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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SHAWNDA JACK, individually and on behalf of other members of the general public similarly situated,

Plaintiff,

v.

HARTFORD FIRE INSURANCE COMPANY, a Connecticut Corporation; and DOES 1-50, Inclusive

Defendants

CASE NO. 09-cv-1683-MMA (JMA)

CLASS AND COLLECTIVE ACTION

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

Date: May 9, 2011
Time: 2:30 p.m.
Judge: Hon. Michael M. Anello
Courtroom: 5

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I. INTRODUCTION

Named Plaintiff SHAWNDA JACK ("JACK") was formerly employed by Defendant HARTFORD FIRE INSURANCE COMPANY ("HARTFORD") (collective, "the Parties") as a customer service representative from August, 2004 through February, 2009. (Dkt. # 1, ¶ 8.) On August 4, 2009, Plaintiff filed her complaint alleging violations of the Fair Labor Standards Act of 1938, the California Labor Code, the California Wage Orders and the California Business & Professions Code, seeking to recover unpaid compensation, penalties and interest on her own behalf and on behalf of a class of approximately twenty-six hundred (2,600) similarly situated persons. (Dkt. #1.)

After more than a year of litigation including exchanges and analyses of vast amounts of data and mediation before a highly-experienced mediator, Robert Kaplan, Esq., the Parties reached a comprehensive settlement ("Settlement") as to a class of California non-exempt employees employed by Defendant within the four-year time period prior to the filing of Plaintiff's complaint in which Defendant will pay up to the total sum of $1,200,000 (one million two hundred thousand dollars) to resolve all of the claims asserted by Plaintiff on behalf of the members of the proposed class. (Sullivan Decl., ¶ 4.) The Settlement is claims-made; any Settlement proceeds not claimed by class members will remain the property of Defendant. (*Id*.)

On January 20, 2011, the Court granted preliminary approval of the class action settlement as requested by Plaintiff, and scheduled a final fairness hearing for May 9, 2011. (Dkt. 40.)

II. INVESTIGATION IN THE CLASS ACTION

The Parties conducted extensive investigation of the facts and law during the prosecution of this action. (Sullivan Decl., ¶ 5.) Such investigations included, *inter alia*, extensive collection of class members' time records and expert analysis of voluminous data produced by Defendant. (*Id*.)

Counsel for the Parties further investigated the law as applied to the evidence discovered regarding Plaintiff's claims, potential defenses, and the damages alleged by Plaintiff on behalf of the class. (*Id*. at ¶ 6) The accompanying declaration of Kevin D. Sullivan provides a detailed account of Class Counsel's investigative efforts which preceded the Settlement.

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III. SUMMARY OF SETTLEMENT TERMS

Defendant will establish a settlement fund of $1,200,000 (one million, two hundred thousand dollars) which shall be allocated as follows:

1. Net Settlement Amount: The total amount to be received by class members is up to $801,100 (eight hundred and one thousand one hundred dollars) and shall collectively be referred to as the "Payout Fund."
2. Fees Award to Class Counsel: The total amount to be received by Class Counsel shall not exceed $360,000.00 (three hundred sixty thousand dollars). (Ex. 1, ¶ 21.)
3. Costs Award to Class Counsel: The total amount in cost reimbursement to Class Counsel shall not exceed $15,000.00 (fifteen thousand dollars). (Ex. 1, ¶ 21.)
4. Enhancement Award to Class Representative: The total amount to be received by Plaintiff for performing her duties as Class Representative shall not exceed $2,500 (two thousand five hundred dollars). (Ex. 1, ¶ 23.)
5. Penalties pursuant to the Private Attorneys General Act of 2004 ("PAGA"): The total amount allocated for penalties shall not exceed $3,000 (three thousand dollars). Pursuant to Labor Code section 2699(i), 75% of this amount, or $2,250 (two thousand two hundred fifty dollars) shall be sent to the California Labor & Workforce Development Agency. (Ex. 1, ¶ 15.)
6. Claims Administration: The total amount to be paid to the third-party claims administrator for mailing notice to class members and distributing payments shall not exceed $18,400 (eighteen thousand four hundred dollars). (Ex. 1, ¶ 20.)

IV. NOTICE TO THE CLASS COMPORTS WITH DUE PROCESS AND RULE 23

Before final approval of a class action may be issued, notice of the settlement must be provided to the class. Fed. R. Civ. P. 23(e)(1). Rule 23 requires that the class receive "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Actual notice, however, is not required. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). Notice to the class must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them

an opportunity to present their objections." *Mullane v. Cent. Hanover Bank& Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted).

Not only must notice of a class action settlement be properly disseminated to the class, its content must also "generally describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and come forward to be heard." *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Under Rule 23(c)(2)(B), the notice directed to the class must clearly, and in concise, plain, easily understood language, state: (a) the nature of the action; (b) the definition of the class certified; (c) the class claims, issues, or defenses; (d) that a class member may enter an appearance through an attorney if they desire; (e) that the court will exclude any member of the class upon request; (f) the method and time to request exclusion; and (g) that the judgment will be binding on class members. Fed. R. Civ. P. 23(c)(2)(B). These requirements have been strictly adhered to in this case.

In its January 20, 2011, Preliminary Approval Order, this Court found the form and methods of notice lodged in the preliminary approval papers to be "clearly comports with all constitutional requirements including those of due process. The Court further [found] that the proposed Class Notice, the Claim Form and the Request for Exclusion Form, are reasonable and adequate and will likely assist Class Members in the Claim Process. (Dkt. 40, 3:9-12.) CAC Services Group, LLC has fully implemented the directives of that Order, ensuring that virtually all Class Members received notice of the Settlement. (Hanson Decl., ¶¶ 5-10 .) Specifically, on February 14, 2011, the Notice was printed, personalized and mailed to 2,666 class members, each of whom were identified as class members by Defendant. (*Id*. at ¶ 6.) Notice reached nearly 96% of the Settlement Class. (*See id*. at ¶¶ 6(c), 10; *see also Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 261 (S.D. Cal. 1988) ("[T]he Supreme Court does not require actual notice for all members of a class in every class action. With so many potential class members here, other forms of notice, such as notice by mail, publication, and radio and television broadcast, could be the 'best practicable' under the circumstances.").

Accordingly, notice to the Settlement Class complied with the Preliminary Approval Order (Dkt. 40), Rule 23, and due process, plainly satisfying the standard of the "best notice practicable under the circumstances."

V. THE PROPOSED SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL

A. PROCEDURAL OVERVIEW

On August 4, 2009, Plaintiff filed this action against Defendant in United States District Court, Southern District of California, alleging wage and hour claims under both California and federal law. (Dkt. # 1; Sullivan Decl.,¶ 10.) Plaintiff sought to represent classes defined as: (1) all current and former non-exempt employees of Defendant who have worked in the United States at any time within the three year time period prior to the filing of Plaintiff's complaint and (2) all current and former non-exempt employees of Defendant who have worked in the state of California within the four year time period prior to the filing of Plaintiff's complaint. (Dkt. # 1, ¶¶ 8-10; Sullivan Decl.,¶ 10.)

The complaint alleged Defendant's (1) violation of the Fair Labor Standards Act of 1938 and California wage and hour law; (2) failure to provide employees duty-free meal periods; (3) failure to authorize and permit rest breaks; (4) failure to pay wages for all hours worked, including off-the-clock work and "rounding" of employee time records and wage rates; (5) failure to properly administer paid time off and make-up time; (5) failure to accurately calculate the regular rate of pay for purposes of overtime compensation; (6) failure to timely pay all final wages and any and all penalties; and (7) unfair business practice in violation of California Business & Professions Code section 17200 *et seq*. (Dkt. # 1; Sullivan Decl.,¶ 11.)

On February 22, 2010, Plaintiff filed her First Amended Complaint ("FAC") to add a cause of action pursuant to California's Private Attorneys General Act of 2004, codified as Labor Code section 2698 *et seq*., and provide additional clarity regarding her previously-alleged claims. (*Id*. at ¶ 12.)

Thereafter, the Parties engaged in extensive discovery where Plaintiff sought, and obtained, the production of all California class members' time and payroll records, phone and computer logs, and IEX records which indicated when class members would log into Defendant's business systems. (*Id*. at ¶ 13.)

As part of her investigation, Plaintiff took the depositions of Defendant's persons most knowledgeable regarding (1) timekeeping policies and practices, (2) meal and rest period policies and practices, and (3) the calculation and provision of compensation from Defendant to its California-based, nonexempt employees during the limitations period, as well as Plaintiff's former

supervisor. (Sullivan Decl., ¶ 14.) Defendant also took the deposition of Plaintiff. (*Id*.)

Plaintiff filed a motion for certification of a class of California non-exempt employees, and that motion was fully briefed by the parties. (Dkt. # 32-36; Sullivan Decl., ¶ 13.) Based on the pleadings and motion for certification, the parties have a firm understanding of the arguments and theories of both sides as well as the evidence obtained by both sides. (Sullivan Decl., ¶ 15.)

Simultaneously, the Parties conducted both informal and formal discussions of possible resolutions of the dispute. (*Id*. at ¶ 16.) On November 8, 2010, the Parties participated in a full-day mediation before Robert Kaplan, Esq., a well-respected mediator in class action "wage and hour" litigation. (Ex. 1, ¶ 4; Sullivan Decl., ¶ 16.) Although the case did not settle on that date, those discussions provided the Parties with invaluable insights concerning the strengths and weaknesses of the case, and the defenses to both liability and damages. (Sullivan Decl., ¶ 16.) On November 12, 2010, Mr. Kaplan conveyed his mediator's proposal to both Parties. (Sullivan Decl., ¶ 17.) This mediator's proposal was agreed to by both Parties on November 15, 2010. (*Id*.) Subsequently, on December 15, 2010, the Parties executed an agreement entitled "Joint Stipulation of Class Action Settlement Agreement and Release of Class Action Claims" which governs the Parties' Settlement, and is lodged herewith as Exhibit 1. (Sullivan Decl., ¶ 18.)

On January 20, 2011, the Court granted preliminary approval of the class action settlement as requested by Plaintiff, and scheduled a final fairness hearing for May 9, 2011. (Dkt. 40.)

Following a 45-day notice period where Settlement Class Members were given the opportunity to claim, opt-out, or do nothing, as well as an extended period to resolve late claims and disputes as to workweeks worked by Settlement Class Members, Plaintiff respectfully requests this Court:

1. Finally approve the class action Settlement, as set forth in the Settlement Agreement;
2. Finally certify the Settlement class in that Plaintiff and the class members are similarly situated for purposes of Rule 23 of the Federal Rules of Civil Procedure, as set forth in the Settlement Agreement;
3. Finally approve the form and method of notice which was sent to potential members of the class; and

/ / /

4. Finally approve the procedure used for the class members to submit claim forms, opt-outs, and/or objections.

By way of separate motion, Plaintiff also seeks approval of an award for (1) attorneys' fees, (2) reimbursement of litigation expenses, (3) approval of administrative expenses, (4) the class representative enhancement award, and (5) PAGA penalties.

B. THE SETTLEMENT CLASS SATISFIES RULE 23(a)

Here, the proposed Settlement Class satisfies the four prerequisites for class treatment as set forth in Rule 23(a). First the requirement of numerosity under Rule 23(a)(1) is satisfied in this case because the Settlement encompasses more than twenty-six hundred current and former employees of Defendant. (Hanson Decl., ¶ 14.) This number is more than sufficient to meet the numerosity requirement. *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (certifying class consisting of 1349 class members).

Second, Rule 23(a)(2)'s requirement of commonality is satisfied. Plaintiff has raised the same claims—for restitution and economic damages for current and former employees of Defendant who worked as nonexempt employees during the class period— and all of those claims have been settled on terms that are identical for Class Members who are in similar circumstances. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

Third, the related requirement of typicality under Rule 23(a)(3) is satisfied because the claims of the named Plaintiff "are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Plaintiff was a nonexempt employee who experienced the same working conditions and alleges the same violations of the California Labor Code as those which will be resolved in the Settlement. Thus, as in *Hanlon*, the typicality requirement is satisfied.

Finally, adequacy is satisfied pursuant to Rule 23(a)(4). To determine adequacy, the Ninth Circuit looks to (1) the absence of any conflict between the named plaintiffs and class counsel, on the one hand, and the class members, on the other; and (2) whether the named plaintiff and class counsel

will vigorously prosecute the action on behalf of the class. *In re Mego Financial Corporation*, 213 F.3d 454, 462 (2000); *Hanslon*, 150 F.3d at 1020.

Here, no conflict of interest exists between Plaintiff and the class members. Each settlement class member will receive economic relief under the settlement. To the extent there are differences in amount of compensation available to Settlement Class Members, those differences apply equally according to objective criteria and merely reflect variations in the Settlement Class Members' length of service piece rate installation technician positions.

C. THE SETTLEMENT CLASS SATISFIES RULE 23(b)(3)

The Settlement Class also satisfies the requirements of Rule 23(b)(3) that common questions of law and fact predominate over individual issues and that resolving the claims collectively through a class action is superior to litigating them individually. As the Ninth Circuit has stated, certification under Rule 23(b)(3) "is appropriate 'whenever the actual interests of the parties can be served best by settling their differences in a single action.' " *Hanlon*, 150 F.3d at 1022 (quoting 7A Wright, Miller & Kane, Federal Practices & Procedures § 1777 (2d ed. 1986).

As in *Hanlon*, any idiosyncratic difference among the Settlement Class Members' claims is vastly dwarfed by predominant common issues of fact and law. As such, the Court should find that predominance is satisfied. Finally, even if differences in the factual and legal circumstances of Settlement Class Members were problematic in a litigation context, the United States Supreme Court has explained that a settlement class need not be manageable as a trial class action in order to be certified as a settlement-only class. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619 (1997). Thus, irrespective of whether this case would be maintainable as a trial class, the Court can certify the Settlement Class because all requirements of Rule 23(a) and Rule 23(b)(3) are satisfied in this settlement context.

Accordingly, this Court should finally certify the Settlement Class proposed by the parties and confirm its decision to appoint Plaintiff as Class Representative and Sullivan & Christiani, LLP as Class Counsel for the Settlement Class.

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D. STANDARDS FOR FINAL APPROVAL

When considering a motion for final approval of a class action settlement under Rule 23(e), the Court's inquiry is whether the settlement is "fair, adequate, and reasonable." Fed. R. Civ. P. 23(e)(2); *Hanlon*, 150 F.3d at 1026 (setting forth fairness and adequacy factors to be considered for approval of class settlement); *accord Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009); *see also*, *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). A settlement is fair, adequate, and reasonable when "the interests of the class are better served by the settlement than by further litigation." Manual for Complex Litigation (Fourth) § 21.61 (2004). The decision to approve or reject a proposed settlement is vested in the Court's sound discretion. *See*, *Class Plaintiffs*, 955 F.2d at 1276. In exercising this discretion, "[t]his circuit has long deferred to the private consensual decision of the parties." *Rodriguez*, 563 at 965; *see also*, *Hanlon*, 150 F.3d at 1027 (approval of class settlement proper after several months of negotiation where there was "[n]o evidence of collusion"). Thus, in evaluating whether the settlement is fair and adequate, the Court's function is not to second-guess the settlement's terms.

E. STRENGTH OF PLAINTIFF'S CASE

The first fairness factor addresses Plaintiff's likelihood of success on the merits and the range of possible recovery. *See Rodriguez*, 563 F.3d at 964-65. In determining the probability of Plaintiff's success on the merits, there is no "particular formula by which that outcome must be tested." *Id*. at 965. Rather, the Court's assessment of the likelihood of success is "nothing more than an 'amalgam of delicate balancing, gross approximations and rough justice.' " *Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Nor, at this stage, need the Court "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Id*. Instead, the Court may presume that through negotiation, the parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery. *See Rodriguez*, 563 F.3d at 965.

Class Counsel continues to believe that Plaintiff's case is strong and that such strength is the reason that Class Counsel was able to succeed in obtaining Defendant's commitment to a $1,200,000

settlement from Defendant. (Sullivan Decl., ¶ 19.) For each claim and component of evidence, however, Defendant has asserted substantial defenses and counter-evidence which introduce uncertainty that Plaintiff would achieve a favorable result in her motion for class certification, as well as at trial. (Sullivan Decl., ¶ 20.) These factors are discussed in detail *infra*. Moreover, as will be discussed, unsettled issues of California law relating to certain of Plaintiff's claims present further uncertainty.

The proposed settlement is reasonable in view of the uncertainties associated with continued litigation of the contested issues in this case. (*Id*. at ¶ 21.) Among other things, the settlement provides Class Members with substantial monetary benefits. (*Id*.) In comparing the strength of Plaintiff's case with the proposed settlement, the proposed settlement is a fair resolution of the issues in this case. (*Id*.)

F. COMPLEXITY AND EXPENSE OF THE LITIGATION

The second fairness factor—the complexity, expense, and likely duration of the litigation—also weighs in favor of approval. "Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class." *Curtis-Bauer v. Morgan Stanley & Co.*, 2008 WL 4667090, *4 (N.D. Cal. Oct. 22, 2008). Indeed, there is no doubt that the time and expense of continuing the litigation would be substantial, and that such transactional costs could significantly reduce whatever judgment, if any, Plaintiff could recover through litigation. The *Rodriguez* court found that approval under this factor was favored where, as here, significant procedural hurdles remained. *See Rodriquez*, 563 F.3d at 966. Avoiding such unnecessary and unwarranted expenditure of resources and time would benefit all parties and the Court. *See Enron Corp. Securities, Derivative & "ERISA" Litig.*, 228 F.R.D. 541, 565 (S.D. Tex. 2005); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D. N.Y. 1995).

The proposed settlement of Plaintiff's claims was reached after more than a year of litigation. (Sullivan Decl., ¶ 22.) No trial date had been set by the Court. (*Id*.) The class certification before the Court was pending at the time settlement was reached. (Dkt. # 36-37.) Should the Court have denied certification, there would have been added delay and expense in appealing such a denial. (Sullivan Decl., ¶ 22.)

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Additionally, the Court ordered that the class certification motion would be for only the California class, relating to claims alleged under the California Labor Code (Dkt. 16, ¶ 3); certification of the nationwide class for FLSA claims would be subsequent to that decision, as well as any potential appeal of an adverse order.

Given the length, complexity, and number of issues involved in a trial of the claims of over two thousand class members, it is possible that a jury may not have reached a unanimous verdict on all issues. Moreover, even if it did reach unanimous verdict, it is likely that an appeal would have followed. Avoiding such a trial and the subsequent appeals in this complex case strongly pushes in favor of settlement rather than further protracted and uncertain litigation.

G. THE AMOUNT OFFERED IN SETTLEMENT

The fourth fairness factor, the amount of recovery offered always weighs in favor of the fairness of the settlement. In assessing the consideration obtained by class members in a class action settlement, "[i]t is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Officers for Justice*, 688 F.2d at 628. In this regard, it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 and n. 2 (2d Cir. 1974); *see also Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983) (court may not withhold approval merely because settlement is only a fraction of what a successful plaintiff would have recovered in a fully litigated case).

In this case, the gross settlement of $1,200,000 is substantial. The settlement provides the class with significant monetary compensation in exchange for the release of their claims. The settlement provides a maximum payout of $801,100 net of administrative fees and costs. The claims administrator reports that, as of April 21, 2011, it has received 1,320 claims, comprising of $517,155.51 in value. (Hanson Decl., ¶ 11.) Consequently, the average payout to class members who returned a valid claim form is projected to be $391.78 per class member. The highest payout claimed by a class member is $791.27. (*Id.* at ¶ 16.)

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Given the risk and uncertainty of the litigation, the benefits of the settlement to the class make the settlement fair, just and reasonable.

H. THE EXTENT OF DISCOVERY COMPLETED AND THE STATE OF THE PROCEEDINGS

The fifth fairness factor, the extent of discovery and the current state of the proceedings, likewise supports final approval. Substantial discovery has been conducted in this case, giving Plaintiff and Class Counsel "a good grasp on the merits of [her] case before settlement talks began." *Rodriquez*, 563 F.3d at 967; *see also Jaffe v. Morgan Stanley & Co., Inc.*, 2008 WL 346417, *9 (N.D. Cal. Feb. 07, 2008) (finding approval appropriate where parties had engaged in extensive discovery prior to settlement).

The proposed settlement was reached among the settling parties after the completion of extensive discovery. (Sullivan Decl., ¶23.) In connection with these discovery proceedings, numerous depositions were taken and thousands of pages of documents were exchanged by the parties. (*Id*.) Time-intensive analyses were conducted of these documents to ascertain the frequency and magnitude of the violations alleged in Plaintiff's first amended complaint. (*Id*.) As a result, the proposed settlement was reached only after the parties had exhaustively examined the factual and legal bases of the disputed claims. (*Id*.) This fact strongly militates in favor the Court's approval of the settlement.

I. ABSENCE OF COLLUSION

"Before approving a class action settlement, the district court must reach a reasoned judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties . . . ." *Ficalora v. Lockheed Cal. Co.*, 751 F.2d 995, 997 (9th Cir.1985) (citing *Officers for Justice*, 688 F.2d at 625). Where a settlement is the product of arms-length negotiations conducted by capable and experienced counsel, the court begins its analysis with a presumption that the settlement is fair and reasonable. *See* 4 Newberg on Class Actions § 11.41.

J. THE EXPERIENCE AND VIEWS OF COUNSEL

The experience and views of counsel also weigh in favor of approving the Settlement. Counsel for Defendant and proposed Class Counsel, both of whom have substantial experience in prosecuting and negotiating the settlement of class action and employment litigation, concur that the settlement

is fair, and proposed Class Counsel have recommended approval of the proposed settlement as in the best interests of the putative Settlement Class. *See Rodriguez*,563 F.3d at 967 (" '[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation,' *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.1995)") *see also Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996) (noting that a district court is "entitled to give consideration to the opinion of competent counsel that the settlement [is] fair, reasonable, and adequate").

Class Counsel possess extensive experience in wage and hour class actions such as this case. (Sullivan Decl., ¶ 24.) Class Counsel aggressively negotiated discovery disputes with the resulted that they obtained documents, data and testimony, over Defendant's objections. (*Id*.) That information permitted a thorough evaluation of the merits of the case as well as projections of Defendant's exposure to liability. (*Id*.)

Additionally, Class Counsel prepared a motion for class certification which was strong enough to bring Defendant to the negotiating table in mediation, and reach a settlement before the Court prepared its ruling on certification. (Sullivan Decl., ¶ 25; Dkt. # 32, 37.)

Class Counsel strongly believe that the proposed settlement is a fair, adequate, and reasonable resolution of the Class' dispute with Defendant, and is preferable to continued litigation. (Sullivan Decl., ¶ 26.)

K. REACTION OF THE CLASS MEMBERS TO THE PROPOSED SETTLEMENT

Courts have repeatedly recognized that the "absence of any objectors strongly supports the fairness, reasonableness, and adequacy of the settlement." *Barcia v. Contain-A-Way, Inc.*, 2009 WL 587844 (S.D. Cal. Mar. 6, 2009). Indeed, "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc*., 221 F.R.D. 523, 529 (C.D. Cal. 2004). Thus, the Court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it.

Imporantly, **no class member has filed an objection to the instant settlement**. (Hanson Decl., ¶ 13.) On January 20, 2011, the Court entered an Order Granting Preliminary Approval and Settlement

Hearing. (Dkt. 40.) In its order, the Court preliminarily approved the proposed settlement, the proposed notice, and scheduled a final fairness hearing for May 9, 2011. (*Id*.) The court also made the following order with respect to when the class members could object to the settlement: "Deadline to file claims, Opt-Out or Object. *Stip.* ¶¶ 33-35. . . [is] 45 days after mailing Class Notice by Claims Administrator." (*Id*. at 4:1.)

The Notice, which was mailed to each class member on February 14, 2011, prominently advised the class members of the requirements regarding objections in the body of the Notice itself:

> Any objection must be in writing and state each specific reason in support of your objection and any legal support for each objection. Your objection must also state your full name, address, telephone number, date of birth and the dates of your employment with Hartford. To be valid and effective, any objections to approval of the Settlement must be filed with the Clerk of the Court and delivered to each of the above-listed attorneys no later than March 31, 2011.

(Hanson Decl., Ex. 1, ¶ IV(C).)

The Claims Administrator mailed notice packages to 2669 class members identified by Defendant's records and undertook exhaustive measures to ensure that all reasonable steps were taken to ensure the Class Members' receipt of those notice packages. (Hanson Decl., ¶¶ 6(a), 8.) In response, **no class member filed an objection to the settlement**. (*Id*. at ¶ 13.) This response by the class members provides further support for final approval. The absence of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement are favorable to the class members. *See In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416, 420 (W.D. N.Y. 1994); *Dillard v. City of Foley*, 926 F.Supp. 1053, 1063 (M.D. Ala. 1995); *In re Michael R. Milken & Assoc. Sec. Litig.*, 150 F.R.D. 46, 56-57 (S.D. N.Y. 1993); *In re Fleet/Norstar Sec. Litig.*, 935 F.Supp. 99, 107 (D. R.I. 1996).

Here, every Class Member was mailed the Court-approved notice of the proposed settlement. (Hanson Decl., ¶¶ 6(a), 8.) That notice contained a detailed narrative of the background of the litigation and the terms of the proposed settlement. (*Id*. at Ex. 1, ¶¶ I-II.) The notice also provided class members with clear instructions about how to object to the proposed settlement if the class members opposed final approval of the proposed settlement. (*Id*. at Ex. 1, ¶ IV(C).)

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Class Members were given comprehensive information about the terms of the proposed settlement far exceeding the disclosure general required in class action settlements. *See*, *e.g.*, *Gottlieb v. Wiles*, 11 F.3d 1004, 1013 (10th Cir. 1993) (to satisfy Rule 23(e), "[i]t is not necessary to give all of the details of the settlement, but only to 'fairly apprise' the class members of the terms of the settlement.").

The claims administrator appointed by the Court in this matter tracked numerous statistics relating to the Class Members' response to the settlement. Among them are the number of notice packages mailed (2,669) and the number of claims received (1,320). On its face, this would suggest a response rate of 49.5%. Although this response rate is, itself, substantial in a labor class action, it is not the best gauge of class member participation. Because Class Members' shares of the payout fund are determined in proportion to the number of weeks they worked for Defendant, Class Members who worked longer in qualifying positions have a greater stake in the payout fund. Therefore, the *workweeks claimed as a percentage of the total of weeks worked* by all eligible class members is the most meaningful measure of participation. The 1,320 claims submitted by Class Members represent ***64.5%*** of the pool of eligible workweeks. (Hanson decl., ¶ 11.) This is an extraordinarily high participation rate. Additionally, the fact that **no class member filed an objection to the settlement** to the proposed settlement speaks volumes with respect to the overwhelming degree of support for the proposed settlement among Class Members. Positive reaction to the proposed settlement is compelling evidence that the proposed settlement is fair, just, reasonable, and adequate.

L. ANALYSIS OF THE CLASS CLAIMS AND ASSERTED DEFENSES

In addition to the tangible, monetary value of the settlement, significant value should be placed on Defendant's substantive change in its compensation policy. As set forth in Plaintiff's motion for class certification, subsequent to the filing of the instant lawsuit, HARTFORD has confirmed that its policies regarding "work-time" and the payment of compensation to the class have changed. (Dkt. 32-1, 5:15-6:16.)

To summarize, prior to this litigation, Defendant would pay its employees according to whatever timesheets the employees entered, but these timesheets were not based upon accurate data. Each employee's manager was able to have exact—to the minute—reports of when the employees

began work by turning on their phones or computers, but employees did not have access to these reports. The analysis of these timesheets showed that significant amounts of class members' work-time during the relevant limitations period was not being compensated.

When these allegations were brought to Defendant's attention, Defendant promptly changed its policy to have its managers meaningfully review its employees' timesheets for errors, and cross-check them with the time reports available to the manager.

Two items of note should be taken from this: (1) Plaintiff's prosecution of the lawsuit brought about substantive change in Defendant's policy which has ensured that Defendant's current and future employees are being paid to the minute, and (2) Defendant's response to Plaintiff's allegations has virtually negated any "willful" violations of the California Labor Code, including, but not limited to, Sections 203 and 226.7.

1. Claims for Failure to Compensate for All Time Worked

These claims are addressed immediately *supra*. These claims make up the largest monetary value of the class claims. Indeed, as most class members worked eight-hour shifts, much of the work-time which was not included in compensation to class members was overtime, entitling class members to one-and-one-half times their regular rates of pay for that time which went uncompensated.

Defendant vehemently opposed these claims, arguing that each class member was required to certify his/her time sheets before submitting them to their managers, and that any error is not the fault of Defendant. Moreover, Defendant argued that even where an employee would log in before his/her shift began, there was no conclusive way to prove an employee was "actually working" before/after his/her scheduled shift, asserting that any such inquiry would be highly individualized and grounds to deny class certification. Defendant offered numerous declarations from its employees, stating that when they arrived to work early, they would often eat breakfast, read the newspaper or magazines, check personal email, etc. in support of its motion.

Plaintiff's analysis established there were approximately 265,000 workweeks during the relevant limitations period. A sample analysis found a large majority of class members suffered damage of approximately $2.50 to $4.50 per workweek. However, often times there were instances where class members suffered no injury at all.

Based on the foregoing, assuming (1) Defendant's compensation policy was found to be illegal, and (2) Plaintiff was able to obtain certification on this issue, Plaintiff valued this claim between $530,000 and $1,192,500. Should the Court have denied certification, or found Defendant's policy to be legal, the value of these claims was $0.00. Plaintiff did not include any portion for penalties in this valuation.

2. Claims for Failure to Provide Meal Periods

Presently, the meal period issue is up for review with the California Supreme Court. *Brinker Restaurant Corp. v. Sup. Ct.*, Cal.Rptr.3d 688 (2008); *Brinkley v. Public Storage*, 87 Cal.Rptr.3d 674 (2009). Furthermore, while the California Supreme Court in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1096 (2007), established that meal period payments were wages, other courts are considering separate—but related—issues that may have impacted the parameters or amounts of any claimed damages. For instance, the issue of how a meal period must be "provided" (*i.e.* Does an employer have an affirmative obligation to ensure a 30 minute, uninterrupted meal period, or simply give the opportunity to take the meal period?) is currently unsettled. The settlement in this matter was reached only after consideration of these potentials.

Instances where class members were working during their meal periods were found in Defendant's time records. However, such instances did not have such regular occurrence as Defendant's failure to take into account computer and phone logs when calculating work-times.

Additionally, Defendant opposed these claims at the class certification stage, setting forth declarations from multiple employees, stating that they were never coerced or pressured to work through or skip meal periods.

If *Brinker* came down on the employer's side, Plaintiff's claims would be worthless. Plaintiff did not include any portion for penalties in this valuation, as any meal period violations were not willful.

Plaintiff valued these claims in a realistic range between $200,000 and $250,000.

3. Claims for Failure to Provide All Hours Earned of Personal Time Off ("PTO")

HARTFORD required its employees to use PTO time if they arrive to work less than 60 minutes late. However, HARTFORD limited PTO usage to a minimum of 15 minute increments.

Thus, when an employee arrived for work less than 15 minutes late, he/she lost compensable time, as a minimum of 15 minutes of PTO must be taken from their PTO bank. The PTO policy applied to all nonexempt employees. Upon hiring, and on every January 1, an employee receives a deposit of PTO hours into his/her PTO Bank.

HARTFORD also possessed a uniform tardiness policy. The tardiness policy applied to all nonexempt employees. Pursuant to the tardiness policy, absences of less than 60 minutes in duration are administered under the PTO policy. Specifically: time missed due to a tardy occurrence will be charged to the employee's PTO bank

However, for nonexempt employees, the minimum withdrawal from the PTO bank is 15 minutes. Class Members experienced a loss of compensation as a result of this PTO policy. As an example, six minutes of tardiness would result in a class member giving up nine additional minutes (to reach a 15-minute increment) of PTO. A class member's regular rate of compensation would not start until the fifteen minute mark, and his/her PTO was used until that time. Thus, HARTFORD would fail to compensate a class member for nine minutes of his/her earned work-time in such a scenario.

Plaintiff valued this claim in a realistic range of between $65,000 and $150,000.

4. Claims for Rounding Violations

Prior to providing payroll to Class Members, Defendant would "edit" the recorded work-time, transferring the work-time to a different numerical system. The work-time (recorded on a system of 1 to 60 minutes) is transferred to a separate system, based on 1 to 100. For example, 20 (out of a possible 60) work-minutes will be transferred to 0.33 (out of a possible 1.00). This "edit" process is standard and uniform as to class members.

Succinctly, Defendant would edit the work-time as follows: Defendant divides the minutes worked (ignoring hours) by 60, then deducts all but 2 decimals. For example, 20 minutes would be divided by 60, resulting in .3333333. HARTFORD then deducts all but 2 of the decimals, resulting in a representation of .33 (out of a possible 1.00).

The damage to Class Members was caused in the transfer of numerical systems. For example, if an employee is making $15.00 an hour, and works 20 minutes, that employee should receive $5.00

(or exactly one-third of 15). However, under Defendant's system, the employee would receive only $4.95 ($15.00 divided by 100 equals 0.15. 0.15 multiplied by 33 equals $4.95).

Defendant vehemently opposed these claims in its opposition to Plaintiff's class certification. (Dkt. # 34, 7:23-25.) Defendant's expert reported that the class was actually *overpaid* as a result of the rounding practices. (*Id*.)

Plaintiff valued these claims at as little as $0.00 (should Defendant have prevailed), but realistically in the range of between $500 and $5,000. Plaintiff did not include any portion for penalties in this valuation, as any rounding violations were not willful.

5. Claims for Wages Due and Owing at the Time of Termination

California Labor Code section 203 imposes a waiting-time penalty where an employer willfully fails to pay wages to an employee who is discharged or who quits. Here, Plaintiff faced a significant challenge in obtaining these penalties, as the burden was placed on Plaintiff to establish the "willful" element. Accordingly, Plaintiff placed minimal value on these claims.

6. Claims for PAGA Penalties

It is this firm's practice to fully pursue all available PAGA penalties only where the Defendant's violations may be deemed willful. As the foregoing has stated, Defendant's subsequent remedial changes in its compensation policies and practices negated any willful intent to underpay its employees. Accordingly, Plaintiff placed minimal value on these claims.

M. THE SETTLEMENT PRESENTS A REASONABLE COMPROMISE PROVIDING SUBSTANTIAL BENEFITS TO THE CLASS MEMBERS

The sum of the foregoing ranges is between $795,500 and $1,597,500. As the parties have settled for $1,200,000, it is thus clear that the settlement is fair on its face. Accordingly, the settlement should receive final approval.

N. PLAINTIFF IS A PROPER CLASS REPRESENTATIVE

It is undisputed, for purposes of this settlement only, that Plaintiff JACK is a qualified class representative in that she and the members of the class are similarly situated. (*See* Ex. 1, ¶ 12.) Ms. JACK is a member of the class she represents, and has participated extensively in the prosecution and settlement of this matter. (Sullivan Decl., ¶¶ 27-31.) Ms. JACK spent more than sixty hours helping

prosecute the matter, including meeting with counsel, reviewing documents, clarifying dates and policies, reviewing discovery responses and document production, confirming the truthfulness of claims her counsel asserted, and offering input into the defenses alleged by HARTFORD. (*Id.*)

VI. CONCLUSION

In light of the foregoing, Plaintiff respectfully requests the Court issue an order certifying the class for the purposes of settlement and granting final approval of the settlement.

Dated: April 24, 2011

SULLIVAN & CHRISTIANI, LLP

s/ Kevin D. Sullivan
Kevin D. Sullivan
Attorney for Plaintiff SHAWNDA JACK, individually and on behalf of other members of the general public similarly situated