

1 R. Rex Parris (SBN 96567)
2 Kitty K. Szeto (SBN 258136)
3 John M Bickford (SBN 280929)
4 Ryan A. Crist (SBN 316653)

PARRIS LAW FIRM

43364 10th Street West
Lancaster, California 93534
Telephone: (661) 949-2595
Facsimile: (661) 949-7524

Attorneys for Plaintiffs, the Certified Class,
and the Aggrieved Employees

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KERN

ALFONSO GARIBAY HERNANDEZ, an
individual, and ERIK VALENZUELA, an
individual, for themselves and all members of the
certified class, and on behalf of aggrieved
employees pursuant to the Private Attorneys
General Act ("PAGA"),

Plaintiffs,

v.

UNITED STATES COLD STORAGE OF
CALIFORNIA, a California corporation; and
DOES 1 through 100, inclusive,

Defendants.

Case No. S-1500-CV-282297-SPC

[Assigned for all purposes to the Honorable
Thomas S. Clark, Dept. 17]

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED MOTION
FOR FINAL APPROVAL**

[Filed concurrently with Notice of Motion;
Declarations of Kitty K. Szeto, Alfonso
Garibay Hernandez, Erik Valenzuela, and
Jennifer M. Keough; and [Proposed] Order]

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1 **SUMMARY OF MOTION**

2 Plaintiffs Alfonso Garibay Hernandez and Erik Valenzuela (“Plaintiffs”) seek final approval of a
3 proposed class action settlement that was preliminarily approved by the Court on March 22, 2019.
4 Subject to the Court’s final approval, Defendant United States Cold Storage of California (“Defendant”)
5 has agreed to pay a total of **\$1,750,000.00** (the “Settlement”). Plaintiffs also seek approval of:

- 6 • \$612,500 to Class Counsel in attorneys’ fees for 1,292.05 hours of work on this case;
7 • \$25,000 to Plaintiffs as a service award for their service as the Class Representatives;
8 • \$55,012.87 to Class Counsel in litigation costs, which is \$4,987.13 ***less than*** the amount
9 allocated in the Settlement that will be disbursed to the class;
10 • \$11,426 to the Settlement Administrator for costs associated with administering the
11 settlement; and
12 • \$7,500 in PAGA penalties to the Labor and Workforce Development Agency.

13 The remainder, totaling **\$1,038,561.13**, will be distributed pro-rata to the participating Class
14 Members based on the number of workweeks they worked in each of the respective subclasses. This
15 will result in each Class Member receiving an average estimated gross payment of **\$962.79**. (Keough
16 Decl., ¶ 12.) This settlement is fair, reasonable, and adequate and the Court should grant final approval.

17 **PROCEDURAL HISTORY**

18 **I. BACKGROUND FACTS**

19 Defendant is a storage company that stores product for its customers in large refrigerated
20 warehouses. This product includes perishable items such as butter, cheese, whey protein, meats,
21 vegetables, and juices. Defendant operates eight plants in California: Sacramento, Tracy, Union City,
22 Turlock, Bakersfield, Fresno, Tulare South, and Tulare North.

23 Defendant employs warehousemen to load and unload its customers’ product, inventory it, and
24 organize it within its plants. When trucks drop off the product, warehousemen check its temperature and
25 unload it from the truck. They then move it by forklift to its designated storage area inside the plant.
26 When it is time to deliver the product, warehousemen retrieve the product and reload it on to trucks for
27 delivery.

28 *////*

1 Defendant has had several uniform meal and rest break policies during the class period. From the
2 beginning of the class period to around May 2013, its uniform meal and rest break policy stated:

3 Employees are provided with a 30-minute meal period, to be taken
4 approximately in the middle of the workday. Employees are allowed a
5 fifteen-minute rest period for every four hours of work or major portion
6 thereof. Your supervisor will schedule your meal and rest periods.

7 In May 2013, Defendant updated the policy. The revised policy reads:

8 **Meal Periods:** USCS provides a thirty-minute unpaid meal period for non-
9 exempt employees working five or more hours in a day, and a second
10 thirty-minute unpaid meal period for employees working twelve or more
11 hours in a day. California Employees receive a second thirty-minute
12 unpaid meal period when they work ten or more hours in a day. Employees
13 should take their meal periods near the middle of their shift, such as
14 between 12:00 and 1:00, or other suitable mealtime. During a meal period,
15 an employee is not required or permitted to perform any work; he or she is
16 relieved of all duty and may leave the premises.

17 **Rest Periods:** USCS provides non-exempt employees with a 15-minute
18 paid rest period for every four hours worked or major fraction thereof.
19 Employees must remain on the premises throughout rest periods. Your
20 supervisor will schedule your meal and rest periods. Insofar as is
21 practicable, employees should take the rest period in the middle of the work
22 period. If the nature or circumstances of the work prevent the employee
23 from taking the break at the preferred time, the employee may take the
24 break at another point in the work period. Taking rest periods at the
25 beginning or ending of shifts (for the purpose of arriving late or leaving
26 early) is not permitted.

1 Finally, sometime in 2014, Defendant sent “all employees” a memo containing a new “company policy
2 relating to meal periods and rest periods.” It also dispersed a revised meal and rest break policy that all
3 warehouseman were required to sign. It reads, in relevant part:

4 I understand that California law and Company policy require that I must be
5 provided a meal period of no less than 30 minutes whenever I exceed 5
6 hours in a work day. The meal period must begin before I exceed 5 hours
7 of work.

8 I understand that I may waive my right to an unpaid meal period whenever
9 I work 6 hours or less. On instances when I work 6 hours or less, and I
10 decide that I would like to take an off-duty meal period, I will advise my
11 supervisor so that a meal period can be provided. **Otherwise, I agree that**
12 **I have waived the meal period whenever I work 6 hours or less in a**
13 **workday.**

14 I understand that if I work more than 10 hours in a workday, I must be
15 provided a second 30-minute meal period. If my total work hours for the
16 workday are 12 hours or less, I may voluntarily waive the second meal
17 period. I understand that if I work more than 12 hours, I cannot waive this
18 second meal period. This second meal period must begin before I exceed
19 10 hours of work.

20 On instances when I work more than 10 but less than 12 hours in a day, the
21 following is my choice:

22 **I choose to waive the second meal period. YES_____ NO_____**

23 I understand that I can revoke the decision to waive a second meal period
24 by notifying my supervisor, in writing.

25 Although Defendant claims the prospective meal break waiver contained in its 2014 policy is voluntary,
26 it admits every warehouseman purportedly “agreed” to waive their second meal breaks.

27 ////

28 ////

1 **II. CLASS CERTIFICATION**

2 In July 2017, the court granted class certification of three subclasses: (1) the Wage Statement
3 Class; (2) Warehouseman Class I; and (3) Warehouseman Class II.

4 The Wage Statement Class consists of all current and former employees of Defendant within the
5 State of California at any time from June 24, 2013 to November 16, 2013. The theory of recovery for
6 the class is that Defendant's uniform wage statements do not comply with the requirements set forth in
7 Labor Code section 226. Specifically, Defendant's wage statements to not list (1) the correct name and
8 address of the legal employer and (2) the start date for the pay period at issue.

9 Warehousemen Class I consists of all current and former non-union warehousemen who worked
10 for Defendant within the State of California at any time between June 24, 2010 and the date the 2014
11 meal and rest break policies were instituted. The theory of recovery for this class is that Defendant's
12 meal and rest break policies for this time period were facially unlawful. The first policy is allegedly
13 unlawful because it fails to inform its employees they are entitled to "a first meal period no later than the
14 end of an employee's fifth hour of work, and a second meal period no later than the end of an
15 employee's 10th hour of work." It simply provides employees with *one* "30-minute meal period, to be
16 taken approximately in the *middle of the workday*," which the employee's "supervisor will schedule" for
17 them. Additionally, the policy allegedly fails to authorize rest breaks in the middle of the work period
18 "insofar as practicable." And although the second policy provided employees with "a thirty-minute
19 unpaid meal period [when they work] five or more hours in a day, and a second thirty-minute unpaid
20 meal period . . . when they work ten or more hours in a day," it does not provide the correct timing of
21 these breaks. Similar to the earlier policy, it specifically states employees should take their meal breaks
22 at a "*suitable mealtime*," such as "*between 12:00 and 1:00*" without consideration of when their
23 scheduled shift began.

24 Warehouseman Class II consists of all current and former non-union warehousemen who worked
25 for Defendant within the State of California at any time between the date the 2014 meal and rest break
26 policies were instituted to the present. The theory of recovery for this class is that the 2014 meal break
27 policy contains a prospective meal period waiver, which is unlawful.

1 **III. MEDIATION**

2 The Parties attended two private mediations conducted by Judge Patrick J. O'Hara (Ret.) on May
3 23, 2017 and Paul Grossman on September 7, 2018. (Szeto Decl., ¶ 3.) A preliminary agreement was
4 reached on September 7, 2018, and the Parties drafted the specific language of the Proposed Settlement,
5 which was fully executed on February 21, 2019. (*Id.*, Ex. 1.) At all times, these negotiations have been
6 adversarial, non-collusive, in good faith, and at arm's length. (*Id.*, ¶ 3.)

7 **ARGUMENT**

8 **I. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE.**

9 In deciding whether to approve a proposed class action settlement, the Court must find it is "fair,
10 adequate, and reasonable." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 (*Dunk*).) In
11 doing so, the Court must consider all relevant factors

12 such as the strength of plaintiffs' case, the risk, expense, complexity and
13 likely duration of further litigation, the risk of maintaining class action
14 status through trial, the amount offered in settlement, the extent of
15 discovery completed and the stage of the proceedings, the experience and
16 views of counsel, the presence of a governmental participant, and the
17 reaction of the class members to the proposed settlement.

18 (*Ibid.*) The Court must not "attempt to decide the merits of the case" or "substitute its evaluation of the
19 most appropriate settlement for that of the attorneys." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168
20 Cal.App.4th 116, 133.) "Due regard should be given to what is otherwise a private consensual
21 agreement between the parties." (*Dunk*, at p. 1801.) As such, the Court's inquiry is "limited to the
22 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
23 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole,
24 is fair, reasonable and adequate to all concerned." (*Ibid.*, internal quotation marks omitted.)

25 **A. An initial presumption of fairness exists.**

26 "[A] presumption of fairness exists where: (1) the settlement [was] reached through arm's-length
27 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
28

intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” (*Dunk, supra*, 48 Cal.App.4th at p. 1802.) Each of these elements is satisfied.

1. The Settlement is the result of informed arm’s-length negotiations.

The Proposed Settlement is the result of two private mediations conducted by Judge Patrick J. O’Hara (Ret.) on May 23, 2017 and Paul Grossman on September 7, 2018. (Szeto Decl., ¶ 3.) During this time, the Parties stayed litigation so they could focus solely on negotiations. (*Ibid.*) A preliminary agreement was reached on September 7, 2018, and the Parties drafted the specific language of the Proposed Settlement, which was fully executed on February 21, 2019. (*Ibid.*) At all times, these negotiations have been adversarial, non-collusive, in good faith, and at arm’s length. (*Ibid.*)

2. The parties have conducted sufficient investigation and discovery to allow counsel and the court to evaluate the fairness of the Settlement.

The Parties have conducted enough discovery to allow an evaluation into the fairness of the Proposed Settlement. For the past five years, Class Counsel has investigated the veracity, strength, and scope of the class claims, and successfully to move for class certification. (Szeto Decl., ¶¶ 3, 7.) There have been ongoing investigations, extensive research into legal and factual issues, and formal and informal discovery, including the formal exchange of payroll data prior to mediation. (*Ibid.*) Class Counsel interviewed Plaintiffs and other Class Members to gather facts and the names of potential witnesses, and took numerous depositions. (*Ibid.*) The Parties also exchanged multiple sets of written discovery requests and responses, and produced documents in response to formal discovery requests. (*Ibid.*) The data and documents reviewed and analyzed include, but are not limited to, Plaintiffs’ and other Class Members’ employment files, time records, and wage statements and Defendants’ employee handbooks. (*Ibid.*) Counsel for the Parties also met and conferred on numerous occasions to discuss issues relating to the pleadings, discovery, discovery motions filed by Plaintiffs, and production of various documents and data. (*Ibid.*)

3. Counsel are experienced in similar litigation and view the settlement favorably.

Class Counsel has extensive experience in handling class actions and complex litigation matters. (Szeto Decl., ¶ 4 & Ex. 2.) In their view, the Proposed Settlement is fundamentally fair, reasonable, and

adequate. (*Id.*, ¶ 7.) As explained below, the Proposed Settlement considers the risks associated with a classwide jury trial, and Defendant’s contentions regarding certification and manageability at trial.

4. There are no objectors to the settlement and only 9 class members requested to be excluded from it.

The Settlement was well received by the class. Not a single Class Member objected and only nine individuals requested to be excluded from the Settlement. (Keough Decl., ¶¶ 7–10.) Specifically, no objections were made as to the amount of the Settlement, the request for a service award to Plaintiffs, or the request for attorneys’ fees and costs.

B. The strength of Plaintiffs’ case balanced against the amount offered in settlement weighs in favor of approval.

Although the initial presumption of fairness is satisfied, the Court must still “independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those who claims will be extinguished.” (*Kullar, supra*, 168 Cal.App.4th at p. 130, internal quotation marks omitted.) This involves examining “the strength of the case for the plaintiffs on the merits, balanced against the amount offered in settlement.” (*Ibid.*, internal quotation marks omitted.) Here, the three subclasses require separate analysis as to their strength.

1. Wage Statement Class.

Labor Code Section 226, subdivision (a), requires employers to provide their employees with “an accurate itemized statement in writing” showing, among other things, “the inclusive dates of the pay period” and “the name and address of the legal entity that is the employer.” (Lab. Code, § 226, subd. (a).) “An employee suffering injury as a result of a knowing and intentional failure” to include this information is entitled to \$50 for the initial violation, and \$100 for each subsequent violation, not to exceed \$4,000 total. (*Id.*, § 226, subd. (e)(1).)

Defendant’s pre-November 13, 2013 uniform wage statements do not comply with section 226. Specifically, the wage statements did not list (1) the correct name and address of the legal employer or (2) the start date for the pay period at issue.

The class members also suffered an injury. “An employee is deemed to suffer injury” if the employer fails to accurately and completely provide the required information “and the employee cannot

1 promptly and easily determine [the information] from the wage statement alone.” (Lab. Code, § 226,
2 subd. (e)(2)(B).) Promptly and easily “means a reasonable person would be able to readily ascertain the
3 information without reference to other documents or information.” (*Id.*, § 226, subd. (e)(2)(C).) Since
4 there is no way an employee can determine the correct legal employer or the pay period start date from
5 the wage statement alone, the class members suffered an injury.

6 The violations were also knowing and intentional. “Knowing and intentional” is defined as
7 follows:

8 For purposes of this subdivision, a “knowing and intentional failure” does
9 not include an isolated and unintentional payroll error due to a clerical or
10 inadvertent mistake. In reviewing for compliance with this section, the
11 factfinder may consider as a relevant factor whether the employer, prior to
12 an alleged violation, has adopted and is in compliance with a set of
13 policies, procedures, and practices that fully comply with this section.

14 (Lab. Code, § 226, subd. (e)(3).

15 The “most comprehensive” analysis of the “knowing and intentional” requirement “appears to be
16 in” *Willner v. Manpower Inc.* (N.D.Cal. 2014) 35 F.Supp.3d 1116 (*Willner*). (*Derum v. Saks & Co.*
17 (S.D.Cal. 2015) 95 F.Supp.3d 1221.) There, the court

18 identified three principles from the language of the statute: first, “knowing
19 and intentional” requires something more than a violation of § 226(a)
20 alone; second, a “knowing and intentional” failure must be more than an
21 “isolated and unintentional payroll error due to a clerical or inadvertent
22 mistake”; and third, whether a violation of § 226(a) was “knowing and
23 intentional” is a factual determination. Based on those conclusions and
24 California courts’ definition of the similar phrase “willingly and
25 knowingly,” which appears in other sections of the California Labor Code,
26 the court concluded that “a ‘knowing and intentional’ violation requires a
27 showing that the defendant knew that facts existed that brought its actions
28 or omissions within the provisions of section 226(a).

1 (*Id.* at p. 1228, quoting *Willner*, at pp. 1131–1132.) Put simply, “[t]o establish that [an employer’s]
2 violation of [section 226] was ‘knowing and intentional,’ plaintiffs must demonstrate that [the employer
3 was] ‘aware of the factual predicate underlying the violation[s]’ ”—i.e., that its wage statements did not
4 contain the required information. (*Cobardo v. Patacsil* (E.D.Cal. 2017) 248 F.Supp.3d 1002, 1010,
5 quoting *Novoa Charter Communications, LLC* (E.D.Cal 2015) 100 F.Supp.3d 1013, 1028.)

6 Since Defendant processed and issued its own wage statements during the relevant time period, it
7 presumably knew what was contained on them. Accordingly, the violations were knowing and
8 intentional.

9 Defendant moved for summary judgment against the Wage Statement Class, claiming “it had a
10 good faith belief that it was not in violation of Labor Code section 226, which precludes a finding of a
11 knowing and intentional violation.” It also argued the class members were not injured. The court
12 rejected both arguments, holding Defendant did not meet “its initial burden of proving it is entitled to
13 judgment as a matter of law on the ‘knowing and intentional’ requirement,” nor did it meet “its burden to
14 show the Wage Statement Class was not injured, as a matter of law.” Defendant maintains Plaintiffs’
15 wage statement claim is a technicality that does not harm or injure the employees. Therefore, it claims
16 there is no support for a class wide finding of liability.

17 The proposed Settlement provides five percent (5%) of the remaining balance of the Net
18 Settlement Fund, or approximately \$52,125.00, to the Wage Statement class. The Wage Statement class
19 includes all hourly employees from June 24, 2013 to the date of preliminary approval. This includes
20 Plaintiffs’ derivative wage statement violations for failure to include meal and rest break premiums.
21 However, during negotiations, the Parties addressed whether the individuals who received direct
22 violative wage statements between June 24, 2013 and November 13, 2013 should receive a higher award
23 for Defendant’s failure to include the applicable pay periods and correct employer address. The
24 mediator agreed, and suggested a multiplier of 14 to be applied specifically to those individuals’ claims,
25 to which the parties agreed. (Settlement Agreement at p. 16:28–17:8.) If Plaintiffs proved direct wage
26 statement violations between June 24 and November 13, 2013, the maximum recovery would be
27 approximately \$245,000.00 (\$100 per violation x 245 class members x 10 pay periods). Lastly, during
28 the negotiations, the Parties believed a higher percentage of the Settlement Fund should be distributed to

1 the Class Members to cover their meal and rest break claims. (Szeto Decl., at ¶ 8.) Class Counsel
2 believes the result to be fundamentally fair, reasonable, and adequate. (*Id.* at ¶ 7.)

3 2. **Warehousemen Class I.**

4 California “obligates employers to afford their nonexempt employees meal periods and rest
5 breaks during the workday.” (*Brinker, supra*, 53 Cal.4th at p. 1018.) The number of breaks depends
6 upon the number of hours worked. Generally, an employer must “provide” an employee with the ability
7 to take a 30-minute uninterrupted meal period after no more than 5 hours of work, and a second meal
8 period after no more than 10 hours of work. (Lab. Code, § 512, subd. (a); see also Cal. Code Reg., tit. 8,
9 § 11130, subd. 11(A) & (B).) Although an employer is not required to “police” meal periods to ensure
10 no work is performed, it must do more than simply make a meal period available. Rather, an employer
11 satisfies its obligation to provide meal periods when it “relieves its employees of all duty, relinquishes
12 control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-
13 minute break, and does not impede or discourage them from doing so.” (*Brinker*, at p. 1040.)

14 Employers are also required to authorize and permit “10 minutes of rest time for every four hours
15 worked or major fraction thereof unless the employee’s entire workday consists of less than 3.5 hours.”
16 (*Campbell v. Vitran Express Inc.* (C.D.Cal. Nov. 12, 2015, CV 11-5029 RGK (SHx)) 2015 WL
17 7176110, at *3; see also Cal. Code Reg., tit. 8, § 11130, subd. 12(A).) Put differently, “[e]mployees are
18 entitled to 10 minutes rest for shifts from three and one-half to six hours in length, 20 minutes for shifts
19 of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so
20 on.” (*Brinker, supra*, 53 Cal.4th at p. 1029.) “The only constraint on timing is that rest breaks must fall
21 in the middle of work periods ‘insofar as practicable.’ ” (*Id.* at p. 1031.) This means employers are
22 “subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each
23 work period, but may deviate from the preferred course where practical considerations render it
24 infeasible.” (*Ibid.*)

25 Defendant’s break policies during this time period were unlawful. The first policy is unlawful
26 because it fails to inform its employees they are entitled to “a first meal period no later than the end of an
27 employee’s fifth hour of work, and a second meal period no later than the end of an employee’s 10th hour
28 of work.” It simply provides employees with *one* “30-minute meal period, to be taken approximately in

1 the *middle of the workday*,” which the employee’s “supervisor will schedule” for them. Additionally, the
2 policy fails to authorize rest breaks in the middle of the work period “insofar as practicable.” And although
3 the second policy provides for a second meal period, it does not provide the correct timing of these breaks.
4 Similar to the earlier policy, it specifically states employees should take their meal breaks at a “*suitable*
5 *mealtime*,” such as “*between 12:00 and 1:00*” without consideration of when their scheduled shift began.
6 At trial, the fact finder will need to determine whether Defendant’s meal and rest break policy violated
7 California law. If it does, then Defendant “has violated the wage order and is liable.” *Brinker*
8 *Restaurant Corp. v. Superior Court* 53 Cal. 4th 1004, 1033 (2012). At that point, the only issue to be
9 decided is the class’s total damages—the amount of which can be determined on a permissibly
10 individual basis.

11 Notably, it doesn’t matter that some employees might have taken compliant meal and rest breaks.
12 In *Brinker*’s wake, courts have repeatedly found that a defendant employer’s evidence of an inconsistent
13 application of an illegal policy to be insufficient on its own to defeat class certification. As recently
14 explained,

15 In *Benton*, the court reversed the denial of class certification, stating, “The
16 mere fact that some technicians may have taken breaks (or declined to take
17 breaks) . . . ‘does not show that individual issues will predominate in the
18 litigation.’” Similarly, in *Faulkinbury* . . . , the court reversed the denial
19 of class certification, explaining that “[i]n opposition to the motion for
20 class certification, [the defendant employer] submitted declarations from
21 current employees [I]n light of *Brinker*, this evidence at most
22 establishes individual issues of damages, which would not preclude
23 certification.” In *Hall* . . . , the Court of Appeal, in reversing the denial of
24 class certification, stated that with regard to *Brinker*’s progeny “[t]hose
25 courts have . . . agreed that, where the theory of liability asserts the
26 employer’s uniform policy violates California’s labor laws, factual
27 distinctions concerning whether or how employees were or were not
28 adversely impacted by the allegedly illegal policy do not preclude

1 certification. And in *Bradley*, the court reversed the trial court’s decision to
2 deny class certification due to variations among putative class members,
3 explaining that *Brinker* has “expressly rejected . . . [the idea] that evidence
4 showing some employees took rest breaks and others were offered rest
5 breaks but declined to take them made . . . certification inappropriate.”

6 (*Ibid.*, internal citations omitted, some alterations in original, others added.)

7 Finally, calculating each class member’s individual damage award for meal period violations is
8 relatively straightforward. Employers have an obligation to not only provide timely meal breaks, but “to
9 record having done so.” (*Brinker, supra*, 53 Cal.4th at p. 1053 (conc. opn. of Werdegar, J.), citing Cal.
10 Code Regs., tit. 8, § 11050(7)(A)(3).) As a result, “[i]f an employer’s records show no meal period for a
11 given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty
12 and no meal period was provided.” (*Ibid.*)

13 The proposed Settlement provides fifty-five percent (55%) of the remaining balance of the Net
14 Settlement Fund, or approximately \$573,375.00, to the Warehousemen Class I class. Based on
15 Defendant’s representations, there were approximately 1073 workdays in the Warehousemen Class I
16 while the first two meal policies were in effect (745 in the first, 328 in the second), and approximately
17 245 warehousemen at any given time. (Szeto Decl., at ¶ 8.) If Plaintiffs proved a 50% violation rate
18 under the first meal period policy, this would total \$1,368,937.50 in damages (745 work days x 245
19 employees x \$15.00 per hour x 50% violation rate). In addition, if Plaintiffs proved a 50% violation rate
20 under the second meal policy, this would equate to approximately \$602,700.00 (328 work days x 245
21 employees x \$15.00 per hour x 50% violation rate). This totals approximately \$1,971,637.50 in
22 potential damages for the Warehousemen Class I class, plus approximately \$824,400.00 (229 former
23 employees x \$15.00 per hour x 8 hours in a day x 30 days) in derivative waiting time penalties under
24 Labor Code section 203.

25 Defendant maintains these policies are not facially unlawful, and that it provided adequate breaks
26 to the class. It also argued strenuously against class certification, and believes this class should be
27 decertified. Plaintiffs took these arguments into consideration, with the assistance of the mediator, and
28 applied the appropriate discounts in arriving at the settlement amount. Given the potential risks

1 associated with trial and potential appeals, Class Counsel believes this settlement amount is
2 fundamentally fair and adequate. (Szeto Decl. at ¶ 7.)

3 **3. Warehousemen Class II.**

4 Defendant's 2014 meal break policy contain a prospective meal period waiver, which is unlawful.
5 These waivers expressly state Defendant will not provide meal periods when shifts are 6 hours or less or
6 when shifts are more than 10, but less than 12 hours.

7 *Brinker* expressly states employees cannot waive a meal period until their employer first
8 provides them the opportunity to take it. (See *Brinker, supra*, 53 Cal.4th at p. 1033 ["No issue of waiver
9 ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an
10 employee has no opportunity to decline to take it"].) Indeed, the DLSE has stated:

11 "As a statutorily protected right, the decision to forego a meal period must be
12 made personally by each worker on a daily basis. The decision to forego a
13 meal period may not, therefore, be based on a specific requirement of the
14 employer or on a policy or practice which could reasonably be perceived to
15 be a condition of employment. Therefore, blanket 'waivers' of meal periods
16 . . . will not be considered valid."

17 (*Saechao v. Landry's Inc.* (N.D.Cal. Mar. 16, 2016, No. C 15-00815 WHA) 2016 WL 1029479, at *3
18 (*Saechao*), quoting DLSE Opinion Letter (Aug. 13, 2013) at pp. 3–4; see also *Robles v. Sunview Vineyards*
19 *of California, Inc.* (E.D.Cal. Mar. 31, 2009, No. CIV-F-06-0288 AWI SMS) 2009 WL 900731, at *5.)
20 There is also an issue as to whether these waivers were truly voluntary.

21 Defendant also moved for summary judgment against Warehouseman Class II, which the court
22 denied as well. Additionally, the court—on its own—noted that the 2014 meal period policy might be
23 facially unlawful for another reason as well:

24 A review of the 2014 Meal and Rest Break Policy in question . . . reveals
25 that the written policy does not alert employees to the fact that the second
26 meal period may only be waived if the first meal period was not
27 waived. . . . Accordingly, without reaching a decision on the validity of a
28 prospective waiver generally, this Court finds that moving Defendant failed

1 to carry its burden to show that this particular prospective waiver policy is
2 not facially invalid. In fact, the policy appears to be facially invalid. The
3 issue as to voluntariness is therefore moot at this time.

4 The proposed Settlement provides forty-five percent (40%) of the remaining balance of the Net
5 Settlement Fund, or approximately \$417,000.00, to the Warehousemen Class II class. If Plaintiffs
6 proved a violation rate of 50% under the third meal period policy, this would total approximately
7 \$1,438,762.50 in damages (783 work days x 245 employees x \$15.00 per hour x 50% violation rate).
8 Again, Defendant maintains this policy is not unlawful, and that it provided meal periods to the class. It
9 also argued strenuously against class certification. Plaintiffs took these arguments into consideration,
10 with the assistance of the mediator, and applied the appropriate discounts in arriving at the settlement
11 amount. (Szeto Decl., at ¶¶ 7, 8.)

12 While there are considerable risks associated with a class action trial and resulting appeals, Class
13 Counsel has taken class action cases to trial, and stood (and stand) ready and willing to do so again in this
14 case. That said, when presented with a settlement that will benefit the entire class in the very near future,
15 the risk of later potentially recovering nothing must be candidly recognized and evaluated. Defendant
16 similarly denies all allegations in the complaint. It further contends Plaintiffs' trial plan is unmanageable,
17 and that the classes should be decertified. However, Defendant has concluded that further conduct in the
18 case would be protracted and expensive. For those reasons, Class Counsel is confident this proposed
19 settlement is in the best interests of the class. (Szeto Decl., ¶ 7.)

20 **II. PLAINTIFFS' SERVICE AWARD IS FAIR AND REASONABLE**

21 "Incentive awards are fairly typical in class action cases." (*Rodriquez v. West Publishing Corp.*
22 (9th Cir. 2009) 563 F.3d 948, 958.) The rational for such awards is to compensate the named plaintiffs
23 "for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Clark*
24 *v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 806.) Courts consider the following
25 factors when awarding incentive awards: " '(1) the risk to the class representative in commencing suit,
26 both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class
27 representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the
28 litigation and; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the

litigation.’ ” (*In re Cellphone*, *supra*, 186 Cal.App.4th at pp. 1394–1395, quoting *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294, 299.) For the past four years, Plaintiffs have spent a substantial amount of time assisting in the prosecution of this case. (See Hernandez Decl., ¶¶ 3–14; Valenzuela Decl., ¶¶ 3–11.) It is also possible that they will be denied future employment if an employer found out about this case. (Szeto Decl., ¶ 5.) In addition, Plaintiffs have agreed to a General Release of all potential claims against Defendant, with the exception of worker’s compensation claims. (Settlement Agreement at pp. 13:12–14:10.) This is not something the Class Members will have to do. (*Ibid.*) As such, an incentive award of \$15,000 for Plaintiff Hernandez, and \$10,000 for Plaintiff Valenzuela is fully deserved and justified. (*Id.* at p. 12:15–25.)

III. COSTS TO BE REIMBURSED TO CLASS COUNSEL

The total costs Class Counsel will have incurred by the time this case is concluded is \$55,012.87, which is \$4,987.13 *less than* the amount allocated in the Settlement. A breakdown of these costs are attached as Exhibit “3” of the Szeto Declaration. The costs incurred include the costs for filing the complaint, taking and defending depositions, hiring experts, the costs relating to Class Counsel traveling to Court appearances, and the costs of attending mediation with highly qualified and experienced mediators. These expenses are reasonable and necessary in the prosecution of this class action. Accordingly, Class Counsel requests that the Court approve \$55,012.87 to Class Counsel for litigation costs and expenses.

IV. THE ATTORNEYS’ FEES REQUESTED BY CLASS COUNSEL ARE FAIR AND REASONABLE

A. The fee request is justified under the percentage of common fund approach.

Class counsel seeks the approval of an attorneys’ fee award equal to 35% of the Settlement obtained as a result of the filing of this case. This “common fund” doctrine, under which attorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs out of the fund, has long been a staple of class action settlements: “a lawyer who recovers a common fund for the benefit of persons other than . . . his client is entitled to a reasonable attorney’s fee from the fund as a whole.” (*Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478.) Federal courts have endorsed the percentage method as a fair way to calculate a reasonable fee when contingency fee litigation has

1 produced a common fund. (See, e.g., *Blum v. Stenson* (1984) 465 U.S. 886, 900 fn.16 [under common
2 fund doctrine, “reasonable fee is based on a percentage of the fund bestowed on the class”]; *Six (6)*
3 *Mexican Workers v. Ariz. Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1311 [common fund fee is
4 generally “calculated as a percentage of the recovery”].)

5 In *Camden I Condominium Association, Inc. v. Dunkel*, the court identified twelve factors to be
6 considered in determining whether fee awards are reasonable in a common fund case: (1) the time and
7 labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform
8 the legal services properly; (4) the preclusion of other employment by the attorney due to the acceptance
9 of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitation imposed
10 by the client or the circumstances; (8) the amount involved and results obtained; (9) the experience,
11 reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the
12 professional relationship with the client; and (12) awards in similar cases. (*Camden I Condominium*
13 *Association, Inc. v. Dunkel* (11th Cir. 1991) 946 F.2d 768, 772.)

14 **1. The time and labor involved favor the fee award sought.**

15 Class Counsel used its class action experience and skills to litigate and bring this matter to a
16 successful conclusion. Prior to commencing this lawsuit, Class Counsel had conducted a significant
17 amount of investigations into the factual and legal issues, Defendant’s business, and its operations and
18 employment policies, practices, and procedures. (Szeto Decl., ¶ 6.) During the litigation of this case,
19 Class Counsel interviewed and obtained information from Plaintiffs and other putative class members,
20 conducted formal and informal discovery, conducted legal research, reviewed and analyzed a volume of
21 documents and data, and undertook calculations of the potential value of the claims. (*Ibid.*) Counsel for
22 the parties met and conferred on numerous occasions over the issues relating to the pleadings, discovery,
23 discovery motions filed by Plaintiffs, and production of various documents and data prior to the
24 mediation. (*Ibid.*) Counsel for the parties also engaged in extensive settlement negotiations and
25 prepared for and attended Court proceedings, mediation, and settlement negotiations. (*Ibid.*)

26 Class Counsel dedicated the full extent of staffing and monetary resources necessary to prosecute
27 the case with maximum efficiency, and has fully and actively participated in this litigation process. The
28 chart attached as Exhibit “4” to the Szeto Declaration sets forth in detail the hours that Class Counsel

1 has spent performing tasks on behalf of Plaintiff and the Class. Class Counsel has spent a total of
2 1,292.05 hours of work, with an estimated fair market value of \$646,025 at \$500 per hour, to obtain a
3 significant recovery on behalf of Plaintiffs and the Class Members. These hours were required to bring
4 this case to its successful conclusion. In light of the value of time expended and the carrying of costs
5 involved in this litigation, the requested attorney fee award of \$612,500 is fair, adequate, and reasonable.

6 **2. The risks assumed by Class Counsel favor the fee award sought.**

7 Class Counsel assumed a very real risk in taking on this case. Plaintiff, through his counsel, took
8 on a regional corporation with far more resources than Class Counsel. Class Counsel took the case on a
9 contingency basis, and invested time, effort, and money with no guarantee of any recovery. Class
10 Counsel proceeded knowing there was a chance that Defendant would prevail and that even if Plaintiff
11 prevailed, there was a chance that the case would take years to bring to trial and would not be resolved
12 without an appeal. The risk of no recovery in complex class actions of this type is very real. There are
13 numerous cases where Class Counsel in contingent-fee cases such as this one, after devoting thousands
14 of hours and advancing significant sums in out-of-pocket expenditures, received no compensation
15 whatsoever. (See *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026 [“The risk of
16 maintaining class action status throughout the trial” was an important factor in approving the class action
17 settlement.]) From the outset Defendant has adamantly denied any liability and continues to do so.

18 **3. Class Counsel obtained an excellent result for the class.**

19 The results obtained by Class Counsel are an excellent result for this case. The total value of this
20 Settlement is \$1,750,000.00. Accordingly, Class Members will receive an estimated average gross
21 payment of \$962.79. (Keough Decl., ¶ 12.)

22 The fairness of this fee award is further supported by the high quality of Class Counsel’s legal
23 representation as described above and in the declaration. Class Counsel’s highly-informed, diligent, and
24 efficient prosecution of this matter positioned Plaintiff to successfully settle this case, affording redress
25 to the entire proposed settlement class, and avoided the inevitable expense and risk attendant with
26 protracted litigation.

27 ////

28 ////

1 The quality of opposing counsel is also important in evaluating the quality of Class Counsel's
2 work. Here, as set forth above, Defendant was represented by experienced and skilled lawyers from a
3 law firm with a deserved reputation for vigorous advocacy in the defense of complex employment class
4 action cases. The ability of Class Counsel to obtain this Settlement in the face of such formidable legal
5 opposition confirms the quality of Class Counsel's representation. Accordingly, this factor strongly
6 supports the requested fee.

7 **4. Class Counsel's award is relatively modest.**

8 Here, Class Counsel seeks 35% of the value of all settlement dollars totaling \$1,750,000. Most
9 cases consider the size of the settlement fund for purposes of evaluating fee requests, in relation to how
10 large it renders the resulting fee award. (See, e.g., *In re Washington Public Power Supply System*
11 *Securities Litigation* (9th Cir. 1994) 19 F.3d 1291, at p. 1297 ["[T]he percentage of an award generally
12 decreases as the amount of the fund increases"].) Accordingly, the fee request here is in line with other
13 fee awards.

14 **5. The skill and reputation of Class Counsel justifies the fee requested.**

15 As shown in the accompanying declaration, Class Counsel are recognized leaders in employment
16 class actions, and put the full use of their skill and experience to work in the service of Plaintiffs and the
17 class in this case. (Szeto Decl., ¶ 4, *see also id.*, Ex. 2.) As a result, these factors favor the fee award
18 sought by Class Counsel. The Parris Law Firm has dedicated itself to this case. Class Counsel are
19 nationally-recognized trial and class-action attorneys and employed their knowledge, skill, and
20 experience in bringing to conclusion a very favorable result in a unique, hard-fought litigation. (*Ibid.*)
21 The goal achieved is the extraordinary result of obtaining \$1,750,000 in total for the Class. Class
22 counsel respectfully requests an award of attorneys' fees equal to 35% of that amount.

23 **B. The lodestar methodology also justifies approval of the requested fees.**

24 While the percentage-of-the-benefit approach is endorsed as the better approximation of the
25 workings of the marketplace than the lodestar approach, when a common fund is involved, courts may
26 also use the lodestar method to "cross-check" the results of the other. (See *Laffitte v. Robert Half Inter.*
27 *Inc.* (2016) 1 Cal.5th 480, at at p. 505 [explaining that "[a] lodestar cross-check is simply a quantitative
28 method for bringing a measure of the time spent by counsel into the trial court's reasonableness

determination”].) Importantly, “the lodestar calculation . . . does not override the trial court’s primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award.” (*Ibid.*) The lodestar is calculated based on reasonable hours at reasonable prevailing hourly rates for the attorneys. (*Ketchum v. Moses* (2011) 24 Cal.4th 1122, at p. 1131–1132.) Under California law, Class Counsel is entitled to compensation for every hour reasonably spent on the matter. (*Id.* at p. 1133.)

The reasonableness of hours is assessed by “the entire course of the litigation, including pretrial matters, settlement negotiations, discovery, litigation tactics, and the trial itself[.]” (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447.) As discussed above, this case was highly contested and required a significant amount of time and labor. Defendant made it clear very early on that it disputed all of the claims alleged in the lawsuit and disputed that the claims were appropriate for class treatment or representative adjudication. Defendant raised affirmative defenses and denied liability, and the pursuit of this case involved gathering and analyzing data not only from Defendant but also from the Class Members. The handling of this litigation involved a great amount of effort, and required and involved the exercise of a high level of skill, which Class Counsel has as a result of its extensive experience in employment class actions and wage-and-hour litigation. Long and difficult battles would have followed as the case moved toward trial, including taking and defending declarant and expert depositions, depositions of additional Person Most Knowledgeable witnesses, conducting additional written discovery and document production, and engaging in additional motion practice. As Class Counsel geared up for these battles, Class Counsel undertook intense preparation in an attempt to resolve the entire matter through mediation.

As set forth above, Exhibit “4” to the Szeto Declaration sets forth in detail the numerous tasks that Class Counsel performed on behalf of Plaintiff and the Class, and the time required for completing those tasks. The chart demonstrates that Class Counsel spent a total of 1,292.05 hours of work, with an estimated fair market value of \$646,025, to obtain a significant recovery on behalf of Plaintiffs and the Class Members. In light of the facts and circumstances of this case, as well as the results Class Counsel has achieved on behalf of Plaintiffs and the other Class Members, Class Counsel has spent a reasonable number of hours on this matter.

1 **CONCLUSION**

2 For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the
3 proposed class action settlement.

4 DATED: June 24, 2019

PARRIS LAW FIRM

5
6 By: _____

Kitty K. Szeto
Attorneys for Plaintiffs, the Certified Class,
and the Aggrieved Employees

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PROOF OF SERVICE
1013A(3) CCP

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 43364 10th Street West, Lancaster, California 93534

On June 24, 2019, I served the foregoing document described as

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS'
UNOPPOSED MOTION FOR FINAL APPROVAL

 X by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

*** Please See Attached List ***

 BY MAIL

 I deposited such envelope in the mail at Lancaster, California. The envelope was mailed with postage thereon fully prepaid.

 As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U. S. postal service on that same day with postage thereon fully prepaid at Lancaster, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

 BY PERSONAL SERVICE

 I delivered such envelope by hand to the addressees at _____

 BY FACSIMILE

 I served such document(s) by fax at See Service List to the fax number provided by each of the parties in this litigation at Lancaster, California. I received a confirmation sheet indicating said fax was transmitted completely.

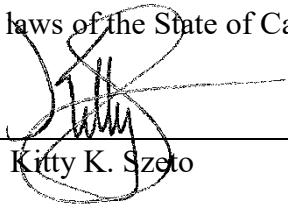
[X] **BY ELECTRONIC SERVICE as follows:** Based on a court order, or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addressed listed on the attached Service List.

 BY OVERNIGHT MAIL

 I placed such envelope in an overnight express mailer addressed to the party or parties listed on the attached list with delivery fees fully pre-paid for next-business-day delivery, and delivered it to an overnight express pick-up driver on the stated date.

Executed on June 24, 2019 at Lancaster, California.

 X I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Kitty K. Szeto

ATTACHMENT TO PROOF OF SERVICE

HERNANDEZ, ALFONSO V. UNITED STATES COLD STORAGE OF CALIFORNIA, ET AL.
KERN COUNTY CASE NO. S-1500-CV282297-SPC

Chris Rusca, Esq.
SAGASER, WATKINS & WIELAND PC
5260 N. Palm Avenue, Suite 400
Fresno, California 93704
Telephone: (559) 421-7000
Facsimile: (559) 473-1483
chris@sw2law.com

/Attorneys for Defendants United States
Cold Storage of California and United
States Cold Storage, Inc.

California Labor and Workforce Development Agency /LWDA
1515 Clay Street, Ste. 801
Oakland, California 94612
Telephone: (916) 653-9900
<https://dir.tfaforms.net/209>