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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ALEGRIA A. ALMERO, an individual, on behalf of herself and all others similarly situated

Plaintiffs,

v.

QUEST DIAGNOSTICS, INC., a Delaware Corporation, and DOES 1 through 50, inclusive,

Defendants.

Case No. SACV 08-0794 DOC (RNBx)

Assigned to Hon. David O. Carter

State Action Filed: June 17, 2008

Removed: July 18, 2008

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

[Filed concurrently with Notice of Motion; Declaration of James R. Hawkins; Declaration of Krista Tittle; Declaration of Alegria Almero; [Proposed] Order Granting Final Approval of Class Action Settlement; and [Proposed] Final Judgment.]

Date: December 6, 2010
Time: 8:30 a.m.
Courtroom: 9D

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MEMORANDUM OF POINTS AND AUTHORITIES

Named Plaintiff ("Named Plaintiff") hereby submits this Memorandum of Points and Authorities in support of her Unopposed Motion for Final Approval of Proposed Class Action Settlement.

The parties' Stipulation of Settlement (the "Stipulation" or "Settlement"), filed on April 29, 2010 together with Named Plaintiff's Motion for Preliminary Approval of Settlement ("Motion for Preliminary Approval"), was entered into after extensive negotiations, including formal and informal communications and a lengthy formal mediation before a well-respected mediator with significant experience in wage and hour class action matters. The proposed Settlement provides a significant financial recovery to members of the Settlement Class in the form of a $2,000,000 Common Settlement Fund.

Notice was disseminated to the 9892 members of the Settlement Class through first class direct mail. There have been no objections to and only 75 opt outs from the Settlement. As discussed in greater detail below, the proposed Settlement is fair, reasonable, and adequate and plainly meets the standards for final approval.

I. FACTUAL BACKGROUND

A. Nature of the Dispute

In this wage and hour action, Named Plaintiff alleges that she and the other members of the Settlement Class were not provided legally compliant meal periods and rest breaks during their employment with Quest Diagnostics, and that Quest Diagnostics failed to pay an extra hour of compensation under the foregoing circumstances. In addition, Named Plaintiff alleges that Quest Diagnostics effectively required her and the other members of the Settlement Class to work off-the-clock. Based on these allegations, Named Plaintiff asserts the following causes of action on a class-wide basis: (1) failure to pay wages, including overtime; (2) failure to provide rest periods and meal periods or compensation in lieu thereof; (3) failure to provide

accurate itemized employee wage statements; and (4) violation of California's Unfair Competition Law. (Declaration of James R. Hawkins Decl. ("Hawkins Decl." at ¶ 2.)

Quest Diagnostics vigorously denies all of Named Plaintiff's allegations, and has denied them throughout this Litigation. Quest Diagnostics has asserted a number of serious and potentially dispositive defenses. Among other things, Quest Diagnostics contends that members of the Settlement Class were provided meal periods and rest breaks as required by California law, were properly compensated for all hours worked, were provided accurate itemized wages statements, and thus are not entitled to collect any unpaid wages or related penalties arising from Named Plaintiff's claims.

B. Litigation History

Named Plaintiff filed the Complaint in this action on June 17, 2008. Quest Diagnostics removed the action to this Court on July 18, 2008. (Hawkins Decl. at ¶ 2.) This lawsuit was sharply disputed between the parties from the outset.

As explained in detail in the Motion for Preliminary Approval, which is incorporated herein by reference, the parties have engaged in extensive investigation into the factual and legal claims presented in this Litigation. (See id. at ¶ 3.) Counsel for Named Plaintiff's conducted significant discovery and investigation regarding Quest Diagnostics' business practices and the impact of those practices on the Litigation. (Id.) Moreover, the parties actively litigated this matter for over a year and a half, which litigation has included the formal and informal exchange of information and documents. (Id.) As a result of their respective discovery efforts and the parties' own investigation and analysis of the claims, the parties were able to evaluate thoroughly the underlying facts, legal theories, and defenses presented by this action.

To date, no class has been certified and no Court has made any findings that Quest Diagnostics engaged in any wrongdoing or wrongful conduct, or otherwise acted improperly in violation of any state or federal law, rule, or regulation, with

1 respect to the issues presented in the Litigation. (Id.)

2 After engaging in extensive negotiations, including formal and informal
3 communications and a lengthy formal mediation before a well-respected mediator
4 with significant experience in wage and hour class action matters, the parties reached
5 an agreement to settle this action. (Id. at ¶¶ 4-5.)

6 On June 14, 2010 after considering Named Plaintiff's papers and conducting a
7 hearing, the Court entered the Order Granting Preliminary Approval of Class Action
8 Settlement, Certifying Settlement Class, and Providing for Class Notice (the
9 "Preliminary Approval Order"). The Preliminary Approval Order, *inter alia*, granted
10 preliminary approval of the proposed Settlement, directed the parties to disseminate
11 notice to the Settlement Class, set August 23, 2010 as the deadline for Class Members
12 to opt out of or object to the Settlement, and scheduled the Final Approval Hearing for
13 September 27, 2010.

14 **C. Settlement Administration**

15 Pursuant to the Preliminary Approval Order, on July 9, 2010, Simpluris, Inc.
16 (the "Settlement Administrator") sent the Notice of Class Action and Proposed
17 Settlement (the "Notice") by first-class mail to 9880 members of the Settlement
18 Class.[1] (Declaration of Krista Tittle ("Tittle Decl.") at ¶ 5.)

19 Following the July 9 mailing of the Notice, two members of the Settlement
20 Class submitted challenges to the Settlement Administrator disputing their number of
21 Eligible Work Months.[2] (Tittle Decl. at ¶ 9.) These challenges were timely submitted

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23 [1] The Settlement Administrator also sent the Notice to 60 individuals who were not
24 Class Members, but who were inadvertently included in the list of Class Members.
25 Upon learning that these individuals were inadvertently included in the list of Class
26 Members, the Settlement Administrator sent notice to each of them advising them
accordingly. (Tittle Decl. at ¶ 7.)

27 [2] In addition, one of the 60 individuals who was inadvertently included in the list of
Class Members (see footnote 2, *supra*) submitted a challenge to the Settlement
28 Administrator disputing her number of Eligible Work Months. Upon review of this

(Footnote continued)

1 by the August 23, 2010 deadline. (Id.) In accordance with Section IX.B. of the
2 Settlement, the Settlement Administrator reviewed personnel information regarding
3 these three individuals that it received from Quest Diagnostics and, in consultation
4 with counsel, computed the appropriate number of Eligible Work Months for each
5 individual. (Id.) On October 26, 2010, the Settlement Administrator sent letters to
6 these two Class Members advising them of the Settlement Administrator's
7 determination of their Eligible Work Months. (Id.)

8 On or about September 13, 2010, the Settlement Administrator and the parties
9 discovered that 72 additional members of the Settlement Class had been inadvertently
10 omitted from the list of Class Members who were sent the Notice on July 9. (Id. at ¶
11 10.) Pursuant to the Court's September 15, 2010 Order, on September 20, 2010, the
12 Settlement Administrator sent the Notice to each of the 72 omitted Class Members.
13 (Id.) In accordance with the Settlement and the Court's September 15 Order, the
14 omitted Class Members received the full 45-day notice period to object to or opt out
15 of the Settlement or to submit a challenge disputing their number of Eligible Work
16 Months. (Id.)

17 Of the 9892 Class Members who were sent the Notice on July 9, 2010 and
18 September 20, 2010, only 75 have opted out, representing 0.0076% of the Settlement
19 Class. (Id. at ¶¶ 11-12.) Moreover, of these 9892 Class Members, none has objected
20 to the Settlement. (Id.)

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26 individual's personnel information, the Settlement Administrator concluded that she
27 was not a member of the Settlement Class. On October 26, 2010, the Settlement
28 Administrator sent notice to this individual advising her accordingly. (Tittle Decl. at ¶ 8)

II. THE SETTLEMENT

A. Definition Of The Settlement Class

The Settlement provides for the certification of a Settlement Class, for settlement purposes only, to be defined as "all non-exempt regular full-time and part-time employees employed at, or providing direct logistics, administrative, or customer service support to, any Quest Diagnostics Incorporated laboratory in the State of California between June 17, 2004 through the date of preliminary approval of the Settlement. The foregoing definition shall include only persons employed physically in the State of California and only the period of time a person was employed at or in support of a laboratory, and shall not include any period of time during which any such person was employed at any Quest Diagnostics Patient Service Center or who has performed his or her job duties exclusively outside of the State of California." (Settlement at ¶ I.S.)

B. Settlement Benefits

In consideration of a release of claims, as defined in the Settlement (see Settlement at ¶ VI.A.), the Settlement provides substantial financial compensation to Settlement Class members.

a) The Settlement Amount

The Settlement requires payment by Quest Diagnostics of a total of $2,000,000 to the Settlement Class as the Common Settlement Fund. (Settlement at ¶ I.F.) All settlement payments to the Settlement Class, attorneys' fees and costs, administrative costs, and enhancements to the Named Plaintiff will be paid from the Common Settlement Fund. The full amount of the Common Settlement Fund will be paid out, as no funds will revert to Quest Diagnostics. (Id. at ¶¶ I.F., X.)

b) Administrative Costs

All of the costs associated with providing Notice to the Settlement Class and administering the Settlement, including the fees and costs incurred or charged by the Settlement Administrator, shall be paid from the Common Settlement Fund.

(Settlement at ¶ VII.) The parties have mutually-agreed to use Simpluris, Inc. as the Settlement Administrator, and Simpluris, Inc. has agreed to undertake administration of the Settlement at a cost of $75,000. (Settlement at ¶ VII; Hawkins Decl. at ¶ 12; Tittle Decl. at ¶ 13.)

c) Monetary Payments to Settlement Class Members

Each and every member of the Settlement Class who did not opt out will automatically receive a lump sum payment calculated pursuant to the formula set forth in Paragraph X.A of the Settlement. Specifically, each Class Member who did not opt out will receive a uniform Eligible Work Month Payment for each Eligible Work Month during which he/she worked in a Covered Position, less applicable withholding taxes.

The Eligible Work Month Payment will be determined by dividing the Net Settlement Fund (which is equal to the Common Settlement Fund minus attorneys' fees and costs, enhancements, and administrative costs) by the total number of Eligible Work Months worked by all members of the Settlement Class who do not opt out, rounded to two decimal places. An Eligible Work Month is defined as a calendar month in which a member of the Settlement Class was employed by Quest Diagnostics in the State of California in a Covered Position during the period between June 17, 2004 through the date of the Court's order preliminarily approving the Settlement. Eligible Work Months shall not include any month in which a member of the Settlement Class was on a leave of absence or other non-working status for the entire month or was working outside of the State of California for the entire month.

The 9817 Class Members not opting out worked a total of 343,370 Eligible Work Months. Thus, assuming a Net Settlement Amount of $1,306,739[3], Class Members' compensation will total approximately $3.80 per Eligible Work

[3] This estimated amount represents the Common Settlement Fund ($2,000,000) less administrative costs ($75,000), attorneys' fees of 30% of the Common Fund ($600,000), costs ($8,260.31), and enhancements ($10,000).

Month.[4] (Hawkins Decl. at ¶ 9.)

Based on an estimated Eligible Work Month value of $3.80, the average class member's compensation (net of attorneys' fees, enhancements, and costs) will be approximately $132.92 and the compensation for a Full-Time Equivalent (73 work months) will be approximately $277.40 (less applicable taxes and withholdings). Thus, depending on a class member's tenure in a Covered Position, Class Members could receive payouts in the hundreds of dollars. Such a settlement recovery, in a case in which liability is sharply contested and the outcome highly uncertain, is quite favorable. (Id.)

Moreover, unlike many other class action settlements involving wage and hour allegations that have been approved and that require the Class Members to submit claim forms and to prove the amount of benefits due to them, the Settlement here provides for an automatic cash payment to each and every member of the Settlement Class based on their respective number of Eligible Work Months. (Settlement at ¶¶ IX, X.) There is no requirement that the Class Member undertake any additional efforts to obtain the payment. (Id.) The lack of any additional burdens that the Class Members must undergo in order to claim and obtain the cash payments pursuant to the Settlement is yet another significant benefit that each Class Member will enjoy pursuant to the Settlement.

d) Payment of the Residual, If Any, To Non-Profit Organizations

Any settlement payments returned as undeliverable or not cashed within one hundred and eighty (180) calendar days of mailing by the Settlement Administrator shall be considered uncashed and will be donated to the Western Center on Law and Poverty, subject to applicable law. (Settlement at ¶X.B.) Thus, no part of the Settlement Amount will revert back to Quest Diagnostics. (Id.)

[4] Again, the actual payment will depend upon the amount of attorneys' fees and costs and enhancement payments awarded by the Court.

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e) Enhancements To Named Plaintiff and Attorneys' Fees and Costs

Quest Diagnostics does not oppose the request for an award of enhancements contained within Named Plaintiff's simultaneous application herein for an award of enhancements up to $10,000.00 to Named Plaintiff for her participation in and assistance with this Litigation. Any enhancement awarded to Named Plaintiff by the Court will be deducted from the Common Settlement Fund. (Settlement at ¶ XIII.)

Quest Diagnostics does not oppose the simultaneous application herein by Named Plaintiff's Counsel for past and future attorneys' fees in amount not to exceed 30% of the Common Settlement Fund and for reasonable past and future costs and expenses necessary to prosecute and settle the Litigation and the Settlement. The attorneys' fees and costs awarded to Named Plaintiff's Counsel will be deducted from the Common Settlement Fund. (Settlement at ¶ XII.) The amount of fees and costs to be sought for Court approval was negotiated separately after the parties reached an agreement on the Common Settlement Fund amount and other terms of the Settlement. (Hawkins Decl. at ¶ 5.)

III. NAMED PLAINTIFF REQUESTS THAT THE CLASS BE FINALLY CERTIFIED FOR SETTLEMENT PURPOSES

The Settlement Class was preliminarily certified by this Court on June 14, 2010. Named Plaintiff asserts that, as described in her Motion for Preliminary Approval, the proposed Settlement Class meets all four prerequisites of Federal Rule of Civil Procedure 23(a) necessary to class certification, and likewise satisfies Federal Rule of Civil Procedure 23(b)(3). Certification for Settlement purposes is thus warranted.[5]

[5] Quest Diagnostics vigorously disputes the existence of some or all of the certification requirements. However, for settlement purposes only, Quest Diagnostics has stipulated to certification of the class, without prejudice to its position regarding certification in the event that the Settlement is not approved.

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IV. THE SETTLEMENT SHOULD RECEIVE FINAL APPROVAL

A. Criteria For Final Settlement Approval

It is well-established that the law favors settlement, particularly in class actions, which are "an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense." Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976); Class Plaintiffs v. City of Seattle, 955 F.2d 1268 (9th Cir. 1992). In granting final approval, the Court must find that the proposed settlement, taken as a whole, "is fair, reasonable, and adequate." Fed. R. Civ. Pro. 23(e)(2); Class Plaintiffs, 955 F.2d at 1291.

Courts have cautioned that "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits." Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982). Indeed, the Court "need not '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. Moreover, the proposed settlement "is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." Id. (citations omitted).

Rather, in determining whether a proposed settlement is "fair, reasonable, and adequate," the Court is to balance the following eight factors:

> 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[6]; and the reaction of the class members to the proposed settlement.

Class Plaintiffs, 955 F.2d at 1291(quoting Officers for Justice, 688 F.2d at 625); Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1242 (9th Cir. 1998); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998); Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.,221 F.R.D. 523, 525 (C.D. Cal. 2004). The relative importance to be attached to any particular factor depends upon the nature of the claims, the types of relief sought, and the unique facts and circumstances presented by the individual case. Class Plaintiffs, 955 F.2d at 1291(quoting Officers for Justice, 688 F.2d at 625).

Because the court must consider risk factors and the uncertainty of the outcome of the litigation as well as the potential recovery, a proposed class settlement may be fair, just, and reasonable even though it amounts to only a fraction of the potential recovery in a fully litigated case. See Linney, 151 F.3d at 1242 (risk of going to trial would have been significant); Torrisi v. Tuscon Elec. Power Co., 8 F.3d 1370, 1375-1376 (9th Cir. 1993) (in determining whether a class action settlement is "fair, reasonable, and adequate," factors impacting the risk of continued litigation should be considered.)

Here, a balancing of the foregoing factors clearly supports the Court's final approval of the Settlement.

B. The Proposed Settlement Fully Satisfies The Standards For Final Approval.

The proposed Settlement was reached after lengthy litigation by highly capable and experienced counsel. (Hawkins Decl. at ¶¶ 3-5.) Since the Litigation commenced, the parties have conducted extensive formal and informal discovery and exchanged information concerning the issues raised in the case. (Id. at ¶ 3.) As a result of these efforts, and the parties' own investigation and analysis of the claims,

[6] Because the Litigation does not involve any governmental participants, this factor is not discussed here.

1 the parties were able to thoroughly evaluate the underlying facts, legal theories, and
2 defenses at issue in the Litigation. (Id.)
3 The proposed Settlement was reached following extensive, arms-length
4 negotiations, including those taking place in a lengthy formal mediation before
5 Eugene Moscovitch of ADR Services, Inc., a respected mediator with significant
6 experience in the area of wage and hour class actions. (Hawkins Decl. at ¶¶ 4-5.)
7 Although the parties were willing to explore the potential for settlement, each side
8 also was fully committed and prepared to litigate the case through trial and appeal if a
9 settlement had not been reached. (Id.) The proposed Settlement was reached at the
10 end of a process that was neither fraudulent nor collusive. (Id.) Counsel for the
11 parties aggressively advanced their respective positions throughout the Litigation, the
12 settlement negotiations, and the mediation. (Id.) The result is a fair, adequate, and
13 reasonable settlement for the Named Plaintiff and members of the Settlement Class.
14 (Id. at ¶ 8.) In fact, in light of the substantial risks and lengthy delays that would be
15 involved in prolonged litigation and the complexity of trying this case as a class
16 action, counsel believe this Settlement fairly compromises the claims of both parties.
17 (Id.)

18 **a) The Strength of Named Plaintiff's Case; the Risk, Expense,**
19 **Complexity, and Likely Duration of Further Litigation; and**
20 **the Risk of Maintaining Class Action Status**

21 Among the factors supporting approval of the Settlement are (1) the strength of
22 Named Plaintiff's case, (2) the risk, expense, complexity, and likely duration of
23 further litigation, and (3) the risk of maintaining class action status throughout the
24 trial.
25 In contrast to the certain financial benefits that the proposed Settlement
26 provides members of the Settlement Class, continued litigation would involve
27 substantial risks. Named Plaintiff's claims rest upon a number of legal and factual
28 contentions that are unresolved, unsettled, novel, disputed, and uncertain. For

instance, current California law regarding meal period claim is highly uncertain as a number of substantive issues underlying these claims are presently before the California Supreme Court in Brinker v. Superior Court, 165 Cal.App.4th 25, 80 Cal.Rptr.3d 781 (2008), *review granted by* 196 P.3d 216, 85 Cal.Rptr.3d 688 (2008), and Brinkley v. Superior Court, 167 Cal.App.4th 1278, 84 Cal.Rptr.3d 873 (2008), *review granted by* 198 P.3d 1087, 87 Cal.Rptr.3d 674 (2009). These cases likely will not be decided for a year or more, and they could ultimately be dispositive of some or all of Named Plaintiff's meal period claims. (Hawkins Decl. at ¶ 8.)

In addition, Quest Diagnostics has asserted a number of serious and potentially dispositive defenses in the Litigation. Among other things, Quest Diagnostics contends that members of the Settlement Class were provided meal periods and rest breaks as required by California law, were properly compensated for all hours worked, were provided accurate itemized wages statements, and thus are not entitled to collect any unpaid wages or related penalties arising from Named Plaintiff's claims. (Id.)

Moreover, Quest Diagnostics contends that Named Plaintiff would not be able to achieve class certification if the Litigation were to proceed because, among other things, individual issues predominate over common issues, including with respect to the multiple individualized inquires required to determine whether or not each Class Member was provided a meal period and rest break and was properly paid all wages due under California law. (Id.)

Although Named Plaintiff and her counsel believe that it is possible that she would ultimately have prevailed in Litigation, the result is highly uncertain. In light of the above and the nature of the litigation process in general, Named Plaintiff recognized that the issues of liability and class certification present significant uncertainty and risk. If Named Plaintiff was unable to prevail on these claims, a judgment would be entered for Quest Diagnostics, and members of the Settlement Class would receive nothing. The proposed Settlement, in contrast, offers a guaranteed value to the Settlement Class that fairly and reasonably accounts for the

very real risks of continued litigation. (Id.)

Moreover, litigation of Named Plaintiff's claims would have been lengthy and expensive for both sides. Given the matters at issue, Quest Diagnostics was prepared and highly motivated to defend this action aggressively through trial and, if necessary, any appeal. Similarly, Named Plaintiff was ready, willing and able to litigate her claims vigorously. (See Hawkins Decl. at ¶ 8.) A trial in this matter would have required both sides to work through additional complicated and protracted discovery and motion practice. (Id.)

Accordingly, litigation of this matter through trial and appeal would have been lengthy, contentious, and expensive. At the end of that process, Settlement Class members might have received nothing and, even if Named Plaintiff had prevailed, Settlement Class members likely would have had to wait several years to receive any relief. Through the proposed Settlement, in contrast, Settlement Class members will immediately receive substantial settlement benefits and will not have to bear the risk of an unfavorable judgment. (Id.)

b) The Amount Offered In Settlement

The relief provided to the Settlement Class by the proposed Settlement is significant and substantial. As noted above, the proposed Settlement requires a payment of a Common Settlement Fund of $2,000,000.00 out of which all settlement payments to the Settlement Class, attorney fees and costs, enhancements to Named Plaintiff, and administrative costs will be paid. There are 9817 members of the Settlement Class who did not opt out. (Hawkins Decl. at ¶ 9.) The parties estimate that the Settlement will result in a payment of approximately $3.80 per Eligible Work Month for each member of the Settlement Class during the class period. Because each Class Member's individual share of the Common Settlement Fund is based upon his/her tenure in a Covered Position, the distribution of settlement benefits is weighted in favor of those Class Members who were most affected by the alleged wage and hour violations. The Class Members will receive a benefit directly in cash upon final

1 approval without any requirement of a claims process or prove up.

2 **c) The Extent of Discovery Completed and the Stage of the**
3 **Proceedings**

4 As noted above, the proposed Settlement was reached after investigation and
5 analysis by highly capable and experienced counsel. (See Hawkins Decl. at ¶¶ 3-5.)
6 Since this action was filed in June 2008, the parties have engaged in substantial
7 investigation into the factual and legal claims presented in the Complaint. (Id.) The
8 parties have conducted substantial formal and informal discovery and have exchanged
9 information concerning the issues raised in the case. (Id.) In addition, Named
10 Plaintiff's Counsel took the deposition of a Quest Diagnostics' human resources
11 director regarding Quest Diagnostics' meal period and rest period practices,
12 timekeeping procedures, wage payment practices, and other issues. (Id.) Named
13 Plaintiff's Counsel has further undertaken a substantive analysis of the legal principles
14 applicable to the claims against Quest Diagnostics and the potential factual, legal, and
15 procedural defenses to those claims. (Id.) As a result of these efforts, and the parties'
16 own investigation and analysis of the claims, the parties were able to evaluate
17 thoroughly the underlying facts, legal theories, and defenses at issue in the Litigation.
18 (Id.)

19 The proposed Settlement was reached following extensive, arms-length
20 negotiations, including those taking place in a lengthy formal full day mediation
21 before Eugene Moscovitch of ADR Services, Inc., a respected mediator with
22 significant experience in the area of wage and hour class actions. (Hawkins Decl. at
23 ¶¶ 4-5.) Although the parties were willing to explore the potential for settlement, each
24 side also was fully committed and prepared to litigate the case through trial and appeal
25 if a settlement had not been reached. The proposed Settlement was reached at the end
26 of a process that was neither fraudulent nor collusive. (Id.) Counsel for the parties
27 aggressively advanced their respective positions throughout the Litigation, the
28 settlement negotiations, and the mediation. (Id.) The result is a fair, adequate, and

1 reasonable settlement for Named Plaintiff and members of the Settlement Class. (Id.
2 at ¶ 8.); See In re Paine Webber Ltd. Partnerships Litig., 171 F.R.D. 104, 125
3 (S.D.N.Y. 1997) (internal citations omitted)("[s]o long as the integrity of the arm's
4 length negotiation process is preserved…a strong initial presumption of fairness
5 attaches to the proposed settlement.").

6 **d) The Experience and Views of Counsel**

7 As explained above, Named Plaintiff's Counsel has sought and obtained
8 information and documentation regarding Named Plaintiff's claims through the formal
9 and informal exchange of information between the parties and through their own
10 review, analysis, and investigation into the underlying facts, events, and issues.
11 (Hawkins Decl. at ¶¶ 3, 8, 13-18.) As such, Named Plaintiff's Counsel was able to
12 evaluate thoroughly the issue presented in the Litigation. (Id.)

13 Both Named Plaintiff and her counsel were prepared to litigate the claims in
14 this case, but they strongly and unequivocally support the proposed Settlement as
15 being in the best interests of the class. (See Hawkins Decl. at ¶ 8.) While not
16 conclusive, the recommendations of counsel proposing the settlement are entitled to
17 great weight in the Court's preliminary fairness evaluation. See, e.g., 4 Conte &
18 Newberg, Newberg on Class Actions § 11.47 (4th ed. 2002) ("Newberg"); In re Paine
19 Webber Ltd. Partnerships Litig., 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("great weight
20 is accorded to the recommendations of counsel, who are most closely acquainted with
21 the facts of the underlying litigation.") (citations omitted).

22 In this regard, Named Plaintiff's Counsel are experienced in handling complex
23 wage and hour class action litigation and have successfully litigated numerous wage
24 and hour class actions. (See Hawkins Decl. at ¶¶ 13-17.) Indeed, Named Plaintiff's
25 Counsel have been certified and approved as lead class counsel in numerous other
26 wage and hour class actions. (Id.)
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1 e) **The Reaction of The Class Members to the Proposed**
2 **Settlement**

3 Not surprisingly, the response of the Class Members to the proposed Settlement
4 has been overwhelmingly positive. Notice of the proposed Settlement was sent by
5 first-class mail to 9892 Settlement Class members. (Tittle Decl. at ¶¶ 7, 10.) None of
6 the Class Members has objected to the Settlement, and only 75 Class Members have
7 opted out, which represents only 0.0076% of the total Settlement Class. (Id. at ¶¶ 11-
8 12.) The absence of objections and opt-outs is compelling evidence that the
9 settlement is fair and reasonable, and weighs heavily in favor of final approval. See
10 Newberg, *supra*, § 11:48 ("Courts have taken the position that one indication of the
11 fairness of a settlement is the lack of or small number of objections.")

12 **V. THE INCENTIVE AWARD IS APPROPRIATE.**

13 The Settlement Agreement provides for an enhancement award to the Named
14 Plaintiff, subject to Court approval, in the amount of $10,000, which will be paid out
15 of the Common Settlement Fund . (Settlement at ¶ XIII.)

16 The enhancement is appropriate and reasonable in light of the following facts:
17 (1) Named Plaintiff actively participated in all stages of the litigation and has been
18 continuously apprised of the progress of the case; (2) Named Plaintiff has always
19 maintained the best interests of her former co-workers while performing her class
20 representative duties; (3) Named Plaintiff spent many hours conferring with Class
21 Counsel and assisting Class Counsel in factual development in the prosecution of the
22 case; (4) Named Plaintiff faced a financial risk that she would be liable for
23 Defendants' costs and potentially Defendant's attorneys' fees; (5) Named Plaintiff
24 risked exposure of future employability in this field as a result of participation in a
25 lawsuit against a former employer; and, (6) Named Plaintiff's efforts have resulted in a
26 favorable outcome for the Class. (See Almero Decl. at ¶¶ 4-9.); *see, e.g.,* Cook v.
27 Niedert, 142 F.3d 1004, 1015 (7th Cir. 1998); Roberts v. Texaco, 979 F.Supp. 185
28 (S.D.N.Y. 1997) ("present or past employee whose present position or employment

credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril, a substantial enhancement award is justified"); Thornton v. East Texas Motor Freight, 497 F.2d 416,420 (6th Cir. 1974) ("We also think there is something to be said for rewarding those drivers who protect and help to bring rights to a group of employees who have been the victims of discrimination."). Here, there is only one class representative, and the requested enhancement award in the amount of $10,000 (ten thousand dollars) is reasonable.

VI. PLAINTIFF REQUESTS FOR APPROVAL OF PLAINTIFF'S COUNSEL'S ATTORNEYS' FEES AND COSTS.

A. Attorneys' Fees

After more than eighteen (18) months of heavily contested litigation, Class Counsel successfully negotiated a Settlement with Defendant which provides for a Two Million Dollar ($2 million) common fund for the payment and administration of claims of the Class Members and payment of attorneys fees, costs, and Named Plaintiff's enhancement award. This Settlement payment is all-in, with no reversion to Defendant.

As part of the settlement, the parties agreed to an award of attorneys' fees equal to 30% of the total settlement value. (Settlement at ¶ XII.) The requested fee falls at the bottom end of the Ninth Circuit's benchmark of 25% to 40% of a common fund and is fair compensation for undertaking such complex, risky and time-consuming litigation on a contingent basis. See Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990).

Since the attorneys' fees requested are well within the range of reasonableness and the results achieved for the Class Members are excellent, Plaintiffs respectfully request that the Court award the requested fees equal to 30% of the common fund. The requested fee is fair compensation for undertaking this complex, risky, expensive, and time-consuming litigation on a contingent basis. (Hawkins Decl. at ¶¶ 17-21.)

In defining a reasonable fee, the Court should mimic the marketplace for cases involving a significant contingent risk such as this one. Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law in class actions, attorneys providing these substantial benefits should be paid an award equal to the amount negotiated in private bargaining that takes place in the legal market place. Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 338, *rehg. denied*, 446 U.S. 947 (1980). "When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market would set. . . . The judge, in other words, is trying to mimic the market in legal services." Gaskill v. Gordon, 160 F.3d 361, 363 (7th Cir. 1998); Lealao v. Beneficial California, Inc. 82 Cal.App.4th 19, 49-50 (2000) ("attempting to award the fee that informed private bargaining, if it were truly possible, might have reached." A fee award should approximate a "percentage fee [] freely negotiated in comparable litigation."); In re Copley Pharmaceutical, Inc. 1 F.Supp.2d 1407, 1411 (D. Wyo.1998) ("the percentage of the fund method better approximates the workings of the marketplace by focusing on the results achieved.").

The United States Supreme Court has ruled that the parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorneys' fees. *See* Evans v. Jeff D., 475 U.S. 717, 734-35, 738, n.30 (1980). In Hensley v. Eckerhart, 461 U.S. 424, 437 (1983), the Supreme Court held that negotiated, agreed-upon attorneys' fee provisions are the ideal towards which the parties should strive:

> A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.

Id.

The United States Supreme Court has reemphasized this policy and further stressed that the trial court "has a responsibility to encourage agreement" on fees.

1 Blum v. Stenson, 465 U.S. 886, 902 n.19 (1984). Here, as part of the Settlement,
2 Defendant agreed not to oppose an award of 30% of the settlement amount for
3 attorneys' fees. Such a fee is commensurate with what the market would provide for
4 similar services and the Court therefore can most certainly enforce the agreement. As
5 the United States Supreme Court has instructed:

6 Given the unique reliance of our legal system on private litigants to
7 enforce substantive provisions of law through class and derivative actions, **attorneys providing the essential enforcement services must**
8 **be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace**, as it will
9 otherwise be economic for defendants to increase injurious behavior.

10 Deposit Guaranty Nat. Bank, *supra*, 445 U.S. at 338.[1]
11 The requested fee and cost award was a product of arms-length negotiations and fairly
12 reflects the marketplace value of the services rendered by Class Counsel in this case.
13 As a result, the fee agreed to by the parties should be approved.

14 Federal courts in this Circuit have recognized that an appropriate method for
15 awarding attorney's fees in class actions is to award a percentage of the "common
16 fund" created as a result of the settlement. See, e.g., *Vincent* v. Hughes Air West,
17 Inc., 557 F.2d 759,769 (9th Cir. 1977). The purpose of the common fund/percentage
18 approach is to "spread litigation costs proportionally among all the beneficiaries so
19 that the active beneficiary does not bear the entire burden alone." Vincent, supra, 557
20 F.2d at 769. In Quinn v. State of California, 15 Ca1.3d 162, 167 (1995), the
21 California Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit
22 which creates a fund from which others derive benefits may require those passive
23 beneficiaries to bear a fair share of the litigation costs." Similarly, in City and County
24 of San Francisco v. Sweet, 12 Cal.4th 105, 110 (1995), the California Supreme Court
25 recognized that the common fund doctrine has been applied "consistently in California
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1 when an action brought by one party creates a fund in which other persons are entitled
2 to share." The reasons for applying the common fund doctrine include: "... fairness
3 to the successful litigant, who might otherwise receive no benefit because his
4 recovery might be consumed by the expenses; correlative prevention of an unfair
5 advantage to the others who are entitled to share in the fund and who should bear
6 their share of the burden of its recovery; encouragement of the attorney for the
7 successful litigant, who will be more willing to undertake and diligently prosecute
8 proper litigation for the protection or recovery of the fund if he is assured that he
9 will be properly and directly compensated should his efforts be successful." (Id.)
10 Several courts have expressed frustration with the alternative "lodestar"
11 approach for deciding fee awards, which usually involves wading through
12 voluminous and often indecipherable time records. Commenting on the lodestar
13 approach, Chief Judge Marilyn Hall Patel wrote in In re Activision Securities
14 Litigation, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989):
15 "This court is compelled to ask, 'Is this process
16 necessary?' Under a cost-benefit analysis, the answer
17 would be a resounding, 'No!' Not only do the *Lindy Kerr-Johnson* analyses consume an undue amount of court time
18 with little resulting advantage to anyone, but in fact, it
19 may be to the detriment of the class members. They are
20 forced to wait until the court has done a thorough,
21 conscientious analysis of the attorneys' fee petition. Or,
22 class members may suffer a further diminution of their
23 fund when a special master is retained and paid from the
24 fund. Most important, however, is the effect the process
has on the litigation and the timing of settlement. Where
attorneys must depend on a lodestar approach, there is
little incentive to arrive at an early settlement."
25 The percentage approach is preferable to the lodestar because: (1) it aligns the
26 interest of class counsel and absent class members, 2) it encourages efficient
27 resolution of the litigation by providing an incentive for early, yet reasonable,
28 settlement; and (3) it reduces the demands on judicial resources. Id. at 1378-79.

1 The Ninth Circuit now routinely uses the percentage of the common fund approach
2 to determine an award of attorney's fees. *See, e.g.,* In re Pacific Enterprises
3 Securities City and County of San Francisco Litigation, 47 F.3d 373, 378-79 (9th
4 Cir. 1994) (approving attorney's fee of 33 1/3%.).

5 Plaintiff counsel's request for fees of in the sum of thirty (30%) of the Common
6 Settlement Fund is well within the range of reasonableness. Historically, courts have
7 awarded percentage fees in the range of 25% to 50%, depending on the circumstances
8 of the case. In re Activision Securities Litigation (N.D. Cal. 1989). Indeed, California
9 cases in which the common fund is under $10 million small, tend to award attorneys'
10 fees above the 25% benchmark. See Craft v. County of San Bernardino, 624 F. Supp.
11 2d 1113, 1127 (C.D. Ca. 2008) (holding attorneys' fees for large fund cases are
12 typically under 25% and cases below $10 million are often more than the 25%
13 benchmark). More particularly, a review of California cases in other districts reveals
14 that courts usually award attorneys' fees in the 30%-40% range in wage and hour class
15 actions that result in recovery of a common fund under $10 million. See Vasquez v.
16 Coast Valley Roofing, Inc., 266 F.R.D. 482, 491-92 (E.D. Ca. 2010) (citing to five
17 recent wage and hour class actions where federal district courts approved attorney fee
18 awards ranging from 30 to 33%).

19 Class Counsel has borne, and continues to bear, the entire risk and cost of
20 litigation associated with this class action on a pure contingency basis. (Hawkins Decl.
21 at ¶¶ 18-21.) The factual and legal issues posed in this case were difficult. Class
22 Counsel have diligently litigated this case and have produced an excellent result for
23 the Class Members. (Id.) Based on Class Counsel's past experience in class action
24 wage and hour litigation, it is safe to state that Class Counsel may be called upon to a
25 expend additional amounts of time in the presentation and resolution of contests and
26 disputes relating to Class Members' claims under the terms of the proposed
27 settlement. (Id.) This includes disputes as to the amounts of individual claims and
28 perhaps other issues.

1 It is recognized that one of the primary factors justifying an enhanced
2 attorneys' fees reward is the attendant risks inherent in the litigation. As observed in
3 City of Detroit v. Grinnell Corporation, 495 F.2d 448,470 (2d Cir. 1974):

4 "No one expects a lawyer whose compensation is contingent
5 upon his **success** to charge, when successful, as little as he
6 would charge a client who had agreed to pay
for his services, regardless of success. Nor,
7 particularly in complicated cases producing large
recoveries, is it just to make a fee depend solely on
8 the reasonable amount of time expended."

9 Despite the complexity of the case, Class Counsel have, through the investment of
10 substantial effort and time of their boutique law firm, been able to secure an
11 outstanding settlement on behalf of the Class Members. Defendant has vigorously
12 contested liability, the amount of claimed damages, and the propriety of class
13 certification. Plaintiff has faced substantial obstacles in demonstrating that class
14 certification would be appropriate and then in establishing Defendant's liability and
15 damages.

16 It is this kind of situation, involving complex issues, that has been recognized as
17 deserving of a substantial attorney fee award. As a result, Plaintiff respectfully
18 request the Court award reaonsable attorneys' fees in the sum of $600,000.

19 **B. Costs of Litigation**

20 The request for reimbursement of costs in the amount of $8,260.31 is fair
21 and reasonable. The costs are all litigation-related costs. (Hawkins Decl. at ¶ 22.)
22 The authority for the court to award this is the parties' settlement agreement. Plaintiff
23 requests approval of reimbursement of these reasonable costs.

24 **VII. CONCLUSION**

25 For the reasons set forth above, Named Plaintiff respectfully requests that the
26 Court grant final approval to the proposed Settlement.

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JAMES HAWKINS APLC

Dated:November 29, 2010

By: /s/ James Hawkins
James R. Hawkins
Attorneys for Plaintiffs