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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

KIRKLAND SINGER, individually and on behalf of Current and Former California Employees of Becton, Dickinson and Company and Med-Safe Systems, Inc.,

Plaintiff,

v.

BECTON, DICKINSON AND COMPANY, and MED-SAFE SYSTEMS, INC.,

Defendants.

Case No. 08cv0821 IEG (BLM)

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

Date: April 19, 2010
Time: 10:30 a.m.
Judge: Hon. Irma E. Gonzalez
Dept.: Courtroom 1
Trial: Not Set (Conditionally Settled)

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Plaintiff Kirkland Singer ("Named Plaintiff" or "Singer") hereby seeks final approval of the proposed class/collective action settlement (the "Settlement") the Court preliminarily approved on December 9, 2009. Subject to the Court's approval, Singer and Defendants Becton, Dickinson and Company and Med-Safe Systems, Inc. (Defendants) have agreed to settle the Vacation Settlement Group and the Non-Exempt Settlement Groups' claims against Defendants in exchange for One Million Dollars ($1,000,000) inclusive of all settlement payments, attorneys' fees and costs, claims administration fees, employer taxes, Named Plaintiff's enhancement award, and PAGA penalties payable to the California Labor Workforce Development Agency ("LWDA") pursuant to Labor Code § 2699.

Pursuant to the Court's Order granting preliminary approval of the settlement, the Class Notice and Claim Form ("Class Notice) have been distributed by the Claims Administrator, Simpluris, Inc. ("Simpluris") to the Vacation Settlement Group Members and the Non-Exempt Settlement Group Members as they are defined in the Stipulation and Settlement Agreement of Class Claims ("Stipulation") and in the Court's December 9, 2009 Order. A total of 266 current and former employees in one or both of the Settlement Groups were mailed a Class Notice.

The response to the Settlement from the individuals in the Settlement Groups has been tremendous. No objections or requests for exclusions have been received. Moreover, 174 valid claims were submitted, representing an overall claims rate of 65.41%. Broken down by classes, 65.41% of the Vacation Settlement Group Members filed valid claims (of the Vacation Settlement Group Members eligible to receive money from the Vacation Payout Fund, 49.29% filed valid claims) and 66.08% of the Non-Exempt Settlement Group Members filed valid claims. Monetarily, this extraordinary response rate equates to 78.90% of the Payout Funds being claimed by Class Members ($488, 546.78 of the $619,167 Payout Fund).

///

The purpose of this hearing is to determine whether the proposed settlement of this Litigation should be finally approved, the amount of Named Plaintiff's enhancement award for his service as a Class Representative, and the amount of the award of attorneys' fees and costs paid to Class Counsel. Named Plaintiff submits this Memorandum in Support of Final Approval of Settlement and the proposed order granting final approval and entry of Judgment in this action. The application for Named Plaintiff's enhancement award, and for attorneys' fees and costs, is addressed in a separate memorandum. Plaintiff's Motions for Final Approval and for an Award for Enhancement Award, Attorneys' Fees and Costs are unopposed by Defendants.

II.

THE CLAIMS AND PROCEDURAL BACKGROUND

On March 27, 2008, Plaintiff filed a purported class action against Defendants on behalf of himself and other current and former employees in the Superior Court for the State of California in the County of San Diego. Defendants removed the case to federal court on May 6, 2008. Following the Court's Order on Defendants' Motion to Strike and Motion to Dismiss, Plaintiff filed a First Amended Complaint ("FAC") on August 11, 2008. (Graham S.P. Hollis Declaration in Support of Motion for Preliminary Approval ("Hollis Preliminary Approval Decl."), ¶8).

In his FAC, Plaintiff alleged wage and hour violations over a class period extending back to March 27, 2004 and sought various forms of relief on behalf of current and former employees such as unpaid wages, including statutory wages for meal periods and rest breaks, vacation wages, interest, waiting time penalties, PAGA penalties, restitution, damages, injunctive and other equitable relief, and attorneys' fees and costs under various provisions of the California Labor Code and the applicable wage orders of the Industrial Wage Commission. Primarily, Plaintiff alleged as class claims that Defendants: (1) had an illegal "use-it-or-lose-it" policy, whereby employees forfeited accrued vacation wages ("Vacation Claims"); and (2) Defendants did not pay

1 non-exempt employees all wages including meal and rest period premiums, overtime, reporting
2 time and minimum wages ("Non-Exempt Claims").[1] (Hollis Preliminary Approval Decl.,¶¶ 9-10).
3 The parties have engaged in extensive informal and formal discovery, investigation and
4 pre-trial motion practice concerning the facts and the law. Indeed, even before filing this action,
5 Plaintiff and his counsel Grace**Hollis** LLP (referred to as "Class Counsel") engaged in a
6 considerable amount of investigative work into the claims, filed an exhaustion letter with the
7 LWDA under the PAGA, engaged in numerous discussions with Defendants' counsel concerning
8 the claims, and attempted pre-litigation resolution of class claim. Moreover, after the action was
9 filed, the Parties and Class Counsel engaged in a significant amount of pre-certification discovery
10 including the exchange and analysis of initial disclosures, approximately 2,300 pages of
11 documents, and over 325 discovery responses. Specifically, the Parties engaged in a production
12 and analysis of: (1) extensive time and pay records for a cross-section of persons in the Non-
13 Exempt Settlement Group; (2) vacation accrual and usage records for person in the Vacation
14 Settlement Group for the time period 2004 through 2006; and (3) Defendants' policies regarding
15 meal and rest periods, vacation pay, and pay and timekeeping practices utilized at Defendants'
16 Med-Safe facility in Oceanside, California. Plaintiff Singer was subjected to a two-day deposition
17 in February 2009. Additionally, Class Counsel conducted a two-day deposition in April 2009 of
18 Defendant Med-Safe's person most knowledgeable about policies and practices at its Oceanside
19 facility relating to reporting time pay, meal and rest periods, vacation/paid-time off, timekeeping
20 and payroll. Class Counsel conducted interviews of witnesses and putative class members to
21 obtain information on the alleged wage and hour violations, to quantify the potential class, and
22 performed exhaustive legal research into key legal issues. (Hollis Preliminary Approval Decl., ¶¶
23
24 [1] See FAC in Court file. Plaintiff Singer additionally alleged in the FAC that Defendants misclassified him as an exempt employee and sought relief relating to this claim as well. Singer's misclassification
25 claim was not plead as a purported class action or representative action claim, rather it was alleged as an individual claim limited to the time period February 23, 2004 through April 30, 2005. Singer's
26 misclassification claim was resolved by agreement on June 2, 2009 - at the same time the class claims were resolved. In order to fully effectuate the resolution of Singer's misclassification claim as well as to
27 refine the pleadings in light of the proposed class Settlement, which included the inclusion of claims under the Fair Labor Standards Act ("FLSA"), the Parties filed a Second Amended Complaint ("SAC") in
28 December 2009. The SAC is currently the operative Complaint.

1 7, 11-21; Graham S.P. Hollis Declaration in Support of Motions for Final Approval and Award of
2 Enhancement, Fees and Costs ("Hollis Decl."), ¶¶ 19-21, 32, 36, 38; Kirkland Singer Declaration
3 in Support of Preliminary Approval Motion ("Singer Preliminary Approval Decl."), ¶¶ 6-10.

4 The Parties voluntarily agreed to engage in settlement discussions. These negotiations
5 included informal settlement discussions and the Parties' formal mediation session on May 21,
6 2009 before well-respected neutral mediator Joel M. Grossman, Esq. Defendants vigorously
7 contended that it fully complied with applicable law and is not liable to Plaintiff or the putative
8 class for any of the asserted damages. In preparation for this mediation, Class Counsel engaged in
9 significant analysis of vacation usage and accrual rates, meal period data, time and pay data, and
10 policies and procedure manuals provided by Defendants. Class Counsel submitted an extensive
11 mediation brief, evidence and legal authorities to the mediator prior to and during the mediation in
12 support of the damage assessment. Plaintiff Singer and his counsel and Defendants' representative
13 and its counsel attended the all-day mediation session. Serious and intense negotiations occurred
14 at the mediation. Although the mediation session did not result in a settlement, Mr. Grossman
15 made a mediator's proposal to resolve the Parties' impasse. Taking into account the mediator's
16 opinion, Defendants and Named Plaintiff ultimately accepted the mediator's proposal on June 2,
17 2009. In short, the investigation and both informal and formal discovery have been involved and
18 thorough, and have placed the parties in an excellent position to evaluate the lawsuit's merits and
19 value. (Hollis Preliminary Approval Decl., ¶¶ 13-21; Hollis Decl., ¶¶ 32, 36, 38)

20 Though the Parties had reached agreement as to the major terms of the Settlement on June
21 2, 2009, many important details remained unresolved, and the Parties thereafter held extensive
22 additional negotiations over the course of the next five-plus months to achieve agreement on all the
23 terms of the proposed Settlement Agreement including the language of the Class Notice, Claim
24 Forms, associated releases and the proposed final judgment. Finally, a SAC was prepared and
25 filed in December 2009 in order to refine the pleadings as result of the investigation and settlement
26 process. (Hollis Preliminary Approval Decl., ¶¶ 9, 14, 23; Hollis Decl., ¶¶ 22, 32-33, 36, 38)
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III.

THE SETTLEMENT

In consideration for settlement and release of claims, the proposed Settlement provides that Defendants will pay up to One Million Dollars ($1,000,000.00) (the "Settlement Fund") to: (1) compensate Vacation Settlement Group Members and Non-Exempt Settlement Group Members (collectively "Settlement Group Members") including Named Plaintiff for their alleged unpaid wages, interest and penalties; (2) make the PAGA penalty payment to the LWDA; (3) pay the costs of settlement administration, (4) pay the employer's portion of payroll taxes attributable to the wage component of the individual Settlement Awards to Settlement Class Members; (5) compensate Named Plaintiff for his service to the Vacation and Non-Exempt Settlement Groups; and (6) pay Class Counsel's fees and costs.

Under the terms of the proposed Settlement, all Vacation Settlement Group Members and all Non-Exempt Settlement Group Members who do not opt-out of the Settlement (i.e. "Vacation Class Members" and "Non-Exempt Class Members"), including the Named Plaintiff, were eligible to submit a Claim Form for a settlement award, thereby becoming a "Vacation Settlement Class Member" and/or "Non-Exempt Settlement Class Members" (collectively "Settlement Class Members") respectively. Under the terms of the proposed Settlement:

a. Settlement Class Members were collectively entitled to collect a maximum of $619,167.00. Of this amount, $556,077.34 has been allocated to a Non-Exempt Payout Fund and $63,089.66 allocated to a Vacation Payout Fund. (Hollis Decl. ¶¶ 9-11; see also Declaration of Denise M. Visconti ("Visconti Decl.");

b. A PAGA payment in the amount of $3,000.00 is to be paid to the LWDA;

c. A fixed fee of $8,000.00 has been allocated for Claims Administrator expenses;

d. Named Plaintiff will seek a $25,000.00 Enhancement Award for his service to the Settlement Groups, without objection by Defendants; and

e. Class Counsel will seek a fee of $333,333.00 (approximately 33.33% of the Settlement Fund) plus costs not to exceed $11,500.00, without objection by Defendants.

There are 266 Settlement Group Members. (Krista Tittle Declaration ("Tittle Decl."), ¶¶ 6, 8-9) Of the 266 Vacation Settlement Group Members, 71 of these were eligible to claim funds from the Vacation Payout Fund. The 71 individuals were all separated from their employment with Defendants and were not paid all purportedly owed vacation wages.[2] All 259 persons in the Non-Exempt Settlement Group were eligible to collect from the Non-Exempt Payout Fund. (Hollis Preliminary Approval Decl., ¶ 21) If a person was both a Vacation Settlement Class Member and a Non-Exempt Settlement Class Member, he/she shall receive a Settlement Award from both the Non-Exempt and Vacation Payout Funds assuming the proposed Settlement becomes final.

The proposed Settlement provides that the Vacation and the Non-Exempt Payout Funds will be paid on a "claims made" basis, subject to a guaranteed 50% floor to be paid out to Settlement Class Members. However, as stated in the Declarations of Krista Tittle and Graham Hollis, the 50% claims floor was well exceeded. Class Members claimed 78.90% of the total Payout Funds ($488,546.78 was claimed out the available $619,167.00). Broken down by type of Payout Funds, 50.81% of the Vacation Payout Fund was claimed ($32,068.10 claimed from the $63,089.66 Vacation Payout Fund), and 81.79% of the Non-Exempt Payout Fund was claimed

[2] Defendant Med-Safe's person most knowledgeable about the vacation policies and practices, Nathan Miller, testified that up until approximately December 31, 2006, Med-Safe employees at the Oceanside site were not allowed to carry over into the new year, accrued, unused vacation time (a "use-it-or-lose-it" policy). He further testified that starting in the year 2007, Med-Safe changed its practices, allowing unused vacation time to be carried over into a new year. Med-Safe credited then-current employees' vacation banks with any lost vacation time. In preparation for the Parties' mediation, Defendants provided Class Counsel with data detailing usage and accrual rates. The discovery and investigation revealed that potential actual damages resulting from the vacation claim (as a result of an illegal "use-it-or-lose-it" policy) is limited to employees whose employment ceased and were not paid out their unused, accrued vacation wages earned between 2004 and December 31, 2006 (representing 71 individuals eligible to receive Settlement Awards from the Vacation Payout Fund). (Hollis Preliminary Approval Decl., ¶¶ 16, 20; see also Hollis Decl., ¶¶ 6, 9 and Visconti Declaration regarding clarification of how and why the amount of the Vacation Payout Fund and number of Vacation Settlement Group Members decreased from that stated in the Preliminary Approval Motion. Although these amounts decreased, the formula to calculate the Settlement Awards from the Vacation Payout Fund did not change – it remains at 110% of the actual vacation wages lost.

1 ($456,478.68 claimed from the $556,077.34 Non-Exempt Payout Fund). (Hollis Decl., ¶¶ 6,9-10;
2 Tittle Decl., ¶¶ 11-12 and Exhibit B attached thereto). By agreement, the Named Plaintiff's total
3 individual Settlement Award from the Vacation and Non-Exempt Payout Funds combined will
4 not exceed $750.00 (Settlement Agreement at ¶¶ 4-7; Hollis Decl., ¶¶ 22; Kirkland Singer
5 Declaration in Support of Motions for Final Approval and Award of Enhancement Award,
6 Attorneys' Fees and Costs ("Singer Decl.") ¶ 6)

7 The Vacation Settlement Awards will be based on one hundred and ten percent (110%) of
8 the actual vacation wages purportedly owed (based on the amount of accrued, unpaid vacation time
9 multiplied by the person's final hourly rate of pay) to each person in the Vacation Settlement
10 Group. (Stipulation at ¶ 5; Hollis Decl., 9) The payment of the Non-Exempt Settlement Awards
11 will be calculated by assigning a certain dollar value to each week of work by persons in the Non-
12 Exempt Settlement Group. Many of the awards are substantial. For example, if a Non-Exempt
13 Settlement Group member worked one year, he or she would be eligible to recover approximately
14 $734; working the entire Class Period as a non-exempt employee would equate approximately to
15 more than a $4,225.00 gross non-exempt settlement award. (Hollis Preliminary Approval Decl.,
16 ¶21) Of each Vacation and Non-Exempt Settlement Award, 50% will be allocated to wages, 40%
17 will be allocated to penalties and 10% will be allocated to interest. (Settlement Agreement at ¶ 5B)
18 Of course, in exchange for these payments, Vacation Settlement Class Members (including Named
19 Plaintiff) will release their Vacation Released Claims against Defendants and Non-Exempt
20 Settlement Class Members (including Named Plaintiff) will release their claims against Defendants
21 relating to the non-exempt claims. Named Plaintiff furthermore will release all claims against
22 Defendants relating to his employment and separation thereof, not just the Non-Exempt and
23 Vacation Claims. (Settlement Agreement at ¶ 2(a)-(c); Hollis Preliminary Approval Decl., ¶ 24;
24 Hollis Decl., 23; Singer Decl., ¶ 6)

25 In addition to $1,000,000.00 Settlement Fund, current and future employees at the Med-
26 Safe facility located in Oceanside will benefit from Named Plaintiff's prosecution of the class
27 claims. For example, upon receipt of Named Plaintiff's LWDA letter, Defendants reviewed its
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policies and procedures utilized at the Oceanside facility, conducted an in-depth review all wage statements and payroll records, and implemented certain auditing tools and training efforts to ensure ongoing compliance with California law. It further ceased the use of the "auto-deduction" feature utilized in its timekeeping and payroll system and implemented a system whereby non-exempt employees are required to record actual meal period times. As a result, currently employed Non-Exempt Settlement Group members and future non-exempt employees will not have 30 minutes of time and wages automatically taken from them for a meal period that may not have been provided or taken. Defendants also implemented a system, in approximately early 2008, to pay meal premiums. (Hollis Preliminary Approval Decl., ¶ 26; Hollis Decl., ¶14; Singer Decl., ¶ 5)

IV.

THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT FINAL APPPROVAL

When a proposed class-wide settlement is reached, it must be submitted to the court for approval. Court approval of a class settlement is considered at a final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented and class members may be heard regarding the settlement. Manual for Complex Litigation (Second) ("Manual (Second)") § 30.44 (1993). Governing the settlement of class actions, Federal Rules of Civil Procedure 23(e)(1)(c) specifically provides: "The court may approve a settlement, voluntary dismissal or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable and adequate." Accordingly, during final approval, the court must consider whether the settlement is fair, adequate and reasonable. *Officers for Justice v. Civil Service Com'n, etc.*, 688 F.2d 615, 625 (9th Cir. 1982).

Class action settlements should be approved where (1) the proposed settlement is fairly and honestly negotiated; (2) serious questions of law and fact exist placing the ultimate outcome of the litigation in doubt; (3) the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the parties have determined that the

1 settlement is fair and reasonable. *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (5th Cir.
2 1984); *Marcus v. State of Kansas*, 209 F. Supp 2d 1179 (D. Kan, 2002); *Lopez v. City of Santa Fe*,
3 206 F.R.D. 285, 288 (D.N.M. 2002). Each of these four criteria is satisfied here. As discussed in
4 detail below and in the accompanying Declarations of Graham Hollis, this Settlement was reached
5 after approximately one and one-half years of hard-fought, intensive litigation. The Settlement
6 was concluded in June 2009 through arm's length negotiations and with the assistance of highly
7 experienced mediator Joel M. Grossman, Esq. who is specialized in wage and hour class actions.
8 Experienced counsel for the Settlement Groups who vigorously protected the interests of the
9 Settlement Group Members negotiated the Settlement. There were complex legal and factual
10 issues that place the ultimate outcome of the litigation in doubt. Accordingly, the immediate value
11 of the settlement to the Settlement Group Members far outweighs the possibility of relief if this
12 protracted and expensive had continued through trial and appeal.

13 Finally, the considered judgment of all parties to the Settlement is that the Settlement is
14 fair and reasonable in light of the immediate benefit provided by the Settlement to Class Members.
15 Settlements of disputed claims are favored by the courts. *Waits v. Weller*, 653 F.2d 1288, 1291 (9th
16 Cir 1981) ("settlement encouraged in appropriate class action settlements"). In evaluating
17 settlements, the courts have long recognized that compromise is particularly appropriate since
18 litigation is difficult and notoriously uncertain. Settlement is especially favored in class actions
19 because it minimizes the litigation expenses of all parties and reduces the strain on judicial
20 resources. *Officers for Justice, supra*, 688 F.2d at 625 ("voluntary conciliation and settlement are
21 the preferred means of dispute resolution. This is especially true in complex class action
22 litigation"); *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action
23 suits, there is an overriding public interest in favor of settlement."); *In re Dept. of Energy Stripper*
24 *Well Exemption Litig.*, 653 F. Supp. 108, 115 (D.Kan. 1986) ("It is in the interests of the courts and
25 the parties that there should be an end to litigation and the law favors the peaceful settlement of
26 controversies.") Under this standard, the court must decide whether the proposed settlement falls
27 within the range of reasonable settlements, taking into account that settlements are compromises
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between the parties reflecting subjective, unquantifiable reasoned judgments concerning the risks and possible outcomes of litigation. *Id.*

In cases such as this one, courts have repeatedly emphasized that there is a strong initial presumption that the compromise is fair and reasonable *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *11 (C.D. Cal. 2005). Courts are advised not to adjudicate the merits of the action, nor their judgment for that of the parties who negotiated the settlement, nor should they reopen and enter into negotiations with the litigants in hopes of improving the terms of settlement. *Id.*, at *11; *Officers for Justice, supra,* 688 F.2d at 625. The essential evaluation is whether, given the risks of litigation and the range of probable results, the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. *Id.* At 625; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *Stanton v. Boeing Co.*, 327 F.3d 938 (9th Cir 2003). Here, the facts and circumstatnces compel the conclusion that the proposed settlement satisifies that standard.

V.

THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. The Test for Fairness

To determine whether a proposed settlement is fair, adequate and reasonable, courts consider some or all of the following factors: "(1) the strength of plaintiffs' case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Officers for Justice, supra,* 688 F. 2d at 625. The list of factors is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a consensual agreement between the parties.

> "[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, supra,* 688 F.2d at 625.

The question whether a proposed settlement is fair, reasonable and adequate necessarily requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "the terms of the compromise with the likely rewards of litigation." *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied* 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968)). Therefore, many courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. *Kirkorian v. Borelli*, 695 F. Supp 446, 451 (N.D. Cal. 1988); *Weinberger*, 698 F. 2d at 74. For example, in *Lyons v. Marrud, Inc.*, 91972-1973 Transfer Binder] Fed. Sec. L. Rep (CCH) Paragraph 93, 525 (S.D.N.Y 1972), the court noted that "[e]xperienced and competent counsel have assessed these problems and the probability of success on the merits. They have concluded that compromise is well-advised and necessary. The parties' decision regarding the respective merits of their position has an important bearing on this case." *Id.* at paragraph 92, 520.

B. The Settlement Satisfies the Test for Fairness

1. 65.41% of the Settlement Groups Submitted Valid Claims, Representing 78.90% of Funds Claimed, With No Objectors and No Requests for Exclusion

After dissemination of the Class Notice to the 266 Settlement Group Members, which provided each Settlement Group Member with the terms of the settlement (including the amount that would be sought for Named Plaintiff's enhancement award and attorneys' fees and costs), not one member filed an objection or filed a request for exclusion. (Tittle Decl., ¶¶ 9, 11, 14; Hollis Decl., ¶ 6). The absence of any objector and opt-outs strongly supports the fairness, adequacy and reasonableness of the Settlement. See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are received, the fact can be viewed as indicative of the settlement."); *Stoetzner v. U.S. Steel Corp.*, 897 F. 2d 115, 118-119 (3d. Cir. 1990) (29 objections out of 281 member class 'strongly favors settlement'); *Laskey v. Int'l Union*, 638 F. 2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed settlement should be considered when determining fairness of settlement.)

Importantly every Vacation Settlement Group Member and Non-Exempt Settlement Group Member was given the opportunity to participate in the Settlement under the same terms as

every other Vacation Settlement Group Member and Non-Exempt Settlement Group Member respectively. Claims were submitted by 65.41% of the Settlement Groups, which represents 78.90% of the Payout Funds being claimed. (Tittle Decl., ¶ 11 and Exhibit B; Hollis Decl. ¶ 6). In this Settlement, there was a low undeliverable rate, however, if one excludes the 14 Settlement Group Members who were "undeliverable," the effective claims response rate increases to 68.24%. (Tittle Decl., ¶ 10; Hollis Decl., ¶ 7). Given the fact that not one Settlement Group Member objected or requested exclusion, and that 79.80% of the Payout Funds have been claimed, the Court can conclude that the settlement is fair, reasonable and adequate.

2. The Investigation and Discovery are Sufficient to Allow Counsel and the Court to Act Intelligently

The stage of proceedings at which this proposed Settlement was reached militates in favor of final approval of the Settlement. The agreement to settle did not occur until Class Counsel processed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the monetary results that could be obtained through further litigation. Indeed, Class Counsel was actively preparing the case for certification and ultimately trial, and all necessary discovery for the settlement had been concluded. (Hollis Preliminary Approval Decl., ¶¶ 7, 11-13, 15-21; Hollis Decl., 20-21, 32, 36; Singer Preliminary Approval Decl., ¶¶ 8, 11, 13) There was no need for continued litigation simply to reaffirm what the negotiating parties already knew.

In this case, Class Counsel faced a variety of factual and legal arguments from Defendants, which threatened to complicate class certification. Although there would be some risk in further litigation of the Vacation Claims, in Class Counsel's experience, the Vacation Claims appeared to have a very high survival of class certification. Although Class Counsel felt very strong about the likelihood of prevailing on the Vacation Claims, Class Counsel was also aware that there were some risks with pursuing further litigation of these claims, which could include a denial of class certification, or having the claims discarded by way of a dispositive motion. Accordingly, a Settlement was reached on the Vacation Claims that would allow individuals who lost vacation wages to collect a 110% of their actual vacation wages lost to compensate them for the lost wages, penalties and interest. (Hollis Preliminary Approval Decl., ¶¶ 15-16, 19-20; Hollis Decl., ¶¶ 9, 12)

Regarding the Non-Exempt Claims, Class Counsel did not view these claims as straightforward and strong as the Vacation Claims in large part due to the uncertainty surrounding an employer's obligation to provide breaks to its employees. Additionally, the "auto-deduction" system presented a challenge in light of Defendants' contention that pursuing claims related to this system would involve a highly individualized inquiry. Defendants, in summary, presented a strong and credible defense position from which to bargain on these claims and Class Counsel recognized the value of early resolution of the dispute. Taking into account the facts that were established, the efforts that would be required to further develop evidence concerning the disputed facts, the exhaustive analysis Class Counsel conducted regarding the value of the Non-Exempt Claims, and the risks that would be undertaken if this case did not settle, Class Counsel believes the Settlement achieved for the Non-Exempt Claims is well within the range of reasonableness for wage and hour class actions and is fair and adequate. Indeed, Class Counsel believes the Settlement represents an excellent outcome for the Non-Exempt Settlement Group because if settlement had not been achieved at the time it occurred, Class Counsel anticipates that litigation expenses would have increased dramatically without having the benefit of guidance from the California Supreme Court regarding meal periods. For example, because Named Plaintiff would have been required to file a motion for class certification in late 2009 and trial was set for February 2010, the parties would have expended an extraordinary amount of time and money on these matters while risking that that an appeal could be taken as a result of the uncertainties surrounding meal period requirements. (Hollis Preliminary Approval Decl., ¶¶ 15, 17-19, 21, 30; Hollis Decl., 10-14)

Based on their evaluation and bearing in mind the benefits of the monetary and non-monetary aspects of the Settlement when compared to the risk of further expenses, lost time and uncertainties regarding class certification, liability and available remedies, Named Plaintiff and Class Counsel has determined that the proposed Settlement is in the best interest of the Settlement Group Members. (Hollis Preliminary Approval Decl., ¶¶ 15-22, 24-30; Hollis Decl., 6-34, 36, 38-42; Singer Preliminary Approval Decl., ¶¶ 7-11, 13-25; Singer Decl., ¶¶ 3-5) As the federal court

held in *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. Lexis 8476 (N.D. Cal. January 27, 2007), where the parties faced uncertainties similar to those in this litigation:

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

Extensive discovery was analyzed here and a two–day deposition of both Named Plaintiff and Defendants' person most knowledgeable was taken. Lengthy mediation briefs were researched and prepared. Settlement Group Members were interviewed concerning both the Vacation and Non-Exempt Claims. Extensive and time-consuming damage calculations were prepared based on actual vacation wage losses and extrapolated damages for the non-exempt claims. During the mediation, which was both contentious and arm's length, Defendants disputed both liability and amounts of damages. (See generally, Hollis Preliminary Approval Decl., Hollis Decl., Singer Preliminary Approval Decl., Singer Decl., and Visconti Decl.)

Based on the complexity of the case (which is essentially two cases in one), the novelty of the legal issues, the substantial and uncertainty of the outcomes on both liability and certification issues, as well as the need to ascertain damages, Named Plaintiff and Class Counsel believe that the result achieved is an excellent one and is more than fair and in the best interest of the Class Members. This is bolstered by the fact that there were no objectors or opt-outs and that 79.80% of the Payout Funds were claimed. There can be no doubt that counsel for both parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation, given the relative strengths and weaknesses of their positions. (Hollis Preliminary Approval Decl., ¶¶ 15-22, 24-30; Hollis Decl., 6-34, 36, 38-42)

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3. The Settlement Was Reached Through Arm's Length Bargaining

This Settlement was the result of arm's length negotiations conducted through formal and informal settlement conferences between the parties through their respective attorneys. Class Counsel have conducted significant investigation and discovery into the facts of this class action case, including extensively interviewing Named Plaintiff; interviewing Settlement Group Members regarding the Vacation and Non-Exempt claims; reviewing and analyzing over 2,300 pages of documents relating to the Vacation and Non-Exempt Claims; preparing and assessing over 325 pre-certification discovery responses; conducting a two-day deposition of Nathan Miller, Defendant's Human Resources representative and person most knowledgeable at the Oceanside, California facility; and engaging in extensive damage calculations based on both actual and extrapolated data. (Hollis Preliminary Approval Decl., ¶¶ 7-21, 25-26; Hollis Decl., ¶¶ 19-21, 26, 32, 36, 38; Singer Preliminary Approval Decl., ¶¶ 5-11; Visconti Decl.)

Prior to the initiation of settlement discussions, Class Counsel reviewed and outlined the case based upon the provided information and determined the conditions of settlement, which would be fair and reasonable to the Settlement Groups. Class Counsel was experienced in the types of settlement appropriate to resolve the Vacation and Non-Exempt Claims, as Class Counsel had previously litigated and settlement many other wage and hour actions. (*Id.*; Hollis Preliminary Approval Decl., ¶¶ 2-6, 26-27; Hollis Decl., 2-3, 24, 27-30, 35)

Following this discovery and law and motion practice, the parties agreed to mediation before Joel M. Grossman, Esq. Mr. Grossman is a highly experienced wage and hour mediator in California. The full-day mediation session held on May 21, 2009 was intense and ended with a mediator's proposal. On June 2, 2009, the parties agreed to the mediator's $1,000,000 proposal. Class Counsel believes this is an excellent result given the actual risks on certification and liability facing both sides. After accepting the mediator's proposal on June 2, the specific terms of the settlement required intensive five-plus months of additional negotiations before the final written agreement could be signed. Class Counsel and Defendants' counsel negotiated and prepared the Stipulation, the Class Notice, the Claim Forms, the proposed order granting preliminary approval,

and the proposed order granting final approval and final judgment. Class Counsel was faced with many attempts by Defendants' counsel to include language that would not benefit the Settlement Groups including broad release as well complicated claim forms. Class Counsel therefore had to ensure that the terms and the form of all of the settlement documents were fair to every member of the Settlement Groups and contained the requisite opportunities for notice, exclusion and objections in accordance with class action law. Once the Stipulation and the accompanying exhibits was finalized and executed, Class Counsel prepared and filed the motion requesting Court approval of the settlement. (Hollis Preliminary Approval Decl., ¶¶ 13-14, 22-24; Hollis Decl., ¶¶ 15, 22, 32, 36, 38)

On December 9, 2009, this Court preliminarily approved the proposed Settlement and ordered that notice of the proposed settlement be disseminated to the members of the Settlement Groups. Simpluris then mailed, to the 266 former and current employees who comprise the Settlement Groups, the Class Notice and Claim Form providing Settlement Group members with an opportunity to exclude him or herself, object, and participate. (Hollis Decl., 6-7; Tittle Dec.) In sum, Named Plaintiff and Class Counsel believe this Settlement is fair, reasonable and adequate and indeed a fabulous result.

4. Counsel is Experienced in Similar Litigation and Settlements

Class Counsel in this matter has extensive class action experience including wage and hour litigation. Class Counsel has participated in every aspect of the litigation and settlement discussions and have concluded the proposed Settlement is fair, adequate and reasonable and in the best interests of the Settlement Groups. (Hollis Preliminary Approval Decl., ¶¶ 2-6, 26-27, 30; Hollis Decl., 2-3, 24, 27-30, 35, 42)

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

The complexities and duration of further litigation cannot be overstated. As discussed above, Defendants asserted substantial and real defenses to this action. Even if Named Plaintiff were successful on class certification and at trial, there is little doubt that Defendants would appeal in the event of an adverse judgment especially considering the uncertainty surrounding meal

1 period laws in California. A post-judgment appeal by Defendants would have required many more
2 years to resolve, assuming judgment was affirmed. If the judgment was not affirmed in total, then
3 the case could have dragged on for years after the appeal. The benefits of a guaranteed recovery
4 today, of the very remedy that Named Plaintiff would seek at trial, outweigh an uncertain result
5 three or more years in the future.

6 Both Named Plaintiff and Class Counsel recognize and are mindful of the expense and
7 length of time involved in future litigation of this action and also of the inherent problems of proof
8 under, and the alleged defenses to, the claims asserted in this action. Costs would have mounted
9 and recovery would have been delayed if not denied, thereby reducing the benefits of an ultimate
10 recovery. Based upon their reasoned analysis, Named Plaintiff and Class Counsel have
11 determined that the Settlement is in the best interests of the Settlement Groups. Similarly,
12 Defendants have concluded that any further defense of this litigation would be protracted and
13 expensive. Substantial amounts of time, energy and resources of Defendants have been, and
14 unless, the Settlement is made, will continue to be devoted to the defense of the claims asserted by
15 Named Plaintiff. Defendants therefore agreed to settle in the manner and upon the terms set forth
16 in the Stipulation to put to rest the claims. (Stipulation at Section V). Therefore, these can be little
17 doubt that the agreed upon proposed Settlement of claims is the most efficient and cost-effective
18 method to provide Settlement Class Members with payments of wages, penalties and interest.

19 6. The Amount Offered in Settlement Supports Final Approval

20 The Settlement in this case of $1 million represents a maximum payout out of the
21 settlement sum for the benefit of the Settlement Groups. Vacation Settlement Group Members
22 who lost vacation wages are able to collect 110% of the lost wages to reimburse them for the lost
23 wages, penalties and interest. Non-Exempt Settlement Group Members on the other hand will be
24 able to collect a per workweek amount for each week worked as a non-exempt employee during
25 the Class Period. Non-Exempt Class Members for example working one year should receive
26 approximately $734. Overall, the Payout Funds combined represent 28.96% of the calculated
27 claimed losses. This recovery is well within the range of the 25% to 35% recovery approved in
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Glass c. UBS Fin. Services., 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. January 27, 2007). As a result, the Settlement provides the Settlement Group Members with a substantial portion of the recovery as would have been sought at trial as well as the policy changes that would have been sought such as the elimination of the auto-deduction system and the payment of meal premiums (both of which increases provides substantial monetary benefits to current and prospective employees of Defendants). (Hollis Preliminary Approval Decl., ¶¶ 15-21, 30; Hollis Decl., ¶¶ 8-14; Singer Preliminary Approval Decl., ¶¶ 7, 14-15; Singer Decl., ¶ 5; Visconti Decl.)

C. The Named Plaintiff and the Class Members are Similarly Situated

Whenever a plaintiff seeks class certification for purposes of settlement, the Court must ensure that the certification requirements are met as if the case if fully litigated. *Amchem Prods., Inc. v. Winsor*, 521 U.S. 591, 620 (1997). In a collective action, the Court must determine whether the class members are similarly situated and have a common interest at the final approval stage. *Leuthold v. Destination Am.,* 224 F.R.D. 462, 466 (N.D. Cal. 2004). Here, there can be no question that the Named Plaintiff and the Class Members are similarly situated and have a common interest. The Named Plaintiff held a non-exempt position and lost vacation wages, making him a member of both the Vacation Class and the Non-Exempt Class. Additionally here, members of the Vacation Settlement Group seek remedies under California's wage and hour laws for the alleged "use-it-or-lose it" vacation violations. The proposed Settlement provides compensation for those identical claims. Similarly, the Non-Exempt Settlement Group Members seek remedies based on alleged failures of Defendants to pay for all hours worked and for meal and rest premiums. The proposed Settlement provides members of the Non-Exempt Settlement Group with compensation for their identical claims. (Hollis Preliminary Approval Decl., ¶¶ 7, 12, 15-21)

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VI.

CONCLUSION

For the reasons stated herein and in the accompanying declarations and Motion for Award of Enhancement Award, Attorneys' Fees and Costs, Named Plaintiff respectfully submits that the Settlement satisfies the standards of fairness and adequacy and is well within the range of reasonableness and therefore should be finally approved.

Dated: April 5, 2010

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