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SARA ZINMAN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

SARA ZINMAN, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC., and DOES 1 through 100,

Defendants.

Case No. C09-02045 CW

PLAINTIFF SARA ZINMAN'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Date: January 5, 2012
Time: 2:00 p.m.
Judge: Hon. Claudia Wilken
Courtroom: 2, 4th Floor

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT on January 5, 2012 at 2:00 p.m., or as soon thereafter as counsel may be heard in Courtroom 2 – 4th Floor of the United States District Court of California, located at 1301 Clay Street, Oakland, California, Plaintiffs and Class Representative SARA ZINMAN ("Plaintiff"), individually and on behalf of all others similarly situated, will, and hereby does, move this Court to grant, pursuant to Federal Rule of Civil Procedure 23(e), final approval of the Settlement Agreement and entry of judgment in accordance with the Settlement Agreement.

Plaintiff makes this Motion on the grounds that the proposed settlement is fair, adequate and reasonable. This Motion is based upon this Notice of Motion and Motion for Final Approval of Class Action Settlement; the Memorandum of Points and Authorities in Support Thereof; the Declaration of Gilardi & Co. Claims Administrator Andrew Morrison in Support thereof; the Declaration of H. Tim Hoffman in Support of Motion for Approval of Attorneys' Fees, Costs and Motion for Final Approval; the Motion for Preliminary Approval and all pleadings in support thereof (already on file), including the Settlement Agreement and Release and its attachments; the arguments of counsel; the complete files and records in the above-captioned matter; and such additional matters as the Court may consider.

Dated: December 21, 2011

HOFFMAN & LAZEAR

By: */s/ H. Tim Hoffman*
H. TIM HOFFMAN
Class Counsel and Counsel to
Plaintiff Sara Zinman

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND BACKGROUND

Plaintiff and Class Representative SARA ZINMAN requests that this Court grant final approval of the parties' settlement of Plaintiff's claims for overtime compensation and related wage and hour claims.

This settlement, in the amount of $400,000.00, is "fair, reasonable, and adequate" within the meaning of Federal Rule of Civil Procedure 23(e). A telling indicator of the fairness, adequacy and reasonableness of this settlement is the favorable response of the class. Specifically, of the 58 Settlement Class Members who were mailed notices, none filed objections to the settlement, and none requested to be excluded from the action. The estimated average recovery per class member who opted to participate in the suit is $7179.97. See Declaration of Andrew Morrison ("Morrison Decl.") at ¶ 13.

Moreover, Class Counsel has conducted sufficient investigation and both formal and informal discovery to enable them to evaluate the claims and defenses in the action, and believe the settlement is in line with the strength of the Plaintiff's claims, given the risk, expense, complexity, and likely duration of further litigation. *See Staton v. Boeing Co*., 327 F.3d 938, 960 (9th Cir. 2003); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

Accordingly, Plaintiff[1] respectfully requests that this Court: (a) grant final approval for the class action settlement reached in this matter; and (b) enter the proposed judgment accordingly.

II. PROCEDURAL BACKGROUND

A. CLAIMS MADE IN THE CASE

On May 8, 2009, Plaintiff filed a complaint against Wal-Mart (the "Complaint"), on behalf of a putative class of employees that included herself and all individuals who were

[1] Defendant Wal-Mart Stores, Inc. ("Defendant") has agreed to cooperate with Plaintiff's request for final approval of the Settlement and Release. Settlement Agreement §10.2.

employed by Wal-Mart in the position of Merchandise Assistant within the State of California and the United States. On June 1, 2010, the Court denied Plaintiff's motion for leave to amend the Complaint to broaden the class definition. See Docket No. 34.

The Complaint alleges the following claims: (1) denied overtime pay under the Fair Labor Standards Act ("FLSA"); (2) restitution of overtime pay pursuant to California's Unfair Competition Law, Business & Professions Code §§ 17200 *et seq.* and the California Labor Code; (3) failure to provide rest breaks and meal periods; (4) failure to provide accurate wage statements; (5) restitution of business expenses; and (6) waiting time penalties.

The Parties have engaged in formal and informal discovery, including the exchange of extensive compensation and other personnel data related to the Settlement Class and the deposition of Defendant's Vice President of Human Resources & Office Services. Declaration of Bryan J. Schwartz in Support of Plaintiff's Motion for Preliminary Approval (Dkt. 50) (herein "Schwartz Dec.") at ¶5. Plaintiff's counsel has conducted an analysis of payroll and employment data. *Id.* at ¶6. Furthermore, counsel for the Parties have debated extensively concerning the merits of the Parties' claims and defenses and other issues relevant to evaluating this matter, through the mediator, and bilaterally. *Id.* at ¶7.

B. SETTLEMENT OF THE CASE

On November 19, 2010, the Parties participated in a mediation before Mark S. Rudy, Esq., a highly respected mediator in the field of wage and hour class actions. *Id.* at Exhibit B, Resume of Mark S. Rudy, Esq. While the mediation did not successfully conclude on November 19, 2010, after ongoing communications, the Parties accepted a mediator's proposal of settlement on or about December 3, 2010. Schwartz Dec., at ¶7. The parties then engaged in extensive, back-and-forth communications to arrive at specific settlement terms, with Plaintiff's counsel pushing for the most advantageous terms for the class, under the circumstances. *Id.* At all times the

negotiations leading to settlement were adversarial, non-collusive, and at arms' length. *Id.*. A final stipulation of settlement was entered into on June 15, 2011. *Id.* at Exhibit A.

C. PRELIMINARY APPROVAL OF THE SETTLEMENT

On August 30, 2011, the Court granted preliminary approval of the class action settlement, directed distribution to the class of the notice of settlement, and set a hearing for final approval. See Dkt. 59. In doing so, the Court determined that the parties' settlement falls within the "range of reasonableness." *Id.* at ¶ 1. The parties, through a professional and independent claims administrator, have now completed the notice and claims process.

III. THE PROPOSED SETTLEMENT AND ITS TERMS

A. SETTLEMENT TERMS

The terms of the settlement are described in great detail in Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement (Dkt. 48) at pages 7-15. The settlement agreement was entered into the record as Exhibit A to the Declaration of Bryan J. Schwartz in Support of Plaintiff's Motion for Preliminary Approval (Dkt. 50-1) (herein, "Settlement Agreement").

In the Order Granting Plaintiff Sara Zinman's Unopposed Motion for Preliminary Approval of Class Action Settlement (Dkt. 59), the Court directed the parties to "execute and file a brief addendum to the Settlement clarifying that the waiver of claims under the federal Fair Labor Standards Act, 29 U.S.C. §216(b), shall only occur if class members file Opt-in and Claim forms, consenting to join in this matter." The fully executed addendum is attached to the Declaration of H. Tim Hoffman in support of the instant motion as Exhibit 1.

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B. THE NOTICE AND CLAIMS PROCESS

1. Summary of the Notice Process

Per the Court's preliminary approval order and the terms of the Settlement Agreement, the parties retained the professional claims administration firm of Gilardi & Co., LLC (the "Claims Administrator") to perform the notice and claims administration procedures in this matter. *See* Morrison Decl. at ¶ 1. The class notices described the litigation, the terms of the settlement and each class member's options with regard to the proposed settlement. The class notices were sent, postage pre-paid, via first class mail to the last known address of each class member. *See* Morrison Decl. at ¶ 4. Prior to mailing these class notices, the Claims Administrator took systematic measures to update any addresses that may have changed. *See* Morrison Decl. at ¶ 2. In addition, in those instances in which a notice was returned to the Claims Administrator, the Claims Administrator took further address verification measures and re-mailed the notice. *See* Morrison Decl. at ¶ 8.

The class notices advised Class Members of the pertinent formula used to determine their portion of the settlement sum and estimates of the possible settlement payment amount. Further, the Claim Forms were individualized to advise each Class Member of the estimated settlement amount that he or she would receive so that each Class Member could evaluate the settlement and its financial implications, and could request credit for additional work weeks if he or she believed the amount reflected on the Claim Forms was incorrect. *See* Notice, Dkt. 57-2.

After sending a reminder postcard, and at the request of the parties, the Claims Administrator contacted each class member who had not submitted a claim at his or her last known telephone number to inquire if the notice had been received and/or if it should be re-mailed. Morrison Decl. at ¶ 6. For telephone numbers that were incorrect or no longer in service,

the Claims Administrator took further steps to acquire up-to-date contact information for each class member, and attempted to reach him or her again. Morrison Decl. at ¶ 6.

2. The Reaction of the Class Members

Notice was sent to 58 Settlement Class Members. None of the Class Members filed an objection to the settlement, or requested to be excluded from the action. The Claims Administrator has received Claim Forms from 39 Class Members, and all of those Claimants will share the proceeds of the Net Settlement Fund. See Morrison Decl. at ¶ 9. Each Class Member who submitted a Claim Form will recover an estimated average of $7,179.97. Morrison Decl. at ¶ 13. None of the settlement amount will be returned to Defendant. See Settlement Agreement §§5.1 and 5.1.5.

IV. ARGUMENT

A. STANDARD FOR APPROVAL

Federal law strongly favors and encourages settlements, especially in class actions. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990) ("it hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits") (internal quotation marks and citation omitted). Moreover, when reviewing a motion for approval of a class settlement, the Court should give due regard to "what is otherwise a private consensual agreement negotiated between the parties," and must therefore limit the inquiry "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 v. Civil Service Comm'n*, 688 F. 2d 615, 625 (9th Cir. 1982).

To approve a proposed settlement of a class action under Fed. R. Civ. P. 23(e), the Court must find that the proposed settlement is "fair, adequate and reasonable," recognizing that "it is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Staton, supra*, 327 F.3d at 960 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). Although Rule 23 provides no precise formula for making this determination, the Ninth Circuit has identified several factors to be considered. These factors include: (1) the strength of the case; (2) the size of the claims and amount offered to settle them; (3) the risk, expense, complexity and likely duration of further litigation; (4) the stage of the proceedings, *i.e.*, whether the plaintiffs and their counsel have conducted sufficient discovery to make an informed decision on settlement; (5) whether the class has been fairly and adequately represented during settlement negotiations by experienced counsel; and (6) the reaction of the class to the proposed settlement. *See id.* (noting that the relative importance of each of these factors will depend on the circumstances of the case); *see also* Schwarzer, *et al.*, *Cal. Practice Guide: Federal Civil Procedure Before Trial* (The Rutter Group) § 10:849 (rev. #1 2008) (listing factors). Here, all of the relevant factors weigh strongly in favor of final approval.

B. ALL OF THE PERTINENT FACTS WEIGH IN FAVOR OF FINAL APPROVAL.

1. Strength of the Case

Plaintiff's counsel has analyzed and evaluated the merits of Plaintiff's claims against Wal-Mart, Wal-Mart's defenses, and the impact of the Settlement Agreement on Plaintiff and the Class Members. Specifically, while Plaintiff's counsel believes that Plaintiff's claims are meritorious, Plaintiff's counsel has also considered factors such as the potential denial of class certification, the length and risks of trial and other normal perils of litigation as well as Wal-Mart's affirmative defenses, the prospect of a potential adverse ruling on summary judgment, the difficulties of complex litigation, the lengthy process of establishing specific damages, and

various other delays and appeals. In particular, Plaintiff's counsel considered some of the unique difficulties presented for class certification in this case in light of recent case law developments. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, —— U.S. ——, 131 S.Ct. 2541, 2550-52 (2011) (basis for class certification generally); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953 (9th Cir. 2009) (reversing District Court's class certification order). Plaintiffs' counsel was well aware of the fact that Wal-Mart was prepared to pursue a number of defenses aggressively, both on the merits and to class certification. Taking these factors into account, Class Counsel has assessed the strength of this matter and believes that the settlement is fair and reasonable.

2. Size of the Claims and Amount Offered to Settle Them

The Notice of Settlement provided information regarding the nature of the claims and the formula used to calculate the Settlement Sums for Participating Claimants. In addition, the Claim Form provided Class Members with an estimate of their individual claims based on the number of total work weeks worked during the settlement class period. This Notice and Claim Form thus provided the Class Members with accurate information on the value of the settlement potentially available to them. Notably, the Class Members reacted favorably to the offered settlement, with no Class Members objecting and zero class members opting out. The average recovery per Class Member participating is a very substantial sum: $7,179.97.

Plaintiff believes the recovery is substantial, especially as its adequacy must be judged as "a yielding of absolutes and an abandoning of highest hopes . . . Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation. . ." *Officers for Justice*, 688 F.2d at 624 (citations omitted). Accordingly, the Settlement is not to be judged against a speculative measure of what might have been achieved. *See, e.g., Linney v.*

Cellular Alaska P'ship, 151 F.3d 1234, 1242 (9th Cir. 1998). In addition, the Court should consider that the Settlement provides for payment to the Class now, rather than a speculative payment many years down the road. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). As noted in the preliminary approval motion, the average amount recovered per Class Member compares favorably with other settlements approved by this Court, *e.g.*: *Gerlach v. Wells Fargo & Co.*, 05-cv-00585-CW (N.D. Cal.) (Wilken, J.) (Dkt. 331) (settlement class members received $9,000,000 among 4,200 class members, or an average of $2,142 each); *Stanfield v. First NLC*, 06-cv-3892-SBA (N.D. Cal.) (Armstrong, J.) (Dkt. 324) (settlement class members received $9,218,333.33 among 2,940 class members, or an average of $3,135 each); *Rosenburg v. International Business Machines Corp.*, 06-cv-00430-PJH (N.D. Cal.) (Hamilton, J.) (Dkt. 127) (approximately 11,000 settlement class members received under $4,500 each on average from a settlement worth approximately $66,600,000, after deducting 25% in fees, $45,000 in named plaintiffs' service payments, and $250,000 in costs). Therefore, considering the present value of Settlement and the Class Members' full knowledge of their claims and their estimated settlement award, the Settlement amount obtained by Plaintiff is well within the range of reasonableness.

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

Class Members will receive settlement payments without waiting years for payment, and without facing substantial risk of non-recovery. Further litigation of this matter would not serve the interests of the Class Members, because it could require each Class Member to offer individualized evidence, and perhaps more importantly, the delay, uncertainty and litigation costs associated with such efforts would be significant, without any assurance of recovery. *See In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995), *cert. denied*, 516 U.S. 824 (1995). ("[T]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal

litigation"). By the same token, further litigation would result in a significant delay of eventual payments to Class Members, if any. Under the Settlement Agreement, however, it is anticipated that participating Class Members will be mailed their payments within ten (10) business days of final approval. Settlement Agreement, §5.2.2.

Consequently, this factor supports final approval here. The Settlement affords the Class prompt and substantial relief, while avoiding significant legal and factual hurdles that otherwise may have prevented the Class from obtaining any recovery at all. While Class Counsel believe that Plaintiff's claims are meritorious, they are experienced and understand that the outcome of class certification, trial and any attendant appeals, are inherently uncertain.

4. The Stage of the Proceedings

The Settlement Agreement was reached with the assistance of Mark Rudy, a widely respected mediator with significant experience in mediating wage and hour class action disputes. Schwartz Dec. at ¶ 2 and Exhibit B. This resolution was reached following information and document exchanges and investigation by experienced counsel who had litigated similar claims in the past within the same industry. Id. at ¶ 5. As a result of these efforts and over two years of litigation, the parties had sufficient information to evaluate the strengths and weaknesses of the claims and defenses, whether to pursue litigation or settle, and the appropriate settlement value for the claims at issue. As such, the litigation had reached a stage where "the parties certainly [had] a clear view of the strengths and weaknesses of their cases." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y 1985), *aff'd* 798 F.2d 35 (2d Cir. 1986). Therefore, review of the stage of proceedings and discovery also favors approval of the Settlement.

5. Class Representation

Class Members have been represented by attorneys who are experienced in the areas of law at issue here. As set forth more fully in documents submitted with the motion for preliminary

approval, Class Counsel have significant experience in both the substance of wage and hour claims and the procedures for class and collective actions. Class Counsel wholly support approval of this Settlement and respectfully submit that their support should be accorded significant consideration. Schwartz Dec.at ¶¶ 3, 4, and 11. "'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' [and] [t]hus, 'the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'" *Nat'l Rural Telcomms Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (citations omitted). In addition, and as explained in the context of the Motion for Preliminary Approval, the proposed settlement was the product of arm's-length (and often contentious) bargaining and was conducted before an experienced mediator. Schwartz Dec. at 7.

6. The Reaction of the Class to the Proposed Settlement

The Ninth Circuit and other federal courts have made clear that the number or percentage of class members who object to or opt out of the settlement is a factor of great significance. *See Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 837 (9th Cir. 1976); *see also In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001)("[i]t is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy" (internal quotation marks and citation omitted)). On one hand, numerous federal courts have held that a relatively high percentage of objectors or opt outs will not necessarily preclude approval of a class settlement. *See, e.g., Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987) (citing numerous cases in which class settlements were approved despite the fact that significant percentages, ranging from 15% to 56%, of relevant Class

Members opted out of the settlement or otherwise objected). At the same time, other courts have made clear that a relatively low percentage of objectors or opt outs is a very strong sign of fairness that factors heavily in favor of approval. *See Cody v. Hillard*, 88 F. Supp. 2d 1049, 1059-60 (D.S.D. 2000) (approving the relevant settlement in large part because only 3% of the apparent class had objected to the settlement); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 372 (S.D. Ohio 1990) (approving the relevant settlement and affording "substantial weight" to the fact that fewer than 5% of the class members elected to opt out of the settlement); *In re Art Materials Antitrust Litig.*, 100 F.R.D. 367, 372 (N.D. Ohio 1983) (approving the settlement and holding that the fact that none of the class members had objected and a small percentage opted out of the settlement was "entitled to nearly dispositive weight").

Critically, in this case, *not one* Class Member has objected to or opted out of the settlement. Morrison Decl. at ¶¶ 10 and 11. Out of 58 Settlement Class Members who were sent notice of the settlement, 39 have made claims. *Id.* at 9. The remainder have not responded to the notice, despite repeated attempts to contact them by mail and telephone. *Id.* at 5 and 6. Plaintiff submits that the parties have made extensive efforts to increase the level of the claims rate. However, because this settlement is not reversionary, the claiming Settlement Class Members will receive a pro-rata increase in their settlement amounts, and none of the Settlement Funds will revert to Defendant.

In sum, all of the relevant factors demonstrate that this is a fair, adequate and reasonable settlement, and final approval is therefore appropriate.

C. THE CLASS REPRESENTATIVE'S MODEST ENHANCEMENT PAYMENT IS APPROPRIATE.

With respect to the class representative's enhancement payment of $5,000, the award is limited and within the range of such awards commonly provided in litigation of this nature – and particularly given the extensive recovery for the putative class members. *See, e.g., In re Mego*

Fin. Corp. Sec. Litig. 213 F.3d 454, 456–457, 463 (9th Cir.2000) (approving incentive awards of $5,000 each to two class representatives); *Gerlach, supra* ($15,000 enhancement awarded to representative plaintiff – *see* Dkt. #331-1, p. 12 of 33); *Glass*, 2007 WL 221862 at *16 (approving payments of $25,000 to each named plaintiff).

Plaintiff's enhancement is justified according to the standards articulated in *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995) (Williams, J.) (awarding $50,000 to a lead plaintiff), including: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representatives; 3) the amount of time and effort spent by the class representatives; 4) the duration of the litigation, and; 5) the personal benefit (or lack thereof) enjoyed by the class representatives as a result of the litigation. *See Van Vranken*, 901 F.Supp. at 299.

Here, California's jurisprudence is unsettled on the question of two-way fee-shifting in meal period cases (Cal. Lab. §226.7) under Cal. Lab. §218.5 (*see Kirby v. Immoos Fire Protection, Inc.*, S185827, granting review of 113 Cal.Rptr.3d 370), but there is a distinct possibility that Plaintiff could be liable for Wal-Mart's fees and costs for pursuing her meal and rest period claims, depending on how *Brinker* is decided. *See Van de Kamp v. Bank of America* 204 Cal.App.3d 819, 869 (1988) (holding that those who choose to take the risks of litigation, *i.e.*, representative plaintiffs, should be the ones who bear the cost when they are unsuccessful).

Moreover, Plaintiff Zinman has cooperated extensively with Hoffman & Lazear as the sole Plaintiff pursuing the claims on behalf of the class since the case was filed several years ago. *See* Declaration of Sara Zinman (Dkt. 49) ("Zinman Dec."), at ¶¶ 3, 4 and 8. She has spent dozens of hours speaking to counsel about her claims, cooperating regarding mediation, and in other ways seeking to advance the class's interests. *Id.* at ¶¶ 2 and 8.

Undersigned counsel believes that $5,000 is the minimum enhancement in a case of this nature which would viably promote the public policy interest in encouraging those with wage/hour claims to assert them, despite the fears associated with doing so. Schwartz Dec. at ¶9; Zinman Dec., at ¶7; *Gentry v. Superior Court*, 42 Cal.4th 443, 459-461 (2007).

V. CONCLUSION

For the foregoing reasons, Plaintiff, on behalf of herself and the Settlement Class Members, respectfully requests that this Court grant final approval of the class settlement reached in this matter, award the class representative a $5,000 enhancement, and enter the proposed judgment accordingly.[2]

Respectfully submitted,

DATE: December 21, 2011

HOFFMAN & LAZEAR

By: */s/ H. Tim Hoffman*
H. Tim Hoffman
Attorneys for Plaintiff and Class Counsel

[2] Plaintiff's counsel's motion for fees and costs was filed separately. *See* Dkt. 60.