

**TOTAL****\$2,163.94**



Galen T. Shimoda (Cal. State Bar No. 226752)  
Justin P. Rodriguez (Cal. State Bar No. 278275)  
Renald Konini (Cal. State Bar No. 312080)  
**Shimoda & Rodriguez Law, PC**  
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Email: attorney@shimodalaw.com  
jrodriguez@shimodalaw.com  
rkonini@shimodalaw.com

Attorneys for Plaintiff JESSE GIL individually  
and on behalf of similarly situated employees

[additional parties continued on next page]

**SUPERIOR COURT OF CALIFORNIA**  
**FOR THE COUNTY OF FRESNO**

JESSE GIL and DANIEL AYALA,  
individually and on behalf of all other  
similarly situated employees,

Plaintiffs,

vs.

OUTBACK, INC., a California Corporation;  
and DOES 1 to 100, inclusive,

Defendants.

**Case No. 21CECG03273**

*Assigned for All Purposes to Hon. Jon M. Skiles  
Department 503*

**CLASS ACTION**

**DECLARATION OF JESSE GIL IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION AND PAGA SETTLEMENT**

Date: July 3, 2025

Time: 3:30 p.m.

Dept.: 503

Judge: Hon. Jon M. Skiles

Filed: November 3, 2021

FAC Filed: January 24, 2024

SAC Filed: November 20, 2024

Trial Date: None Set

David Alami (State Bar No. 314628)  
Daniel J. Hyun (State Bar No. 309184)  
Shaheen A. Etemadi (State Bar No. 319138)

**Torus LLP**

2 Park Plaza, Suite 1260  
Irvine, CA 92614  
Telephone: (949) 590-4122  
Facsimile: (949) 528-2596

Attorneys for Plaintiff DANIEL AYALA individually  
and on behalf of similarly situated employee

1 I, Jesse Gil, declare:

2 1. I am a competent adult and I have personal knowledge of the facts set forth in this  
3 declaration. I am making this declaration on behalf of myself, as a named plaintiff, and in support of  
4 Plaintiffs' Motion for Preliminary Approval of Class Action and PAGA Settlement. I have personal  
5 knowledge of the matters set forth herein, and, if called as a witness, could competently testify thereto.

6 2. I worked for Defendant Outback, Inc. ("Defendant") from approximately December 2017  
7 to September 1, 2021, as a non-exempt employee. I was subject to all of Defendant's policies and  
8 practices that have been alleged as unlawful in the Complaint and the notices sent to the Labor and  
9 Workforce Development Agency ("LWDA"), including the following: failure to pay overtime wages,  
10 failure to pay minimum wages, failure to provide meal or rest and recovery periods or pay premiums in  
11 lieu thereof, failure to provide accurate wage statements, failure to timely pay final wages, failure to pay  
12 reimbursement for expenses, failure to pay all wages, failure to maintain accurate records, failure to  
13 provide paid sick leave, untimely payment of wages, and unfair competition.

14 3. I have actively participated in the litigation of this case for the benefit of all Class  
15 Members. Prior to obtaining an attorney, I contacted several law offices and researched potential  
16 attorneys to bring the claims. I wanted to make sure I the law firm chosen to bring the claims had  
17 attorneys with experience and skill in bringing those types of claims. I also researched the typical issues  
18 raised when litigating the potential claims. I wanted to make sure I could have an informed discussion  
19 with an attorney about the claims and have a better idea of what to expect moving forward in litigation  
20 and how to help the case proceed. After securing Shimoda & Rodriguez Law, PC, I continued to be  
21 actively involved in the case to help ensure a positive outcome. I began working with Shimoda &  
22 Rodriguez Law, PC, to investigate the claims on September 1, 2021, discussing the facts of the case,  
23 showing and explaining the context behind the documents I had to support the claims, and discussing  
24 potential witnesses to corroborate the information I was providing.

25 4. My attorneys explained to me the risks and benefits of bringing a class action and a claim  
26 under the Private Attorneys General Act ("PAGA"). I understood that pursuing the case as a class and  
27 PAGA action meant that it would take substantially longer than pursuing my claims individually,  
28 whether in Court or with the California Labor Commissioner, and that I risked getting nothing in the

1 end, but I believed it was important to make sure that Defendant followed the law for everyone. I  
2 undertook a professional and financial risk in pursuing the case as a class and PAGA action because my  
3 name would be on a publicly available document showing that I had sued a former employer and, if  
4 unsuccessful in bringing the claims, I would be obligated to pay Defendant's costs incurred over the  
5 course of this complex litigation. My understanding is that this is a substantial risk because the costs  
6 associated with litigation, in general, are very high and this cost is multiplied many times over in  
7 complex litigation like class actions.

8         5. During the course of this litigation, I have given detailed accounts of all the facts related  
9 to my employment. I provided my attorneys with extensive documentation that I believe supported the  
10 claims brought against Defendant. I met with and assisted my attorneys in understanding these  
11 documents and providing context for Defendant's payroll process as it applied to me and how I believed  
12 it applied to Defendant's other employees within the class. I worked for Defendant for nearly four (4)  
13 years at multiple different job sites with multiple different supervisors and fellow Class Members, so I  
14 was able to discuss the similarities of the wage and hour policies and practices among all Class  
15 Members beyond what the documents showed. The work I performed for this case included an  
16 extensive review of documents and payroll practices to show and explain to my attorneys what was  
17 happening and why I thought it was unlawful. For example, I explained to my attorneys my job duties  
18 and responsibilities, the type of tasks and work performed in a typical day and any circumstances that  
19 would cause relevant differences to my daily work that affected the class claims. We reviewed payroll  
20 and personnel file documents for myself and other Class Members who agreed to share their personal  
21 information to see whether and how any of the documents corroborated the validity of the claims and to  
22 list potential witnesses related to any issues raised by the documents. Additionally, I also explained the  
23 job duties of other Class Members, the type of tasks and work performed, how the wage and hour issues  
24 affected Class Members, typical schedules and staffing for the types of jobs and/or job sites, how  
25 Defendants' timekeeping system worked, the different types and layouts of jobsites, and Defendant's  
26 employee handbook and stand alone wage and hour policies affecting Class Members. I also reviewed  
27 and explained to my attorney's the different pay code itemizations on the paystubs, what earnings they  
28

1 represented, the nature and frequency of prevailing wage jobs and how we would work prevailing and  
2 non-prevailing wage jobs in the same workweek.

3 6. My attorneys and I continued to discuss and review these items throughout the case as  
4 more information was provided by Defendant. The review became even more detailed when reviewing  
5 and discussing the payroll data sample that was produced as part of informal discovery for mediation. I  
6 also spent a substantial amount of time working to identify potential witnesses and speaking to others  
7 who could be interviewed by my attorneys and provide declarations.

8 7. I participated in the negotiations and settlement discussions in this case, including  
9 participating in mediation by phone, speaking with my attorneys to answer questions, provide any  
10 additional information needed to assist the negotiations, and discussing the potential terms of the  
11 Agreement to evaluate its adequacy. Throughout the course of this litigation I have asked questions  
12 when I needed clarification about various aspects of this case to make sure steps were continually taken  
13 to advance the interests of Class Members. I have reviewed the final Joint Stipulation of Class Action  
14 and PAGA Settlement and Release, discussed the terms with my attorneys, and asked my attorneys any  
15 questions I had. I believe the terms of the Settlement and allocations are fair and reasonable given the  
16 facts of the case.

17 8. To date, I estimate that I have spent approximately 120-140 hours assisting my attorneys  
18 in litigating this case. I expect that the amount of time I spend on this case will increase if preliminary  
19 approval is granted because Class Members will likely reach out to me about the Settlement, the Notice  
20 of Settlement, and the process for receiving payment.

21 9. I have not received any benefits as a result of filing this lawsuit. However, I believe I  
22 have experienced several substantial burdens as a result of filing this lawsuit that other Class Members  
23 were not subject to. As noted above, I took on the professional risk of lengthening my unemployment  
24 after working for Defendant because future employers were able to see, from publicly available  
25 documents, that I sued my former employer. Additionally, I undertook the risk of having to pay  
26 Defendant's litigation costs if the Court or jury ruled against us on the claims. I have spent a substantial  
27 amount of time in this case over the past three (3) years, securing a monetary benefit for many  
28 individuals who have not had to do anything whatsoever to have the opportunity to receive it. The time

1 I have spent on this case has had to occur during my lunch and/or break times, after hours, and on my  
2 days off. This is particularly challenging because I have small children, who I have to drop off to school  
3 and after school programs. Rather than spend this time with friends and family, I have spent this time for  
4 the benefit of Class Members. Also, I have experienced stress and anxiety arising from this litigation  
5 and its impact on my potential future employment prospects. I believe awarding the full Enhancement  
6 Payment is warranted given the time I have spent on the case and the benefit secured for Class Members  
7 and the LWDA, and the risks and burdens I have experienced as a result of this litigation.

8 10. I understand that any Enhancement Payment I may receive is for my participation as a  
9 Class Representative and it is not contingent on my support or approval of the Agreement.

10 11. I have no interest in the designated *cy pres* beneficiaries, Capital Pro Bono, Inc., and the  
11 Center for Workers' Rights, whether financial, in their governance, or otherwise.

12 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
13 true and correct. Executed on 6/4/25 in Fresno, California.

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Jesse Gil (Jun 4, 2025 16:50 PDT)

17 Jesse Gil  
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1 Galen T. Shimoda (Cal. State Bar No. 226752)  
Justin P. Rodriguez (Cal. State Bar No. 278275)  
2 Renald Konini (Cal. State Bar No. 312080)  
**Shimoda & Rodriguez Law, PC**  
3 9401 East Stockton Boulevard, Suite 120  
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5 Email: attorney@shimodalaw.com  
jrodriguez@shimodalaw.com  
6 rkonini@shimodalaw.com

7 Attorneys for Plaintiff JESSE GIL individually  
and on behalf of similarly situated employees  
8 [additional parties continued on next page]  
9

10 **SUPERIOR COURT OF CALIFORNIA**  
11 **FOR THE COUNTY OF FRESNO**  
12

13 JESSE GIL and DANIEL AYALA,  
14 individually and on behalf of all other  
15 similarly situated employees,

16 Plaintiffs,

17 vs.

18 OUTBACK, INC., a California Corporation;  
19 and DOES 1 to 100, inclusive,

20 Defendants.  
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**Case No. 21CECG03273**

*Assigned for All Purposes to Hon. Jon M. Skiles  
Department 503*

**CLASS ACTION**

**DECLARATION OF DANIEL AYALA IN  
SUPPORT OF PLAINTIFFS' MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION AND PAGA SETTLEMENT**

Date: July 3, 2025

Time: 3:30 p.m.

Dept.: 503

Judge: Hon. Jon M. Skiles

Filed: November 3, 2021

FAC Filed: January 24, 2024

SAC Filed: November 20, 2024

Trial Date: None Set



1 David Alami (State Bar No. 314628)  
2 Daniel J. Hyun (State Bar No. 309184)  
3 Shaheen A. Etemadi (State Bar No. 319138)

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8 Attorneys for Plaintiff DANIEL AYALA individually  
9 and on behalf of similarly situated employee  
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1 I, Daniel Ayala, declare:

2 1. I am a competent adult, I have personal knowledge of the facts set forth in this declaration,  
3 and I am making this declaration on behalf of myself, as a named plaintiff, and in support of Plaintiffs’  
4 Motion for Preliminary Approval of Class Action and PAGA Settlement. I have personal knowledge of  
5 the matters set forth herein, and, if called as a witness, could competently testify thereto.

6 2. I worked for Defendant Outback, Inc. (“Defendant”) from approximately from  
7 approximately May 2023 to August 2023 as a non-exempt employee. I was subject to all of Defendant’s  
8 policies and practices that have been alleged as unlawful in the Complaint and the notices sent to the  
9 Labor and Workforce Development Agency (“LWDA”), including the following: failure to pay overtime  
10 wages, failure to pay minimum wages, failure to provide meal or rest and recovery periods or pay  
11 premiums in lieu thereof, failure to provide accurate wage statements, failure to timely pay final wages,  
12 failure to pay reimbursement for expenses, failure to pay all wages, failure to maintain accurate records,  
13 failure to provide paid sick leave, untimely payment of wages, and unfair competition.

14 3. I spent several hours performing my duties as a plaintiff in this class action case, and I  
15 remain committed to performing the duties of a class representative. Throughout the case, I participated  
16 in many conversations with my attorneys to be as informed as I could be about what class action cases  
17 are, how class actions affect class members, the steps and risks involved in litigating class actions, the  
18 strengths and weaknesses of the claims, what would be required of me as a class representative, and the  
19 status of the case. I spent time going over documents with my attorneys, described Defendant’s policies  
20 and practices, and answered questions about my work experience. I also assisted my attorneys to prepare  
21 for mediation and made myself available on the day of the mediation to answer any questions from my  
22 attorneys. Even while the settlement agreement was being negotiated, I communicated with my attorneys  
23 for updated on the case. I wanted to know when the next hearings were so I could try to be available if  
24 my attorneys needed my help.

25 4. My attorneys explained to me the risks and benefits of bringing a class action and a claim  
26 under the Private Attorneys General Act (“PAGA”). I understood that pursuing the case as a class and  
27 PAGA action meant that it would take substantially longer than pursuing my claims individually, whether  
28 in Court or with the California Labor Commissioner, and that I risked getting nothing in the end, but I

1 believed it was important to make sure that Defendant followed the law for everyone. I undertook a  
2 professional and financial risk in pursuing the case as a class and PAGA action because my name would  
3 be on a publicly available document showing that I had sued a former employer and, if unsuccessful in  
4 bringing the claims, I would be obligated to pay Defendant's costs incurred over the course of this  
5 complex litigation. My understanding is that this is a substantial risk because the costs associated with  
6 litigation, in general, are very high and this cost is multiplied many times over in complex litigation like  
7 class actions.

8 5. My attorneys and I continued to discuss and review these items throughout the case as  
9 more information was provided by Defendant. The review became even more detailed when reviewing  
10 and discussing the payroll data sample that was produced as part of informal discovery for mediation. I  
11 also spent a substantial amount of time working to identify potential witnesses and speaking to others  
12 who could be interviewed by my attorneys and provide declarations.

13 6. To date, I estimate that I have spent approximately 60-80 hours assisting my attorneys in  
14 litigating this case. I expect that the amount of time I spend on this case will increase if preliminary  
15 approval is granted because Class Members will likely reach out to me about the Settlement, the Notice  
16 of Settlement, and the process for receiving payment.

17 7. I have reviewed the final Joint Stipulation of Class Action and PAGA Settlement and  
18 Release, discussed the terms with my attorney, and asked my attorney any questions I had. I believe the  
19 terms of the Settlement and allocations are fair and reasonable given the facts of the case.

20 8. I understand that any Enhancement Payment I may receive is for my participation as a  
21 Class Representative and it is not contingent on my support or approval of the Agreement.

22 9. I have no interest in the designated *cy pres* beneficiaries, Capital Pro Bono, Inc., and the  
23 Center for Workers Rights, whether financial, in their governance, or otherwise.

24 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
25 true and correct. Executed on 06/09/2025 in Fresno, California.

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Daniel Ayala (Jun 9, 2025 18:26 CDT)

Daniel Ayala

1 Galen T. Shimoda (Cal. State Bar No. 226752)  
Justin P. Rodriguez (Cal. State Bar No. 278275)  
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7 Attorneys for Plaintiff JESSE GIL individually  
and on behalf of similarly situated employees

8 [additional counsel continued on next page]

9  
10 **SUPERIOR COURT OF CALIFORNIA**  
11 **FOR THE COUNTY OF FRESNO**

12 JESSE GIL and DANIEL AYALA,  
13 individually and on behalf of all other  
similarly situated employees,

14 Plaintiffs,

15 vs.

16 OUTBACK, INC., a California Corporation;  
17 and DOES 1 to 100, inclusive,

18 Defendants.

**Case No. 21CECG03273**

*Assigned for All Purposes to Hon. Jon M. Skiles  
Department 503*

**CLASS ACTION**

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS' MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION AND PAGA  
SETTLEMENT**

Date: July 3, 2025

Time: 3:30 p.m.

Dept.: 503

Judge: Hon. Jon M. Skiles

Filed: November 3, 2021

FAC Filed: January 24, 2024

SAC Filed: November 20, 2024

Trial Date: None Set

1 David Alami (State Bar No. 314628)  
2 Daniel J. Hyun (State Bar No. 309184)  
3 Shaheen A. Etemadi (State Bar No. 319138)

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9 Attorneys for Plaintiff DANIEL AYALA individually  
10 and on behalf of similarly situated employee  
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1 TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

2 The Motion for Preliminary Approval of Class Action and PAGA Settlement (“Motion”) in the  
3 above referenced case came before this Court, on July 3, 2025, at 3:30 p.m., in Department 503 before  
4 the Honorable Jon M. Skiles, presiding. In the operative Complaint, Plaintiffs Jesse Gil and Daniel  
5 Ayala (“Plaintiffs”) allege causes of action for failure to pay overtime wages, failure to pay minimum  
6 wages, failure to provide meal periods, failure to provide rest periods, wage statement violations,  
7 waiting time penalties, failure to reimburse expenses, failure to pay all wages, and failure to provide  
8 recovery periods. Plaintiffs have also alleged Defendant is liable for unfair competition and civil  
9 penalties under the Private Attorneys General Act (“PAGA”) based on these violations. Plaintiffs  
10 sought attorneys’ fees and costs as part of this Action. Defendant denied all of Plaintiffs’ claims and  
11 denied that this case was appropriate for class treatment. No class has been certified.

12 The parties have agreed to settle the class and PAGA claims. Defendant will provide monetary  
13 consideration in exchange for a release of claims consistent with the terms of the proposed settlement  
14 as set forth in the Joint Stipulation Regarding Class Action and PAGA Settlement and Release  
15 (“Agreement” or “Settlement”). Any capitalized terms herein shall have the same meaning as set forth  
16 in the Agreement. The Court, having received and considered Plaintiffs’ Motion for Preliminary  
17 Approval of Class Action and PAGA Settlement, the declarations in support, the Agreement, the  
18 proposed Notice of Settlement, and other evidence, HEREBY ORDERS AND MAKES  
19 DETERMINATIONS AS FOLLOWS:

20 **I. PRELIMINARILY CERTIFYING A SETTLEMENT CLASS; APPOINTMENT OF**  
21 **CLASS REPRESENTATIVES; APPOINTMENT OF CLASS COUNSEL**

22 The Court finds that certification of the following class for settlement purposes only is  
23 appropriate under the California Code of Civil Procedure and related case law:

24 All individuals who have, or continue to, perform work for Defendant in  
25 California as hourly, non-exempt employees from November 3, 2017, up  
to December 10, 2024.

26 The Court recognizes that the foregoing definition is for Class Member identification purposes  
27 only and is not intended to capture the claims at issue or limit or alter the released claims under the  
28 Agreement.

1 The Court finds that Class Members meet the ascertainability and numerosity requirements since  
2 the parties can identify with a matter of certainty, based on payroll records, individuals who fall within  
3 the definition and the number of Class Members would make joinder impractical. The commonality and  
4 predominance requirements are met for settlement purposes since there are questions of law and fact  
5 common to Class Members. The common questions of law or fact in this case all stem from Plaintiffs'  
6 contentions that Defendant caused the violations outlined above by 1) failing to pay Plaintiffs and  
7 similarly situated employees all prevailing wages they were entitled to, 2) failing to properly incorporate  
8 the value of all non-discretionary remuneration into Plaintiffs' and similarly situated employees' regular  
9 rates of pay for the purpose of calculating premium wages such as overtime, meal and rest period  
10 premiums, and sick leave wages, 3) failing to pay Plaintiffs and similarly situated employees for all  
11 hours worked as a result of not paying for unauthorized overtime hours, attending meetings, taking  
12 trucks to repair shops, deducting time for meal periods not taken, and completing pre/post shift  
13 paperwork and inspections, 4) failing to provide legally compliant meal, rest, and recovery periods, and  
14 5) failing to reimburse Plaintiffs and similarly situated employees for all expenses they incurred for  
15 work. The PAGA, waiting time penalty, wage statement violation, and unfair competition claims also  
16 derive from these violations. Additionally, Class Members seek the same remedies under state law.  
17 The typicality requirement for settlement purposes is also satisfied since the claims of the Class  
18 Representatives are based on the same facts and legal theories as those applicable to the Class Members.

19 The Court also finds that preliminarily and conditionally certifying the settlement class is  
20 required to avoid each Class Member from litigating similar claims individually. This Settlement will  
21 achieve economies of scale for Class Members with relatively small individual claims and conserve the  
22 resources of the judicial system.

23 The Court finds that Plaintiffs Jesse Gil and Daniel Ayala and Plaintiffs' counsel, Galen T.  
24 Shimoda, Justin P. Rodriguez, Renald Konini of Shimoda & Rodriguez Law, PC, as well as David  
25 Alami, Daniel J. Hyun, and Shaheen A. Etemadi of Torus LLP, to be adequate representatives of the  
26 settlement class. The Court appoints them as Class Representatives and Class Counsel, respectively.  
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## II. PRELIMINARILY APPROVING CLASS ACTION AND PAGA SETTLEMENT

The Court has reviewed the Agreement, which was submitted with Plaintiffs' Motion as Exhibit A. The Court finds, on a preliminary and conditional basis, that the Settlement is fair, reasonable, and adequate and falls within a range of reasonableness for a settlement that could ultimately be given final approval by this Court. The Court finds the Settlement was agreed upon only after extensive investigation, litigation, and arms-length negotiations by counsel experienced in complex litigation, who took reasonable steps and measures to weigh the potential value of the disputed claims against the risks of continued litigation. The Court also acknowledges that Class Members may present any objections to the Settlement at a fairness hearing approved by this Court or opt-out of being bound by the preliminarily approved Agreement. The Court preliminarily approves the Agreement and all terms therein as if stated here in full, including the \$367,500 Gross Settlement Amount.

The amounts allocated under the Agreement for potential attorney's fees and costs, Enhancement Payments to the Class Representatives, and Settlement Administrator Costs are preliminarily approved and shall be included in the Notice of Settlement to enable Class Members to review and comment thereon. The Court will consider the reaction of Class Members when evaluating the reasonableness of the requested amounts at final approval. *See In re Heritage Bond Litig.*, 2005 WL 1594403, \*21 (C.D. Cal. 2005) ("The absence of objections or disapproval by class members to Class Counsel's fee request further supports finding the fee request reasonable"). Plaintiffs and Class Counsel are directed to provide updated information in connection with the motion for final approval that will enable the Court to again assess the appropriateness of any requested fee percentage, to perform a lodestar cross check of the requested fee percentage, and to quantify the amount of time spent by Plaintiffs on this case and any further risks and/or burdens incurred as a result of acting as Class Representatives. Class Counsel is also directed to provide an updated declaration and itemization regarding actual litigation costs incurred. The Settlement Administrator shall also submit a declaration attesting to Settlement Administrator Costs incurred. The Court will review these amounts and allocations in connection with the final approval hearing. To the extent the Court ultimately awards less than the amounts allocated under the Agreement for attorney's fees and costs, any Enhancement Payments, and/or Settlement Administrator Costs, the

1 difference between the amounts awarded and the amounts requested shall be added to the Net Settlement  
2 Amount for distribution to Participating Class Members pro rata as set forth in the Agreement.

3 The Court approves of ILYM Group, Inc., acting as the Settlement Administrator in this case and  
4 hereby appoints them to fulfill those duties as outlined in the Agreement.

5 The Court approves of the Twenty Thousand Dollar (\$20,000) PAGA Payment, which shall be  
6 paid from the Gross Settlement Amount, not in addition to the Gross Settlement Amount, to resolve the  
7 alleged PAGA claims. Seventy-Five percent (75%) of the PAGA Payment will be paid to the Labor and  
8 Workforce Development Agency (“LWDA”) and Twenty-Five percent (25%) will be paid to Aggrieved  
9 Employees on a pro rata basis as described in the Agreement. The Court also finds that the Agreement  
10 provides a recovery that creates an effective, substantial deterrent to any potential future non-  
11 compliance, furthering the purpose of the Labor Code and LWDA.

12 The Court approves of the identified *cy pres* beneficiaries and distribution plan wherein any  
13 checks issued to Participating Class Members and/or Aggrieved Employees that are not cashed by the  
14 deadline to do so shall be donated equally, *i.e.* 50/50, to Capital Pro Bono, Inc., and the Center for  
15 Workers’ Rights. *See In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 718 (2006). No portion of the  
16 Gross Settlement Amount will revert to Defendant for any reason.

17 The releases and waivers for Class Members who do not opt out of being bound by the  
18 Agreement (*i.e.* Participating Class Members), Aggrieved Employees, and the Class Representatives are  
19 also approved by the Court as set forth in the Agreement.

20 **III. APPROVAL OF THE NOTICE OF SETTLEMENT AND METHOD FOR**  
21 **DISTRIBUTING THE NOTICE OF SETTLEMENT**

22 The Court finds that the proposed Notice of Settlement, filed with Plaintiffs’ Motion as Exhibit F  
23 and incorporated by reference, fairly and adequately advises Class Members of the terms of the  
24 Agreement, the rights being waived, their right to opt out, the ability to dispute the number of  
25 workweeks worked during the Class Period, their pro rata share of the Net Settlement Amount, how to  
26 participate in the settlement, how to file documentation in opposition to the proposed settlement, and  
27 when to appear at the fairness hearing to be conducted on the date set forth below. The Court further  
28 finds that the Notice of Settlement and proposed distribution of such notice by first class mail to each

identified Class Member at his or her most recent address based on a National Change of Address database search from the Class Members' last known address and a skip trace on any Class Members who have the Notice of Settlement returned as "undeliverable" or "not at this address" comports with all constitutional requirements, including those of due process.

The Court also finds that because there is a strong interest in providing Class Members the opportunity to participate in the settlement, along with the parties' efforts to minimize any intrusion of privacy rights, the sharing of employment information as set forth in the Agreement is not a serious intrusion on their privacy rights. Hence, the Court orders Defendant to provide Class Member information to the Settlement Administrator as set forth in the Agreement and any other information the Settlement Administrator needs to effectuate notice to Class Members and Aggrieved Employees. The Class Member information will be provided to the Settlement Administrator only, and not to Plaintiffs or Class Counsel, as contemplated within the Agreement and approved by this Order. The Settlement Administrator shall only use this information for the purposes identified in the Agreement and shall keep this information confidential consistent with the terms of the Agreement.

#### **IV. IMPLEMENTATION SCHEDULE**

Accordingly, with good cause shown, the Court hereby approves and orders that the following implementation schedule be adhered to:

|                                                                                                                                                              |                                                                                                                                      |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| Last day for Defendant to provide Settlement Administrator with Class Member and Aggrieved Employee information                                              | Within 14 calendar days after the Preliminary Approval Date                                                                          |
| Last day for Settlement Administrator to complete NCOA search, update Class Member and Aggrieved Employee mailing information, and mail Notice of Settlement | Within 14 calendar days after the Settlement Administrators' receipt of Class Members' information from Defendant                    |
| Last day for Class Members to opt-out, submit disputes, submit objections, and submit data requests                                                          | 60 calendar days after mailing of Notice of Settlement or within 10 days after Notice of Settlement is re-mailed, whichever is later |

|                                                                                                                                                                                                                                                                                                            |                                                                                                   |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|
| Last day for Settlement Administrator to provide Parties with signed declaration reporting on settlement administration statistics                                                                                                                                                                         | Within 14 calendar days after end of the Notice Period                                            |
| Last day for Settlement Administrator to calculate the final Net Settlement Amount, the final Individual Settlement Amounts to Participating Class Members and/or Aggrieved Employees, any applicable taxes thereon, and report the results of these calculations to Class Counsel and Defendant's Counsel | Within 7 calendar days after the Effective Date                                                   |
| Last day for Defendant to fund settlement                                                                                                                                                                                                                                                                  | Within 21 calendar days after the Effective Date                                                  |
| Last day for Settlement Administrator to deliver payment of Class Counsel's attorney's fees and costs, Enhancement Payments, PAGA Payment, Settlement Administrator Costs, payment to Participating Class Members, and payment to Aggrieved Employees                                                      | Within 7 calendar days after Defendant has funded the settlement                                  |
| Last day for Participating Class Members and Aggrieved Employees to cash settlement checks                                                                                                                                                                                                                 | 180 calendar days after issuance of checks to Participating Class Members and Aggrieved Employees |
| Last day for Settlement Administrator to deliver value of uncashed settlement checks to <i>cy pres</i> beneficiaries                                                                                                                                                                                       | Within 14 calendar days after settlement check cashing deadline                                   |
| Last day for Settlement Administrator to provide Parties with compliance declaration                                                                                                                                                                                                                       | Within 21 calendar days after settlement check cashing deadline                                   |

## V. FINAL APPROVAL AND HEARING

The Court hereby grants Plaintiffs' Motion and sets final approval hearing on the proposed date of November 13, 2025, at 3:30 p.m., with briefs and supporting documentation to be submitted according to the California Code of Civil Procedure, in this Department. Participating Class Members may object as set forth in the Agreement as well as appear and present such objections at the fairness hearing in person or by counsel.

1 If for any reason the Court does not grant final approval of the Agreement, all evidence and  
2 proceedings held in connection therewith shall be without prejudice to the status quo and rights of the  
3 parties to the litigation, including all challenges to personal jurisdiction and to class certification for any  
4 purpose other than approving a settlement class. The parties will revert to their respective positions as if  
5 no settlement had been reached at all.

6 **IT IS SO ORDERED.**

7  
8 Date: \_\_\_\_\_

By: \_\_\_\_\_  
Judge of the Superior Court