Dylan Pollard, Esq., SBN 180306
Matt C. Bailey, Esq., SBN 218685
Roxanna Tabatabaeepour, Esq., SBN 260187
POLLARD | BAILEY
9701 Wilshire Blvd., 10th Floor
Beverly Hills, CA 90212
Telephone: (310) 854-7650
Facsimile: (310) 492-9934

Attorneys for Plaintiffs, Michael Robinson, Randy Blair and Keene Kirksey

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA-SAN FRANCISCO DIVISION

MICHAEL ROBINSON, an individual; RANDY BLAIR, an individual; and KEENE KIRKSEY, an individual; on behalf of themselves and all other similarly situated current and former employees,

Plaintiff,

vs.

NEXTERA ENERGY OPERATING SERVICES, LLC, a Delaware Limited Liability Company; NEXTERA ENERGY RESOURCES, LLC, a Delaware Limited Liability Company; and DOES 1 through 100, Inclusive,

Defendants.

Case No.: CV-10-02671-SI

CLASS ACTION

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

[Filed Concurrently with the *Declaration Of Matt C. Bailey, Esq.*; *Declaration of Alejandra Zárate* & *[Proposed] Order Granting Final Approval Of Settlement*]

Filed: May 17, 2010
Judge: Hon. Susan Illston

Date: August 31, 2012
Time: 9:00 a.m.
Dept.: Courtroom 10

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PLEASE TAKE NOTICE that on August 31, 2012, at 9:00 a.m., or as soon thereafter as counsel may be heard, Plaintiffs Michael Robinson, Randy Blair and Keene Kirksey ("Plaintiffs") will move this Court, located in Dept. 10 of the United States Courthouse located at 450 Golden Gate Ave., San Francisco, CA 94102-3483, for an order as follows:

1. Granting final approval of the class action settlement set forth in the *Amended Stipulation Of Settlement ("Settlement Agreement")*, a true and correct copy of which is attached to the proposed *Order Granting Final Approval Of Settlement*, filed concurrently herewith, as **Exhibit 1**;

2. Finding that the Notice to the Class constituted the best notice practicable under the circumstances to all potential members of the Class, and fully complied with Fed. R. Civ. P. 23(c) and (e);

3. Finding that Defendant has satisfied its notice obligations pursuant to the Class Action Fairness Act, at 28 USCS § 1715(b);

4. Directing payment to Settlement Class Members and to CPT Group, Inc. for its services as the Settlement Administrator pursuant to the terms of the Settlement Agreement.

Concurrent with the instant Motion, and under a separate cover, Plaintiffs also move this Court for approval of Class Counsel's attorney's fees and costs, and approval of the enhancement payment to the representative Plaintiffs.

This motion will be based on this Notice, the Memorandum of Points and Authorities, the Settlement Agreement and all exhibits thereto, the Declaration of Matt C. Bailey, Esq., the Declaration of Alejandra Zárate, the documents and records on file in this matter, and such additional arguments, authorities, and evidence and other matters as may be presented by the parties hereafter.

Dated: August 16, 2012

POLLARD | BAILEY

By: _____

MATT C. BAILEY, Esq.
DYLAN F. POLLARD, Esq.
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Michael Robinson, Randy Blair and Keene Kirksey ("Plaintiffs"), individually and on behalf of all others similarly situated, respectfully move this Court for an Order granting final approval the proposed Settlement of the above-captioned wage and hour class action against Defendant NextEra Energy Operating Services, LLC ("NextEra" or "Defendant"), which will dispose of the instant Action in its entirety.

In deciding whether to grant final approval of the proposed Settlement, the primary issue to be decided is whether the Settlement falls within the range of possible approval – i.e., a range of being fair, adequate and reasonable. As demonstrated herein, the proposed Settlement embodies all of the features of a settlement that is fair, reasonable, adequate, and in the best interests of the members of the Class, as it is the product of **(1)** arms-length negotiations, employing a neutral mediator, **(2)** negotiated by experienced class action attorneys, **(3)** subsequent to undertaking sufficient investigation necessary to evaluate the relative strength and value of the Class' claims, and **(4)** reflects a reasoned compromise based directly on the relative strength and value of the Class' claims, as well as the risks, expense, complexity and likely duration of further litigation.

Importantly, class member reaction to the Notice was overwhelmingly positive. There were **no objections** and only one exclusion request was received, representing a 99.62% participation rate. Similar numbers have been deemed exceptional in the wage context [*Chu v. Wells Fargo Invs., LLC*, 2011 U.S. Dist. LEXIS 15821, 11 (N.D. Cal. Feb. 15, 2011) ("it is strong testament to the fairness of the settlement that not a single objector has come forward and that only 16 out of 2,752 noticed class members opted out.")], and well above participation rates in non-reversionary meal break settlements which final approval was granted. *See e.g. Gong-Chun v. Aetna Inc.*, 2012 U.S. Dist. LEXIS 96828, 44 (E.D. Cal. July 11, 2012) ("[L]ess than two percent of Class Members opted out of the Settlement. Further, no objection to the Settlement Agreement was received…. The response of the class was positive, and this weighs in favor of finding that the settlement is

favorable to the Class Members.").

For these reasons, as set forth more fully herein, Plaintiffs respectfully request that this Court enter the proposed Final Approval Order submitted herewith.

II. STATEMENT OF THE CASE

A. THE PARTIES

Defendant NextEra Energy Operating Services, LLC is a Delaware company which, among other things, is in the business of operating wind generation plants in California. Defendant owns and/or operates approximately thirteen (13) distinct wind-farm locations throughout the State of California.

Plaintiff Michael Robinson was employed by Defendant in the position of *Wind Technician III* from approximately July 2003 to February 2008. From the period of 2006 to February 2008, Plaintiff Robinson performed work in this position at the *Green Ridge* and *WPP 90, 91, 91-2, 92* wind-farm locations.

Plaintiff Randy Blair was employed by Defendant in the position of *Wind Technician I* from approximately 1998 to December 2008. From the period of 2006 to December 2008, Plaintiff Blair performed work in this position at the *Green Ridge* and *WPP 90, 91, 91-2, 92* wind-farm locations.

Plaintiff Keene Kirksey was employed by Defendant in the position of *Wind Technician II* from approximately October 2003 to July 2009. From the period of 2006 to July 2009, Plaintiff Kirksey performed work in this position at the *Green Ridge*, *Diablo*, and *WPP 90, 91, 91-2, 92* wind-farm locations.

B. THE CERTIFIED SETTLEMENT CLASS

The Settlement will dispose of the Action as to the following settlement class certified by the Court:

> All persons employed by NextEra Energy Operating Services, LLC who, from May 17, 2006 to May 16, 2012, performed work in the position of Wind Technician I, Wind Technician II, Wind Technician III, and/or Wind Technician Leader at a wind generation plant owed and/or operated by NextEra in California..

See Amended Settlement Agreement, at ¶1(a); *Preliminary Approval Order*, at 2:1-5.

The above certified Settlement Class encompasses a total of 265 individuals, one of whom has subsequently requested to be excluded after receiving the Notice of Settlement. *See Declaration of Alejandra Zárate* (*"Zárate Dec."*), at ¶12.

C. THE CLASS ACTION COMPLAINT

On May 17, 2010, Plaintiffs filed the instant Action, the thrust of which alleges that Defendant, by way of uniform policies and practices which subjected Class Members to continuous control, failed to provide Class Members access to off-duty meal and rest periods, compensation for all compensable working time and accurate wage statements that included all hours actually worked, or accurate statements of gross pay. The *First Amended Complaint* alleges the following causes of action: **(1)** Failure to Provide Meal Periods (or compensation therefor); **(2)** Failure to Provide Rest Periods (or compensation therefor); **(3)** Failure To Pay Wages For All Hours Worked; **(4)** Failure To Pay Overtime Compensation; **(5)** Failure To Provide Accurate Wage Statements; and **(6)** Unlawful, Deceptive, and/or Unfair Business Practices (*B & P* §17200 Et Seq.).

D. PLAINTIFFS' INVESTIGATION

Subsequent to Plaintiffs filing of the Complaint, the Parties engaged in substantial discovery, which was sufficient to enable Plaintiffs' Counsel to evaluate the strength and value of the Class' claims for purposes of settlement. *See Declaration of Matt C. Bailey In Support Of Motion For Final Approval ("Bailey Dec."*), at ¶9-13.

For their part, Plaintiffs' Counsel propounded significant written discovery – including four sets of Requests for Production of Documents, two sets of Special Interrogatories and one set of Requests for Admissions – and reviewed in excess of 1,000 pages of documents, comprised of: **(a)** Defendant's California policy manuals and policy-related documents, including Defendant's standardized policies relating to meal and rest periods, employee compensation, and employee time keeping, **(b)** records relating to the three named Plaintiffs, including personnel files and time records, and **(c)** documentation necessary to identify the composition of the Class and evaluate potential damages. *See id.*, at ¶¶9-10. In addition, subsequent to administration of a *Pioneer Notice*, Plaintiffs' Counsel conducted a standardized

factual intake of 47 current and former Wind Technician employees (approximately 20% of the proposed Class) with regard to Plaintiffs' theory of liability, enabling Plaintiffs' Counsel to evaluate Defendant's practices at each of Defendant's California wind-farm locations. *See id*., at ¶11.[1]

For their part, Counsel for Defendant propounded three sets of Requests for Production of Documents and Special Interrogatories and took the depositions of each of the three named Plaintiffs. *See id*., at ¶12.

Based on Plaintiffs' Counsel's experience obtaining certification and litigating similar claims, such investigation was sufficient to expose and evaluate the strengths and weaknesses of the substantive merit of the Class' claims, as well as the likelihood of obtaining and maintaining certification of such claims through trial. *See id*., at ¶12.

E. SETTLEMENT NEGOTIATIONS

The proposed Settlement is the product of extensive and on-going arms-length negotiations between the Parties, entailing three full days of mediation with two separate mediators. *See Bailey Dec.*, at ¶15-16.

On October 17, 2011, the Parties attended mediation before Robert T. Fries, Esq. *See id*., at ¶15. While the mediation was not successful, it served to highlight for the Parties significant issues relating to the strengths and weaknesses of the Plaintiffs' case. *Id*. Thereafter, on November 9, 2011 and November 10, 2011, the Parties attended mediation before Alan Berkowitz, Esq. of Judicate West, a well-regarded mediator with significant experience mediating wage and hour class action cases. *See Bailey Dec.*, at ¶16. The mediation process was hard fought, with both sides presenting reasoned and informed arguments, requiring a second day of mediation. *Id*. Thereafter, negotiations continued through and until January 27, 2012, whereupon the finalized Settlement Agreement that is the subject of this motion was finally agreed upon, and then subsequently executed. *Id*.

[1] It bears noting that the discovery process was hard fought, requiring the Court to order that Defendant provide responses to Class discovery [*Dkt No. 23*], and to resolve disputes over the scope, content and administration of the *Pioneer Notice*. *See Dkt Nos. 23 and 27*.

F. THE PROPOSED SETTLEMENT

The *Amended Settlement Agreement ("Settlement Agreement")*, attached to the proposed *Order Granting Final Approval of Settlement* as **Exhibit "1,"** sets forth the central terms of the Settlement reached by the Parties, including the following key features:

1. Defendant agrees to settle this matter for a maximum amount that shall not exceed Six Hundred Fifty Thousand Dollars ($650,000.00) ("Gross Settlement Amount"), from which the following payments will be made: **(a)** payments to Settlement Class Members, including Defendant's portion of any payroll taxes; **(b)** claims administration costs; **(c)** incentive payments to the Class Representatives; and **(d)** attorneys' fees and costs. *See Settlement Agreement*, at ¶2(a). The Settlement is non-reversionary, administered without a claims process, and requires that any undelivered funds be distributed to a charitable/nonprofit organization via *cy pres*. *See id*., at ¶4(a). In no event shall less than the $650,000.00 Gross Settlement Fund be paid by Defendant. *See id*.

2. Members of the Settlement Class who do not opt-out (i.e. "Settlement Class Members") will receive an equitable share of the "Net Settlement Amount" – which under the proscribed allocation formula will be no less than $427,500.00. *See Settlement Agreement*, at ¶2(b)(v). The amount paid to each Settlement Class Member will be based upon a formula that equitably distributes the Net Settlement Amount based upon the number of workweeks each Settlement Class Member was employed by Defendant during the Class Period. *See id*., at ¶3(a)-(b). Based on this formula, the average payment to a Settlement Class Member is currently estimated to be $1,619.71, with the highest payment being $4,044.97 and the lowest payment being $16.18. *See Zárate Dec.*, at ¶13.

3. The cost of Settlement administration, which is to be paid from the Gross Settlement Amount, has been determined to be $11,500.00. *See Zárate Dec.*, at ¶14. This is below the estimated "not to exceed" amount of $15,000.00. *See Settlement Agreement*, at ¶2(b)(i).

4. Upon application to and approval by the Court, the three Class Representatives will receive incentive payments, to be paid from the Gross Settlement Amount, in the amount

of Ten Thousand Dollars ($10,000.00) each, for a total of Thirty Thousand Dollars ($30,000.00). *See id.*, at ¶2(b)(ii).

7. Upon application to and approval by the Court, Class Counsel will receive an award of attorneys' fees in an amount of 25% of the Gross Settlement Amount ($162,500.00) for their efforts in litigating this action on behalf of the Class. *See Settlement Agreement*, at ¶2(b)(iii). Counsel will also seek to recover costs incurred in prosecuting the Action in an amount not to exceed $15,000.00. *See id.*, at ¶2(b)(iv).

G. PRELIMINARY APPROVAL

On May 16, 2012, subsequent to the Parties making modifications to the Settlement Agreement as proposed by the Court, this Court entered its *Order Granting Preliminary Approval* (Dkt No. 55).

H. FACILITATION OF NOTICE AND REACTION OF THE CLASS

On June 15, 2012, the Settlement Administrator provided Notice to the Class using first class mail pursuant to the Order of this Court. *See Zárate Dec.*, at ¶6. A true and correct copy of the Notice which was provided is attached as **Exhibit B** to the *Settlement Agreement*. Of the 265 Notice packets sent, only 9 packets were ultimately deemed by the Claims Administrator to be "truly undeliverable" after curative efforts were undertaken. *See Zárate Dec.*, at ¶8.

The reaction of the Class has been significantly positive, as there were **no objections** to the Settlement [*Id.*, at ¶11; *Bailey Dec.*, at ¶28], and only one exclusion request was submitted. *See Zárate Dec.*, at ¶9.

III. LEGAL ARGUMENT

A. STANDARDS FOR FINAL APPROVAL OF A CLASS SETTLEMENT

Pursuant to FRCP, Rule 23, "[t]he claims … of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." *See* Fed. R. Civ. P. 23(e)(1)(A). "Approval under this rule entails a two-step process: (1) preliminary approval of the settlement; and (2) final approval of the settlement at a fairness hearing following notice to the class." *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222, 10 (N.D. Cal. Sept. 12, 2011); *see also* David F. Herr, *Manual for Complex*

Litigation (Fourth) §21.632 (West 2004).

In evaluating a proposed settlement for final approval, the Court's inquiry "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." *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir., 2009). "To determine if a settlement satisfies these criteria, the trial court examines: **(1)** the strength of the 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 the proceedings; **(6)** the experience and views of counsel; **(7)** the presence of a governmental participant; and **(8)** the reaction of class members to the proposed settlement." *See Wren v. RGIS Inventory Specialists*, 2011 U.S. Dist. LEXIS 38667, 19 (N.D. Cal. Apr. 1, 2011) (citing *Churchill Village v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). "Not all of these factors will apply to every class action settlement" and "[u]nder certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval." *See Nat'l Rural Telcoms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525-526 (C.D. Cal., 2004).

In evaluating these factors, the Court's analysis should be guided by the following general principles:

First, due regard should be given to what is otherwise a private consensual agreement between the parties. *See Rodriguez*, 563 F.3d at 965 ("This circuit has long deferred to the private consensual decision of the parties."). "Settlement is a compromise, which balances the possible recovery against the risks inherent in litigating further." *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222 at 24. Indeed, "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *See Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th Cir. 1982). As such, "the settlement or fairness hearing is not

to be turned into a trial or rehearsal for trial on the merits" or "judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *See id*. "[T]he Court need only review the parties' proposed settlement to determine whether it is within the permissible '***range of possible judicial approval***' and thus, whether the notice to the class and the scheduling of the formal fairness hearing is appropriate." *See Gardner v. GC Servs.*, 2011 U.S. Dist. LEXIS 126607, 16 (S.D. Cal. Nov. 1, 2011) (emphasis added).

Second, "[w]hile balancing all of these interests, the court's inquiry is ultimately 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.'" *See Knight v. Red Door Salons, Inc.*, 2009 U.S. Dist. LEXIS 11149, 8 (N.D. Cal. Feb. 2, 2009). Thus, an "agreement … reached through arms-length negotiation between experienced parties whose negotiations were overseen by an experienced mediator … is entitled to a presumption of fairness." *See Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377, 44 (C.D. Cal. Apr. 12, 2010); *Wren*, 2011 U.S. Dist. LEXIS 38667 at 20 ("An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining.").

B. THE SETTLEMENT MEETS ALL THE CRITERIA FOR FINAL APPROVAL

Applying the above factors, the proposed Settlement embodies all of the key features of a settlement that is fair, reasonable, adequate, and in the best interests of the members of the class, and as such, meets all the criteria necessary for final approval.

1. The Factors Giving Rise to a Presumption of Fairness Exist

A presumption of fairness exists here, as the proposed Settlement **(1)** is the product of extensive arms-length negotiations brokered by an independent mediator knowledgeable in wage and hour class litigation [*Bailey Dec.*, at ¶¶15-27], **(2)** that was negotiated by Counsel with significant experience in similar wage and hour class litigation [*See id.*, at ¶¶2-8], **(3)** which occurred after Counsel had conducted sufficient investigation to evaluate the strength and potential value of the Class' claims, as well as the likelihood of obtaining and maintaining

class certification of such claims through trial. *Id*., at ¶¶9-13. Based thereon, the Court should give considerable weight to the competency and integrity of Counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct.

2. The Relative Strength of the Plaintiffs' Case Balances in Favor of Approval of the Settlement

The relative strength of the claims brought on behalf of the Class weigh in favor of the Court finding that the settlement is fair, adequate, and reasonable, as various issues existed which had the potential to completely eliminate recovery by Class Members on their claims.

With regard to meal period and overtime claims – which are the Class' strongest claims – the relative strength turned on the Parties' dispute as to whether Class Members were subject to Defendant's "continuous control," and as a result, failed to receive access to "off-duty" breaks and compensation for all time mandated by law.[2] *See Bailey Dec*., at ¶¶18-22.

Specifically, Plaintiffs claimed that Wind Technician employees were systematically confined to wind-farm locations, and as such, never received a legally-compliant meal period [3] based on **(1)** the fact wind-farms were geographically expansive and remote, and **(2)** that Wind Technician employees were required to use company trucks to commute to and within the various wind-farm locations, but could not use such vehicles for personal purposes as a matter

[2] As is expressly mandated by the Wage Orders, on-duty working time encompasses all time which employees are "subject to the control of an employer" [8 CCR 11040(2)(K) ("'Hours worked' means the time during which an employee is subject to the control of an employer….")], and as such, "California law requires that employees be compensated for all time 'during which an employee is subject to the control of an employer.'" *See Rutti v. Lojack Corp.*, 596 F.3d 1046, 1061 (9th Cir., 2010). As held by the California Supreme Court, employees are deemed to be subject to an employer's "control" within the meaning of the Wage Orders to the extent they are not permitted to "use 'time effectively for their own purposes.'" *See Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 586 (2000).

[3] The California Supreme Court has concluded that the inability to freely leave the job site for a meal break amounts to control, *per se*. *See Morillion*, 22 Cal. 4th at 583 ("'When an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control.'"). This is not a novel concept, but as reflected in the *DLSE Enforcement Manual*, is a longstanding, generally accepted principle of California law. *See DLSE Enforcement Manual*, at §46.5 ("Where an employee – although relieved of all duties – is not free to leave the work place during the time allotted to such employee for eating a meal, the meal period is on duty time subject to the control of the employer, and constitutes hours worked.").

of standardized company policy.[4] *See id.*, at ¶19. Plaintiffs further claimed that Wind Technician employees were entitled to unpaid overtime compensation, as Defendant deducted 30 minutes each day based on the assumption that lawful "off-duty" meal periods were being provided. *Id*. Defendant disputed Plaintiffs' break and overtime claims on the grounds that **(1)** it did not enforce the vehicle policy relied upon by Plaintiffs, which Defendant claimed would be evidenced by testimony that Wind Technicians freely utilized company vehicles to leave the wind field for meal periods,[5] and **(2)** that Wind Technicians, who worked in the wind fields in two-man teams, at all times had complete discretion over the timing and manner which meal and rest periods were taken. *See Bailey Dec.*, at ¶20.

As to the remaining claims – which are largely derivative of the break and overtime claims – the relative strength is arguably even more attenuated.

Plaintiffs' penalty claims under Labor Code Section 226 and Labor Code Section 203, which are predicated upon on alleged break and overtime violations, are subject to the same disputed issues discussed above. *See Bailey Dec.*, at ¶24, 26. However, with regard to Section 203 waiting time penalties, Defendant maintained that even if it was ultimately found liable on Plaintiffs' break and overtime claims, the basis on which Defendant opposed liability would establish a "good faith justification" under 8 CCR 13520(a).[6] *See Bailey Dec*., at ¶26. Moreover, with regard to the paystub claim, Defendant also disputes that Plaintiffs can establish the element of "injury," which is an essential element of a claim under Section 226(a). *See Bailey Dec.*, at ¶24.

In sum, the forgoing issues had the potential to completely eliminate recovery by Class

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4 The Ninth Circuit has concluded that an employer's practice of requiring the use of company trucks coupled with a policy precluding the use of vehicles for personal use gives establishes "total control." *See Rutti*, 596 F.3d at 1062 ("Here, the level is ***total control***. To repeat, Rutti was required to use the company truck and was permitted no personal stops or any other personal use. Thus, under *Morillion*, Rutti had a valid state-law claim for compensation.").

5 Plaintiffs dispute Defendant's contention, in large part, based on the fact that the language of the policy was inconsistent with Defendant's construction of discretionary enforcement, as well as the fact that Plaintiff Robinson was subject to formal written discipline for using the company truck to travel to a convenience store to get food. *See Bailey Dec.*, at ¶19.

6 The good faith justification defense requires that the employer "present[] a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee." *See* 8 CCR 13520(a).

members on the alleged claims, as well as impact the ability to obtain and maintain certification of such claims through trial. As such, this factor weighs heavily in favor of resolution by way of the compromise set forth in the Settlement.

3. The Risk, Expense, and Complexity of Further Litigation Balances in Favor of Approval of the Settlement

Approval of the proposed Settlement is especially appropriate in light of the risk, expense, and complexity of further litigation.

As discussed above, the proposed Settlement takes into consideration the specific factual and legal hurdles faced by the Class in establishing Defendant's liability in this case. *See Bailey Dec*., at ¶¶17-27. This is material, especially when viewed in conjunction with the fact that there is always inherent risk to further litigation, including the risk of obtaining and maintaining class certification through trial.

In addition to the forgoing, inherent uncertainty and risk may also exist insofar as "the proper interpretation of California's statutes and regulations governing an employer's duty to provide meal and rest breaks to hourly workers" was an issue that was pending before the California Supreme Court at the time of mediation. It is established that risks associated with the outcome in *Brinker* created uncertainty supporting settlement. *See e.g. Gong-Chun v. Aetna Inc.*, 2012 U.S. Dist. LEXIS 96828, 38 (E.D. Cal. July 11, 2012) (concluding that "there were significant risks in continued litigation and no guarantee of recovery given the current state of the law due to the pendency of *Brinker*, particularly as it related to the meal break claims."); *Knight v. Red Door Salons, Inc.*, 2009 U.S. Dist. LEXIS 11149, 9 (N.D. Cal. Feb. 2, 2009) ("The law is also uncertain concerning Plaintiffs' meal and rest break claims. [] Given the risks associated with continued litigation, the Settlement Agreement, which offers an immediate and certain award for all of the Class Members, appears a much better option."); *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900, 19-20 (N.D. Cal. Apr. 3, 2009) ("regarding Plaintiffs' chance of success in this case, Defendants note that the question of an employer's duty to provide rest and meal periods is an open one, signaling even less certainty for Plaintiffs.").

These risks, when balanced with the fact that the settlement achieved significant recovery for Class Members, weigh strongly in favor of approval of the Settlement.

4. The Benefits Conferred by the Settlement Balance in Favor of Approval

As discussed above, the Settlement provides Class Members an opportunity to claim a significant monetary benefit that falls well within the **range** of an acceptable settlement under the circumstances, which is the standard on which the instant Settlement must be judged. As held by the Ninth Circuit, a settlement may be fair and reasonable even where the settlement only provides a fraction of what could have been obtained at trial:

> The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d at 625 (emphasis in original). Thus, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Id*. at 624 (citations omitted). As the Second Circuit has pointed out: "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n.2 (2nd Cir. 1974)

See Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1242 (9th Cir. Cal. 1998)

Here, the amount paid to each Settlement Class Member will be determined using a formula that equitably distributes the $427,500.00 "Net Settlement Amount" based upon the number of workweeks each Settlement Class Member was employed by Defendant during the Class Period. *See Settlement Agreement*, at ¶3. Based on this formula, the average payment to a Settlement Class Member is currently estimated to be $1,619.71, with the highest payment being $4,044.97 and the lowest payment being $16.18. *See Zárate Dec.*, at ¶13. This amount constitutes a significant recovery considering the disputed issues detailed above, and falls **well above** the range deemed reasonable in other meal/rest period cases. *See e.g. Schiller v. David's Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776, 48 (E.D. Cal. June 11, 2012) ("Class Members will receive an average of approximately $198.70, with the highest payment to a Class Member being $695.78."); *Martin v. FedEx Ground Package Sys.*, 2008 U.S. Dist. LEXIS 106524, 11 (N.D. Cal. Dec. 31, 2008) ("settlement class members will receive approximately $200 per year worked."); *Sandoval v. Tharaldson Emple. Mgmt.*, 2010 U.S. Dist. LEXIS 69799, 19 (C.D. Cal. June 15, 2010) ("The average amount each Class Member will receive is

approximately $749.60.").

Thus, notwithstanding the existence of issues having the potential to eliminate recovery on each of the Class' claims, the Settlement nonetheless achieves a significant recovery on behalf of the Class. As such, this factor balances in favor of a finding that the terms of the Settlement are fair, adequate, and reasonable.

5. The Extent Of Discovery Completed And The Stage Of The Proceedings Favor Approval of the Settlement

"In analyzing this factor, the Court evaluates whether 'the parties have sufficient information to make an informed decision about settlement.'" *Sandoval*, 2010 U.S. Dist. LEXIS 69799, at 17 (C.D. Cal. June 15, 2010) (quoting *Linney*, 151 F.3d at 1239). "The extent of the discovery conducted to date and the stage of the litigation are both indicators of counsel's familiarity with the case and of Plaintiffs having enough information to make informed decisions", and as such "[a] settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *See Knight*, 2009 U.S. Dist. LEXIS 11149 at 10.

Here, the extent of discovery conducted was sufficient to enable Plaintiffs' Counsel to evaluate the strength and value of the Class' claims for purposes of settlement. *See Bailey Dec*., at ¶¶9-13. In fact, at the time of mediation, Plaintiffs had all but completed precertification discovery.[7] *See id*., at ¶9. As discussed above, Plaintiffs' Counsel obtained and reviewed **(a)** Defendant's California policy manuals and policy-related documents, including Defendant's standardized policies relating to meal and rest periods, employee compensation, and employee time keeping, **(b)** records relating to the three named Plaintiffs, including personnel files and time records, and **(c)** documentation necessary to identify the composition of the class and evaluate potential damages. *See id*., at ¶10. In addition, Plaintiffs' Counsel also interviewed 47 current and former Wind Technician employees on Plaintiffs' theory of liability. *See id*., at ¶11. For its part, Defendant propounded three (3) sets of Requests for Production of Documents and Special Interrogatories, and took the depositions of each of the three (3) named Plaintiffs. *See id*., at ¶12.

[7] The only discovery matter that remained outstanding was to take the deposition of Defendant's Person Most Knowledgeable, which was placed on hold until after mediation.

Based on Plaintiffs' Counsel's experience obtaining certification and litigating similar claims, such investigation was sufficient to expose and evaluate the strengths and weaknesses of the substantive merit of the Class' claims, as well as the likelihood of obtaining and maintaining certification of such claims through trial. *See id*., at ¶13.

6. The Experience and Views of Plaintiffs' Counsel Favor Approval

The experience and views of Counsel warrant a finding by the Court that the settlement is fair, adequate, and reasonable. Plaintiffs' Counsel are qualified and experienced in class wage and hour litigation similar to the instant action. *See Bailey Dec*. at ¶2-8. In the view of Plaintiffs' Counsel, the benefit conferred by the proposed Settlement is fair, reasonable, and adequate to the proposed class under the circumstances, as it reflects a reasoned compromise which not only takes into consideration the inherent risks inherent in all wage and hour class litigation, but also the various issues in this case which had the potential to completely eliminate recovery by Class Members on their claims. *See Bailey Dec.*, at ¶17.

7. The Reaction of the Class Favors Approval of the Settlement

In evaluating this element, "[i]t is established that 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." *See Nat'l Rural Telecomms.*, 221 F.R.D. 523, 529. "The absence of any objector strongly supports the fairness, reasonableness, and adequacy of the settlement." *See Williams v. Costco Wholesale Corp.*, 2010 U.S. Dist. LEXIS 67731, at 13 (S.D. Cal. July 7, 2010).

Here, the reaction of the Class has been overwhelmingly positive, as there were **no objections** [*Zárate Dec.*, at ¶11; *Bailey Dec.*, at ¶28], and only one exclusion request. *See Zárate Dec.*, at ¶9. This represents a 99.62% participation rate. *See id*., at ¶12. Such numbers are within the range deemed exceptional in the wage context [*Chu v. Wells Fargo Invs., LLC*, 2011 U.S. Dist. LEXIS 15821, 11 (N.D. Cal. Feb. 15, 2011) ("it is strong testament to the fairness of the settlement that not a single objector has come forward and that only 16 out of 2,752 noticed class members opted out.")], and fall well above the participation rates in non-reversionary meal break settlements which final approval was granted. *See e.g. Gong-Chun v.*

Aetna Inc., 2012 U.S. Dist. LEXIS 96828, 44 (E.D. Cal. July 11, 2012) ("[L]ess than two percent of Class Members opted out of the Settlement. Further, no objection to the Settlement Agreement was received…. The response of the class was positive, and this weighs in favor of finding that the settlement is favorable to the Class Members.").

8. Additional Factors Weigh In Favor of Finding The Terms Of The Proposed Settlement To Be Fair, Adequate, And Reasonable

In addition to the factors presented above, the proposed Settlement does not possess any obvious deficiencies, such as unduly preferential treatment to members of the Settlement Class or Class Plaintiffs. Settlement proceeds are to be equitably divided among Settlement Class members based on "workweek" formula, and will be distributed by applying the same claim procedures to the entire Class.

Moreover, with regard to administration costs, Class Counsel took efforts to ensure that the interests of the Settlement Class were protected by submitting administration to competitive bid. CPT Group, Inc. – which was selected after submitting the lowest bid in the amount not to exceed $15,000.00 [*Settlement Agreement*, at ¶2(b)(i).] – has confirmed that final costs will come in at $11,500, well under budget. *See Zárate Dec.*, at ¶14.

Furthermore, as demonstrated in Plaintiffs' *Motion For Approval Of Class Counsel's Fees And Costs & Approval Of Stipend To Plaintiffs* (Dkt. No. 58, at 11:1-12:24),[8] the amount of the proposed incentive payments to the three named Plaintiffs (which upon approval of the Court, is $10,000.00 each) is within the range deemed reasonable in the wage and hour context,[9] and is warranted based on **(1)** the significant amount of time Plaintiffs have spent on behalf of the Class, **(2)** that fact the named Plaintiffs subjected themselves to the risks

[8] At the request of the Court, Class Counsel filed the *Motion For Approval Of Class Counsel's Fees And Costs & Approval Of Stipend To Plaintiffs* (hereinafter "Fee Motion") on July 3, 2012, prior to the close of the Response Period.

[9] *See e.g. Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476, 52 (N.D. Cal. Jan. 26, 2007) (finding "requested payment of $ 25,000 to each of the named plaintiffs is appropriate" in wage and hour settlement); *Louie v. Kaiser Found. Health Plan, Inc.*, 2008 U.S. Dist. LEXIS 78314, 18 (S.D. Cal. Oct. 6, 2008) (approving "$25,000 incentive award for each Class Representative" in wage an hour settlement); *West v. Circle K Stores, Inc.*, 2006 U.S. Dist. LEXIS 76558, 28 (E.D. Cal. Oct. 19, 2006) ("the court finds plaintiffs' enhancement payments of $ 15,000 each to be reasonable.").

associated with litigation, including the risk of being liable for Defendant's costs, **(3)** the fact that each named Plaintiff has made his private employment information public, and will bear the stigma for bringing a class action wage dispute, and **(4)** providing a more broad "general release" of claims, which is much broad than the "Released Claims" required by the Class in the Settlement.

Additionally, the proposed settlement does not provide for excessive compensation of attorneys' fees and costs to Class Counsel. Here, Plaintiffs' Counsel have agreed to seek no more than 25% of the global settlement fund (i.e. $162,500.00). *See Settlement Agreement*, at ¶3(b)(iii). As set forth in Plaintiffs' *Motion For Approval Of Class Counsel's Fees And Costs*, this amount is not only below the percentage typically awarded in smaller wage and hour class action cases [*Fee Motion* (Dkt. No. 58), at 7:2-28], it only reimburses Class Counsel for 50% of their actual loadstar.[10] See *Fee Motion* (Dkt. No. 58), at 8:17-10:7. The Settlement also provides for the award of costs in an amount not to exceed $15,000.00 [*Settlement Agreement*, at ¶3(b)(iii), which is below Class Counsel's actual out-of-pocket expenses. *See Fee Motion* (Dkt. No. 58), at 10:8-14.

Notwithstanding the forgoing, perhaps the most important indicator bearing on the reasonableness of the attorney fee and enhancement award amounts requested is that, subsequent to receiving Notice, no Class Member has filed an objection. *See In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, 71 (C.D. Cal. June 10, 2005) ("The absence of objections or disapproval by class members to Class Counsel's fee request further supports finding the fee request reasonable.")

In sum, under the applicable standards for approval of class action settlement in California, the settlement in this case meets the standards for final approval.

IV. DEFENDANT HAS SATISFIED CAFA REPORTING OBLIGATIONS

Pursuant to 28 USCS § 1715(d), "[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the

[10] As set forth therein, Class Counsel's lodestar was $313,992.50 on July 3, 2012, which does not include time expended preparing the instant Motion, or time that will be required to travel to San Francisco to attend the Final Fairness Hearing.

appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)." *See* 28 USCS § 1715(d). Defendant satisfied both notice requirements on May 7, 2012, as evidence by the *Declaration Of Cheryl D. Orr* (Dkt. No. 57), filed with the Court on June 25, 2012. As the ninetieth-day subsequent to the May 7, 2012 Notice date was August 5, 2012, this Court is permitted to enter an order giving final approval to the proposed settlement.

V. SELECTION OF A CY PRES BENEFICIARY

Pursuant to the terms of Settlement, any unclaimed (including checks which remain uncashed within 180 days) or unapproved funds are to be paid to a charitable/nonprofit organization consistent with the policy of cy pres set forth in California Code of Civil Procedure § 384(a). *See Settlement Agreement*, at ¶4(a)-(b). The organization is to be selected by mutual agreement of the Parties, subject to approval by the Court at the Final Fairness Hearing, but in the event the Parties are unable to reach consensus, each Party shall submit their proposal to be selected by the Court.

Here, Class Counsel recommends any and all residual amounts of the Settlement fund be disbursed to *UC Berkeley Center for Labor Research and Education* to be put to their next best use in promoting public awareness of employee rights in the State of California (including but not limited to educating the public, policymakers, and assisting individual employees). The *Center for Labor Research and Education* is a not for profit public service and outreach program that conducts research and education on issues related to labor and employment. A true and correct copy of the mission statement for the *Center for Labor Research and Education*, and pertinent contact information for making donations, is attached to the Declaration of Matt C. Bailey as **Exhibit "A."**

VI. CONCLUSION

For the reasons set forth herein, the proposed Settlement is fair to all parties and the Settlement Class. It represents the results of a compromise obtained through many hours of negotiation. For all of the reasons previously stated, Plaintiffs' Counsel respectfully request that the class action settlement be given final approval and that the Court enter the proposed

Order filed concurrently herewith.

Dated: August 16, 2012

POLLARD | BAILEY

By: 

MATT C. BAILEY, Esq.
DYLAN F. POLLARD, Esq.
ROXANNA TABATABAEEPOUR, Esq.

Attornevs for Plaintiffs