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Listed on Next Page*

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SCARLET KESHISHZADEH and LISA
ARCHER, as individuals, on behalf of
themselves, and on behalf of all persons
similarly situated,
Plaintiffs,

vs.

ARTHUR J. GALLAGHER SERVICE
CO., a Delaware Corporation
Defendants.

JAMES CAREY, on behalf of himself and
all others similarly situated,
Plaintiffs,

vs.

ARTHUR J. GALLAGHER AND
COMPANY, a Delaware Corporation, and
GALLAGHER BASSETT SERVICES,
INC., a Delaware Corporation, inclusive,
Defendants.

Case No. **09-cv-0168 LAB (RBB)**

(Consolidated with Case No. 3:09-cv-
1273 LAB (RBB))

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

Hearing Date: March 28, 2011
Hearing Time: 11:45 A.M.

Judge: Hon. Larry A. Burns
Court No.: 9 (2nd Flr.)

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1 Plaintiffs Scarlet Keshishzadeh, Lisa Archer and James Carey (“Plaintiffs”) and
2 Defendants Arthur J. Gallagher Service Co., Arthur J. Gallagher & Co., and Gallagher
3 Bassett Services, Inc. (collectively “Gallagher” or “Defendants”) respectfully submit this
4 memorandum of points and authorities in support of their motion for final approval of the
5 class settlement and for entry of judgment and order dismissing action.

6
7 **I. INTRODUCTION**

8 Plaintiffs have reached a class settlement with Gallagher, which this Court
9 preliminarily approved by Order dated October 29, 2010 [Doc. No. 114].

10 In accordance with the preliminary approval order, the required notice of the
11 proposed settlement was disseminated to the settlement class of 592 members, of whom 434
12 (73.3%) filed timely claims. (See Declaration of Bernella Lenhart at ¶¶ 3, 7, filed herewith).
13 No class member objected to the settlement or opted-out of the settlement. (Id. at ¶¶ 9,10).
14 The entire Gross Settlement Fund of \$3.9 million will be disbursed pursuant to the
15 Settlement Agreement, and none of it will revert to Gallagher. (See Settlement Agreement
16 at ¶ III(A).)¹

17 The parties request that the Court enter an order: (1) granting final approval to the
18 proposed class action settlement; (2) finally certifying the settlement classes; and (3)
19 entering final judgment and dismissing this action.² As described below, the settlement is
20 fair, reasonable, and adequate, and satisfies all requirements for final approval.

21
22 **II. SUMMARY OF THE LITIGATION**

23 On January 28, 2009, plaintiff Scarlet Keshishzadeh filed a Complaint against
24 Gallagher, alleging that Gallagher misclassified “Claims Examiner Employees” in the
25

26 ¹ A true and correct copy of the Settlement Agreement is attached as Exhibit #2 to the Declaration
27 of Norman Blumenthal “Decl. Blumenthal”, served and filed herewith.

28 ² Plaintiffs have simultaneously filed their motion for an order authorizing the payment Class
Counsel’s attorneys fees and costs, and Plaintiffs’ service awards.

1 United States as exempt from federal overtime requirements, and misclassified "Claims
2 Examiner Employees" in California as exempt from state overtime requirements. (Docket
3 No. 1.) Keshishzadeh asserted claims that Gallagher failed to pay overtime wages in
4 violation of the federal Fair Labor Standards Act ("FLSA"); failed to pay overtime wages in
5 violation of California wage and hour law and California Business and Professions Code
6 section 17200 et seq.; failed to pay wages due at termination of employment in violation of
7 California Labor Code sections 201-203; failed to provide accurate, itemized employee
8 wage statements in violation of California Labor Code section 226; and failed to indemnify
9 employees for business expenses in violation of California Labor Code section 2802. (Id.)
10 Plaintiff Keshishzadeh sought to certify a class composed of herself and similarly situated
11 individuals and to recover from Gallagher back wages, interest, penalties, and attorneys' fees
12 and costs. (Id.) (Decl. Blumenthal, ¶ 6(a).)

13 On March 23, 2009, plaintiff Keshishzadeh filed a First Amended Complaint which,
14 inter alia, revised certain of her legal theories while retaining the material allegations of her
15 claims. (Docket No. 13.) (Decl. Blumenthal, ¶ 6(a).)

16 On June 11, 2009, plaintiff James Carey filed a Complaint against Gallagher, alleging
17 that Gallagher misclassified "Claims Representatives" in the United States as exempt from
18 federal overtime requirements, and misclassified "Claims Representatives" in California as
19 exempt from state overtime requirements. (Carey Docket No. 1.) Carey asserted claims that
20 Gallagher failed to pay overtime wages in violation of the federal Fair Labor Standards Act
21 ("FLSA"); failed to pay overtime wages in violation of California wage and hour law and
22 California Business and Professions Code section 17200 et seq.; failed to provide meal and
23 rest breaks in violation of California Labor Code section 512; failed to pay wages due at
24 termination of employment in violation of California Labor Code sections 201-203; and
25 failed to provide accurate, itemized employee wage statements in violation of California
26 Labor Code section 226. (Id.) Plaintiff Carey sought to certify a class composed of himself
27 and similarly situated individuals and to recover from Gallagher back wages, interest,
28

1 penalties, and attorneys' fees and costs. (Id.) (Decl. Blumenthal at ¶ 6(b).)

2 On July 1, 2009, the District Court consolidated plaintiff Carey's civil action with
3 plaintiff Keshishzadeh's civil action. (Docket No. 38.) On July 9, 2009, Plaintiffs filed a
4 Second Amended Complaint, adding Lisa Archer as a plaintiff. (Docket No. 42.) On
5 November 5, 2009, Plaintiffs filed a Consolidated Class Action Complaint, alleging that
6 Gallagher misclassified "Claims Examiner Employees" in California who adjust workers'
7 compensation claims as exempt from state overtime requirements. (Docket No. 54.)
8 Plaintiffs asserted claims that Gallagher failed to pay overtime wages in violation of the
9 FLSA; failed to pay overtime wages in violation of California wage and hour law and
10 California Business and Professions Code section 17200 et seq.; failed to pay wages due at
11 termination of employment in violation of California Labor Code sections 201-203; failed to
12 provide accurate, itemized employee wage statements in violation of California Labor Code
13 section 226; and failed to indemnify employees for business expenses in violation of
14 California Labor Code section 2802. (Id.) Plaintiffs sought to certify a class composed of
15 themselves and similarly situated individuals and to recover from Gallagher back wages,
16 interest, penalties, and attorneys' fees and costs. (Id.) On January 6, 2010, Plaintiffs filed a
17 First Amended Consolidated Class Action Complaint which, inter alia, revised certain of
18 their legal theories while retaining the material allegations of their claims. (Docket No. 59.)
19 (Decl. Blumenthal, ¶ 6(c).)

20 Gallagher answered each of Plaintiffs' Complaints, denying the material allegations.
21 Specifically, Gallagher contended (and continues to contend) that the Action could not
22 properly be maintained as a class action; that members of the class were properly classified
23 as exempt from federal and state overtime requirements; that Gallagher did not fail to pay to
24 any members of the class who are former Gallagher employees any wages allegedly due at
25 the time of their termination; that Gallagher provided accurate, itemized wage statements to
26 members of the class; that Gallagher did not fail to indemnify employees for business
27 expenses; that Gallagher did not violate California Business and Professions Code section
28

1 17200 et seq; and that Gallagher is not liable for any of the penalties claimed or that could
2 be claimed in the Complaints. (See Docket Nos. 3, 14, 44, 56, 67.) (Decl. Blumenthal, ¶
3 6(d).)

4 The parties engaged in significant discovery. Specifically, Plaintiffs served multiple
5 of sets of discovery, consisting of over one hundred document requests and twenty five
6 interrogatories. Plaintiffs also responded to all of the discovery propounded by Gallagher.
7 During the litigation, over ten depositions were conducted, including the depositions of the
8 Plaintiffs, the Plaintiffs' experts, depositions of Gallagher employees, and Gallagher's expert.
9 In total, more than 120,000 pages of documents were produced, reviewed and analyzed by
10 the parties. (Decl. Blumenthal, ¶ 6(e).)

11 The litigation also involved significant law and motion practice, including a motion
12 to consolidate related cases, a motion to stay, and motion for class certification. (See Docket
13 Nos. 38, 98, 104.) In addition, the motion for class certification and opposition relied on the
14 testimony and reports of three expert witnesses. (See Docket Nos. 64, 69.) (Decl.
15 Blumenthal, ¶ 6(f).)

16 On April 15, 2010, the District Court certified a class consisting of all persons
17 employed by Gallagher as Claims Representatives and/or Senior Claims Representatives in
18 California since January 28, 2005 who adjusted workers' compensation claims. (Id.)

19 The parties agreed to mediation before Antonio Piazza, one of the preeminent
20 mediators of wage and hour class actions. Necessary discovery was provided by Defendant
21 prior to the settlement negotiations. The parties prepared for the mediation by exchanging
22 payroll data, calculating damages, and submitting mediation briefs to Mr. Piazza. There can
23 be no doubt that counsel for both parties possessed sufficient information to make an
24 informed judgment regarding the likelihood of success on the merits and the results that
25 could be obtained through further litigation. (Decl. Blumenthal at ¶ 7(a).)

26 The August 20, 2010 mediation session before Antonio Piazza was contentious and
27 arm's length. Counsel for the Parties, after settlement negotiations lasting the entire day,
28

1 reached an agreement, based upon Mr. Piazza's expertise as a mediator and the uncertainties
2 of protracted litigation. (Decl. Blumenthal ¶ 7(c).) After the mediation, the specific terms
3 of the settlement required additional negotiation before the final written agreement could be
4 signed. Even after the parties reached an agreement in the memorandum of understanding,
5 Class Counsel had to ensure that the terms of the final settlement stipulation were fair to
6 every member of the class and retained the requisite opportunities for notice, exclusion, and
7 objection in accordance with class action law. (Decl. Blumenthal ¶ 7(e).) The Settlement
8 Agreement reached represents a compromise and settlement of highly disputed claims.

9 Under the settlement, Gallagher has agreed to pay \$3,900,000.00, which is inclusive
10 of all costs and expenses associated with the settlement, including Class Counsel's
11 attorneys' fees and expenses, the PAGA payment, the Class Representatives' service
12 awards, and the cost of class notice and claims administration. Importantly, this settlement
13 fund is non-reversionary, such that the entire amount will be paid by Gallagher.

14 The Settlement Class consists of all persons who work or worked for Gallagher
15 Bassett Services, Inc. in California, at any time from January 28, 2005 through the date of
16 preliminary court approval of the Settlement (November 2, 2010), as a Claim
17 Representative, Senior Claim Representative, Claims Adjustor, Claims Adjustor Senior,
18 and/or Claims Specialist. (Order at ¶6 [Doc. No. 114].)

19 On November 2, 2010, this Court ruled at the preliminary approval stage that the
20 "The Settlement falls within the range of possible approval as fair, adequate and reasonable,
21 and appears to be the product of arm's-length and informed negotiations and to treat all
22 Class Members fairly." (Order at ¶ 3 [Doc. No. 114].) Notice of the settlement providing
23 class members with an opportunity to file a claim for monetary relief, to opt out, or to object
24 was then mailed on or about November 22, 2010 to the 592 current and former employees
25 who comprise the Class. (Declaration of Lenhart at ¶ 3.) The results were that no Class
26 Members requested exclusion, and no Class Members objected to the settlement.
27 (Declaration of Lenhart at ¶¶ 9, 10.)
28

1 Importantly, the excellent result obtained by this settlement is evidenced by the
2 overwhelmingly positive response of the Class. (Decl. Blumenthal at ¶ 7(f).) As detailed in
3 the Declaration of Lenhart, 434 timely submitted claim forms which represents 73.3% of the
4 total number of employees in the Settlement Class, and evidences favorable reception of the
5 class to this Settlement. (See Declaration of Lenhart at ¶ 7).³

6
7 **III. THE SETTLEMENT BEFORE THE COURT**

8 For purposes of this Settlement, a “Settlement Class Member” is defined as follows:

9 All persons who work or worked for Gallagher Bassett Services, Inc. in
10 California, at any time from January 28, 2005 through the date of preliminary
11 court approval of the Settlement [October 29, 2010], as a Claim
12 Representative, Senior Claim Representative, Claims Adjustor, Claims
13 Adjustor Senior, and/or Claims Specialist.

14 (Order dated November 2, 2010 at ¶ 6 [Doc. No. 114].)

15 In consideration for settlement of this Action and a release of the claims as described
16 in the Agreement, Gallagher agrees to pay a Gross Settlement Amount of Three Million,
17 Nine Hundred Thousand Dollars (\$ 3.9 million). (Settlement Agreement at III(A).) This
18 amount is inclusive of all payments and expenses associated with the Settlement (except any
19 employer payroll taxes), including Settlement Shares to be paid to Settlement Class
20 Members who submitted valid claims; a \$100,000 payment to the California Labor and
21 Workforce Development Agency (“LWDA”) for its share of the settlement of civil penalties;
22 the Settlement Administrator's reasonable fees and expenses not to exceed \$50,000; and
23 (subject to court approval) payments to Plaintiffs, in addition to their Settlement Shares, of
24 \$25,000 each in compensation of their services as Class Representatives and payments to
25 Class Counsel of up to \$1,170,000 for their reasonable attorneys' fees and \$139,762.11 for
26 their expenses incurred in investigating the case, prosecuting the case, preparing for and
27 negotiating at the mediation, documenting the Settlement, securing approval of the

28 ³ As described in Section III below, the parties request that the Court approve the payment of
 settlement shares to the five (5) individuals who submitted claim forms shortly after the deadline.

1 Settlement, and related tasks. (Settlement Agreement at III(B).) There will be no reversion
2 of the Gross Settlement Amount to Gallagher. (Id.) (Decl. Blumenthal at ¶3(a).)

3 The “Net Settlement Amount” is the amount remaining of the Gross Settlement
4 Amount after deducting the Court-approved attorneys' fees and costs, LWDA payment,
5 administration costs, and enhancement awards described herein. The remaining Net
6 Settlement Amount will be distributed as Settlement Shares to all Class Members who
7 submit valid claims, based upon the following allocation formula: The Settlement Share for
8 each Claimant will be calculated by (a) dividing the Net Settlement Amount by the total
9 number of work weeks in a covered position during the Class Period for all Class Members
10 and (b) multiplying the result by each individual Claimant's work weeks in a covered
11 position during the Class Period. (Settlement Agreement at III(C)(1).) (Decl. Blumenthal at
12 ¶ 3(b).)

13 Settlement Class Members who do not submit a valid claim will receive no
14 Settlement Share, and their election not to participate will reduce neither the Gross
15 Settlement Amount nor the Net Settlement Amount. (Settlement Agreement at
16 (III)(C)(3)-(4).) Their respective Settlement Shares will be retained in the Net Settlement
17 Amount for distribution to Claimants on a pro rata basis relative to their Settlement Shares
18 up to a double recovery and thereafter cy pres equally to the Employee Rights Center of San
19 Diego and the American Cancer Society. (Id.) In the event that checks issued to Settlement
20 Class Members are not cashed, they will be donated to the same charities. (Id.) (Decl.
21 Blumenthal at ¶ 3(b).) The parties also request that the Court approve the payment of
22 Settlement Shares to five Settlement Class Members who submitted claim forms one month
23 or less after the deadline for submitting claims.

24 As per section III(B)(2) of the Settlement Agreement, Gallagher and their counsel
25 will not oppose an attorneys' fees award to Class Counsel of 25% of the Gross Settlement
26 Amount or \$1,170,000 (One Million One Hundred Seventy Thousand Dollars) to
27 compensate and reimburse Class Counsel for all of the work already performed by Class
28

1 Counsel in this case and all of the work remaining to be performed by Class Counsel in
2 documenting the settlement, securing Court approval of the settlement, administering the
3 settlement, making sure that the settlement is fairly administered and implemented, and
4 obtaining dismissal of the action. Class Counsel will also be allowed to apply separately for
5 reimbursement of their actual litigation costs of \$139,762.11. (Decl. Blumenthal, ¶ 3(c).)

6 As per section III(B)(1) of the Settlement Agreement, Class Counsel will request that
7 the Class Representatives each receive \$25,000 (Twenty Five Thousand Dollars) \$25,000 to
8 each Plaintiff as his or her Class Representative Payment, subject to approval by the Court,
9 in consideration for serving as the Class Representative. These awards will be paid in
10 addition to their individual claims for a share to which they are otherwise entitled through
11 the claims process. Gallagher does not oppose this request. (Decl. Blumenthal, ¶ 3(d).)

12 As per section III(B)(4) of the Settlement Agreement, the Settlement Administrator
13 shall be paid its reasonable fees and expenses as approved by the District Court in an amount
14 not to exceed \$50,000. (Decl. Blumenthal ¶3(e).)

15 As per section III(B)(3) of the Settlement Agreement, the parties will apply to the
16 District Court for a payment out of the Gross Settlement Amount to the LWDA of \$100,000
17 (the "LWDA Payment") as the LWDA's share of the settlement of civil penalties paid under
18 this Agreement pursuant to the Private Attorneys General Act ("PAGA"). The Settlement
19 Administrator's duties were preparing, printing, and mailing the Class Notice Packet to all
20 Class Members; conducting a National Change of Address search on any Class Notice
21 Packet returned by the U.S. Postal Service as non-deliverable, and re-mailing the Class
22 Notice Packet to the Class Member's new address; setting up a toll-free telephone number to
23 receive calls from Class Members; receiving and reviewing for validity completed Claim
24 Forms and Elections Not to Participate in Settlement; providing the Parties with weekly
25 status reports about the delivery of Class Notice Packets and receipt of completed Claim
26 Forms and Elections Not to Participate in Settlement; calculating Settlement Shares; issuing
27 the checks to effectuate the payments due under the Settlement; issuing the tax reports
28

1 required under this Settlement; and otherwise administering the Settlement pursuant to this
2 Agreement. (Decl. Blumenthal ¶3(f).)

3 Within three days of the Judgment becoming Final, Gallagher will fund the Gross
4 Settlement Amount by depositing the money with the Settlement Administrator. Within ten
5 days after the Judgment becomes Final, the Settlement Administrator will pay to
6 Participating Class Members, the Settlement Shares; to Plaintiffs, the Class Representative
7 Payments; to Class Counsel, the Class Counsel Fees Payment and the Class Counsel
8 Litigation Expenses Payment; to the LWDA, the LWDA Payment; and to the Settlement
9 Administrator, its reasonable fees and expenses. (Settlement Agreement at III(E)(10).)
10 (Decl. Blumenthal ¶3(g).)

11 The Settlement in this case of \$3.9 million represents a substantial benefit for the
12 Class. Plaintiffs retained a damage expert, Desmond Marcello & Amster (“DM&A”), who
13 calculated potential liability to the class for the claims asserted in the Complaint. (Decl.
14 Blumenthal at ¶8(d)). Pursuant to this calculation, Plaintiffs estimated that the potential
15 damages available to class members if they prevailed on their claims was approximately
16 \$15,205,859.17. The settlement of \$3.9 million therefore represents 25.64% of the subject
17 damage claim as calculated by Plaintiff’s expert, assuming these amounts could be proven at
18 trial. (Decl. Blumenthal at ¶8(d)).

19 This recovery is within the range of 25% to 35% of the actual estimated loss to the
20 settlement approved in Glass v. UBS Fin. Servs., 2007 U.S. Dist. LEXIS 8476 (N.D.Cal.
21 Jan. 27, 2007). As a result, the Settlement provides the Class with a recovery that compares
22 favorably to what would have been sought at trial and an equivalent recovery to what was
23 obtained in similar litigation. (Decl. Blumenthal at ¶8(d).)

24 The settlement is fair, adequate and reasonable to the class and should be finally
25 approved. (Decl. Blumenthal ¶3(h).) In sum, this settlement valued at \$3.9 million is an
26 excellent result and provides Class Members with the opportunity to receive a substantial
27 recovery, in many cases thousands of dollars. This result is particularly remarkable in light
28

1 of the fact that liability in this case was far from certain in light of the defenses asserted by
2 Gallagher. (Decl. Blumenthal at ¶ 3(h).)

3
4 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS**
5 **COURT TO GRANT FINAL APPROVAL**

6 When a proposed class-wide settlement is reached, it must be submitted to the court
7 for approval. 2 H. Newberg & A. Conte, Newberg on Class Actions (3d ed. 1992) at §11.41,
8 p.11-87. Court approval of a class settlement is considered at a final settlement approval
9 hearing, at which evidence and argument concerning the fairness, adequacy, and
10 reasonableness of the settlement may be presented and class members may be heard
11 regarding the settlement. See Manual for Complex Litigation, Second §30.44 (1993).
12 During final approval, the court must determine whether the settlement is fair, reasonable
13 and adequate. See Officers for Justice v. Civil Service Com'n, etc., 688 F.2d. 615, 625 (9th
14 Cir. 1982) and Fed. Rules Civ. Proc., rule 23(e).

15 Governing the settlement of class actions, the Federal Rules of Civil Procedure, §23
16 (e) specifically provides:

17 The court may approve a settlement, voluntary dismissal, or compromise that
18 would bind class members only after a hearing and on finding that the
19 settlement, voluntary dismissal, or compromise is fair, reasonable, and
20 adequate.

21 F.R.C.P. § 23(e)(1)(c).

22 Class action settlements should be approved where: (1) the proposed settlement is
23 fairly and honestly negotiated; (2) serious questions of law and fact exist placing the
24 ultimate outcome of the litigation in doubt; (3) the value of an immediate recovery
25 outweighs the mere possibility of future relief after protracted and expensive litigation; and
26 (4) the parties have determined that the settlement is fair and reasonable. Jones v. Nuclear
27 Pharmacy, Inc., 741 F.2d 322, 324 (5th Cir. 1984); Marcus v. State of Kansas, 209 F. Supp.
28 2d 1179 (D.Kan. 2002); Lopez v. City of Santa Fe, 206 F.R.D. 285, 288 (D.N.M. 2002).
Each of those four criteria is satisfied here.

1 As discussed in detail below, this Settlement was reached through arm's-length
2 negotiations. The Settlement was negotiated by experienced counsel for the Class and
3 represented by adequate class representatives, who protected the interests of the Class
4 Members. There were complex legal and factual issues that placed the ultimate outcome of
5 this litigation in doubt. Accordingly, the immediate value of the settlement to the Class
6 Members far outweighs the possibility of relief if this protracted and expensive litigation had
7 continued through trial and appeal. Finally, the considered judgment of all parties to the
8 Settlement is that the Settlement is fair and reasonable in light of the immediate benefit
9 provided by the Settlement to the Class Members, which is a conclusion that is reinforced by
10 the overwhelming response of the Class Members submitting claims.

11 Settlements of disputed claims are favored by the courts. Waits v. Weller, 653 F.2d
12 1288, 1291 (9th Cir 1981) ("settlement encouraged in appropriate class action settlements").
13 In evaluating settlements, the courts have long recognized that compromise is particularly
14 appropriate since such litigation is difficult and notoriously uncertain.

15 Settlement is especially favored in class actions because it minimizes the litigation
16 expenses of all parties and reduces the strain on judicial resources. Officers for Justice,
17 supra, 688 F.2d at 625 ("voluntary conciliation and settlement are the preferred means of
18 dispute resolution. This is especially true in complex class action litigation"); Cotton v.
19 Hinton, 559 F.2d 1326, 1331 (5th Cir.1977) ("Particularly in class action suits, there is an
20 overriding public interest in favor of settlement."); In re Dept. Of Energy Stripper Well
21 Exemption Litig., 653 F.Supp. 108, 115 (D.Kan.1986) ("It is in the interests of the courts
22 and the parties that there should be an end to litigation and the law favors the peaceful
23 settlement of controversies.")

24 "[T]he court's intrusion upon what is otherwise a private consensual agreement
25 negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a
26 reasoned judgment that the agreement is not the product of fraud or overreaching by, or
27 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
28

1 reasonable and adequate to all concerned.” Officers for Justice, supra, 688 F.2d at 625.
2 Under this standard, the court must decide whether the proposed settlement falls within the
3 range of reasonable settlements, taking into account that settlements are compromises
4 between the parties reflecting subjective, unquantifiable judgments concerning the risks and
5 possible outcomes of litigation. Id.

6 In cases such as this one, courts have repeatedly emphasized that there is a strong
7 initial presumption that the compromise is fair and reasonable. In re Heritage Bond Litig.,
8 2005 U.S. Dist. Lexis 13555, at *11 (C.D. Cal. 2005). Courts are advised not to adjudicate
9 the merits of the action, nor substitute their judgment for that of the parties who negotiated
10 the settlement, nor should they reopen and enter into negotiations with the litigants in the
11 hopes of improving the terms of the settlement. Id., at *11; Officers for Justice, supra 688
12 F.2d at 625.

13 The essential evaluation is whether, given the risks of litigation and the range of
14 probable results, the settlement, taken as a whole, is fair, reasonable and adequate to all
15 concerned. Officers for Justice, supra 688 F.2d at 625; Hanlon v. Chrysler Corp., 150 F.3d
16 1011, 1026 (9th Cir. 1998). Here, the facts and circumstances compel the conclusion that the
17 proposed settlement satisfies that standard.

18 19 **V. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE**

20 **A. The Test for Fairness**

21 To determine whether a proposed settlement is fair, reasonable, and adequate, courts
22 consider some or all of the following factors: “(1) the strength of plaintiffs' case; (2) the risk,
23 expense, complexity and likely duration of further litigation; (3) the risk of maintaining class
24 action status throughout the trial; (4) the amount offered in settlement; (5) the extent of
25 discovery completed and the stage of proceedings; (6) the experience and views of counsel;
26 (7) the presence of a governmental participant; and (8) the reaction of the class members to
27 the proposed settlement.” Officers for Justice, supra, 688 F.2d at 625; see also Staton v.
28

1 Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003).

2 The list of factors is not exhaustive and should be tailored to each case. Officers for
3 Justice, at 625. Due regard should be given to what is otherwise a private consensual
4 agreement between the parties. Id. The inquiry “must be limited to the extent necessary to
5 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by,
6 or collusion between, the negotiating parties, and that the settlement, taken as a whole, is
7 fair, reasonable and adequate to all concerned.” Id., at 625. “Ultimately, the [trial] court’s
8 determination is nothing more than ‘an amalgam of delicate balancing, gross approximations
9 and rough justice.” Id.

10 The question whether a proposed settlement is fair, reasonable and adequate
11 necessarily requires a judgment and evaluation by the attorneys for the parties based upon a
12 comparison of “the terms of the compromise with the likely rewards of litigation.”
13 Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied 464 U.S. 818 (1983)
14 (quoting Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,
15 390 U.S. 414, 424-25 (1968)). Therefore, many courts recognize that the opinion of
16 experienced counsel supporting the settlement is entitled to considerable weight. Kirkorian
17 v. Borelli, 695 F. Supp. 446, 451 (N.D. Cal. 1988); Reed v. General Motors Corp., 703 F.2d
18 170, 175 (5th Cir. 1983); Weinberger, 698 F.2d at 74; Armstrong v. Board of School
19 Directors, 616 F.2d 305, 325 (7th Cir. 1980); Fisher Bros. v. Cambridge-Lee Indus., Inc.,
20 630 F. Supp. 482, 489 (E.D. Pa. 1985). For example, in Lyons v. Marrud, Inc., [1972-1973
21 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 93,525 (S.D.N.Y. 1972), the court
22 noted that “[e]xperienced and competent counsel have assessed these problems and the
23 probability of success on the merits. They have concluded that compromise is well-advised
24 and necessary. The parties’ decision regarding the respective merits of their position has an
25 important bearing on this case.” Id. at ¶ 92,520.

26 **B. The Settlement Satisfies the Test for Fairness**

27 1. The Investigation and Discovery are Sufficient to Allow Counsel
28

1 Class Counsel has litigated similar overtime cases against other employers. (Decl.
2 Blumenthal at ¶2.) Although Plaintiffs and Class Counsel believed that their case had merit,
3 they recognized the potential risks that both sides would face if litigation of this action
4 continued. Indeed, this Court in a May 19, 2010 Order expressed doubts about the ability of
5 Plaintiffs to oppose Defendant's motion for summary judgment and stated that it "cannot
6 imagine granting summary judgment in Plaintiffs' favor." [Doc. No. 107]. As the federal
7 court recently held in Glass v. UBS Fin. Servs., 2007 U.S. Dist. LEXIS 8476 (N.D.Cal.
8 January 27, 2007), where the parties faced uncertainties similar to those in this litigation:

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

18 Id. at *12.

19 Lengthy mediation briefs were researched and prepared. Economic experts were
20 engaged by the parties to prepare different calculations of the damages under possible
21 outcome scenarios, and a survey of the class members was conducted by Defendant's expert.
22 (Decl. Blumenthal at ¶ 7(a).)

23 During the mediation negotiations, which were both contentious and arm's-length,
24 Gallagher vigorously disputed liability in light of the administrative exemption, and the
25 amount of overtime worked by the employees. Moreover, Gallagher disputed that class
26 could be maintained because individual issues predominated, as the applicability of the
27 exemption would have to be separately determined for each Class Member based on their
28 individual experience. While class certification was granted by the Court, such a ruling is
always without prejudice and class certification in this action would have remained a hotly
disputed and contested issue. Finally, Defendant was ready to move for summary judgment
in the event mediation was not successful. (Decl. Blumenthal at ¶ 7(b).)

1 Based on the complexity of the case, the novelty of the legal issues, the substantial
2 risks and uncertainty of the outcome on liability issues, as well as the need to ascertain
3 damages without precise time records, Plaintiffs believe that the Settlement is an excellent
4 one and is more than fair and in the best interests of the Class Members. There can be no
5 doubt that counsel for both parties possessed sufficient information to make an informed
6 judgment regarding the likelihood of success on the merits and the results that could be
7 obtained through further litigation, given the relative strengths and weaknesses of their
8 positions. (Decl. Blumenthal at ¶ 7(d).)

9
10 2. The Settlement Was Reached Through Arm's Length Bargaining

11 This settlement was the result of arm's-length negotiations at the August 20, 2010
12 mediation with Mr. Piazza, as well as formal and informal settlement conferences between
13 the parties through their respective attorneys. Through formal and informal discovery
14 procedures, Gallagher disclosed information relating to their organization, the various
15 employment positions, the size of the putative class, the employees' job duties, work hours
16 and salary ranges, and the number of workweeks for the Class Members. This information
17 permitted Class Counsel to evaluate liability and prepare valuation estimates. After
18 comprehensive legal and factual analysis, including the factual and legal defenses asserted
19 by Defendant, Class Counsel possessed sufficient information for intelligent evaluation of
20 the case for purposes of settlement. (Decl. Blumenthal at ¶ 7.)

21 Prior to the initiation of settlement discussions, Class Counsel reviewed and outlined
22 the case based upon the provided information, and determined the conditions of settlement
23 which would be fair and reasonable to the Class. Class Counsel was experienced in the
24 types of settlement appropriate to resolve these overtime claims, as Class Counsel has
25 previously litigated and settled other employment actions. Initial informal discussions were
26 productive and encouraged both parties to further analyze their positions and to pursue
27 formal mediation. (Decl. Blumenthal at ¶ 7.)

28

1 Following this discovery and discussion between counsel, the parties agreed to
2 mediation before Antonio Piazza, a respected mediator for wage and hour class actions. The
3 parties prepared for the mediation by exchanging payroll data, calculating damages, and
4 submitting mediation briefs to Mr. Piazza. At the end of the day, after his independent
5 review of the facts in this case, Mr. Piazza determined the amount that he believed was fair,
6 reasonable, and adequate, and recommended a settlement amount to the parties as the
7 mediator's proposal that was not subject to further negotiation. Counsel for the parties, after
8 contentious negotiations, both agreed to accept the mediator's proposal, which was given
9 great weight by the parties given Mr. Piazza's expertise as a mediator, and the uncertainties
10 and cost of the years of litigation the parties faced if the mediators' proposal was not
11 accepted. (Decl. Blumenthal at ¶ 7.) Most importantly, Plaintiffs and Class Counsel
12 believe that this settlement is fair, reasonable and adequate.

13 By reason of the settlement, Gallagher has agreed to pay Three Million, Nine
14 Hundred Thousand Dollars (\$ 3.9 million) representing at least 25.64% of the maximum
15 claim value in full discharge of all claims asserted in this action, without a reversion to
16 Gallagher, as payment in full of all claims arising from the events described in the
17 Consolidated Complaint including Class Counsel's attorneys' fees and costs, service awards
18 for the Class Representatives, the PAGA payment, and the cost of class notice and claims
19 administration. The settlement sum is inclusive of all expenses and costs associated with the
20 settlement, with the exception of employer payroll taxes.

21 After the mediation, the specific terms of the settlement required additional
22 negotiation before the final written agreement could be signed. Even after the parties
23 reached an agreement at mediation, Class Counsel had to ensure that the terms of the
24 Settlement were fair to every member of the class and contained the requisite opportunities
25 for notice, exclusion, and objection in accordance with class action law. By October 2010,
26 the settlement agreement was finalized and executed, at which time the preliminary motion
27 requesting Court approval of the settlement was prepared and filed by the parties on October
28 22, 2010. [Doc. No. 113]. On November 2, 2010, this Court preliminarily approved the

1 class settlement as fair, reasonable and adequate, and ordered that notice of the proposed
2 settlement be disseminated to the members of the Class. [Doc. No. 114]. Notice of the
3 settlement providing class members with an opportunity to opt out or object was then mailed
4 by November 22, 2010 to the 592 employees who comprise the Class. (Declaration of
5 Lenhart at ¶ 3.) In response to the notice, not one Class Member has objected to the
6 proposed settlement and not one Class Member opted out from the Settlement. (Decl.
7 Blumenthal at ¶ 4 ; Declaration of Lenhart at ¶¶ 9, 10). Plaintiffs and Class Counsel believe
8 that this settlement is fair, reasonable and adequate.

9
10 3. Counsel is Experienced in Similar Litigation

11 Class Counsel in this matter has extensive class action experience in many fields and
12 has represented thousands of persons nationwide in actions including labor and overtime
13 litigation, securities shareholder litigation, constitutional challenges to state and local
14 statutes, collateral protection insurance cases, consumer refund actions and tobacco
15 litigation. A list of previous and current class action cases managed and settled by the Class
16 Counsel in this action is provided to the Court by way of Exhibit #1 to the Declaration of
17 Blumenthal submitted in support of this motion. Class Counsel have participated in every
18 aspect of the settlement discussions and have concluded the settlement is fair, adequate and
19 reasonable and in the best interests of the Class. (Decl. Blumenthal at ¶ 2 and ¶ 3(h).)

20
21 4. There Are No Objectors to the Settlement and No Opt-Outs

22 After dissemination of the class notice to the 592 members of the Class, which
23 provided each class member with the terms of the settlement, **not one class member has**
24 **filed an objection to the settlement** and zero (0) class members requested exclusion from
25 the settlement. (Decl. Blumenthal at ¶ 4.) The absence of any objector strongly supports the
26 fairness, reasonableness and adequacy of the Settlement. See In re Austrian & German Bank
27 Holocaust Litigation 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) (“If only a small number of
28 objections are received, that fact can be viewed as indicative of the adequacy of the

1 settlement.”); Stoetznner v. U.S. Steel Corp., 897 F.2d 115, 118-119 (3d. Cir. 1990) (29
2 objections out of 281 member class 'strongly favors settlement'); Laskey v. Int'l Union, 638
3 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed
4 settlement should be considered when determining fairness of settlement.)

5 Importantly, every Class Member was given the opportunity to participate in the
6 Settlement under the same terms. Of the total 592 employees in the Class, 434 timely
7 submitted claims, representing 73.3% of the employees in the Class. (See Declaration of
8 Lenhart at ¶¶ 3, 7). As described above, the parties request that the Court also authorize the
9 payment of settlement shares to five Class Members who submitted claims within one month
10 of the deadline.

11 Here given the fact that not one Class Member objected and the overwhelming
12 majority of Class Members filed claims, the Court can conclude that the settlement is fair,
13 reasonable and adequate.

14 5. The Risk, Expense, Complexity, and Likely Duration of Further
15 Litigation

16 The complexities and duration of further litigation cannot be overstated. As
17 discussed above, Gallagher asserted substantial and real defenses to this action. Even if
18 Plaintiffs were successful at maintaining class certification and prevailed at trial, there is
19 little doubt that Defendant would post a bond and appeal in the event of an adverse
20 judgment. A post-judgment appeal by Defendant would have required many more years to
21 resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total,
22 then the case could have dragged on for years after the appeal. The benefits of a guaranteed
23 recovery today, of the very remedy that Plaintiffs would seek at trial, outweigh an uncertain
24 result three or more years in the future. (Decl. Blumenthal at ¶ 8(a).)

25 Both the Plaintiffs and Class Counsel recognize the expense and length of a trial in
26 this action against Defendant through possible appeals which could take at least another
27 three years. Class Counsel also have taken into account the uncertain outcome and risk of
28 litigation, especially in complex actions such as this action. Class Counsel are also mindful

1 of and recognize the inherent problems of proof under, and alleged defenses to, the claims
 2 asserted in the action. Moreover, post trial motions and appeals would have been inevitable.
 3 Costs would have mounted and recovery would have been delayed if not denied, thereby
 4 reducing the benefits of an ultimate victory. Plaintiffs and Class Counsel believe that the
 5 settlement set forth in the Stipulation confers substantial benefits upon the Settlement Class
 6 and each of the Settlement Class Members. Based upon their evaluation, Plaintiffs and
 7 Class Counsel have determined that the settlement set forth in the Stipulation is in the best
 8 interest of the Class. (Decl. Blumenthal at ¶ 8(b).)

9 Similarly, Defendant has concluded that settlement of this action is desirable in the
 10 manner and upon the terms and conditions set forth in the Stipulation in order to avoid the
 11 expense, inconvenience, and burden of further legal proceedings, and the uncertainties of
 12 trial and appeals. There can be little doubt that the agreed upon settlement of claims is the
 13 most efficient and cost-effective method to provide payments to the members of the Class
 14 who are current and former employees of Defendant.

15 VI. CONCLUSION

16 For the reasons stated herein, the parties respectfully submit that the proposed
 17 settlement satisfies the standard of fairness established by the federal courts and should
 18 therefore be finally approved.
 19

20
 21 Dated: February 28, 2011

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