COHELAN KHOURY & SINGER
Michael D. Singer (SBN 115301)
msinger@ckslaw.com
605 C Street, Suite 200
San Diego, CA 92101
Tel.: (619) 595-3001

THE PHELPS LAW GROUP
Marc H. Phelps (State Bar No. 237036)
Marc@phelpslawgroup.com
23 Corporate Plaza Drive, Suite 150
Newport Beach, CA 92660
Tel.: (949) 629-2533

THE CARTER LAW FIRM
Roger Carter (State Bar No. 140196)
roger@carterlawfirm.net
23 Corporate Plaza Drive, Suite 150
Newport Beach, CA 92660
Tel.: (949) 245-7500

Attorneys for Plaintiffs SAMANTHA JONES and ROBERT GROB and the Conditionally Certified Class

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

SAMANTHA JONES and ROBERT GROB, individually and on behalf of all persons similarly situated, Plaintiffs vs. ABERCROMBIE & FITCH TRADING CO., an Ohio corporation; ABERCROMBIE & FITCH STORES, INC., and DOES 1 through 100, Inclusive, Defendants.	**CASE NO. 2:15-cv-00105-JGB-(Ex)** **CLASS ACTION** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND ENTERING JUDGMENT** Date: November 19, 2018 Time: 9:00 a.m. Courtroom: 1 Judge: Hon. Jesus G. Bernal

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATUTES AND REGULATIONS

Page

Federal Rules of Civil Procedure

MISCELLANEOUS AUTHORITIES

Page

Manual for Complex Litigation (Fourth)

William Rubenstein, Alba Conte & Herbert Newberg, 4 Newberg on Class Actions (5th ed. 2014) ("Newberg")

I. INTRODUCTION

Plaintiffs and appointed Class Representatives Samantha Jones and Robert Grob ("Plaintiffs") seek final approval of a non-reversionary common fund Settlement of $9,600,000 on behalf of all current and former California non-exempt hourly employees of Abercrombie & Fitch Trading Co. and Abercrombie & Fitch Stores, Inc. ("Defendants" or "Abercrombie" or "A&F"), who were scheduled for one or more "call in" shift(s) at any time from July 30, 2010 through August 13, 2018 ("Settlement Class Members") ("Class Period"). Declaration of Michael D. Singer ("Singer Decl.) ¶8.

The Settlement was preliminarily approved on August 13, 2018. Dkt. No. 73. On August 30, 2018, the Court-approved Notice of Class Action Settlement (together with the Opt-Out Request Form) was mailed via first-class U.S. mail to 61,554 members of the Class informing them of their rights and benefits under the Settlement and of the September 29, 2018, deadline to postmark and return an opt out form and to file and serve objections to the Settlement. Singer Decl. ¶¶20, 21; Declaration of Tim Cunningham on behalf of CPT Group, Inc. ("CPT Decl.") ¶¶3, 5, 6 - Exh. A.

Through the present time, not a single member of the Class has objected to any term of the Settlement, and only 74 of 61,554 Class Members (one tenth of one percent) have requested exclusion from the Settlement. CPT Decl. ¶¶10, 11, 12. Following the grant of final approval, and the effective date of Settlement, 61,480 Class Members will receive substantial payments, which average $112.96, and with highest payments of $1,604.88. CPT Decl. ¶19.

The Class has embraced the Settlement as one which is fair, adequate and reasonable. Class Counsel respectfully requests the Settlement now be finally approved, and that the Class Representative Enhancement Payments, Class Counsels' attorneys' fees and costs, and the Settlement Administrator's expenses be awarded in the sums requested.

///

///

II. FACTUAL AND PROCEDURAL HISTORY

A. Complaint and Plaintiffs' Claims

Plaintiff, Samantha Jones, filed this case on July 30, 2014, in the San Francisco County Superior Court on behalf of herself and a class of non-exempt hourly employees who worked at Abercrombie's retail stores. About October 16, 2014, the case was removed to the United States District Court, Northern District of California. Dkt. No. 1. The case was subsequently transferred to the Central District. Dkt. Nos. 24-26. On October 15, 2015, Plaintiff filed an amended complaint adding claims and an additional Plaintiff/Class Representative, Robert Grob. Dkt. No. 44. Plaintiffs' operative Second Amended Complaint alleged, among other labor violations, that Abercrombie failed to compensate the Class for reporting time and other unpaid pre-shift work. Plaintiffs also brought derivative claims for failing to pay all wages earned upon termination of employment and PAGA penalties. *Id.*

Defendants operate a nationwide chain of retail apparel stores, including the Abercrombie & Fitch, Hollister, abercrombie kids, and Gilly Hicks brand stores. All California store-level retail employees are employed by Abercrombie & Fitch Stores, Inc. regardless of the store brand in which they work.

Both Plaintiffs worked as non-exempt hourly employees of Abercrombie & Fitch Stores, Inc. at Abercrombie & Fitch and Hollister brand stores in California: Plaintiff Ms. Jones, from December 2005 to January 2014, and Plaintiff Mr. Grob from August 2009 to September 2013. Singer Decl. ¶9. Plaintiffs' principal claim arises under the "Reporting Time Pay" provision of Wage Order 7, which requires an employer to pay for a set amount of hours, half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, if an employee "is required to report for work and does report, but is not put to work ... ." 8 Cal. Code Regs. § 11070(5)(A). Specifically, Plaintiffs allege that Abercrombie scheduled employees for "call-in" shifts that required employees to call an hour in advance of the start of the shift to confirm that they must work the shift. When the employee was not needed, the employee was not

paid. When the employee was needed, the employee was paid beginning when he or she clocked in. Plaintiffs contend that when employees placed that call they were "report[ing] for work," meaning that any time the employees called in to work and were told that no work would be available, reporting pay was due. They also allege that the time spent calling in was "work" that the employees should have been compensated for, but were not. Singer Decl. ¶10.

Plaintiffs believe that with long-established public policy construing statutes liberally in favor of protecting employee rights as it pertains to wages, hours, and working conditions, courts would find that call-in scheduling triggers reporting pay obligations, particularly because the scheme is designed for the benefit of the employer to save labor costs at the expense of employees' freedom to obtain alternate work. Plaintiffs believe any ambiguity on this point will be resolved in favor of providing more protection for employees' pay, not less, and they note that trial courts have come to that conclusion. Finally, Plaintiffs believe class certification of their theories is indicated. They contend the call-in procedure was a uniformly-applied policy that presents purely legal issues applied to facts not materially in dispute. As a result of Plaintiffs' litigation, in May, 2016, Defendants stopped having its employees call in to determine whether they would work that day. Singer Decl. ¶11.

B. Discovery and Defendants' Defenses

After the exchange of information, the Parties exchanged extensive mediation briefs prior to the date set for each scheduled mediation. Defendants responded to Plaintiffs' arguments with nearly 50 pages of briefing arguing against Plaintiffs' claims. Defendants argued that there is no private right of action for reporting time pay, and that such pay cannot be derivatively recovered under the UCL or PAGA. Defendants further argued the claim would not be certified for class treatment because the call-in practice was implemented at the store manager level, resulting in significant variability. Defendants also maintained the claim fails on the merits, arguing reporting time pay is intended only to compensate employees who physically show up at the worksite. Similar

arguments were made as to the derivative claims.[1] Singer Decl. ¶12.

III. MEDIATION, AND SUMMARY OF PROPOSED SETTLEMENT

A. Mediation

On March 20, 2018, after extensive investigation, research, discovery, and analysis of damages, the Parties attended a full-day private mediation in San Francisco with David A. Rotman, a well-known and experienced wage and hour class action mediator facilitating the negotiations. At the end of the day, the case could not be resolved. A second day of mediation was scheduled for May 18, 2018, again with Mr. Rotman. On this second day of mediation, the Parties worked diligently through another full day of negotiations which led to an agreement in principal to enter into a class-wide Settlement. Singer Decl. ¶13.

B. The Settlement Terms

Subject to Court approval, the Parties agreed the Class claims be settled for a maximum settlement of $9,600,000, no part of which may revert to Defendants, that included: (a) attorneys' fees of up to 30% ($2,880,000), though Class Counsel are seeking a benchmark 25% ($2,400,000)[2] award of fees to compensate them for work performed for the nearly four and one-half years and work remaining to document and administer the Settlement and securing final Court approval; (b) litigation costs of $43,323.69 (originally estimated at $75,000); (c) Class Representative Enhancement Payments of $10,000 to each named in consideration and recognition of their service on behalf of the Settlement Class resulting in an average payment of $112.96 and highest payments of $1,604.88, for risks they may have been responsible for payment of costs in the event of loss, stigma and impact on future job opportunities, and for general releases

---

[1] See also, Defendants' 21-page Notice of Joinder to Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Dkt. 71, detailing the defenses to Plaintiffs' claims and the hurdles to certification Plaintiffs must overcome. "Defendants' Joinder".

[2] The Settlement Agreement, Dkt. 70-2, ¶7, provides for "a maximum of $2,880,000 (30% of the Settlement Amount) for the payment of Class Counsel's Attorney Fees."

of all claims each may have had against Defendants arising out of their employment; (d) a $37,500 (75% of $50,000) PAGA Payment to the LWDA, and (d) administration expenses to CPT Group, Inc., of $154,500 (originally estimated at $136,500). See, Dkt. No. 70-2, ¶¶7, 11-15, 36 & 44. Singer Decl. ¶14.

After all Court-approved deductions, the remaining Net Settlement Amount ("NSA" or "Class Recovery") estimated at $6,944,676.31[3] will be distributed to all participating Class Members without the need to return a claim form. Each such Class Member will receive a proportionate share of the Class Recovery based on the number of call-in shifts and scheduled shifts during the Class Period. Singer Decl. ¶15.

Ninety percent (90%) of the Class Recovery will be allocated to each Class Member by dividing the number of call-in shifts each Class Member was scheduled to work within the Class Period by the total call-in shifts all Class Members were scheduled to work within the Class period and multiplying that fraction by the Class Recovery. Dkt. No. 70-2, ¶34(a). Based on this formula, the average payment is estimated to be $101.66 while the highest payments are estimated at $1,524.15 CPT Decl. ¶17. The remaining ten percent (10%) of the Class Recovery will be allocated to the Class by dividing the number of shifts each Class Member was scheduled to work within the Class Period by the total number of shifts all Class Members were scheduled to work within the Class Period and multiplying that fraction by the Class Recovery. Dkt. No. 70-2, ¶34(b). Based on this formula, the average payment is estimated to be $11.30 and highest payments are estimated at $274.20. CPT Decl. ¶18; Singer Decl. ¶17.

Since all Settlement Class Members are in both the Call-in Shifts Group and the Scheduled Shift Group, based on the foregoing formulas, they will receive an aggregate average payment of $112.96 and aggregate highest payments of $1,604.88. CPT Decl. ¶19; Singer Decl. ¶18.

---

[3] Since Preliminary Approval, the NSA available to the Class has increased by $511,676.31 following the reduction in Class Counsel's requested fee from 30% to 25% and by $31,767.32, the difference between the allowed litigation expense of $75,000 and Class Counsel's actual litigation expenses of $43,232.68. Singer Decl. ¶16.

No portion of the Settlement funds will revert to Defendants under any circumstances. After 90 days of issuance of the Settlement payment checks, all uncashed or undeliverable Settlement payment checks will be forwarded to the State of California's unclaimed funds division for further handling. Dkt. No. 70-2, ¶41. Singer Decl. ¶19.

IV. PRELIMINARY APPROVAL, NOTICE AND THE CLASS RESPONSE.

On August 13, 2018 Plaintiffs' Motion for Preliminary Approval [Dkt 70], joined by Defendants' Notice of Joinder [Dkt. 71] was heard. The Court determined that the Settlement Agreement was fair, reasonable, and adequate for the Class, conditionally certified the Class, and granted preliminary approval of the Settlement Agreement. Dkt. No. 73. The Court further approved and directed the mailing of the Notice of Class Action Settlement and Opt-Out Request Form ("Class Notice"), pending minor edits to be made beforehand. *Id*. Singer Decl. ¶20.

Following the recommended edits to the Class Notice, and a National Change of Address database search to update Class Member addresses, on August 30, 2018, the administrator mailed the Class Notice to 61,554 Class Members. CPT Decl. ¶¶5, 6. The Class Notice advised the Class of (1) the pendency of the Class Action; (2) the terms of the Settlement; (3) the automatic payment of their proportionate share of the Settlement if they did not return an opt out request; (4) the released claims; (5) their right to submit objections or requests for exclusion and the manner and deadline for doing either act, and (6) the date, time and place set for the final approval hearing. *Id*. Singer Decl. ¶21.

Since the September 29, 2018 deadline to object or opt out, not a single objection has been received as to any term of the Settlement and only .001% (74 of 61,554) of the Class have requested exclusion. CPT Decl. ¶¶10, 12; Singer Decl. ¶22.

V. FINAL APPROVAL OF THE SETTLEMENT SHOULD BE GRANTED

A. Class Settlements are Subject to Court Review and Approval

"A class action shall not be dismissed, settled, or compromised without the approval of the Court, and notice of the proposed dismissal, Settlement or compromise

shall be given as the Court directs." Fed. R. Civ. P. Rule 23(e). A class action Settlement is approved when the district court finds it is fair, adequate, and reasonable. Rule 23(e)(1)(C); *Staton v. Boeing Co.*, 327 F. 938, 952 (9th Cir. 2003).

B. Class Action Settlement Approval Has Three Steps

Rule 23(e) Settlement approval includes three steps: (1) preliminary approval of the proposed Settlement; (2) dissemination of a notice of the Settlement to the class; and, (3) a formal fairness hearing at which counsel may introduce evidence and argument supporting the fairness, adequacy, and reasonableness of the Settlement, and class members may be heard. *Murillo v. Pac. Gas & Elec. Co.*, 266 F.R.D. 468, 473 (E.D. Cal. 2010). This procedure safeguards class members' due process rights and enables the Court to guard class interests. *See* William Rubenstein, Alba Conte & Herbert Newberg, *4 Newberg on Class Actions* (5th ed. 2014) ("*Newberg*"), §§ 13:39, *et seq*.

The first two steps are complete. The first step was completed on August 13, 2018, when the Court preliminarily approved the Settlement as fair, adequate and reasonable. The second step, dissemination of the Class Notice, was completed on August 30, 2018. The third step is the final approval hearing, when the Court will evaluate the Class' response and determines whether the Settlement is fair, adequate, and reasonable.

C. The Court Should Exercise Discretion to Approve a Settlement

The decision whether a Settlement is fair, reasonable, and adequate is committed to the Court's sound discretion. *Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir. 2000) (citing *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1238 (9th Cir. 1998); Manual for Complex Litigation (4th ed. 2004) § 21.61 at 308, *Officers for Justice v. Civil Serv. Comm'n. of the City and County of San Francisco* (9th Cir. 1982) 688 F. 2d 615, 625, cert. denied (1983) 459 U.S. 1217.)

Although the Court has discretion to determine whether a proposed class Settlement is fair, the Ninth Circuit has "long deferred to the private consensual decision of the parties." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)

(citing *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1027 (9th Cir. 1998)). "[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). "[I]n evaluating whether the Settlement is fair and adequate, the Court's function is not to second guess the Settlement's terms." *Garner v. State Farm Auto Ins. Co*., No. CV 08 1365 CW (EMC), 2010 U.S. Dist. Lexis 49477, *21 (N.D. Cal. Ap. 22, 2010).

A "[s]ettlement 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." *Hanlon*, 150 F.3d at 1027 (9th Cir. 1998).

D. The Settlement Satisfies the Ninth Circuit Approval Standards

The Court's determination of whether a proposed Settlement is fair, adequate, and reasonable involves a balancing of factors. These factors may include, among others: "the strength of plaintiff's case; the risk, expense, complexity, and the 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. This list is not exclusive and different factors may predominate in different factual contexts." *Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1375-76 (9th Cir. 1993) (citation omitted). Some of these factors were addressed in the Preliminary Approval Motion and supporting declarations, Dkt. Nos. 70-1 – 70-4. The law favors Settlement, particularly in class actions and other complex cases, where substantial resources can be conserved by avoiding the time, cost, and rigors of litigation. See *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1275 (9th Cir. 1992).

"In the Ninth Circuit, a court affords a presumption of fairness to a Settlement 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.'" (cite omitted) *Rodriguez v. West Publishing Corp.*, No. CV-05-3222 R(MCx) 2007 U.S. Dist. LEXIS 74849 at 32-33 (C.D. Cal. Sept. 10, 2007).

E. The Settlement is Fair, Adequate and Reasonable

At the preliminary approval stage the Court was provided with information satisfying all but the final *Rodriguez* factor. Based on that information, the Court preliminarily found the Settlement to be fair, adequate, and reasonable. Dkt. No. 73. The fourth factor, number of objectors, is now known. Without a single objection asserted, the Settlement continues to be entitled to a presumption of fairness. CPT Decl. ¶12; Singer Decl. ¶22.

1. Strength of Plaintiffs' Case and Risk, Expense, Complexity and Likely Duration of Further Litigation Support Final Approval

While Plaintiffs believe in the merits of their case, they also recognize the inherent risks and uncertainty of litigation, including that the Class could receive nothing, and understand the benefit of providing a significant settlement sum now. The specific risks include: (i) denial of certification; (ii) if class certification were granted, that Court may later decertify the Class; (iii) the Court grants Defendants' summary judgment or summary adjudication; (iv) the need for a unanimous jury; (v) the possibility of an unfavorable, or less favorable, result at trial; (vi) the possibility post-trial motions may result in an unfavorable, or less favorable, result at trial; and, (vii) the possibility of an unfavorable, or less favorable result on appeal, and the certainty that the process would be lengthy.

Though Plaintiffs are confident in the merit of the reporting pay claim, the issue has been litigated in two federal lower courts, which reached opposite conclusions.[4]

[4] *Casas v. Victoria's Secret Stores, LLC*, C.D. of California, Case No. 14-cv-06412-GW and *Bernal v. Zumiez*, E.D of California, Case No. 16-cv-1801-SB.

There is no controlling California case law on point, and no Court of Appeal has reached the issue of how the reporting time provision of the Wage Order should be interpreted and applied in the "call-in" scheduling context. Singer Decl. ¶23. Defendants are equally confident in their defenses. Defendants claim that there is no private right of action for Plaintiffs' reporting time pay claims either under the Wage Order or Labor Code § 558. Defendants claim that PAGA does not provide a remedy for alleged violations of the Wage Order. Defendants further claim that even if the claim could be brought, it would not be certified for class treatment because to the extent that Abercrombie ever utilized a call-in practice, it was sporadic and inconsistently applied manager-by-manager, each of whom had leeway concerning if and how they would apply any such protocol. Defendants claim that applying the reporting time pay theory to pre-shift telephone calls fails on the merits, since the reporting time pay provision has, for over 70 years, been understood to afford compensation only to employees who physically show up at the worksite ready to work. Defendants also contend that even if a court concluded that Abercrombie's interpretation was wrong, Abercrombie could nevertheless show it acted in "good faith" reliance upon the contrary interpretation, a defense that could bar or significantly limit the company's exposure. Defendants also claim that Plaintiffs' claims for the few minutes spent making alleged pre-shift phone calls are *de minimis*—small amounts, incapable of accurate recording and compensation—and non-compensable in any event. Finally, Defendants claim that Plaintiffs' derivative and related claims fail for these and additional reasons, cannot be certified, and fail on the merits. Defendants vigorously defended against each of Plaintiffs' claims, and asserted no valid claim had been presented, much less any that could be tried on a class-wide basis. Singer Decl. ¶24. see, Defendants' Joinder, Dkt. 71.

Although Plaintiffs disagree with the merits of these defenses, these defenses presented a significant risk for Plaintiffs at certification and/or trial, and Plaintiffs would assume an even greater risk by continuing to litigate. Singer Decl. ¶25. The risk of changes in the law adversely affecting the interests of the class, increased costs, and

expiration of a substantial amount of time, among other factors, all weigh heavily in favor of settlement. *Rodriguez v. West*, 563 F.3d at 966. Plaintiffs faced the risks of not prevailing on a motion for class certification, which would effectively sound the "death knell" for the litigation since the wage claims at issue would be too low for individual employees to pursue on their own. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc*., 244 F.3d 1152, 1163 (9th Cir. 2001) (explaining that "[i]f 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."). Singer Decl. ¶26.

Moreover, given the size of the class, in the event of a "win" that resulted in a *de minimis* payout, the administrative costs would be substantial. *See In re Netflix Privacy Litig*., 2013 U.S. Dist. LEXIS 37286, at *15 (holding that a large class size and the possibility of a low payout weigh in favor of settlement approval). Singer Decl. ¶27.

In summary, although Plaintiffs believe their claims have merit, Plaintiffs nevertheless recognize that the outcome of any litigation is rarely certain. And even if Plaintiffs had prevailed, the odds of a favorable verdict being reversed on appeal are not remote enough to ignore. *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("[i]t is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced"), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (reversing $87 million judgment after trial); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970), *modified*, 449 F.2d 51 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973) (overturning $145 million judgment after years of appeals).

The Settlement is not to be judged against a speculative measure of what might have been achieved, nor must a settlement provide 100% of the potential damages to be fair and reasonable. *Linney v. Cellular Alaska Pshp*, 151 F.3d 1234, 1242 (9th Cir. 1998), *In re Mego Fin. Corp. Sec. Litig.*, 213 F. 3d 454, 459 (9th Cir. 2000). The adequacy of the amount recovered must be judged as "a yielding of

absolutes…Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation ..." *Officers for Justice v. Civil Serv. Comm'n. of the City and County of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted), "[I]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not ... render the settlement inadequate or unfair," *Id.* at 628.

As the Central District and other courts in the Ninth Circuit have observed, "simply because a settlement may amount to only a fraction of the potential recovery does not in itself render it unfair or inadequate. Compromise is the very nature of settlement." *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979). In this case, Plaintiffs consider the Settlement to be significantly more than a "fraction," particularly considering the risks of loss at any stage, the various potential complications, and the dangers and pitfalls that proceeding would entail. Singer Decl. ¶28.

Indeed, "[t]he determination whether a settlement is reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Frank* v. *Eastman Kodak Co*., 228 F.R.D. 174, 186 (W.D.N.Y. 2005), *quoting In re Michael Milken and Assoc. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993). Courts recognize that there is an inherent "range of reasonableness" in determining whether to approve settlement "which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Id.* at 188, *quoting Newman v. Stein*, 464 F. 2d 689, 693 (2d Cir.), cert denied, 409 U.S. 1039 (1972).

2. Realistic Assessment of the Strengths and Weaknesses in the Claims

In its Order Granting Preliminary Approval of Class Action Settlement (Dkt. No. 73), the Court noted that Plaintiffs had estimated the Settlement to be 24% of the $29,070,000 potential value of the reporting pay claim, which is their strongest claim,

but that "$29,070,000.00 figure does not appear to be an estimation of Abercrombie's entire liability for all claims. Without an understanding of Plaintiffs' view of the expected total maximum value of this litigation, the Court is unable to determine whether the Settlement Amount falls in the range of possible approval." *Id.* p.7. The following addresses the Court's concerns by providing additional discussion valuing the remaining claims alleged in the operative complaint in this matter in light of the realistic potential liability. (Dkt. 44, Second Amended Complaint). Singer Decl. ¶29.

a) First Cause of Action: Violation of The Fair Labor Standards Act

This claim was specifically excluded from, and not released in the Settlement Agreement executed by the Parties, and preliminarily approved by this Court. Dkt. 70-2, page 15, ¶16; Singer Decl. ¶30.

b) Fourth Cause of Action: Failure To Pay Wages For Hours Worked And For Overtime Wages In Violation of Ca. Lab. Code Sections 510, 1194 & 1198

This claim was based mainly on Plaintiffs' position that time spent on the phone calls "reporting" to determine if Class Members were needed for a particular shift, as well as time between the call and arriving to work, should be compensated as "time worked." See, e.g., Dkt. 44, ¶20: "CLASS MEMBERS seek compensation for the time spent on the phone waiting to be told that they needed to come in, as well as the time between the call in and the arrival time." This claim was applicable to those shifts in which employees did report for work. Defendants identified 5,406,257 such shifts. Singer Decl. ¶31.

According to the Defendants, Class Members had an average hourly rate of $8.55. Assuming an average call length of five (5) minutes, each such event would have represented a claim of $0.71. This would then result in a total aggregate claim of $3,838,442. Singer Decl. ¶32. The realistic valuation of this claim was tempered by the necessity of establishing at trial the time was compensable work time under the control of the Defendants based on the facts, as revealed in the investigation and litigation of the

claim, as well as not constituting uncompensable *de minimis* time for which no wages might be owed. *Id*. At the time of the mediation, the California Supreme Court had not yet issued its decision in *Troester v. Starbucks Corp*., 5 Cal.5th 829 (2018) (finding California does follow the FLSA "de minimis" rule that small amounts of time need not be compensated). The unpaid telephone "on call" time claim was thus subject to a substantial discount given the short periods of time involved, and the uncertainty of California law at the time of mediation as to a company's liability for small increments of work. Consequently, Plaintiffs estimated this claim would have a 25% likelihood of success on liability at trial, with a final value of $959,610. Singer Decl. ¶33.

c) Fifth Cause of Action: Failure to Provide Reimbursement for Business Expenses in Violation of Labor Code Section 2802

This claim is based on the costs of telephone usage pertaining to pre-shift call-ins for those using cell phones. Assuming an average monthly cell phone charge of approximately $80, four five minute calls per month and 300 total usage minutes charged per month, $6 per month would be a reasonable reimbursement rate. Given approximately 153,450 workweeks or 38,362 months, this would represent an aggregate claim of approximately $230,000. Singer Decl. ¶34. This aggregate claim was, however, subject to a defense of a prior release in 2018 of all reimbursement claims in a settlement by Defendants for the identical Class Members (among others). *Brown vs Abercrombie & Fitch Co.* Case No. 2:17-cv-01093-MHW-EPD, S. D. Ohio. Given the prior release, this claim had only marginal value, perhaps 10% of the approximated value ($23,000). Singer Decl. ¶35.

d) Sixth Cause of Action: Failure to Provide Accurate Itemized Wage Statements in Violation of Labor Code Section 226

This claim, commonly referred to as a "derivative" claim on the basis that the wage statements would only have been inaccurate if Plaintiffs proved they were entitled to additional wages, commenced one year prior to the filing date through May 2016 when the call-in practice was terminated. Singer Decl. ¶36. There were approximately

153,450 workweeks or 76,725 pay periods during this time frame related to the call-in shifts in which work was not provided. *Id*.

The statutory penalty is $50 per pay period with a maximum of $4,000. This would extrapolate to an aggregate claim of $3,836,000 (subject to reduction for employees who reached the $4,000 cap). Singer Decl. ¶37. However, the estimated liability was significantly discounted by a number of factors. For example, this claim was subject to the argument that Labor Code 226(a)(1) penalties lie only for failure to properly state *wages* earned. As such, they could not be asserted for the reporting pay penalties sought under Wage Order 7, should they be determined not to constitute wages. *Id*.

These penalties were additionally subject to the general prohibition on assessing a penalty upon a penalty. Singer Decl. ¶38. Moreover, derivative wage statement penalty claims are limited where wage statements accurately reflect compensation under the rates paid at the time, despite wage and hour violations indicating a different rate was owed. Only the absence of the hours worked on the wage statement will give rise to an inference of injury; the absence of accurate wages is remedied by the violated wage and hour law itself. *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App. 5th 1308, 1336-37 (2018). Accordingly, Plaintiffs estimated a 20% likelihood of success on this claim at trial, resulting in penalties of $767,200. *Id*.

e) Seventh Cause of Action: Failure to Provide Wages When Due in Violation of Cal. Lab. Code Sections 201, 202, and 203

Approximately 30,000 employees separated from employment during the Class Period. Given the substantial use of part-time employees (with average shift lengths of about 4.35 hours), an average of 21.75 hours per week was used for the Labor Code section 203 exposure. With 87 hours per month at $8.55 per hour, the claim would total about $22,000,000. Singer Decl. ¶39. However, no waiting time penalties are owed where the company can state a good faith defense to the claim of unpaid wages. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1201-1243 (2008). Without prior appellate

decision finding the call-in practice violated California labor law, and Defendants' insistence that Plaintiffs presented a novel theory of recovery, Defendants had several viable bases for claiming the good faith defense. Singer Decl. ¶40.

The waiting time penalty claim was additionally subject to the legal argument that penalties are only owed for unpaid *wages*, while Defendants maintained adamantly that the reporting pay owed under the wage order constituted payment of penalties, not wages. See Labor Code section 203 imposing penalties where "an employer willfully fails to pay, without abatement or reduction…any **wages o**f an employee who is discharged…". (emphasis added). With a 5% likelihood of success based on these good faith defenses, Plaintiffs valued this claim at $1,100,000. Singer Decl. ¶41.

f) Eighth Cause of Action: Enforcement of Private Attorney General Act of 2004 (Labor Code sections 2698, *et seq.*

The Parties negotiated a good faith amount for PAGA penalties allocating $50,000 of the Settlement Amount to the State of California, paying $37,500 (75%) to the Labor Workforce and Development Agency, and the remaining $12,500 (25%) paid to the Class. Plaintiffs claimed PAGA penalties for six alleged violations: failure to pay reporting time pay; failure to pay wages; failure to reimburse expenses; failure to timely pay all wages owed at separation from employment; failure to provide accurate wage statements; and failure to maintain accurate employment records. Singer Decl. ¶42.

The failure to pay waiting time penalties would apply to one pay period for each of the 30,000 separated employees. At the rate of $100 per pay period, this would total $3,000,000, subject to the same five percent likelihood of success on the underlying Labor Code section 203 claim, for discretionary penalties owed of $150,000. Singer Decl. ¶43.

The remaining five PAGA claims would apply to the estimated 153,450 workweeks or 76,725 pay periods from July 30, 2013 through May 2016. At $500 per pay period ($100 for each of the five PAGA claims), an outward exposure of $38,362,500 would result subject however to substantial diminution for the likelihood of

success at trial on these claims, as well as the wholly discretionary nature of the penalties. Singer Decl. ¶44. Defendants contend, and Plaintiffs disagree, that PAGA permits only one recovery per pay period, rather than five for each PAGA claim, which would limit Defendants' PAGA potential exposure to $7,672,500. Labor Code section 2699(e)(2) provides that "a court may award a lesser amount than the maximum civil penalty amount specified [in PAGA] 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." Singer Decl. ¶45.

As noted above, Plaintiffs estimated limited success on five of the claims for which they asserted claims for civil penalties under PAGA, with the strongest claim, the primary source of recovery, being the reporting pay claim. With Defendants paying a substantial recovery to the large number of employees in the Class predominately on a highly disputed reporting pay claim to which Defendants believed they had extremely strong defenses, Defendants' exposure for additional civil penalties paid primarily to the State of California on top of liability in highly contested claims was also severely limited. Singer Decl. ¶46.

Plaintiffs' limited valuation of the PAGA claims is also supported by the approval of such payments to the State of California in conjunction with class action settlements. Where settlements "negotiate a good faith amount" for PAGA penalties and "there is no indication that this amount was the result of self-interest at the expense of other Class Members," such amounts are generally considered reasonable." *Hopson v. Hanesbrands, Inc.*, 2009 WL 928133 at *9 (N.D. Cal. Apr. 3, 2009). *Hopson v. Hanesbrands*, 2008 WL 3385452 at *1 (N.D.Cal. Aug. 8, 2008) (approving PAGA settlement of 0.3%, of $1,500); *Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575 at *3 (E.D.Cal. Oct. 31, 2012) (approving PAGA settlement of 0.27%); *Villacres v. ABM Indust., Inc.*, 189 Cal.App.4th 562, 588 (2010) (PAGA claims may be settled **without any money allocated to those claims**). In fact, since PAGA penalties are entirely discretionary, they should not be awarded where it would be overly punitive to the employer. Labor Code

section 2699(e)(2).

Consequently, Plaintiffs conclude that 5% is an appropriate valuation of the remaining five PAGA penalty claims for a total value of approximately $1,900,000, (or approximately $380,000 assuming Defendants' contention that only one PAGA violation per pay period.) Singer Decl. ¶47.

As the Court noted in its Preliminary Approval Order, Plaintiffs estimated the value of the Third Cause of Action - reporting pay - at $29,070,000, and indicated the $9,600,000 Settlement constituted 24% of that amount. However, that estimate did not take into consideration the likelihood of success on class certification, liability, and damages proven at trial. In light of the defenses to the claim noted above, Plaintiffs estimated a 75% likelihood of success on this claim, using their calculations, valued at $21,802,500. Singer Decl. ¶48.

In sum, the total value of Plaintiffs' claims is approximated at $27,053,310[5]. Thus, the $9,600,000 Settlement represents an estimated 38% of Defendants' maximum liability exposure. Singer Decl. ¶49. This Settlement will now pay 61,480 Class Members an average payment of $112.96 and highest payments of $1,604.88. Given the uncertainties surrounding class certification and the unsettled nature of issues impacting liability in this case, this is an excellent result for the Class. Singer Decl. ¶¶14, 50.

3. Stage of Proceedings and Extent of Discovery Support Settlement

The extent of discovery and the stage of proceedings favor approval of the Settlement. This Settlement comes relatively early in the litigation, before the conclusion of discovery and before class certification briefing. Still, before the matter was stayed in October 2015, the Parties exchanged significant written discovery and Defendants took the deposition of Plaintiff Jones. Singer Decl. ¶51. Moreover, the Parties proactively

[5] The discounted claims which total $27,053,310 are broken down as follows: Reporting Time Pay: $21,802,500; Unpaid Wages: $ 959,610; Unreimbursed Expenses: $ 23,000; Wage Statement Violations: $ 767,200; Waiting Time Penalties: $1,100,000; and PAGA Penalties: $2,050,000 ($1,900,000, plus $150,000). However, assuming Defendants' contention that only one PAGA violation was available per pay period, the total evaluation would be $25,533,310 ($27,053,310 less the discounted value of four additional alleged PAGA violations which totaled $1,515,000). Singer Decl. ¶49.

worked up the case through the informal, but extensive exchange of relevant and important information regarding the number of call-in shifts, the number of shifts worked and workers turned away, and additional payroll information to tabulate the metrics. Specifically, Defendants produced statistics showing approximately 1.7 million California call-in shifts for which work was not provided. Singer Decl. ¶52. Plaintiffs believe they had all the essential information necessary to analyze the potential damages at issue in the case and address the probabilities of obtaining such damages through both class certification and trial, and to prepare for two separate mediations. Singer Decl. ¶53. Thus, "the [P]arties have sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998). This early Settlement, made at a time when the Parties have enough information to make an informed appraisal of the case, but before the incurring of significant expense, strongly benefits the Class and favors approval.

During the action's pendency, Class Counsel thoroughly investigated and researched the claims, potential defenses, and the developing body of law relating to the claims. The investigation entailed the exchange of information pursuant to formal and informal discovery methods, including document requests, and deposition of Plaintiff Jones. Singer Decl. ¶54.

Class Counsel thoroughly engaged in the discovery process and made use of documents and data provided by Defendants to assess Defendants' potential liability as well as the likelihood that the Court would grant class certification on any or all of Plaintiffs' claims. Singer Decl. ¶¶12, 13, 52-55. Based on the data and on their own independent investigation and evaluation, Class Counsel believe this Settlement, including the consideration and the terms set forth in the Settlement Agreement, is fair, reasonable and adequate, and in the best interest of the Settlement Class. This analysis took into account all known facts and circumstances, including the risk of significant delay and uncertainty associated with litigation, various defenses asserted by Defendants, and potential appellate issues. Singer Decl. ¶56.

4. The Experience and Views of Counsel Support Settlement

"'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 citations omitted) *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

Class Counsel, Cohelan Khoury & Singer, Carter Law Firm and the Phelps Law Group have significant experience in litigating and settling wage and hour class actions and have obtained certification and settlement approval in many such cases. Singer Decl. ¶¶2-7, 57; Declaration of Marc H. Phelps ¶¶4-9; Declaration of Roger Carter ¶¶5-10, 11. Defendants' counsel, Mark. D. Kemple of Greenberg Traurig, LLP, is also very experienced in wage and hour law and class action litigation.

Experienced counsel, operating at arm's-length at all times each day of mediation, with an experienced wage and hour and class action mediator facilitating those negotiations, have weighed the strengths of the case and examined all the issues and risks of litigation and endorsed the proposed Settlement. The view of the attorneys actively conducting the litigation "is entitled to significant weight" in deciding whether to approve the Settlement. *Fisher Bros. v. Cambridge Lee Industries, Inc.* (E.D. Pa. 1985) 630 F.Supp. 482, 488; *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18, *aff'd.* 661 F.2d 939 (9th Cir. 1981). "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Technologies, Inc.*, (N.D. Cal. 2007), 559 F. Supp. 2d 1036, 1043, citing *Boyd v. Bechtel Corp.*, *supra*, 485 F.Supp. 610, 622.)

Having prosecuted numerous wage and hour class action cases Class Counsel are experienced and qualified to evaluate the Class claims and to evaluate the risks and potential outcome of further litigation and the propriety of Settlement on a fully-informed basis. See, Declarations of Marc H. Phelps, Roger Carter, and Michael Singer.

Counsel on both sides share the view this is a fair and reasonable Settlement in light of the complexities of the case, the state of the law, and of the uncertainties of the outcome of the pending motions and litigation. The opinion of counsel in support of the proposed Settlement is based on a realistic assessment of the strengths and weaknesses of their respective cases, extensive legal and factual research, substantial discovery, and extensive briefing of many dispositive issues. Singer Decl. ¶58.

The opinion of counsel is further based on an assessment of the risks of proceeding with the litigation through trial and, if a verdict were recovered, through appeal, as compared to the value of a settlement which provides immediate benefits to the Class. Given the risks inherent in litigation and the defenses asserted, this Settlement is fair, adequate, reasonable, and in the best interests of the Class, and should receive final approval. Singer Decl. ¶59.

5. The Lack of Objections and the Class' Reaction Support Final Approval

The September 29, 2018 deadline to submit objections and opt-out requests has passed without any objections submitted and just 74 requests for exclusion. CPT Decl. ¶¶6, 10, 12; Singer Decl. ¶22. The absence of objections supports a strong presumption of fairness and that the Settlement is adequate and reasonable. *Martin v. AmeriPride Servcs.*, 2011 U.S. Dist. Lexis 61796 at *21 (S.D. Cal. June 9, 2011); see also *In re: Omnivision Techs.*, 559 F. Supp.2d, 1036, 1043 (N.D. Cal. 2007), ("By any standard, the lack of objection of the Class Members favors approval of the Settlement."); see also *Brown v. American Honda Motor Co., Inc.*, 2010 U.S. Dist. Lexis 145475, at *49 (C.D. Cal. July 29, 2010) ("The comparatively low number of opt-outs … indicates that generally, class members favor the proposed settlement and find it fair." The lack of objections provides persuasive evidence of its reasonableness. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979).

Class Counsel is convinced the Settlement is in the best interest of the Class based on a detailed knowledge of the issues presented in this action and the negotiations. The

length and risks of trial and the perils of litigation that affect the value of the claims were all carefully weighed. In addition, the affirmative defenses asserted by Defendants, the uncertainty of Rule 23 certification, the prospect of a potential adverse summary judgment ruling, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, were also carefully considered by Class Counsel in arriving at the proposed Settlement. Singer Decl. ¶¶12, 13, 23-26, 60. Class Counsel respectfully requests the Court find the proposed Settlement to be fair, adequate and reasonable and grant final approval and enter final judgment accordingly.

VI. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEES, EXPENSES, AND REPRESENTATIVE SERVICE PAYMENTS

Under the Settlement, Class Counsel now respectfully move for an award of Class Counsels' attorneys' fees of $2,400,000[6], (25% of the common fund created), litigation costs of $43,323.69 (originally estimated at $75,000), Enhancement Payments of $10,000 to Plaintiff Jones and $10,000 to Plaintiff Grob, and administration expenses of $154,500 to CPT. Each of these sums is fair and reasonable, Defendants do not oppose these requests, and no Class Member has objected to any request though the amounts sought for fees and litigation costs were actually noted to be higher in the Class Notice than those sought herein. Singer Decl. ¶61.

With the guiding principle that early class action settlements are favored and may not diminish an award of attorneys' fees, Class Counsel submits the fee request is fair and reasonable and should be awarded in light of the benefits bestowed on 61,480 Class

---

[6] Counsel for Plaintiffs have agreed to pay a portion of Class Counsel's approved fees to The Cooper Law Firm ("CLF"). Plaintiffs have agreed to this fee division in writing. CLF and its attorneys were co-counsel for Plaintiffs and the putative Class from the outset of this case and performed significant work prosecuting the matter. CLF and its attorneys had to withdraw as counsel of record in December 2017 when Scott Cooper, the managing attorney at CLF, was appointed to the bench of the Superior Court of California, County of Orange on November 2, 2017. Mr. Cooper has concurrently submitted a declaration documenting CLF's lodestar and costs in support of this motion.

Members, the substantial hours required to achieve this result, the litigation risks and complexities of prosecuting these cases, the contingent nature and delay of any fee, their experience in handling cases of this type, the fees commonly awarded in these cases, the vindication of the Class' rights by securing a non-reversionary $9,600,000 Settlement and remedial changes which ended Defendants' call-in policies and procedures that benefit Defendants' employees now and in the future.

A. 25% of the Common Fund is a Fair and Reasonable Attorneys' Fee

"In common fund cases, attorneys whose compensation depends on their winning the case [ ] must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *Vizcaino v. Microsoft Corp*., 290 F.3d at 1051.

Some courts have found an award of 33% of a common fund represents the "benchmark" when applying California law in diversity cases. *Smith v. CRST Van Expedited, Inc*., 10-CV-1116- IEG WMC, 2013 WL 163293, *5 (S.D. Cal. Jan. 14, 2013) ("These percentages compare favorably with both California (33%) and federal (25%) benchmarks."); *Dennis v. Kellogg Co*., 09-CV-1786-L WMC, 2013 WL 6055326, at *7 (S.D. Cal. Nov. 14, 2013).

Ninth Circuit common fund principles support a percentage award here. This doctrine applies when: (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. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989). These criteria are met when each class member has an "undisputed and mathematically ascertainable claim" to part of a lump-sum settlement recovered on his behalf. *Id*. at 271. These factors are met here. First, the 61,554 Class Members were identified from Defendants' employment records, and Class Notices were mailed to each. Second, the benefits consist entirely of monetary payments traced to each Class Member and establish an "undisputed and mathematically ascertainable claim" to a Settlement share based on the number of call-in or scheduled shifts worked during the Class Period. Third, the fee can be precisely shifted because it is a specific percentage of

the Settlement benefit each Class Member receives.

In diversity actions, the Ninth Circuit applies state law to determine both the right to fees and the method of calculating them. See *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1047 (9th Cir. 2002); *Mangold v. California Public Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995); *Emmons v. Quest Diagnostics Clinical Labs., Inc*., 2017 U.S. Dist. LEXIS 27249 (E.D. Cal. 2017).

The California Supreme Court recently affirmed that trial courts properly grant attorneys' fees in a common fund case based on a percentage of the recovery. *Laffitte v. Robert Half International, Inc*., 1 Cal.5th 480, 503 (2016)[7]. A fee award based on a percentage of the common fund recovery here is proper as it spreads the attorneys' fees among all beneficiaries of the fund, aligns the incentives between plaintiffs' counsel and the class, is a better approximation of the market conditions in a contingency case, and encourages class counsel to seek early settlement and avoid unnecessarily prolonging the litigation. *Id*. The Court also approved the use of a lodestar cross-check at the option of the trial court to double check "the reasonableness of the percentage fee through a lodestar calculation." *Id*. at 504.

Class Counsel's diligent litigation of this action resulted in the creation of an ascertainable common fund of $9,600,000 that substantially benefits the Class. Class Counsel's request for an award of 25% of the common fund should be granted. Singer Decl. ¶62.

Though the Ninth Circuit established a benchmark of 25% in common fund cases, the exact percentage varies depending on the facts of the case and, in "most common fund cases, the award exceeds that benchmark." *Vasquez v. Coast Valley Roofing, Inc*., 266 F.R.D. 482, 491 (E.D. Cal. 2010); *In re Activision Sec. Litig*., (N.D. Cal. 1989) 723 F. Supp. 1373, 1377 ("[a] review of recent reported cases discloses that nearly all common fund awards range around 30%"); *Romero v. Producers Dairy Foods, Inc.*, No.

[7] *Robert Half* recognized the Ninth Circuit's 25% benchmark, but did not adopt a benchmark for awarding common fund attorney fees under California law. *Laffitte v. Robert Half Internat., Inc., supra*, 1 Cal.5th at 495, 503-06.

05-0484, 2007 U.S. Dist. Lexis 86270 (E.D. Cal. Nov. 2007) (awarding 33% of the settlement fund in a wage-and-hour case involving allegations of unpaid wages after explaining that "fee awards in class actions average around one-third of the recover.") Indeed, even this Court has previously recognized on several occasions that "California has recognized that most fee awards based on either a lodestar or percentage calculation are 33%." *McCrary v. Elations Co., LLC* No. ED-CV 13-0242 JGB (SPx), 2016 U.S. Dist. LEXIS 24050 at *2; *McCellan v. Chase Home Fin. LLC*., No. SACV 12-1331-JGB (JEMx) 2015 U.S. Dist. LEXIS 118005, at *20 (C.D. Cal. August 31, 2015) (explaining that while the case was not a common fund case, and that the fees were being paid separately from the funds paid to the Class, attorneys' fee award that approximated 32% of all sums paid under the Settlement Agreement was reasonable, after citing numerous other cases finding that an award of 33% of the common fund was common in class actions.). In reaching its decision in *McClellan*, this Court recognized that "California district courts routinely award attorneys' fees in the range of 30-40% in class actions that result in the recovery of a common fund under $10 million." *McClellan, LLC* at *20.

The district court has the discretion to adjust the 25% benchmark upward or downward, but such an adjustment is warranted only in "unusual circumstances." *Paul, Johnson, Alston & Hunt*, 886 F.2d at 272. In this case, there are no "unusual circumstances" to warrant a downward departure from the benchmark 25% fee.

First, Class Counsels' expertise in class actions weighed heavily in negotiating and providing an excellent benefit to the Class relatively early in this litigation. Upon final approval, participating Class Members will receive substantial recoveries. Given the complexities and uncertainties of this litigation, and for obtaining a relatively early settlement, a downward deviation from the 25% benchmark would be unwarranted. "Indeed, one purpose of the percentage method is to encourage early settlements by not penalizing efficient counsel, ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation." Manual for Complex Litigation (Fourth), § 14.121, p. 212.

Second, this is not a case where a substantial settlement and a recovery of a large attorneys' fee was a foregone conclusion. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-339 (1980) (recognizing the importance of a financial incentive to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk nonpayment). In light of the risks of loss at any stage of this litigation, recovery for the Class, much less attorneys' fees, was never a foregone conclusion.

B. The Circumstances of this Case Support 25% Attorneys' Fee Award Based on the Monetary Recovery

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 ultimate goal in determining fees is to reasonably compensate counsel for their efforts in creating the common fund. *In re Omnivision*, 559 F.Supp.2d 1036, 1046 (2008) (citing *Paul, Johnson, Alston, & Hunt v. Graulty*, 886 F.2d at 271-272.). The Ninth Circuit has approved a number of factors which may be relevant to the district court's determination in evaluating the reasonableness of a fee request: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of the work; (4) the contingent nature of the fee and the financial burden carried by the Plaintiffs; and (5) awards made in similar cases. See *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1048-50 (9th Cir. 2002).

1. The Results Achieved Support the Fee Request

The most important factor to consider in granting a fee award is the success obtained. *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), 2005 U.S. Dist. LEXIS 13627, at *27 (C.D. Cal. June 10, 2005) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). In the face of the uncertainties associated with continued litigation of Plaintiffs' claims, and Defendants' vigorous denials and affirmative defenses, there is no question the results achieved are more than fair, adequate and reasonable to the Class. Class Counsel successfully negotiated a common fund of $9,600,000 (inclusive of attorneys' fees and costs) and as a result of this case,

ended Defendants' policies requiring employees to call-in before a shirt to determine whether they would provide work that day. Class Counsel submits that the Settlement provides an excellent recovery for the Class and that an analysis of this factor militates heavily in favor of approving the 25% fee request.

2. The Risks of Litigation, the Skill Required and the Quality of Representation

Plaintiffs may have a meritorious case, but Defendants have represented they would continue to vigorously contest the validity of Plaintiffs' claims in the same manner they have since the inception of this case, asserting that Plaintiffs have no provide right of action for alleged Wage Order violations that are not a violation of a Labor Code section. Specifically, Defendants have argued Plaintiffs have no avenue to sue for reporting time penalties, whether under the Wage Order directly, Labor Code section 558, the Unfair Competition Law, or PAGA. See, Section V.E.1 above, and Defendants' Joinder, Dkt. 71. Singer Decl. ¶¶23-28. 63. Defendants presented significant other defenses and good faith objections to Plaintiffs' ability to obtain Rule 23 certification, maintaining that the claims are inappropriate for Class treatment due to the lack of commonality, typicality, adequacy, predominance of individual inquiry, and superiority. Dkt. 71. Defendants assert that the obstacles faced by Plaintiffs in seeking certification and maintaining that certification are all the greater given the United States Supreme Court's rulings in *Wal-Mart, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) ("*Dukes*"), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). As a result of *Dukes* and *Comcast*, along with many other cases, Defendants believe that Plaintiffs will not be able to obtain certification outside of the Settlement context. Defendants further contend *Dukes* explicitly disapproved the use of sampling and surveys to determine Class-wide practices, and *Comcast* overturned a certification ruling based on the named representative's failure to identify a reliable damages model that could be used on a class-wide basis. *Dukes*, 131 S. Ct. at 2561; *Comcast*,133 S. Ct. at 1432-33. Thus, while Plaintiffs believe and continue to believe this is a strong case for Rule 23 certification,

there is risk and enormous expense associated with class certification proceedings. Similarly, while Defendants believe Plaintiffs will face several steep hurdles going forward should this matter not resolve, they are mindful that there are risks and significant expenses associated with proceeding further in the case. Singer Decl. ¶¶23-26, 60.

It is beyond question that Plaintiffs faced some formidable defenses to liability and hurdles to proving damages, but it was the skill of experienced wage and hour class action law firms, such as Class Counsel, that obtained a substantial settlement recovery for the Class early in the litigation. Singer Decl. ¶64. The "prosecution and management of a ... class action requires unique legal skills and abilities." *In re Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *39 (citation omitted).

Class Counsel are accomplished attorneys and law firms specializing in wage and hour and class action litigation. See, Declarations of Class Counsel, Michael D. Singer, Marc H. Phelps and Roger Carter. Class Counsel's extensive experience in these types of cases allowed them to effectively and efficiently present the Class' claims to the mediator and Defendants, to persevere through difficult and contentious settlement negotiations, and then subsequently negotiate the terms of the agreement over the course of the next several months to reach the compromise now before the Court for final approval. Class Counsel respectfully submits that without their experience and tenacity, this Settlement could not have been achieved. Less adept, experienced, or determined lawyers likely would not have been able to achieve the results in this case.

While Class Counsel believes strongly in the merits of Plaintiffs' claims and assert they could have overcome Defendants' opposition and hurdles, the issues presented a high degree of litigation risk, particularly in light of the defenses asserted. *See In re Mfrs. Life Ins. Co. Premium Litig.*, MDL No. 1109, 1998 U.S. Dist. LEXIS 23217, at *17 (S.D. Cal. Dec. 18, 1998) ("even if it is assumed that a successful outcome for plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement -- which is not at all apparent -- there is easily enough uncertainty in the mix

to support settling the dispute rather than risking no recovery in future proceedings") (citation omitted).

These risks must be considered in assessing the fairness of the Settlement, which guarantees a prompt and fair recovery from Defendants. In summary, Class Counsel undertook a risky case on a pure contingency basis and achieved a favorable monetary settlement for the Class. The need to fairly compensate firms who undertake unique and risky litigation for plaintiff classes was noted in *Muehler v. Land O'Lakes, Inc*. (D. Minn. 1985) 617 F.Supp. 1370, 1375-76 where, in justifying the award of fees representing 35% of the recovery fund, the Court observed: "If the Plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for Plaintiffs in these cases will disappear …". For all of these reasons, the requested fee should be approved.

3. The Contingent Nature of the Fee and Financial Burden Carried

Many contingent fee cases result in no compensation to Plaintiffs' counsel because cases are dismissed at the pleadings stage, lost at certification, summary judgment or after a trial on the merits, or reversed on appeal. Many hard-fought lawsuits ultimately produce no fee because of discovery of facts unknown when the case was commenced, changes in the law while the case is pending, or decisions of judges or juries following a trial on the merits, despite tremendous efforts by plaintiffs' counsel.

A law firm that prosecutes class action cases does not get paid in every case. Sometimes, it get nothing or is awarded fees equal to only a small percentage of the amount it actually performed work. Where plaintiff's counsel does succeed, therefore, it is appropriate to compensate the firm for the risks the firm regularly undertakes. As the California Supreme Court has explained:

> [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. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. A lawyer who

> both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions.

Ketchum v. Moses, 24 Cal.4th 1122, 1132-33 (2001) (internal citation and quotation omitted). Accordingly, courts have recognized that "[i]t 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 v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002).

Furthermore, "[A]n attorney should be compensated both for services rendered and for the risk of loss or nonpayment assumed by accepting and prosecuting the case." *In re Quantum Health Resources, Inc.*, 962 F. Supp. 1254, 1257 (1997). Class Counsel undertook all risks of this litigation on a contingent basis. Singer Decl. ¶65. They accepted the risks of dispositive motions, obtaining and maintaining certification, proving liability and damages at trial, and surviving post-trial motions and appeals. They faced the risk of litigating this case for years, and spending hundreds of thousands of dollars in attorney and staff time and costs, or more, without pay or reimbursement. To meet their responsibility to the Class, Class Counsel had to assure at all times they had sufficient resources to prosecute this action. *Id*.

District Courts within the Ninth Circuit recognize "[t]he rationale behind awarding a percentage of the fund to counsel in common fund cases is the same that justifies permitting contingency fee arrangements in general." *In re Quantum Health Resources, Inc. Sec. Litig*., 962 F. Supp. at 1257 (citing *Skelton v. General Motors Corp*., 860 F. 2d 250, 252 (7th Cir. 1988). "The underlying premise is the existence of risk—the contingent risk of non-payment." *In re Quantum Health Resources, Inc., supra* at 1257. "Because payment is contingent upon receiving a favorable result for the class, an attorney should be compensated both for services rendered and for the risk of loss or nonpayment assumed by accepting and prosecuting the case." *Id*. (*citing*, 1 Alba Conte, Attorney Fee Awards (3d ed. 2004) § 1.09).

Unlike counsel for Defendants, who were regularly paid a fair-market hourly rate, Class Counsel received no compensation for their services for nearly four and one-half years and received no reimbursement of the expenses required to prosecute the case. The contingent nature of the representation, and the risks of this litigation, fully warrant judicial approval of the fee request. Singer Decl. ¶66.

The contingent nature of Class Counsels' compensation militates in favor of Plaintiffs' attorneys' fee request.

4. Awards in Similar Cases

The 25% benchmark fee falls at the low-end of percentages awarded, which range from 20% to 50%, and is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation. Courts often look to fees awarded in comparable cases to determine if a requested fee is reasonable. *Vizcaino*, 290 F.3d at 1050 n.4. In analogous wage and hour lawsuits and settlements in the Ninth Circuit, District Courts, including this Court, have awarded attorneys' fees in percentages greater than Class Counsel's fee request, e.g. *Stuart v. RadioShack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645 (N.D. Cal. Aug. 9, 2010) (noting a fee award of 1/3 of the settlement was "well within the range of percentages which courts have upheld as reasonable in other class action lawsuits."); *Singer v. Becton Dickinson and Co.*, No. 08-cv-821-IEG (BLM), 2010 U.S. Dist. LEXIS 53416 at *22-23 (S.D. Cal. June 1, 2010) (approving fee award of 33.33% of the common fund); *Rieve v. Coventry Healthcare Inc., No. 11-cv-1032-DOC, at ¶ 7 (*33.33% of $3 million settlement fund as attorneys' fees in wage and hour settlement); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92 (E.D. Cal. 2010) (33.33% award); *Chavez et al. v. Petrissans et al.*, E.D. Cal., 1:08-cv-00122 (33.3% award*); Benitez v. Wilbur*, E.D. Cal. Case No. 08-1122 LJO GSA (33.33% award*), Ingalls v. Hallmark Retail, Inc*. CV08-04342, 2009 U.S. Dist. LEXIS 131078 (C.D. Cal. Oct. 16, 2009) (33.33% fee in $5.6 million wage and hour class action); *Birch v. Office Depot, Inc*., 2007 U.S. Dist. LEXIS 102747 (S.D. Cal. Sept. 28, 2007) (40% fee in $16 million wage and hour class action); *Rippee v. Boston Mkt.* Corp., Case No. 05cv1359, 2006

U.S. Dist. LEXIS 101136 (S.D. Cal. Oct. 10, 2006) (40% fee in $3.75 million wage and hour class action), and *Smith v. CRST Van Expedited, Inc*., 2013 U.S. Dist. Lexis 6049 *14 (S.D. Cal. Jan. 14, 2013), (33-1/3% fee in $2,625,000 wage and hour class action).

If this case had been filed as individual litigation, the customary fee arrangement would be 33-1/3% to 40% or more, of the recovery. Class Counsel's fee request is in line with, if not lower than, most awards in similar cases. This factor also supports Class Counsel's fee request.

5. The Reaction of the Class Supports the Fee Request

District courts in the Ninth Circuit may also consider the reaction of the Class when awarding attorneys' fees. *In Re Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *48 ("The presence or absence of objections from the class is also a factor in determining the proper fee award."). Here, the Class was informed Class Counsel would seek a fee of 30% of the common fund, an amount which is $480,000 more than the amount sought by this motion. Not a single objection has been submitted by any member of the Class. The absence of objections supports the fee request.

C. Although not Required, Class Counsel's Fee Request is Reasonable if Cross-Checked With the Lodestar

Class Counsel seeks approval of attorneys' fees based on a percentage of the common fund recovery, not a lodestar. While a percentage fee may be cross-checked against a lodestar increased by a risk multiplier, courts are not required to engage in this exercise, and many California district courts decline to do so. See, e.g. *Glass v. UBS Financial Services, Inc*., No. 06-4066-MMC, 2007 WL 221862 (N.D. Cal. Jan. 26, 2007) (finding "no need to conduct a lodestar cross-check [as] [c]lass counsel's prompt action in negotiating a settlement while the state of the law remained uncertain should be fully rewarded"); *Lopez v. Youngblood*, No. 07-0474-DLB, 2011 WL 10483569 (E.D. Cal. Sept. 2, 2011) ("A lodestar cross-check is not required in this circuit, and in a case such as this, is not a useful reference.")

Where the cross-check is used, the "calculation need entail neither mathematical

precision nor bean-counting" and is not intended to be a "full-blown lodestar inquiry." "Where the use of the lodestar method is used as a cross-check, it can be performed with a less exhaustive cataloguing and review of counsel's hours." *Barbosa v. Cargill Meat Solutions Corp*, 297 F.R.D. 431, 451 (E.D. Cal. July 2, 2013).

The lodestar method is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Staton*, 327 F.3d at 965. A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095; *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900.

Class Counsel dedicated 959.9 hours of attorney and para-professional time prosecuting the case producing a lodestar fee of $636,638.00. The hours expended were reasonable in light of the complexity and duration of the litigation of nearly four and one-half years. Singer Decl. ¶¶67, 68, Exh. 1 – Summary of Hours, Lodestar Fee & Expenses and Exh. 2 – Time Records; Phelps Decl. ¶¶12-13, Exh. A – Time Records; Carter Decl. ¶¶16, 17, Exh. A – Time Records.

1. Class Counsel's Hourly Rates Are Reasonable

Class Counsel is entitled to hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Ketchum v. Moses*, 24 Cal.4th 1122, 1133 (2001); *Children's Hospital and Med. Center v. Bonta*, 97 Cal. App. 4th 740, 783 (2002) (affirming rates as "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work"). When determining reasonable hourly rates, Courts may consider the attorney's skill and experience, the nature of the work performed, and the relevant area of expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 632 (1998). Prior awards of counsel's rates are strong evidence of reasonableness. *See Margolin v. Regional Planning Commission*, 134 Cal.App.3d 999, 1005 (1982).

Class Counsel's skill and experience support their hourly rates, ranging from $450

to $850. They are in line with rates typically approved in wage and hour class action litigation in California and have been specifically approved by numerous state and federal courts in California. Singer Decl. ¶¶2-6, 69; Phelps Decl. ¶¶10, 13; Carter Decl. ¶¶18, 19. Class Counsels' practice is limited exclusively to litigating class actions on behalf of consumers and wage and hour employees, and have been appointed Class Counsel or co-Class Counsel in over 175 such cases. Singer Decl. ¶¶2-6, 70; Phelps Decl. ¶¶7-9; Carter Decl. ¶¶9, 10, 14, 19. As leading attorneys in the field, Class Counsel continually monitors prevailing market rates of defense and plaintiff law firms and set the billing rates to follow those of attorneys and staff of comparable skill, qualifications and experience. Singer Decl. ¶71. Other wage and hour attorneys working as Class Counsel before California courts charge comparable if not higher rates. Singer Decl. ¶72, Exh. 3 – Westlaw Court Express's Legal Billing Report, Volume 14, Number 4, California Region for December 2012; Exh. 4 – 2012 National Law Journal survey of hourly billing rates for Partners and Associates.

2. Class Counsel's Total Hours are Reasonable

Hours are reasonable if "at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982). "[T]he standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed." *Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990); *see also*, *Norman v. Housing Auth.*, 836 F.2d 1292, 1306 (11th Cir. 1988) ("The measure of reasonable hours is determined by the profession's judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done").

Here, the time spent by Class Counsel on this litigation was necessary, reasonable, and non-duplicative. Although three firms worked on this case, duplication was minimized by the timing of the entry of each firm into the litigation and the focus on related, but different claims. Singer Decl. ¶73.

3. A Risk Multiplier is Appropriate and Reasonable

Where a fee is based on a lodestar, a court may adjust it upward by using a positive multiplier to reflect "reasonableness" factors, including, (1) quality of representation, (2) class benefits, (3) complexity and novelty of issues presented, and (4) risk of nonpayment. *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011). "Multipliers can range from 2 to 4 or even higher." *Wershba v. Apple Computer, Inc*., 91 Cal. App. 4th 224, 255 (2001).

As detailed throughout this Motion, the quality of representation was excellent, resulting in significant benefits to the Class now, and in the future. This result was achieved despite complex and disputed factual and class certification issues, and a vigorous defense to all claims. See, Defendants' Joinder, Dkt. 71. The case was undertaken entirely on a contingent basis and presented a high risk Class Counsel may not have been paid or reimbursed for costs advanced.

A lodestar should also be adjusted for delay in payment. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989) ("an appropriate adjustment for delay in payment" should be factored into the calculation of a fee award); see also *Fischel v. Equitable Life Assur*. Soc. 307 F. 3d 997 (9th Cir. 2002) (in common fund cases, delay in obtaining payment must be compensated.) Under federal case law, delay must be considered separately from any enhancement for contingency. See, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U.S. 711 (1987).

The decision to settle this action at the time the Parties did should not be penalized. Class Members will avoid the risks of additional litigation and are assured of substantial and immediate monetary recovery. "[T]he promptness of settlement cannot be used to justify the refusal to apply a multiplier to reflect the size of the class recovery without exacerbating the disincentive to settle promptly inherent in the lodestar methodology." *Lealao v. Beneficial California, Inc.* 82 Cal.App.4th 19, 53 (2000). To not apply a multiplier under these circumstances would be inconsistent with California policy, as "awards that are too small [will] chill the private enforcement essential to the

vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims." *Id.* at 53.

If the optional cross-check is undertaken, the percentage of the common fund requested is comparable to the lodestar, with a multiplier applied to reflect quality of representation and Class benefits. Based on all relevant factors, particularly benefits provided to the Class and risk assumed by Class Counsel for delay and non-payment, a 3.7 multiplier is reasonable. Applying that to the lodestar of $636,638 yields a fee equal 25% of the common fund created.

D. Class Counsel's Litigation Expenses Are Reasonable and Should be Reimbursed

"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." *West v. Circle K Stores, Inc.*, No. Civ. S-04-0438, 2006 U.S. Dist. LEXIS 76558, at *25 (E.D. Cal. Oct. 19, 2006). Class Counsel incurred costs of $43,323.69 to successfully prosecute this litigation. Singer Decl. ¶74, Exh. 5 – Itemized Costs; Phelps Decl. ¶13, Exh. B – Itemized Costs; Carter Decl. ¶22, Exh. B – Itemized Costs. These expenses were necessary to the effective representation of the Class. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *In Re DJ Orthopedics, Inc. Secs. Litig*., No. 01-CV-2238-K (RBB), 2004 U.S. Dist. LEXIS 11457, at *21 (S.D. Cal. June 21, 2004). These costs included filing fees for pleading and motions, service of process, deposition transcript, copying, postage, messenger services, mediation fees, preparing for and participating in two separate mediations, travel, attorney service fees, etc. *Id*.

E. Class Representative Enhancement Payments Are Reasonable

A district court may award service payments to named plaintiffs in class actions. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). The purpose of service payments 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.

Subject to this Court's approval, Class Counsel requests the modest sums of $10,000 to be awarded to Plaintiff Jones and $10,000 to Plaintiff Grob for their commitment to prosecuting this action for over four and one-half years, work performed, their efforts, risks undertaken for the payment of costs if the case had been lost, general releases of all claims arising from their employment which no other Class Member was required to enter into, stigma upon future employment opportunities for having sued a former employer, and the substantial recoveries bestowed on 61,480 Class Members as well as all employees hired after May, 2016, who do not need to call-in daily or if sent home early, paid as required by law. See, Declaration of Samantha Jones and Declaration of Robert Grob; Phelps Decl. ¶12; Singer Decl. ¶75. The service payment requests are comparable to awards approved by District Courts. Plaintiffs invested much personal time and effort in the investigation, before and after the case was commenced, assisted their counsel with the factual development, and participated in the prosecution, mediation and settlement of the case. Phelps Decl. ¶12; Declarations of Samantha Jones and Robert Grob. The requested service payments are justified, fair and reasonable. Defendants do not oppose these payments and there is no opposition by any Class Member, which further supports their reasonableness of the requests.

F. The Administration Expenses Are Reasonable

Class Counsel also seek payment of $154,500[8] to CPT Group, Inc., the appointed Settlement Administrator for its work in noticing the Class, and its administration of the Settlement as described in the CPT Decl. ¶20, Exh. C. The parties have no objection to this payment.

CPT has administered, and will continue to administer the Settlement following final approval, by calculating Settlement Payment awards, printing and mailing settlement checks, reporting taxes to the appropriate agencies, responding to inquiries,

[8] The additional 7,554 Class Members increased the bid by $18,000. The Settlement Agreement provides that Class Counsel's allowed litigation costs of up to $75,000 may include and cover the additional administration expense. Dkt. 70-2, SA ¶ 12.

voiding uncashed checks, and forwarding the sum represented by uncashed checks to the State's unclaimed property department for further handling on behalf of the Class Member. CPT Decl. ¶2. The requested amount is fair and reasonable and should be awarded.

G. The Proposed PAGA Payment Is Reasonable

Pursuant to the Settlement Agreement, $37,500 (75% of $50,000) from the maximum Settlement amount will be paid directly to the Labor Workforce and Development Agency ("LWDA") in connection with the PAGA claim asserted by the Class. This result was reached after good-faith negotiation between the Parties. Where PAGA penalties are negotiated in good faith and there is no indication that the amount was the result of self-interest at the expense of other Class Members, such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc., No*. CV-08-0844 EDL, 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009). PAGA claims may be settled without any money allocated to the Labor Code violation claims. *Villacres v. ABM Indust., Inc*., 189 Cal.App.4th 562, 588 (2010). In fact, PAGA penalties are entirely discretionary, and should not be awarded where it would be overly punitive to the employer. Labor Code §2699(e)(2).

VII. CONCLUSION

Class Counsel respectfully requests the Court grant final approval of the proposed Settlement, enter judgment, and award the Class Representative Enhancement Payments, Class Counsels' attorneys' fees and litigation expenses, the administrator's fees and expenses, and the PAGA payment in the amounts requested by this motion.

Dated: October 11, 2018

Respectfully submitted,

COHELAN KHOURY & SINGER
THE PHELPS LAW GROUP
THE CARTER LAW FIRM

By: */s/ Michael D. Singer*
Michael D. Singer
Co-Counsel for Plaintiffs