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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, on behalf of its members employed by defendants, and RAUDEL COVARRUBIAS, DAVID SIMMONS AND STEPHEN S. SWADER, SR., individually and on behalf of all similarly situated current and former employees,

Plaintiffs,

v.

CONOCOPHILLIPS COMPANY and DOES 1 through 10, inclusive,

Defendants.

Case No. CV08-2068 PSG (FFMx)

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT; DECLARATIONS OF COUNSEL; EXHIBITS

Submitted Concurrently with:
1) Plaintiffs' Confidential Memorandum Re: Merits and Value of Settlement; 2) Plaintiffs' Motion for Award of Attorneys' Fees and Costs; 3) Plaintiffs' Memorandum Re: Proposed Incentive Awards to Named Plaintiffs

DATE: May 6, 2013
TIME: 1:30 p.m.
LOCATION: Courtroom 880

Judge: Hon. Philip S. Gutierrez

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TO DEFENDANT AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 6, 2013 at 1:30 p.m., in Courtroom 880 of the above-entitled court, located at the Roybal Federal Building, 255 East Temple Street, Los Angeles, California, Plaintiffs Raudel Covarrubias, David Simmons, and Stephen S. Swader, Sr., and Plaintiff United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC ("USW"), by and through their undersigned attorneys, hereby do move the Court for an Order Granting Final Approval of Class Action Settlement.

This Motion is made pursuant to Federal Rule of Civil Procedure 23(e). The motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, Declarations and Exhibits filed herewith, the pleading and papers filed in this action, as well as any further documentation submitted to the Court and oral argument of counsel.

DATED: April 8, 2013

HADSELL STORMER
RICHARDSON & RENICK LLP

By: s/ Randy Renick

Attorneys for Plaintiffs Raudel Covarrubias, David Simmons, and Stephen S. Swader Sr.

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Attorneys for Plaintiff USW

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I. INTRODUCTION

Plaintiffs Raudel Covarrubias, David Simmons, and Stephen S. Swader, Sr., and Plaintiff United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC ("USW"), on behalf of themselves and the classes which have been certified herein, seek final approval of the proposed $15.5 million class action settlement ("Settlement") of wage and hour claims brought on behalf of refinery Operators and Lab Workers employed in California by Defendant ConocoPhillips Company ("ConocoPhillips"),[1] between February 14, 2004 and December 12, 2012. The Settlement was preliminarily approved by this Court on December 12, 2012. (Dkt. Nos. 412-413).

The Settlement was reached after four and one-half years of hard-fought litigation. During that time the parties conducted extensive discovery and engaged in protracted motion practice, including the filing of three Motions for Summary Judgment, two consolidated Appeals, and three Motions for Class Certification. The case settled shortly before Plaintiffs' Motion for Summary Judgment was to be heard and just weeks before trial was to begin. As a result of the work put into this case, Plaintiffs' counsel had sufficient information to determine the likely range of outcomes should this matter have gone to trial. The resolution was the result of arms-length negotiations and two full day mediation sessions with David Rotman, a highly skilled and experienced mediator. It is an excellent result in light of all the relevant circumstances. Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement and enter the proposed Judgment filed concurrently herewith.

[1] ConocoPhillips has split into two companies. All of the refineries, including the California refineries, are part of a new company named Phillips 66.

II. STATEMENT OF FACTS

A. Pertinent Procedural History

The complaint in this matter was filed in Los Angeles Superior Court on February 15, 2008, and removed to the United States District Court for the Central District of California on March 27, 2008 under the Class Action Fairness Act. The complaint alleges violations of California wage and hour laws based on ConocoPhillips' failure to provide to certain classes of employees a "thirty minute meal period totally relieved of all duties." Complaint at ¶25. The complaint states claims for relief under two state law causes of action: 1) California Labor Code Section 226.7 and Section 11 of the Industrial Welfare Commission Wage Order No. 1-2001, and 2) Cal. Bus. & Prof. Code §17200, with a four year statute of limitations.

On October 27, 2011, this Court certified two subclasses

> All former, current, and future non-exempt hourly employees of Conoco who, at any time since February 15, 2004, worked as an operator on a shift schedule at a Conoco petroleum refinery located in Los Angeles, Santa Maria, or Rodeo California; and
>
> All former and current non-exempt hourly employees of Conoco who, at any time from February 15, 2004 through June 8, 2009, worked in the laboratory on a shift schedule at a Conoco petroleum refinery located in Los Angeles, Santa Maria, or Rodeo, California.

[Dkt. #326, at 18].

On April 30, 2012, Plaintiffs filed a Motion for Summary Judgment for the time period of February 14, 2004 to February 15, 2009. The parties mediated with David Rotman of Gregorio, Haldeman & Rotman on February 15 and again on May 8, 2012.[2] While an agreement in principle based upon a mediator's proposal was reached shortly after the 2nd day of mediation, it took the parties an additional six months to negotiate the final terms of the agreement and reduce it to writing. ("Settlement Agreement" attached as Exh. 1 to the Renick Declaration. (Renick Decl. at ¶7).

[2] The parties also mediated with Steven Rotman on May 18, 2009.

B. Plaintiffs' Claims regarding the Failure to Provide Meal Breaks

1. Operators and Laboratory Workers on 12-Hour Shifts Work on a Rotating Shift Schedule.

ConocoPhillips Company ("ConocoPhillips") operates two refineries in California, one in Los Angeles (consisting of the Carson and Wilmington facilities) and the other in San Francisco (consisting of the Rodeo and Santa Maria facilities). Each refinery operates continuously, 24 hours a day, seven days a week. The oil refining process is a dangerous operation that involves hazardous substances and has the potential for catastrophic consequences if something goes wrong. (Renick Decl. at ¶¶8-9).

Employees at the refineries who work a "rotating shift schedule," meaning they are paid for all hours worked on their shift, are referred to as "shift workers" or "shift employees." Operators and certain Laboratory Workers who work 12-hour shifts are "shift employees." (Renick Decl. at ¶10).

There are generally two types of Operators: Console (also known as "Board" or "Inside") Operators and Field (or "Outside") Operators. Console Operators sit at control boards, called "consoles," inside a control facility and monitor and make adjustments to the levels, pressures, temperatures, and other indicators on equipment, products, and processes in their units to ensure that the units are operating properly. Outside Operators work outside in the units and in satellite operating shelters and they are responsible for maintaining, monitoring, inspecting, and making adjustments to equipment at the direction of Console Operators and supervisors. To keep the refineries operating continuously, each unit has four crews of Operators who rotate between day and night shifts. Every crew on every shift must have certain minimum "crew positions" filled by an Operator at all times. (Renick Decl. at ¶11).

Laboratory Workers are responsible for running tests and analyses on samples of products made at the refinery, testing waste products to ensure they meet environmental specifications, and, when there is a unit upset, testing samples that Operators must rely

on to bring the unit back within specification. Laboratory workers manage quality control of the oil products made in the refineries, analyze samples, and run tests on samples. (Renick Decl. at ¶12).

Both Operators and Lab Workers on a 12-hour shift remain responsible for their units throughout their shifts. ConocoPhillips' written policies require Operators and Lab Workers to remain on the refinery premises and in or near their work areas throughout their shifts. Before leaving their area unit, they must obtain permission from their supervisor or have "proper authorized relief." Operators who leave their area or unit while still on their shift must carry their radios. Under the parties' 12-Hour Shift agreement, Operators and Lab Workers do not have designated or scheduled 30-minute periods during which they are expected to take their meal periods. Operators and Lab Workers typically eat at their work stations, or in the kitchen located near their work stations, when their work allows. (Renick Decl. at ¶13).

2. ConocoPhillips Implements Some Changes to the Meal Break Policies in 2009.

At different junctures in 2009, after this action was filed, ConocoPhillips took actions affecting the meal break policies applicable to Operators and Lab Workers. The refineries are covered by a single collective bargaining agreement between ConocoPhillips and USW. On February 6, 2009, after ConocoPhillips made a last, best, and final offer in bargaining over a new CBA, employees agreed to a CBA containing an "on-duty meal period agreement" drafted by ConocoPhillips covering Operators.[3] (Renick Decl. at ¶14).

Throughout this litigation, the Individual Plaintiffs have disputed the validity of the "on duty meal period agreement" for a variety of reasons, including the fact that the

[3] In March 2009, ConocoPhillips also implemented a procedure for paying for missed meal periods. SUF 27. Plaintiffs dispute that this practice is sufficient to comply with California law's requirement for penalty pay. There is no dispute, however, that ConocoPhillips did not pay Operators or Lab Workers an extra hour of pay for a missed meal period prior to March 2009.

on-duty meal agreement contemplates that employees *could* receive off-duty meals if ConocoPhillips chose to provide relief.

On June 8, 2009, ConocoPhillips also changed the Lab Workers' shift schedules. On that date, Lab Workers began a 13-hour shift during which they received 30-minute meal periods relieved of all duty. Until then, they had been required to remain on duty, in or near the laboratory, for the duration of their shifts unless they had permission to leave. (Renick Decl. at ¶16).

C. Parties

1. Defendant

ConocoPhillips Company ("ConocoPhillips") operates two refineries in California, one in Los Angeles (consisting of the Carson and Wilmington facilities) and the other in San Francisco (consisting of the Rodeo and Santa Maria facilities). ConocoPhillips has split into two companies. All of the refineries, including the California refineries, are part of a new company named Phillips 66. (Renick Decl. at ¶8).

2. Class Representatives

All three Class Representatives are currently employed by Defendant. Raudel Covarrubias is currently employed as an Operator at the Los Angeles refinery. Stephen Swader, Sr., is currently employed as an Operator at the Santa Maria refinery. Plaintiff David Simmons is employed as an Operator at the Los Angeles refinery, though his most recent assignment is to act as the Union's Health & Safety Representative. In its Order granting Class Certification, this Court found the three named Plaintiffs to be adequate representatives of the class under Rule 23(a). [Dkt. 326, Pages 1-12] (Renick Decl. at ¶17).

The three Named Plaintiffs dedicated many hours to this litigation and did so at great risk to their jobs. The Plaintiffs had their depositions taken, provided critical information to their attorneys and other class members that assisted in moving the

litigation forward, attended multiple depositions with company representatives present, and facilitated communications with the class regarding the ongoing status of the case and settlement. *See* Declarations of Raudel Covarrubias, David Simmons, and Stephen Swader and Memorandum Re: Proposed Incentive Awards to Named Plaintiffs filed concurrently.

D. Discovery and Investigation Conducted by Plaintiff

During the course of litigation in this matter the parties engaged in extensive formal discovery. Specifically, the parties took 18 depositions, including 5 depositions of Defendant's managers and supervisors. Plaintiffs served 3 separate Requests for Production on Defendant while Defendant served 6 separate Requests for Production on the Plaintiffs. Plaintiffs served one set of Special Interrogatories on Defendant containing 25 separate questions while Defendant served one set with 19 questions on Plaintiffs. ConocoPhillips produced, and Plaintiffs reviewed, over 119,000 pages of documents including disciplinary reports and actions, policies, manuals, and collective bargaining agreements. In addition, Defendant produced spreadsheets and database reports showing each shift worked by each class member and the applicable rate of pay for each shift during the class period. Plaintiffs retained Todd Stefan of Setec Investigations to organize, maintain and evaluate the timecard and payroll data. Based on all of the evidence obtained, Plaintiffs developed a sophisticated damage analysis modeling the damages they were likely to recover at trial applying a number of different assumptions and scenarios. (Renick Decl. at ¶18); *See* Plaintiffs' Confidential Memorandum re: Merits and Value of the Case submitted concurrently.

E. Settlement Terms

1. Class Certification.

The Settlement subclass stipulated to by the parties is virtually the same as certified by this Court on October 27, 2011:

> All non-exempt hourly employees of Defendant who, at any time from February 15, 2004 to the date of the preliminary approval hearing, worked as an Operator at a Phillips66 petroleum refinery located in Los Angeles (including the Wilmington and Carson facilities), Santa Maria, or Rodeo, California; and All non-exempt hourly employees of Defendant who, at any time between February 15, 2004 through June 8, 2009, worked in the laboratory on a shift schedule at a Phillips 66 petroleum refinery located in Los Angeles, Santa Maria, or Rodeo, California.

(Dkt. #326, at 18, Exh. "1," ¶19).

2. Total Settlement Fund

The total settlement amount is Fifteen Million, Five Hundred Thousand Dollars ($15,500,000). (Exh. "1," ¶18).

3. Payment of Standard Claims.

As set forth in detail in the Settlement Agreement attached as Exhibit 1, the primary mechanism for Settlement involves cash payment to members of the Plaintiff class according to a formula. The formula allows for payment of a percentage of the net recovery to each class member who files a valid claim based upon the number of shifts worked during the class period. For Operators, shifts worked prior to February 5, 2009 are valued at two credits per shift and shifts on or after February 5, 2009 are valued at one credit per shift. (Exh. "1," ¶5). For Lab Workers, shifts worked before June 8, 2009, are valued at two credits per shift. *Id.* There are 847 Class Members.

4. Additional Compensation for Active Litigants.

In recognition of the risks and burdens undertaken by the named Plaintiffs and those class members who actively participated in the litigation, mediations and settlement of this case, the settlement provides additional compensation in an amount not to exceed $15,000 for each to the three Named Plaintiffs. This payment shall be in addition to whatever portion of the settlement proceeds each such individual is otherwise entitled to receive. The enhancements are intended to compensate the three named Plaintiffs in relationship to the rest of the class in light of the additional burdens

and risks they have undertaken by assisting in the prosecution of the lawsuit. (Exh. "1," ¶24).

5. Attorney's Fees and Costs.

The settlement agreement provides for the payment of attorneys' fees in an amount not to exceed one-third 33.3% of the total settlement fund ($5,133,333.33), litigation costs up to $200,000 and the costs of claims administration. Plaintiffs limit their request for fees to $3,039,297.25 (20%) and costs of $98,315.29. (Exh. "1," ¶25). The costs of Administration are $58,806.26.

6. Legislative Amendment to Labor Code Section 512

The USW agrees to make a good faith effort to assist Defendant in supporting a legislative amendment to Section 512 of the Labor Code to include employees employed in the petroleum and chemical refining industry.

7. On Duty Meal Agreement

The Agreement provides that the USW and Defendant will enter into a mutually agreeable on-duty meal period Settlement Agreement covering operators at Phillips 66's California facilities. The amendment has been ratified by the USW membership. (the "On-Duty Meal Period Agreement"). (Renick Decl. at ¶19).

8. Class Notice and Administration of Claims.

The Settlement Agreement provides that each class member will be provided a Notice of Settlement informing them of the terms of the Settlement Agreement, their right to dispute the estimated settlement payment amount, their right to opt out of the class, their right to object to the settlement, and their right to be heard at the final hearing on the fairness of the settlement. (Exh. "1," ¶54). All class members who do not file a request for exclusion will receive a check for their share of the settlement. (Exh. "1," ¶IV, B).

Each Notice was individualized to include the number of shifts worked during the class period and the number of credits which form the basis for determining each

individual claimant's share of the settlement proceeds. In addition, each Notice included each class member's expected share of the settlement. (Exh. "1," ¶54).

Pursuant to the Court's December 12, 2012 Order Granting Preliminary Approval (Dkt. #412), Gilardi & Co. LLC, ("Gilardi" or "Administrator"), of Novato, California was retained to act as the impartial claims administrator. Pursuant to the Court's Order, Defendant provided to the Administrator a database which included 816 unique Class Members' names, last known address, dates of employment and the number of shifts worked during each year in the class period, as well as the number of shifts in the positions of Operator or Lab Worker. (Morrision Decl. at ¶ 2).

Upon receipt of the database, the Administrator updated the addresses against the National Change of Address System, which provides a current name and address for any individual who had filed a change of address form with the United States Postal Service in the prior five years. (Morrison Decl. at ¶ 2). The Administrator set up a toll free telephone number for class members to call with questions. (Morrison Decl. at ¶ 3).

On February 11, 2013, the Administrator sent the approved Class Notice to the 816 class members. (Morrison Decl. at ¶ 4). A second mailing to 31 class members who had not been included on the list provided by Defendants was made on February 26, 2013. (Morrison Decl. at ¶ 6). Of the 847 Notices sent to Class Members 18 were returned with no forwarding address. Searches were conducted and new addressees were obtained for 12 of those 18. The Administrator re-mailed the Notice to each of the updated addresses. (Morrison Decl. at ¶ 8).

The Motion for an award of attorneys' fees and costs was posted on the Gilardi & Co. website on March 19, 2013. (Morrison Decl. at ¶ 5).

The last day to file objections or opt outs was March 28, 2013. There were no objections or requests for exclusion. (Morrison Decl. at ¶¶ 9-10).

Gilardi's fees of $58,806.26 are to be paid out of settlement fund. (Exh. "1," ¶5).

All Class Members will receive their share of the Settlement. The gross settlement amount is $15,500,000. Assuming that the Court awards $3,040,842.25 in attorneys' fees, $98,756.08 in attorneys' costs, $45,000 for enhancement awards to the Named Plaintiffs, $58,806.26 in administration costs, and reserving $4,200 for escrow fees, Gilardi estimates that $12,252,395.41 (gross of taxes) will be available for distribution to the class members. Based on these numbers, Gilardi estimates that the median settlement payment (gross of taxes) will be $15,945.56, and the largest settlement payment (gross of taxes) will be $28,248.60. (Morrison Decl. at ¶ 12).

III. THE SETTLEMENT IS "FAIR, ADEQUATE AND REASONABLE" AND SHOULD BE GRANTED FINAL APPROVAL

It is well established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Svc. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). "[T]here is an overriding public interest in settling and quieting litigation" and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp*., 529 F.2d 943, 950 (9th Cir. 1976); *see, also, Utility Reform Project v. Bonneville Power Admin*., 869 F.2d 437, 443 (9th Cir. 1989).

In evaluating a proposed class action settlement, the Ninth Circuit has recognized that:

> [T]he universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable. The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant[4]; and the reaction of the class members to the proposed settlement. *Officers for Justice*, 688 F.2d at 625 (citations omitted); *accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

[4] There is no governmental participants in this action.

The court is entitled to exercise its "sound discretion" when deciding whether to grant final approval. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Torrisi*, 8 F.3d at 1375. In doing so, "the 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*, 688 F.2d at 625. "Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair." *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 671 F.Supp. 819, 822 (D. Mass. 1987).

Although "[t]he determination of what constitutes a 'reasonable' settlement is not susceptible of a mathematical equation yielding a particularized sum," *In re Michael Milken and Assoc. Secs. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993), each settlement in the instant matter is certainly reasonable.

As set forth below, this Settlement is fair, reasonable and adequate.

A. The Risk and Expense of Continued Litigation

While Plaintiffs believe their case against Defendant is strong, the Settlement eliminates significant risks they would face if the action were to proceed against Defendant. For instance, Plaintiffs would bear the burden of establishing liability, impact and damages. The Settlement is in the Class' best interest because it eliminates the risks of continued litigation, while at the same time creating a significant cash recovery.

Continued litigation against Defendant also would involve significant additional expenses and protracted legal battles, which are avoided through settlement. *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003), *aff'd*

396 F.3d 96 (2d Cir. 2005) ("The potential for this complex litigation to result in enormous expense, and to continue for a long time, was great"); *Marisol A. ex rel. Forbes v. Giuliani*, 185 F.R.D. 152, 163 (S.D.N.Y. 1999) (noting that trial would last at least five months and require testimony from numerous witnesses and experts); *In re Austrian and German Bank Holocaust Litig.*, 80 F.Supp. 2d 164, 174 (S.D.N.Y. 2000) ("Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them.").

As described above, this case has been vigorously litigated and the proposed Settlement is the result of more than four years of litigation between the parties. The Parties have deposed 18 witnesses related to the meal period policies and practices at Defendant's California refineries, produced and reviewed over 100,000 pages of documents and responded to dozens of interrogatories and requests for admission. In addition, Plaintiffs retained forensic computer experts Setec Investigations to sort, evaluate and analyze the class-wide shift and payroll information produced by Defendant for the hundreds of thousands of shifts at issue. Class Counsel worked closely with USW bargaining representatives to gain knowledge about the meal period policies and practices and the general working conditions of shift employees at each of the work sites included in the proposed settlement. (Renick Decl. at ¶20).

Settlement negotiations in this case were conducted over several months and, at all times, were adversarial, non-collusive, in good faith, and at arms' length. Both during and after the mediations, the Parties continued to exchange written proposals and discuss settlement terms through their counsel. Class Counsel sought and obtained input from the Named Plaintiffs in this case regarding the terms of a proposed settlement and, given the need for modifications to existing CBA in order to change ongoing meal period policies and practices, the USW was actively involved in the negotiation and approval of the "going-forward" aspects of the settlement. As this Court is well-aware, throughout the course of this litigation, the Parties engaged in vigorous, and often

highly contentious, litigation, including the filing of cross-motions for summary judgment, appeals and trial preparation. (Renick Decl. at ¶21).

Class Counsel has determined that settling the claims against Defendant is in the best interest of the Class. The Settlement provides an immediate and significant cash benefit to Class Members and avoid the risk of a trial relating to, *inter alia*, the scope of liability and the amount of provable damages. *See also* Plaintiffs' Confidential Memorandum re: Merits and Value of the Case submitted concurrently.

For all of these reasons, the Settlement obtained is certainly "fair, adequate and reasonable" to the Class. Accordingly, final approval should be granted.

B. Strength of Plaintiffs' Case

One important factor in evaluating the fairness and adequacy of the Settlement is the strength of plaintiffs' case and the likelihood of a significantly larger recovery after the completion of the trial and any subsequent appeals. *7-Eleven Owners for Fair Franchising v. Southland Corp., supra*, 85 Cal. App. 4th 11345 (200) at 1145. On the other hand, courts are not to "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.* at 1145

This Agreement is the product of arms-length, non-collusive negotiations attended by experienced class counsel. *See* Declaration of Randy Renick at ¶¶ 23-28. Counsel's judgment that the Settlement is fair and reasonable is entitled to great weight. *Officers for Justice,* 688 F.2d at 625; *Rutter & Wilbanks Corp. v. Shell Oil Co.,* 314 F.3d 1180, 1188 (10th Cir. 2002); *Wilkerson v. Martin Marietta Corp.,* 171 F.R.D. 273, 288-89 (D.Colo. 1997).

C. The Amount Offered in Settlement

In determining whether a proposed settlement is reasonable and adequate, appellate courts apply the following analysis: "It is well settled that in the judicial

consideration of proposed settlements, 'the [trial] judge does not try out or attempt to decide the merits of the controversy', and the appellate court 'need not and should not reach any dispositive conclusions on the admittedly unsettled legal issue'." *7-Eleven Owners for Fair Franchising v. Southland Corp.*, *supra*, 85 Cal. App. 4th at 1146 (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974). Nor is the face amount of damages claimed by plaintiffs to be the measure of the settlement's adequacy without any regard for the inherent risks involved: "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial." *Wershba v. Apple Computer*, supra, 91 Cal. App. 4th at 246. The court elaborated there:

> A settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable. Compromise is inherent and necessary in the settlement process. Thus, even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. *Id.* at 240.

Many settlements have been approved which represented a minuscule fraction of the damages claimed. *See*, *Rebney v. Wells Fargo Bank*, *supra*, 220 Cal. App. 3d 1117 (1990) at 1139 (approving settlement although monetary relief was "relatively paltry"). *See also*, In re Domestic Air Transp. Antitrust Lit. (N.D. Ga. 1993) 148 F.R.D. 297, 325 (approving settlement of 12%-15.3% of possible untrebled damage, *i.e.*, recovery before automatic trebling); *Behrens v. Wometco Enterprises, Inc.* (S.D. Fla. 1988) 118 F.R.D. 534, 543 (approving settlement of 3-5% of estimated recovery at trial); *Newman v. Stein* (2d. Cir. 1972) 464 F.2d 689 (approving settlement of 14% of potential recovery), *cert. denied*, 409 U.S. 1039 (1972).

This Agreement is the product of arms-length, non-collusive negotiations attended by experience class counsel. *See* Declaration of Randy Renick at ¶20. Counsel's judgment that the Settlements are fair and reasonable is entitled to great

weight. (*Officers for Justice*, 688 F.2d at 624.) *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002); *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 288-89 (D.Colo. 1997).

The Settlement provides for the payment of $15,500,000. Based on Plaintiff's counsel's assessment of damages, this represents 100% of the damages incurred prior to Defendant's February 5, 2009 implementation of an on-duty meal period. Had Plaintiffs prevailed on their challenge to the on-duty meal period, the Settlement would represent 60% of the damages incurred from the start of the class period to the date of preliminary approval, December 12, 2012. (Renick Decl. at ¶22).

The recovery here is fair, reasonable, and adequate in light of the continued risk, costs, and uncertainty of litigation. "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004). Approval of a class settlement is justified where "the settlement terms compare favorably to the uncertainties associated with continued litigation regarding the contested issues in th[e] case." *DirecTV*, 221 F.R.D. at 526.

Finally, Class Counsel, who have many years of experience in class action and wage and hour law, recommend the proposed settlement and believe that it is in the best interests of the Settlement Class. "Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation. This is because parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation. Thus, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *DirecTV*, 221 F.R.D. at 528 (internal quotations, alterations, and citations omitted). Here, in pursuing this case and related actions aggressively for more than four years, Class Counsel have demonstrated a high degree of competence in the litigation of the meal period claims at issue here and

strongly believe that the settlement is a fair, reasonable, and adequate resolution of the claims of the Settlement Class and is preferable to continued litigation.

For all of the foregoing reasons, the proposed class settlement should be finally approved because it is fair, reasonable, adequate, and in the best interests of Settlement Class Members.

D. The Attorney's Fees Sought Falls within the Range of Possible Approval

As set forth in the accompanying Motion for the Award of Attorneys' Fees and Costs, the Settlement Agreement provides for attorney's fees up to one-third of the total settlement of $15,500,000, which is $5,133,333. (Exh. "1," ¶25). Plaintiffs, however, have limited their request for fees to $3,040,842.25 (20%) and costs of $98,756.08.

E. Additional Compensation for Named Plaintiffs

As set forth in Plaintiffs' Memorandum Re: Proposed Incentive Awards to Named Plaintiffs, an Incentive Award to each of the three Named Plaintiffs in the amount of $15,000 is appropriate here. The proposed additional compensation, also known as incentive or service awards, for the current named Plaintiffs is consistent with a fair, just and adequate settlement. "Courts routinely approve incentive awards to compensate named Plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D.Pa. 2000).

The size of the incentive awards – $15,000 to each of the 3 named Plaintiffs – is consistent with the range of incentive awards approved by other federal judges in class action cases. For example, in employment discrimination and employment class actions, which are the most representative samples due to the threat to the named Plaintiffs of economic loss from retaliation, law professors Eisenberg and Miller found that the average incentive awards in those samples were about $12,000 and $70,000 respectively. *See* Eisernberg & Miller, *Incentive Awards*, 55 UCLA L.Rev. at 1353. Plaintiffs have found numerous cases where courts have approved incentive awards

similar to, or far larger than, those proposed here. *See, e.g.*, *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp.2d 322 (E.D. Pa.. 2007)(Incentive award of $75,000 to one named plaintiff); *Bynum v. District of Columbia*, 412 F. Supp. 2d 73 (D. D.C. 2006)(incentive awards of $200,000 divided among the six named plaintiffs); *RMED Intern., Inc. v. Sloan's Supermarkets, Inc.*, 2003 WL 21136726 (S.D. N.Y. 2003)(incentive award of $25,000 to one named plaintiff); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685 (N.D.Ga.2001)(incentive award of $300,000 to each of four named plaintiffs); *Van Vraken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D.Cal.1995) (incentive award of $50,000 to one named plaintiff)*; Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D.Ohio,1991)(incentive award of $50,000 to each of six named plaintiffs).

The enhancement awards here are also proportionate to the monetary relief provided by the Settlement Agreement as the monetary benefits provided by the Settlement Agreement to the absent members of the Settlement Class will far outweigh the additional compensation sought for the named Plaintiff. The enhancement awards, totaling $45,000 is 0.3% of the settlement.

Here, each of the class plaintiffs took the risk that future employment, whether it was with the Defendant or another refinery, would also be jeopardized. They took this risk while others choose not to, and took the risk to benefit the other class members. Putting one's employment at risk should be considered by the trial court in making an enhancement award.

F. The Proposed Payment to the Claims Administrator is Reasonable and Proper

Plaintiffs request final approval for claims administration costs to be paid to Claims Administrator Gilardi & Co. in the amount of $58,806.26. As set forth in the attached declaration of Andy Morrison, the Claims Administrator promptly and properly distributed the Class Notice to Class Members and has completed its duties in accordance with the settlement terms, which the Court preliminarily approved.

IV. CONCLUSION

The parties have negotiated an agreement that resolves all issues between the class and the Defendant. The agreement disposes of the risks, costs and delay associated with further litigation, while allowing payments to class members on the equitable basis of days worked during the class period by each class member. Defendant denies liability in any amount approaching the amount of the settlement, but seek through this settlement, to put to rest the continued litigation. There have been no objections. The Settlement is reasonable, fair, and adequate and should be granted final approval by the Court.

DATED: April 8, 2013

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