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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA—SOUTHERN DIVISION

HUGO DELGADO, individually, and on behalf of other members of the general public similarly situated,

Plaintiff,

vs.

NEW ALBERTSON'S, INC,. a Delaware corporation; SUPERVALU INC., a Delaware corporation; AMERICAN STORES COMPANY, LLC, a Delaware limited liability company,

Defendants.

Case No.: SACV08-806 DOC (RNBx)

Assigned to Hon. David O. Carter

PRIVATE ATTORNEYS GENERAL ACT, CALIFORNIA LABOR CODE §§ 2698 ET SEQ.

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, CLASS REPRESENTATIVE ENHANCEMENT, AND AN AWARD OF ATTORNEYS' FEES AND COSTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FINAL APPROVAL AND IN RESPONSE TO OBJECTION

Date: January 23, 2012
Time: 8:30 a.m.
Place: Courtroom 9-D

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 23, 2012, or as soon thereafter as this matter may be heard, before Hon. David O. Carter, United States District Court Judge, in Courtroom 9-D of the United States District Court for the Central District of California, Southern Division, located at 411 West Fourth Street, Santa Ana, California 92701, Plaintiff Hugo Delgado will, and hereby does, move this Court to enter of an order granting final approval of this class action settlement and all agreed-upon terms therein. Plaintiff requests that the Court grant final approval of (1) the Joint Stipulation of Class Action Settlement; (2) the $30,000 payment to the California Labor and Workforce Development Agency; (3) Claims Administration Costs of $135,000; (4) the Class Representative Enhancement Payment of $5000; and (5) $600,000 in attorneys' fees and costs. This Motion is unopposed by Defendants New Albertson's, Inc., Supervalu Inc., and American Stores Company, LLC (collectively, "Defendants").

The Memorandum of Points and Authorities supporting final approval will also address and respond to the sole Class Member objection, which, without foundation, challenges the class notice and request for attorneys' fees. The class notice exceeds the notice requirements set by Federal Rules of Civil Procedure and provided Class Members all the information they needed to make an informed decision about whether they should participate in the settlement. The separately negotiated attorneys' fees are more than reasonable given the unique circumstances of the litigation and are authorized by the California Labor Code and Code of Civil Procedure.

This Motion is based upon: (1) this Notice of Motion; (2) the Memorandum of Points and Authorities in Support of Motion for Final Approval of Class Action Settlement, Class Representative Enhancement, and an Award of

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Attorneys' Fees and Costs; (3) the Declaration of Gene Williams in Support of Motion for Final Approval, Class Representative Enhancement, and an Award of Attorneys' Fees and Costs; (4) the Declaration of G. Arthur Meneses in Support of Motion for Final Approval, Class Representative Enhancement, and an Award of Attorneys' Fees and Costs; (5) the Declaration of Hugo Delgado in Support of Motion for Final Approval, Class Representative Enhancement, and an Award of Attorneys' Fees and Costs; (6) the Declaration of Eric Springer re Motion for Final Approval of Class Action Settlement; (7) the [Proposed] Order Granting Final Approval of Class Action Settlement and Judgment; (8) the records, pleadings and papers filed in this action; and (9) such other documentary and oral evidence as may be presented to the Court at the hearing of this motion.

Dated: December 19, 2011

Respectfully submitted,

Initiative Legal Group APC

By: _____

G. Arthur Meneses
Gene Williams

Attorneys for the Settlement Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Three years of litigation punctuated by hard-fought discovery battles, production of over 3.5 million records, analysis of thousands of wage statements, interviews with prospective Class Members, a successful summary judgment opposition, two class certification motions, and two mediations has yielded the Settlement Agreement[1] before the Court. The settlement accomplishes the litigation's two objectives: (i) correcting the format of Albertson's[2] wage statements and (ii) providing Class Members with statutory-based compensation for the alleged wage statement violations.

Pursuant to the Settlement, Albertson's will modify its wage statements to show both total hours worked and all applicable hourly rates, consistent with the applicable Labor Code provisions. *See* Cal. Lab. Code §§ 226(a)(2) (requiring that wage statements show "total hours worked by the employee"); 226(a)(9) ("all applicable hourly rates"). Albertson's will also pay $700,000 – in full and with no reversion to Albertson's – to Class Members. Separately, and subject to Court approval, Albertson's will reimburse Class Counsel for their reasonable attorneys' fees and costs, not to exceed $600,000.

The Class' response to the Notice[3] has been overwhelmingly positive. (Declaration of Eric Springer ["Springer Decl."] ¶¶ 11-15.) Less than four-tenths of a percent of the Class has opted out and only one Class Member has objected to the Settlement. *See* Objection to [sic] Michelle Williams to Proposed Class Action Settlement and Notice to Appeal ("Williams Objection"), Dkt. No.

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[1] "Settlement Agreement" and "Settlement" refer to the Joint Stipulation of Class Action Settlement. All defined terms used herein have the same meaning as set forth in the Settlement Agreement.

[2] "Albertson's" refers collectively to Defendants New Albertson's, Inc., Supervalu Inc., and American Stores Company, LLC.

[3] "Notice" refers to the Notice of Class Action Settlement.

125 (Dec. 5, 2011). The hastily drafted, yet untimely,[4] objection attempts to articulate two defects with the Settlement, neither of which is availing.[5] First, contrary to what the Williams Objection suggests (without authority), there is no categorical requirement that a class notice provide Class Members with an estimate of their anticipated settlement payments, particularly where, as here, no meaningful estimate is possible before the Court-approved notice process has run its course. Further, the separately negotiated attorneys' fees and costs are authorized by the California Labor Code and the California Private Attorneys General Act, and are reasonable given the unique circumstances of the litigation.

Accordingly, in addition to providing a full analysis about why the Settlement should receive final approval, this Memorandum will demonstrate that (1) the Notice satisfied due process requirements by providing Class Members with sufficient information upon which to make informed decisions about whether they should participate in the Settlement, and (2) the request for statutory attorneys' fees and costs is reasonable and deserved in light of Class Counsel's commitment to the litigation.

II. FACTS AND PROCEDURE

Delgado worked for Albertson's in California as an order selector from October 27, 2007 through January 25, 2008. Albertson's paid Delgado on a weekly basis and provided him with weekly wage statements. In his complaint, Delgado alleged that Albertson's provided employees with wage statements that

[4] The Williams Objection was filed on December 5, 2011 – after the December 2, 2011 deadline.

[5] As to the remedy it seeks, the Williams Objection is not specific. *See, generally*, Williams Obj. Presumably an arrangement whereby the attorneys behind the Williams Objection are invited to share in the Settlement's proceeds would suffice. Counsel of record for the Williams Objection are listed as "Williams, Baker & Associates," with the Williams Objection being managed by a 2009 California Bar admittee.

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did not comply with the requirements of California Labor Code[6] section 226(a). Delgado alleged that the wage statements: (1) did not display his employer's proper name; (2) incorrectly stated the total number of hours he worked during each pay period; and (3) did not state his overtime rate of pay. Delgado sought relief under sections 226(e), 226(g), and 2699. (Complaint, Dkt. No. 1.)

Delgado moved for class certification on October 2, 2009 and Albertson's moved for summary judgment on November 9, 2009. (Plaintiff's Memorandum of Points and Authorities in Support of Motion for Class Certification, Dkt. No. 39; Defendants' Memorandum of Points and Authorities in Support of its Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment o Plaintiff's Claims, Dkt. No. 48.)

The Court ruled on both motions on December 15, 2009. The Court granted Albertson's Motion for Summary Judgment as to Delgado's section 226(g) claim (injunctive relief) as well as his claims under sections 226(e) and 2699 for a violation of section 226(a)(8) (the requirement that an employer include its name and address on wage statements). The Court denied summary judgment as to Delgado's section 226(e) and 2699 claims for a violation of section 226(a)(2) (the requirement that wage statements include the total number of hours worked), and section 226(a)(9) (the requirement that wage statements list all applicable hourly rates in effect during the pay period and the hours worked at each hourly rate). The Court also rejected Albertson's arguments that PAGA violated the Equal Protection Clause of the Fourteenth Amendment and the Separation of Powers Clause of the California Constitution. (Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Class Certification, Dkt. No. 65.)

[6] Unless indicated otherwise, all succeeding statutory references are to the California Labor Code.

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After narrowing the range of issues in play through the partial grant of summary judgment, the Court then denied Delgado's request to certify his proposed class. The Court found that (1) an action may be pursued under section 226(e) only if an employee has actually suffered some injury and (2) determining whether each Class Member were injured would require individualized determinations. As such, the Court found that individual issues predominated over common questions. (Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Class Certification, Dkt. No. 65.)

In denying class certification, the Court noted that Delgado had argued in his Opposition to the Motion for Summary Judgment that he did not have to prove an injury in fact to pursue his PAGA claim. The Court declined to reach that issue as premature but invited Plaintiff to file for class certification of the PAGA claim.

On January 14, 2010, Delgado moved for class certification of his PAGA wage statement claim. (Plaintiff's Memorandum of Points and Authorities in Support of Motion for Class Certification of Plaintiff's PAGA Action; Dkt. No. 70.) On March 15, 2010, the Court granted Plaintiff's Motion and certified the following subclass:

> [a]ll non-exempt or hourly paid employees who have been employed by Defendants in the state of California within one year prior to the filing of this complaint until certification who have received one or more wage statements that show overtime hours, 'Night Premium' hours, 'Premium Night' hours, or 'Sunday Premium' hours as being worked.

(Order Granting Plaintiff's Motion for Class Certification, Dkt. No. 91.)

On March 31, 2010, Defendants filed a Petition for Permission to Appeal the Court's order granting class certification. On June 16, 2010, the 9th Circuit Court denied Defendants' petition for permission to appeal this Court's March 15, 2010 order granting class certification. (Order, Dkt. No. 107.)

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Following certification of Plaintiff's wage statement claim under PAGA, the parties agreed to mediate with Michael Dickstein, a respected wage-and-hour class action mediator. After Class Counsel analyzed a representative sample of the wage statements necessary to make reasonable assumptions about potential relief, the parties mediated on April 16, 2010. Despite a full day of mediation and protracted settlement talks, the parties were unable to reach a settlement.

On October 4, 2010, the Parties participated in a second mediation, this time with well-respected mediator Mark Rudy. Although the Parties did not settle on that day, over the following months, Mr. Rudy assisted the Parties in negotiating a bifurcated settlement. Mr. Rudy proposed injunctive relief for the class in the form of revising Defendants' wage statements to comply with Labor Code 226(a)(2) and 226(a)(9) and a non-reversionary cash payment of $700,000 to Class Members. After the Parties' reached agreement on the class settlement, Mr. Rudy proposed attorneys' fees and costs of $600,000, which was accepted.

The settlement's principal terms are as follows:

- A Settlement Class defined as: "All individuals employed by Defendants in non-exempt positions in California between July 21, 2007 and September 29, 2011, who did not opt-out from participating in these proceedings."
- Injunctive Relief: Albertson's will modify wage statements for non-exempt California employees to display total hours worked and all applicable hourly rates in effect during each pay period. Such modifications will be implemented by no later than January 1, 2012.
- A Maximum Settlement Amount of Seven Hundred Thousand Dollars ($700,000), which includes:
    - Claims Administration Costs of $135,000, to be paid to the mutually agreed upon class action claims administrator Simpluris, Inc. ("Claims Administrator");

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- A Class Representative Enhancement of $5000 to Delgado for his effort in securing the Settlement; and
- Payment to the California Labor and Workforce Development Agency ("LWDA") of $30,000 for settlement of the LWDA's share of the Labor Code Private Attorneys General Act ("PAGA") penalties.

- A Net Settlement Amount of $530,000 (the Maximum Settlement Amount minus Claims Administration Costs, the Class Representative Enhancement, and the LWDA PAGA payment), which shall be paid to Class Members on a pro-rata, non-reversionary basis, according to the number of weeks worked during the Class Period.
  - If the Court grants final approval, all Class Members who timely submitted Claims Forms will be mailed a check for their share of the Net Settlement Amount. Class Members will be paid an average $45, with the highest payment being $70.
  - Because of the non-reversionary structure of the settlement, participating Class Members will be paid an average more than three times what they were projected to be paid at preliminary approval ($45 vs. $12[7]).[8]

[7] $530,000 Net Settlement Amount ÷ 44,647 Class Members = $11.87 average payment.

[8] The non-reversionary structure of the settlement would have made providing Class Members a single estimate of their projected settlement payments particularly difficult and likely misleading (as exemplified by the $45 to $12 spread). Accordingly, Class Counsel and counsel for Albertson's drafted the Notice of Class Action settlement to provide each Class Member with the total number of weeks he or she worked during the Class Period, rather than his or her estimated payment. Because all settlement payment calculations, including pro-rata increases, are based on the number of weeks each Class Member worked during the Class Period, Class Counsel concluded, and the Court confirmed, that this is an acceptable approach and would "provide the best

- Attorneys' fees and costs of $600,000, as provided by California Labor Code sections 226(e) and 2699(g)(1), and California Code of Civil Procedure section 1021.5. Sections 226(e), 2699(g)(1), and 1021.5 provide for statutory fee-shifting so as to allow attorneys' to receive reasonable compensation for their services without undercutting a client or a class' recovery (as would be the case if the attorneys' had no other recourse but to take a percentage of the recovery). Consistent with statutory-fee shifting, Plaintiff's request for $600,000 in attorneys' fees and costs is separate from the $700,000 recovery negotiated for the Class.

On July 1, 2011, Delgado moved for preliminary approval of the class action settlement. On September 29, 2011, the Court granted preliminary approval of the Settlement and directed the parties to mail the Court-approved Notice of Class Action Settlement, Claim Form, and Exclusion Form ("Class Notice") to all known Class Members via first class mail. (Amended Order Granting Preliminary Approval of Class Action Settlement, Dkt. No. 124.)

III. ARGUMENT

A. The Class Action Settlement is Fair, Adequate, and Reasonable

1. Every Relevant Factor Supports Final Approval of the Settlement

Under Federal Rule of Civil Procedure 23(e), the central issue on a motion for final approval of a class action settlement is whether the settlement is "fair, adequate and reasonable." *Officers for Justice v. Civil Serv. Comm.'s*, 668 F.2d 615, 625 (9th Cir. 1982). A settlement is fair, adequate and reasonable when "the interests of the class are better served by the settlement than by further litigation." Herr, *Manual for Complex Litigation, Fourth* ("Manual") § 21.6 at

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notice practicable under the circumstances, constitute due and sufficient notice to all persons entitled to notice, and thereby satisfy due process." (Amended Order Granting Preliminary Approval of Class Action Settlement, Dkt. No. 124.)

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309 (2004).

A settlement is presumed to be fair where, as here, the settlement is the product of arm's-length negotiations, sufficient investigation and discovery have taken place to allow counsel and the Court to act intelligently, and counsel is experienced in similar types of litigation. *See Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

2. The Response of the Class Supports Final Approval

As authorized by the Court's Order preliminarily approving the Settlement Agreement, the parties engaged Simpluris, Inc. ("Simpluris") to provide settlement administration services. (Springer Decl. ¶ 3.) Simpluris' duties have included: (1) printing and mailing the Class Notices; (2) receiving and logging undeliverable Class Notices; (3) receiving and validating Claim Forms and Exclusion Forms; (4) calculating claim payments (this will include distribution of funds and tax-reporting following final approval); and (5) answering questions from Class Members. (*Id.* at ¶ 5.) Simpluris also set up a toll free number so that Class Members could telephone and ask questions about the Settlement.

On October 4, 2011, Simpluris received copies of the Class Notice prepared jointly by Class Counsel and counsel for Albertson's and approved by the Court. (Springer Decl. ¶ 6.) The Class Notices advised Class Members how to claim payment from the Settlement, how to opt out of the Settlement, and how to object to the Settlement. (*Id.*)

On October 7, 2011, counsel for Albertson's provided Simpluris with a mailing list (the "Class List") including each Class Member's full name; last-known address and last-known home telephone number; Social Security number; job title, job description and dates of employment. (Springer Decl. ¶ 7.) The mailing addresses contained in the Class List were processed and updated using the National Change of Address Database maintained by the U.S. Postal Service. (*Id.* at ¶ 8.) On October 18, 2011, Class Notices were mailed to Class Members

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via First-Class U.S. mail. (*Id.* at ¶ 9.)

Simpluris has received a total of 11,676 valid Claim Forms, or 26% of the Settlement Class, which is within the range of participation for comparable class action settlements. (Springer Decl. ¶¶ 11-13.) These participating Class Members will share 100% of the $530,000 Net Settlement Amount. The average recovery under the settlement is approximately $45; the highest is approximately $70. (*Id.* at ¶ 12.) Less than 0.4% percent of the Class opted out. (*Id.* at ¶ 14.) There has been one, unmeritorious objection, addressed in detail below.

A low number of opt outs and objections is a strong indicator that a settlement is fair and reasonable. *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1152-53 (2000) (Class response favourable where "[a] mere 80 of the 5,454 national class members elected to opt out [(1.5% of the entire Class)] and . . . [a] total of nine members . . . objected to the settlement.)

Class Counsel attributes the Class' positive response to the Settlement to a number of factors, including the significant injunctive and monetary relief secured by the Settlement; the clarity of the Class Notice and relative ease in submitting claims for payment; Simpluris' efficient administration; and Class Counsel's independent efforts to ensure that Class Members were well informed of the Settlement. During the notice period, Class Counsel communicated with numerous Class Members, providing Class Members with an explanation of the Settlement's terms, their rights to participate in the Settlement (or to opt out) and to submit claims for payments, and apprising them of the deadline for submitting claims for payment. Class Counsel also maintained an informational website that provided Class Members with a summary of the litigation and invited them to contact Class Counsel to inquire about the Settlement.

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3. Class Counsel Aggressively Litigated This Matter and Conducted Significant Investigation and Discovery into the Claims

Class Counsel were required overcome seemingly indefatigable resistance from a well-financed opponent represented by experienced defense counsel. Albertson's deployed an aggressive defense strategy at every phrase of the litigation. For instance, Albertson's contested the very constitutionality of the California Private Attorneys General Act on which Delgado's claim was based.

The following overview of the case illustrates just how much extra effort went into this litigation due to these challenges:

Pre-Litigation Investigation

After a series of consultations with Delgado about his experiences working for Albertson's, Class Counsel requested and obtained a selection of Delgado's employment records. (Declaration of Gene Williams ["Williams Decl."] ¶ 2.) Delgado's wage statements were among these records and immediately drew Class Counsel's attention because they appeared to double count the hours Delgado worked during certain pay periods and to omit his rates of pay. (*Id.*) Following examination of additional wage statements, Class Counsel concluded that their initial assessment was correct. (*Id.*) Recognizing that employers issue employees identically formatted wage statements, and that the itemization errors would have arisen under circumstances common to all Class Members, Class Counsel advised Delgado on the prospect of bringing a representative action on behalf of former and current employees for Albertson's alleged failure to comply with Section 226(a). (*Id.*)

After receiving Delgado's authorization, Class Counsel began to draft a formal complaint against Albertson's. (Williams Decl. ¶ 3.) To ensure that all possible defendants were named in the action, Class Counsel researched Albertson's corporate status and business affiliations. (*Id.*) Counsel also

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assessed whether Delgado could bring a separate claim seeking civil penalties under PAGA, the California Labor Code Private Attorneys General Act of 2004. (*Id*.) Class Counsel has assumed a leading role in prosecuting PAGA actions and has contributed to the developing body of appellate law surrounding PAGA. After additional research and analysis, Class Counsel concluded that Delgado could assert a viable PAGA claim, and on that basis undertook to satisfy PAGA's administrative prerequisites. Specifically, PAGA requires notification of California's Labor and Workforce Development Agency of Delgado's intent to seek civil penalties. (*Id*.)

Class Counsel filed Delgado's Complaint on July 21, 2008, and after satisfying the administrative prerequisites, filed an amended complaint on August 8, 2008 adding the PAGA claim. (Williams Decl. ¶ 4.) Had Class Counsel not advised Delgado on bringing a representative action under PAGA, the case's settlement value would have substantially decreased after the first class certification motion was denied, as elaborated on below. (*Id*.)

Discovery

On October 23, 2008, Delgado served Albertson's with a set of interrogatories and requests for production of documents seeking the names and contact information of prospective Class Members. (Williams Decl. ¶ 5.) The chief purpose of such "names discovery" is to facilitate interviews with the key witnesses in any wage and hour class action – the employees on whose behalf the claims are brought. Additionally, in that employer defendants already have ready access to the prospective class members, this discovery is crucial in creating a level evidentiary playing field.

The discovery also sought documentary evidence, specifically: (1) documents describing Albertson's organizational structure; (2) Delgado's personnel files, human resource files, and performance evaluations; (3) contracts provided to Delgado at the beginning of his employment; (4) documents signed

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by Delgado relating to the terms and conditions of his employment; (5) policies and procedures manuals provided to employees regarding wage statements; (6) emails, memos, and other correspondence concerning wage statements; (7) orientation materials provided to employees regarding wage statements; (8) documents identifying the job titles, job codes, job locations, or names of all Albertson's employees in California during the class period; (9) documents relating to any complaints or investigations about the wage statements; (10) documents concerning wage statement policies, particularly any changes to the policies during the class period; (11) exemplar wage statements; and (12) a sample of all actual wage statements issued during the class period. (Williams Decl. ¶ 6.)

Although Albertson's largely responded to the document requests, Class Counsel had to battle to obtain the putative Class Members' names and contact information. Three motions to compel were necessary (one as to each named Defendant). Finally, the Court ordered Albertson's to provide the names of 100 persons after first providing notice and an opportunity to opt out. (Williams Decl. ¶ 7.)

After the opt-out process was completed, Class Counsel contacted prospective Class Members to interview them about their experiences receiving wage statements from Defendants. Class Counsel interviewed Class Members and gathered valuable information and evidence to substantiate Delgado's claims. Specifically, during the interview campaign, several Class Members volunteered their wage statements as evidence. These wage statements helped Class Counsel confirm that all Class Members received similarly formatted wage statements and evidenced the same violations. (Williams Decl. ¶ 8.)

On April 8, 2009, Plaintiff propounded a second set of interrogatories, principally for the purpose of ascertaining the size of the class, with implications for both satisfying the class certification "numerosity" requirement and making

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an informed valuation of the case. Requests for admission were propounded, as well, with the objective of confirming that Albertson's issued employees identically formatted wage statements, thereby establishing predominance of common issues of law and fact. On May 11, 2009, Albertson's responded to Plaintiff's interrogatories and requests for admission. (Williams Decl. ¶ 9.)

On August 24, 2009, Albertson's counsel sent an email that provided a sample wage statement containing the format used during the class period and provided supplemental responses to Delgado's interrogatories. (Williams Decl. ¶ 10.)

Following the second, successful motion for class certification, the Court ordered Albertson's to produce all wage statements issued to employees during the class period. In total, Albertson's produced approximately 3.5 million wage statements. More demanding than the production, however, was Class Counsel's review and analysis of several thousand of the produced wage statements. (Williams Decl. ¶ 11.)

Pleading and Motion Practice

This litigation required considerable motion practice. Class Counsel filed three separate motions to compel (as to each named Defendant); two class certification motions; and successfully opposed summary judgment. That Class Counsel generally succeeded with these motions triggered access to important discovery, which in turn provided the evidentiary basis to support class certification. (Williams Decl. ¶ 12.)

Two class certification motions were necessary. The first certification motion was denied on the ground that section 226(e) requires proof of injury as to each putative class member, thus precluding certification. Plaintiff then successfully moved for class certification under PAGA on the basis that section 2699(f)(2) does not require proof of injury to recover penalties.

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Mediations and Settlement

Settlement negotiations between Class Counsel and Albertsons spanned nearly eight months – March of 2010 through October of 2010. (Williams Decl. ¶ 14.) The settlement discussions were especially contentious because, owing to the relative lack of guiding precedent at the time, the parties had widely divergent perspectives on how to appraise Delgado's PAGA claim. (*Id.*) The settlement discussions included two mediation sessions, the first with Michael Dickstein and the second with Mark Rudy, as well as multiple exchanges of settlement proposals. (*Id.*)

Mr. Rudy assisted the Parties in negotiating a bifurcated settlement. Mr. Rudy proposed class benefits of injunctive relief in the form of revising Defendants' wage statements to comply with Labor Code 226(a)(2) and 226(a)(9), and a non-reversionary cash payment of $700,000 to Class Members. (Williams Decl. ¶ 15.) Mr. Rudy then proposed attorneys' fees and costs of $600,000. (*Id.*)

After Mr. Rudy's mediator's proposal, the parties continued to negotiate the remaining settlement terms. (Williams Decl. ¶ 16.) The parties also cooperatively drafted the Court-approved Class Notice. (*Id.*) Both sides have had considerable experience in drafting class notices that fully inform class members about settlement terms and provide them with all information necessary to making an informed decision about their participation in the settlement. (*Id.*)

4. The Settlement Should Be Approved Given the Strengths of the Claims and the Risk of Continued Litigation

The thrust of Plaintiff's case is that Albertson's issued employees wage statements that failed to (1) indicate the total number of hours actually worked during each pay period[9] as required by section 226(a)(2) and (2) identify to

[9] The error arose each time a Class Member worked hours that qualified for any type of premium pay such as "Night Premium" or "Sunday Premium."

corresponding hourly rate of compensation[10] in violation of section 226(a)(9).[11]

Plaintiff was able to settle both his underlying 226(a) claims and his claim for penalties under PAGA. However, of the two settled claims, the only claim with any practical value was the PAGA claim. At the risk of overgeneralization, the value of class-wide claims is dependent, in large part, on the size of a class. Prior to certification, there is no actual class, only a prospective class, and perhaps less charitably, only an "alleged" group of similarly aggrieved individuals. The value of the claims asserted on behalf of a class is estimated by assuming maximum damages in the aggregate and then discounting by credible defenses, the chances of the court denying certification, the chances of losing at trial, and the chances of winning at trial but losing on appeal.

Naturally, if the court denies certification, there is no class and the value of the case falls drastically. To the extent any value remains, it derives almost entirely from the value of a plaintiff's individual claims – hardly enough to merit litigation in their own right, even if only in small claims court. After the Court held that an action under section 226(e) may be pursued only if an employee has actually suffered a tangible injury, and finding that an inquiry as to whether each Class Member was injured by their receipt of improper wage statements would necessary implicate individualized determinations that would preclude certification, the value of Plaintiff's case dropped precipitously. The remaining value of Plaintiff's case lied in the PAGA claim.

Albertson's exposure for PAGA penalties can be calculated at the statutory rate (*see* Cal. Lab. Code § 2699(f)(2) ($100 for the initial violation and $200 for each subsequent violation)) for all pay periods within the one-year PAGA statute of limitations period. As PAGA penalties derive from the underlying Labor

The result is that the same hours were counted twice.

[10] Rather than stating the actual hourly rate, the wage statements only gave formulas; e.g., Daily Overtime @ 1.5 - 1.50 (hours) - 35.21 (earnings).

[11] Plaintiff also alleged that the wage statements failed to state the correct name of legal entity that employed all Class Members, but he lost this claim on summary judgment.

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Code claims, the case for recovering penalties can only be as strong as that for prevailing on the constituent claims. Accordingly, Plaintiff had to liberally discount the value of his PAGA claim. Further, defendants invariably argue for additional reductions to account for the fact that PAGA penalties are discretionary, and can be reduced or even eliminated by the Court. The fact that defendants also argued that PAGA actions are relatively novel, and the lack of published cases explaining how courts should treat PAGA penalties in wage and hour class actions added further uncertainty to this claim, thereby warranting further devaluation. Accordingly, given the unique circumstances of the litigation, and the risks posed by continued litigation, the $700,000 Maximum Settlement Amount is fair and reasonable and provides Class Members with significant monetary relief.

In addition to the monetary recovery provided by the Settlement, Class Counsel also negotiated significant injunctive relief for the benefit of current and future employees that can be monetized. California district courts have approved comparable valuation of similar injunctive in wage and hour class actions. *See, e.g., Rippee v. Boston Market Corp.*, No. 05-CV-1359 BTM (JMA) (S.D. Cal. Oct. 10, 2006); *Barile v. Boston Market Corp*., No. 05-CV-1360 BTM (JMA) (S.D. Cal. Oct. 10, 2006); *Birch v. Office Depot*, No. 06-CV-1690 DMS (WMC) (S.D. Cal. Sept. 28, 2007). In *Rippee*, *Barile* and *Birch*, Judges Moscovitch and Sabraw approved five-year, post-settlement valuations of the relief negotiated as part of class-wide wage and hour settlements.

A similar valuation is applicable here. In light of Class Counsel having negotiated a settlement for 700,000 as to violations occurring over a period of roughly four years and two months (July 21, 2007 to September 29, 2011), Class Counsel estimates that the value of the remedial measures provided by the Settlement over the next five-year period amounts to approximately $830,000 ($700,000 ÷ 4.2 years = $166,667 per year of injunctive relief; $166,667 x 5

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years = $833,333 of injunctive relief). (*See* Williams Decl. ¶18.)

B. The Proposed PAGA Settlement Is Reasonable

Pursuant to the Settlement Agreement, $30,000 from the Maximum Settlement Amount shall be allocated to the resolution of Plaintiff's PAGA claim, and will be paid directly to the LWDA. (Settlement Agreement, Definitions, ¶ 20.) This result was reached after good-faith negotiation between the parties. Where PAGA penalties are negotiated in good faith and there is no indication that the amount was the result of self-interest at the expense of other Class Members such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009) (approving a PAGA settlement of 0.3% or $1,500);[12] *see also Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 579 (2010) ("[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims.").

C. The Requested Payment to the Claims Administrator Is Reasonable and Should Receive Final Approval

Plaintiff requests final approval of claims administration costs in the amount of $135,000. (Springer Decl. ¶ 16.) Simpluris has promptly and properly distributed the Notice to Class Members and completed its duties in accordance with the settlement terms and the Court's preliminary approval Order. (*See generally* Springer Decl.) Accordingly, the $135,000 payment is fair and reasonable and should be accorded final approval.

D. Class Counsel Are Entitled to Reasonable Attorneys' Fees Under California Fee-Shifting Statutes

California law governs Delgado's request for attorneys' fees. *See, e.g., In re*

[12] Here, the Parties have agreed to allocate approximately 4.3% of the Maximum Settlement Amount to PAGA.

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Larry's Apartment, L.L.C., 249 F.3d 832, 837-38 (9th Cir. 2001) (holding that, in a diversity case, the law of the state in which the district court sits determines whether a party is entitled to attorneys fees, and the procedure for requesting an award of attorney fees is governed by federal law); *Helfand v. Gerson*, 105 F.3d 530, 536 (9th Cir. 1997) (a federal court sitting in diversity applies the law of the forum state regarding an award of attorneys' fees.); *Mangold v. California Public Utilities Commission*, 67 F.3d 1470, 1478 (9th Cir. 1995) ("[t]he method of calculating a fee is an inherent part of the substantive right to the fee itself, and a state right to an attorneys' fee reflects a substantial policy of the state.").

As the prevailing party,[13] Delgado is entitled to an award of reasonable attorneys' fees under California Labor Code sections 226(e), 2699(g)(1),and California's private attorney general statute, California Code of Civil Procedure section 1021.5. *See* Cal. Lab. Code § 226(e) ("[a]n employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to . . . an award of costs and reasonable attorney's fees"); Cal. Lab. Code § 2699(g)(1)("[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs"); Cal. Civ. Proc. Code § 1021.5 ("[u]pon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest").

In cases where "the responsibility to pay attorney fees is statutorily or otherwise transferred from the prevailing plaintiff or class to the defendant, the primary method for establishing the amount of 'reasonable' attorney fees is the lodestar method." *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 26 (2000). The "lodestar" is produced by multiplying the number of hours

[13] "Plaintiff is deemed the prevailing party in the Action for purposes of determination of the Class Counsel Award only." (Settlement Agreement, Terms ¶ 20.)

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reasonably expended by counsel by a reasonable hourly rate. *Id*. Here, Class Counsel's lodestar is $753,694 – considerably more than the requested fee award of $461,177 ($600,000 less litigation costs of $138,823. (Declaration of G. Arthur Meneses ["Meneses Decl."] ¶ 7.)[14]

Plaintiff is entitled to attorneys' fees under sections 226(e) and 2699(g)(1) because he has successfully litigated and settled claims arising out of Albertson's alleged failure to provide Class Members with compliant wage statements.

Plaintiff is also entitled to statutory attorneys' fees under California Code of Civil Procedure section 1021.5. Under this statute, the Court may award attorneys' fees to a "successful party"[15] in any action that has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or a large class of persons; (b) the necessity and financial burden of private enforcement are such as to make the award appropriate;[16] and (c) such fees should not in the interest of justice be paid out of the recovery. Cal. Civ. Proc. Code § 1021.5.

That the negotiated fees are slightly less than the Maximum Settlement Amount is not a basis for reducing attorneys' fees because Class Counsel are

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[14] This implies a "negative multiplier" (i.e., less than 1, thus a recovery less than the firm's lodestar) of 0.61 despite multipliers of between 2 and 4 being routinely approved. *See Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) ("Multipliers can range from 2 to 4 or even higher."); *see, e.g. Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478-79 (9th Cir. 1995) (2.0 multiplier); *City of Oakland v. Oakland Raiders* 203 Cal. App.3d 78, 82-85 (1988) (2.34 multiplier).

[15] To be deemed a "successful" or "prevailing party" requires only that the plaintiff achieve its litigation objectives, whether by judgment, settlement, or other means. *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 576-77 (2004). "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefits of the parties sought in bringing suit." *Lyons v. Chinese Hospital Ass'n.*, 136 Cal. App. 4th 1331, 1347 (2006).

[16] The "burden of private enforcement" factor asks whether "the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.'" *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal. 3d 917, 941 (1979).

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entitled to receive the reasonable value of their services. Indeed, statutory attorney fee awards often exceed the damages recovered because that is their express purpose. *Beaty v. BET Holding, Inc.*, 222 F.3d 607, 612-613 (9th Cir. 2000) (a "trial court does not under California law abuse its discretion simply by awarding fees in an amount higher, even very much higher, than the damages awarded").[17] "The courts have often expressed the principle that a slight monetary recovery will not control assessment of the appropriate amount of attorney fees where a constitutional right is vindicated or a significant public benefit conferred." *Harman v. City and County of San Francisco*, 158 Cal. App. 4th 407, 426 (2007).

In *Harman*, the California Court of Appeal affirmed a nearly $1 million attorneys' fee award in a Title VII action in which the plaintiff's damages were $30,300, expressly rejecting the notion that there be some "proportionality" between the plaintiff's damages and the award of attorneys' fees:

> "A rule that limits attorney's fees . . . to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting [42 U.C.S. § 1988]. Congress enacted [§ 1988] specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. These victims ordinarily cannot afford to purchase legal services at the

[17] California has expressly rejected a proposed requirement of capping fees in proportion to the amount of damages awarded in civil rights cases. *See Harman v. City and County of San Francisco*, 158 Cal. App. 4th 407, 415-421 (2007) (trial court's award of $970,000 in fees and $30,300 in damages not abuse of discretion). It is more about the degree of success than proportionality between attorneys' fees and damages. *Id.* at 419. Similarly, under the California Fair Employment Housing Act (Gov. Code § 12900 et seq.), the Court of Appeal affirmed an award of $ 470,000 in attorneys' fees where the plaintiffs succeeded only on some of their claims and the damages awarded amounted to only $ 37,500. *See Vo v. Las Virgenes Municipal Water District*, 79 Cal. App. 4th 440 (2000). Like civil rights actions, wage-and-hour class actions are brought in the public interest. *See In re Trombley*, 31 Cal. 2d 801, 809 (1948) ("because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due"); *Kerr's Catering Service v. Department of Industrial Relations*, 57 Cal. 2d 319, 325-27 (1962) (labor protections are designed to promote the public welfare, as well as protect the interests of individual workers).

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rates set by the private market . . . ."

158 Cal. App. 4th at 420 (quoting *Graciano v. Robinson Ford Sales*, Inc., 144 Cal. App. 4th 140, 164 (2006).

Likewise, that attorneys' fees are sought separate from the Class' recovery is appropriate in light of the claims at issue here; Labor Code claims brought in the public interest and that provide for statutory fee-shifting.[18] *See, e.g., Millea v. Metro-North R.R. Co.*, 2011 U.S. App. LEXIS 16354, *30-1 (2d Cir. Aug. 8, 2011) (reversing statutory attorneys' fees award and remanding for recalculation). As articulated in *Millea*:

> Especially for claims where the financial recovery is likely to be small, calculating attorneys' fees as a proportion of damages runs directly contrary to the purpose of fee-shifting statutes [by assuring that] claims of modest cash value can attract competent counsel. The whole purpose of fee-shifting statutes is to generate attorneys' fees that are disproportionate to the plaintiff's recovery.

Id.

Moreover, insisting that fees be proportional and derivative of the class' recovery would reflect a misunderstanding of the policy rationale for claims that, like those at issue here, provide for statutory fee-shifting.[19] As the United States

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[18] Statutory fee-shifting (as opposed to "fee spreading" where attorneys' fees are paid out of a so-called common fund created for the benefit of the class) is intended to provide incentive for qualified lawyers to take on cases in which the recoveries are so small that it would be economically irrational to accept the representation on a contingency-fee basis. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001); *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 26 (2000). Fee-shifting thus brings "the financial incentives for attorneys enforcing important constitutional [or other] rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." *Ketchum*, 24 Cal. 4th at 1132; *People v. Taylor*, 197 Cal. App. 4th 757, 764 (2011).

[19] The rationale of the cases rejecting the proportionality approach under fee-shifting statutes is not limited to cases brought in the public interest or to non-class actions. *See, e.g., Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 639 (9th Cir. 1989) ("[T]here is no reason to treat attorney's fees in antitrust cases under [the Clayton Act] different from attorney's fees in civil rights cases under section 1988. We have recognized the public benefit of antitrust litigation."); *United Auto. Workers Local 259 Social Sec. Dept. v. Metro Auto Center*, 501 F.3d 283,

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Supreme Court has explained:

> A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious . . . claims but relatively small potential damages to obtain redress from the courts," and stating that such an approach would "seriously undermine Congress' purpose in enacting [its fee-shifting statute.]"). As such, the ratio of fees to recovery here exemplifies the rationale for fee-shifting statutes.

City of Riverside v. Rivera, 477 U.S. 561, 578-79 (1986).

E. Class Counsel's Lodestar Is Reasonable and Should Be Approved

The hourly rates for Class Counsel's partners, senior counsel, and associates, ranging from $270 to $685, are comparable to, or less than, those charged by other class action plaintiffs' counsel[20] and the firms defending class actions, such as Sheppard Mullin Richter & Hampton (partner rates: $495 to $820 an hour; associate rates: $270 to $620 an hour).[21] Class Counsel billed a total of 1574 hours at judicially approved rates, commensurate with the

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295 (3rd Cir. 2007) (citing *Riverside* and stating in ERISA case that, "When delinquencies are small, the cost of recovery may be disproportionate, and requiring proportionality would, in effect, discourage plans from taking their claims to federal courts); *Bldg. Serv. Local 47 v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995) ("[I]n ERISA cases, there is no requirement that the amount of an award of attorneys' fees be proportional to the amount of the underlying award of damages"); *Bd. of Trs. of the Hotel & Rest. Employees, Local 25 & Employers' Health & Welfare Fund v. Madison Hotel, Inc.*, 43 F. Supp. 2d 8, 14 (D.D.C.1999) (following Sixth Circuit); *Niederer v. Ferreira*, 189 Cal. App. 3d 1485 (1987) (applying anti-proportionality logic).

[20] *See, e.g.*, *Richard v. Ameri-Force Mgmt. Servs., Inc.* (San Diego Super. Ct. No. 37-2008-00096019) (partner rates: $695-$750/hour; associate rate: $495/hour); *see also Barrera v. Gamestop Corp*. (C.D. Cal. Nov. 29, 2010, Case No. CV 09-1399) (partner rate: $700/hour; associate rate: $475/hour); *Anderson v. Nextel Retail Stores, LLC* (C.D. Cal. June 20, 2010, Case No. CV 07-4480) (partner rates: $655-$750/hour; associate rates: $300-$515).

[21] *See* "2010 Law Firm Billing Survey," National Law Journal, December 6, 2010, which documents Sheppard Mullin Richter & Hampton's hourly rates. Class Counsel has frequently been opposed by Sheppard Mullin, and in addition to negotiating several settlements with the firm, Class Counsel has prevailed on contested class certification and dispositive motions against Sheppard Mullin. Other major defense firms charge similar rates. For instance, Littler Mendelson's partner rates of $650 have been documented. *See Minor v. Christie's, Inc.*, 2011 U.S. Dist. LEXIS 9219, *21 (N.D. Cal. Jan. 28, 2011).

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prevailing rates among firms that regularly litigate class actions.[22] (Meneses Decl. ¶ 7.) Multiplying the total attorney hours by the applicable hourly rates yields a total lodestar of approximately $753,694. Accordingly, a "negative multiplier" of approximately 0.61 is needed to adjust the lodestar downward to match negotiated fees.

F. Additional Factors Under California Law Support Awarding the Agreed-Upon Class Counsel Fee Award

1. California Case Law Authorizes Courts to Consider Additional Factors in Determining the Reasonableness of a Fee Request

Although the lodestar is the primary reference for the appropriateness of a fee request, courts also consider the difficulty and complexity of the questions involved, and the skill displayed in presenting them and the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award. *See Serrano v. Priest*, 20 Cal. 3d 25 (1977). In addition to the *Serrano* factors, the Court may consider the following factors: (i) the results achieved on behalf of the Class; (ii) Class Counsel's experience, reputation, and ability; and (iii) Class Counsel's significant investment of time and resources into the litigation. *See Ketchum v. Moses*, 24 Cal. 4th 1122, 1139 (2001); *Fracasse v. Brent*, 6 Cal. 3d 784, 792 (1972); *Cundiff v. Verizon Cal., Inc.*, 167 Cal. App. 4th 718, 724 (2008); *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 45-46 (2000).

Each of the factors supplemental to the lodestar favors approval of the negotiated fees.

[22] Class Counsel wrote off 44.5 hours to eliminate potentially inefficient or redundant billing. (Meneses Decl. ¶ 7.)

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2. The Attorneys' Fees Are Supported by the Complexity of the Litigation and the Risk Assumed by Class Counsel

The litigation of Delgado's wage statement claim has proven to be unusually complex and protracted. Discovery was hard-won. Over 3.5 million wage records have been produced, resulting in Class Counsel's analysis of thousands of wage statements. Class Counsel also conducted interviews prospective Class Members; opposed a motion for summary judgment; and researched, drafted, and filed two class certification motions. Far from being a standard, off-the-shelf case, Class Counsel was called on to research, argue, and succeed with novel legal arguments. For instance, Albertson's posited that PAGA constituted an unconstitutional delegation of authority. Moreover, against long odds, Class Counsel prevailed on a second class certification motion after losing the first. Both motion-practice victories directly accrued to the Class Members' benefit, increasing the case's settlement value.

Mirroring the case's challenging path, it took two mediations for the parties to finally negotiate a settlement that both properly compensates Class Members and remedies precisely the alleged wage statement violations that were at-issue throughout the litigation.

3. The Attorneys' Fees Are Supported by Class Counsel's Representing the Class on a Contingency Basis

Providing attorneys who represent clients under contingent-fee agreements a larger fee than the market-value of their services helps to assure adequate representation for plaintiffs unable to afford accomplished attorney hourly rates. *See Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th at 580 ("[A] lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions."); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001) ("[A] contingent fee contract, since it involves a gamble on the result, may properly provide for a

larger compensation than would otherwise be reasonable.").

California courts recognize that "the experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." *Ketchum*, 24 Ca1. 4th at 1136 (quoting Berger, Court Awarded Attorneys' Fees: What is Reasonable?" (1977) 126 U. Pa. L. Rev. 281, 324-25.) "Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions . . . [attorneys] must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior." *Lealao*, 82 Cal. App. 4th at 47.

"It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases . . ." *Chemical Bank v. City of Seattle*, 19 F.3d 1291, 1299 (9th Cir. 1994).

Contingent fees that may far exceed the market value of the services if rendered on a "non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose." *Id.* If this bonus methodology did not exist, "very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing." *Id.* at 1300.

4. The Attorneys' Fees Are Supported by the Results Achieved on Behalf of the Class

As explained throughout this Memorandum, Class Counsel negotiated considerable relief, both injunctive and monetary, for the Class. In addition to injunctive relief reasonably valued at $830,000, Class Counsel negotiated a $700,000 non-reversionary fund to pay all participating Class Members. On

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average, participating Class Members will be paid approximately $45, with the highest payment being approximately $70. (Springer Decl. ¶ 12.) The per-class-member payment is in line with other wage and hour settlements. *See, e.g.*, *Lim v. Victoria's Secret*, No. 04CC00213 (Orange County Super. Ct. Jan. 20, 2006) ($42 average recovery); *Doty v. Costco*, No. 05-03241 (C.D. Cal. May 14, 2007) ($58 average recovery), *Sorenson v. PetSmart*, No. 06-02674 (E.D. Cal. Dec. 17, 2008) ($57 average recovery).

5. The Attorneys' Fees Are Supported by Class Counsel's Experience, Reputation, and Skill

With 60 attorneys, Class Counsel operates one of the largest wage and hour class action practices in California devoted exclusively to representing plaintiffs. (Meneses Decl. ¶ 2.) Class Counsel regularly litigates wage and hour class actions. (*Id.* at ¶¶ 3-5.) During the most recent six-year period, Class Counsel, as sole or lead counsel, has successfully certified 22 class actions by way of contested motions.[23] (*Id.* at ¶ 3.) Class Counsel has, as sole or lead counsel, obtained final approval of over 60 class action settlements totalling tens of millions of dollars on behalf of hundreds of thousands of class members. (*Id.*

[23] Class Counsel also maintains an active and successful appellate practice. In *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2011), Class Counsel succeeded in shielding its client's Private Attorneys General Act ("PAGA") claims from arbitration, obtaining a ruling that PAGA claims cannot be waived by private agreement. The defendant had argued that under *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Federal Arbitration Act (FAA) preempted state law invalidating such arrangements. The Court of Appeal disagreed, finding that Concepcion "does not provide that a public right, such as that created under the [PAGA], can be waived if such a waiver is contrary to state law." *Id.* at 500.

See also Taylor v. Ross Stores, Inc. (San Bernardino Super. Ct. No. RCV 065453, JCCP 4331) (certifying class of assistant managers misclassified as exempt from overtime pay); *Blair v. Jo-Ann Stores, Inc.* (L.A. Super. Ct. No. BC 394795) (with co-counsel, certifying class for claims including misclassification, uncompensated meal breaks and rest periods, and off-the-clock work on behalf of over 10,000 class members); *Mazza v. Am. Honda Motor Co., Inc.* (C.D. Cal. No. 07-07857) (certifying nationwide class of Acura owners California's consumer-protection statutes). *See also* Conte & Newberg, *Newberg on Class Actions*, § 3:10, n.8 (noting *Mazza* as significant development in certification of nationwide classes).

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at ¶ 5.)[24]

6. The Attorneys' Fees Are Supported by Class Counsel's Significant Investment of Time and Resources in the Litigation

The following chart summarizes Class Counsel's work throughout the litigation's several phases:

Attorney	Briefs, Motions, and Pleadings	Case Management	Court Appearances and Preparation	Discovery	Pre-Litigation Investigation	Settlement and Mediation	Total
Art Meneses						30.4	**30.4**
Dina Livhits	129.8	12.5		17.9		4.3	**164.5**
Eduardo Santos	34	1.4		20.8		82.5	**138.7**
Gene Williams	28.6	12.8	26.5	12.2		70.9	**151**
Jamie Greene	73.7	52.9		8.7		233.3	**368.6**
Joseph Liu		0.8				13.5	**14.3**
Lory Ishii	3.4	4.4		1.1	1.7		**10.6**
Marc Primo	39.4			50.6		5.5	**95.5**
Mark Pifko	15.7	8.4		15.6		7.1	**46.8**
Matthew Theriault	16.3	8.4	5	8.7	2	36.6	**77**
Monica Balderrama		0.9		11.3		3.1	**15.3**
Olesya Mikhaylova				23.2			**23.2**
Orlando Arellano	201.7	14.1	7	105.3		4	**332.1**
Rebecca Labat	7.5	4.7		16.1		1.6	**29.9**
Robert Byrnes	38						**38**

[24] In *Clymer v. Candle Acquisition* (L.A. Super. Ct. No. BC328765), Class Counsel successfully appealed a trial court order denying class certification. *In Iskanian v. CLS Transp. Los Angeles LLC* (L.A. Super. Ct. No. BC356521), Class Counsel successfully sought a writ of mandate directing the trial court to reconsider its decision to compel arbitration and dismissing plaintiff's class allegations. In *Coleman v. Estes Express Lines, Inc.*, No. 10-56852 (9th Cir. January 25, 2011), Class Counsel successfully defended an appeal of a district court order remanding the action to state court. The Ninth Circuit adopted Class Counsel's reasoning that a district court must limit its analysis to the allegations contained in complaint when determining whether it lacks subject matter jurisdiction pursuant to the "local-controversy exception" under the Class Action Fairness Act.

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Attorney	Briefs, Motions, and Pleadings	Case Management	Court Appearances and Preparation	Discovery	Pre-Litigation Investigation	Settlement and Mediation	Total
Stephen Gamber					9.6	0.5	**10.1**
Theodore O'Reilly		0.8		14.7		13.3	**28.8**
Total	**588.1**	**122.1**	**38.5**	**306.2**	**13.3**	**506.6**	**1574.8**

G. The Requested Class Counsel Cost Recovery Is Reasonable and Should Receive Final Approval

Class Counsel are also entitled to reimbursement of their litigation costs. Cal. Lab. Code §§ 226(e), 2699(g)(1). Class Counsel incurred and advanced $138,823 in reasonably incurred costs. (Meneses Decl. ¶ 11.)

These are costs of precisely the sort that are reimbursable. *See Bussey v. Affleck*, 225 Cal. App. 3d 1162, 1166 (1990); s*ee also, e.g., In re United Energy Corp. Sec. Litig.*, No. MDL 726, 1989 U.S. Dist. LEXIS 19146, at *16 (C.D. Cal. Mar. 9, 1989) (approving $71,000 in costs for "filing fees, postage, telephone bills, photocopying, legal research assistance, deposition costs, witness fees, and similar items.")

H. The Requested Class Representative Enhancement Is Well-Deserved, Reasonable, and Should Receive Final Approval

Named plaintiffs are eligible for payments that reasonably compensate them for undertaking and fulfilling a fiduciary duty to represent absent class members. *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010); *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 726 (2004) (upholding "service payments" to named plaintiffs for their efforts in bringing the case). The payments are typically greater than the $5000 sought here. *See, e.g., Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. Jan. 26, 2007) ($25,000 each to four class

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representatives); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) ($50,000 to one class representative); *In re Janney Montgomery Scott LLC Financial Consultant Litig.*, No. 06-3202, 2009 U.S. Dist. LEXIS 60790 (E.D. Pa. July 16, 2009) ($20,000 each to three class representatives).

In evaluating the payments to named plaintiffs, courts consider:

> (1) the risk to the class representative in commencing the suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Id. at 1394-95.

Delgado has dedicated substantial time during the case's pendency. (Declaration of Hugo Delgado ¶¶ 9-15.) Plaintiff assisted Class Counsel with the preparation of the initial and amended complaints; reviewed his personal files to provide Class Counsel with evidence regarding their claims and class allegations; regularly conferred with Class Counsel to collaborate on the prosecution of the claims; assisted Class Counsel in compiling the evidence necessary to support the theories of class certification and liability; spent considerable time responding to Albertson's written discovery; was deposed; regularly sought updates on the status of the case; and reviewed and discussed the Settlement Agreement before they approved its terms. (*Id.* at ¶¶ 10-15.) Delgado estimates he spent between 40 to 50 hours assisting his attorneys with the prosecution of this case. (*Id.* at ¶ 17.)

By bringing an action against a former employer for wage-and-hour violations, Plaintiff has also exposed himself to the potential stigma of being branded a "troublemaker" by prospective employers. *See Staton v. Boeing*, 327 F.3d 938, 976 (9th Cir. 2003) ("reasonabl[e] fear [of] workplace retaliation" is a factor in assessing the proper amount of the enhancement).

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It is unlikely that Class Members would have realized any recovery, much less on the Settlement Agreement's favorable terms, but for Plaintiff's courage and resolve as a Class Representative. Plaintiff has thus advanced California's public policy goal of enforcing wage and hour laws. *See Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 340 (2004). The Class Representative Enhancement is also provided in consideration of Delgado's having agreed to a general release of all potential claims they may have against Albertson's, an expansive release that were not required of other Class Members.

As only 0.7% of the Maximum Settlement Amount ($700,000), the $5000 payment to Delgado is a modest award. Accordingly, for the foregoing reasons, the proposed Class Representative Enhancement is reasonable and should be approved.

IV. THE LONE OBJECTION LACKS MERIT

Out of a class of 44,647 persons, one Class Member challenges the Settlement as to two purported deficiencies: (1) that the Notice of Class Action Settlement did not provide Class Members sufficient information upon which to base their decision to participate and, (2) that the attorneys' fees and costs are excessive and should not have been separately negotiated. *See, generally,* Williams Obj. Neither basis for the Objection withstands scrutiny.

As to Objector's first contention, the Notice explained in detail the Settlement's principal monetary terms: the $700,000 Maximum Settlement Amount and the $530,000 Net Settlement Amount (the difference between the Maximum Settlement amount and the $30,000 PAGA payment, $135,000 in administration costs, and the $5000 payment to the named plaintiff) as well as the $600,000 in attorneys' fees. However, the actual, individual Class Member payments were not capable of the same specification. For instance, had all 44,647 Class Members submitted Claim Forms, they would have received an average of $12. Had a far smaller number submitted Claim Forms, the average

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amount would have been much greater. Any purported estimate, though, would have been far more of a guess than an informed estimate. Under the heading "How much will my payment be?" the Notice explained that the amount of any Class Member's payment would be dependent on how long they worked for Albertson, and will be "calculated on a pro-rata basis based on the number of weeks worked." (Supplemental Declaration of Gene Williams in Support of Motion for Preliminary Approval of Class Action Settlement; Dkt. No. 120, Ex. A, section 8, "How much will my payment be?") Therefore, the Notice satisfied due process and the requirements of the Federal Rules of Civil Procedure.

Consequently, the Notice here mirrors that in other approved settlements in which a meaningful estimate of each Class Member's precise payout was impracticable. Indeed, this Court has approved class notice with content similar to the Notice here. *See, e.g.*, Notice of Class Action Settlement,[25] *Sparks v. Weyerhauser*, No. 8:07-cv-00595, Dkt. No. 15[26] (C.D. Cal. June 13, 2008) ("The exact amount that each participating class member will receive under the terms of this settlement is not known at this time.")

The Williams Objection also claims that Class Counsel were remiss not to have negotiated attorneys' fees as a percentage of the class' recovery, in direct contravention of established California authority with the contention that

> [t]he fact that class counsel's award, pending court approval, was negotiated separately with Defendants, may breach class counsel's duty to the class in that class counsel is placing its own financial interests above that of the class and affords Defendants with a potential windfall.

Williams Obj. at

[25] *See also* Order Granting Final Approval of Class Action Settlement, Dkt. No. 30.

[26] In Declaration of Glenn Rothner in Support of Application for Preliminary Approval of Class Action Settlement, Dkt. No. 15, Exh. C.

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Yet the Williams Objection cites no authority[27] for either its contention that the separate negotiation of fees and settlement terms "may" be a breach of duty. In fact, the separate negotiation of settlement terms and attorneys' fees has been widely endorsed, in case law and in the leading complex litigation treatise. *See, e.g., Ramos v. Countrywide Home Loans, Inc.*, 82 Cal. App. 4th 615, 628 (2000) (approving a settlement where attorneys' fees and costs negotiated separate from settlement terms); *Consumer Privacy Cases*, 175 Cal. App. 4th 545 (2009) (same); *accord* Herr, *Manual for Complex Litigation*, (4th ed. 2009) §§ 21.662, 21.71, pp. 522-524, 533-534.[28]

As here, in *Consumer Privacy Cases* the objectors claimed that a "'separate' payment scheme [of attorneys' fees and costs] is a breach of class counsel's fiduciary responsibility to the class because it puts class counsel's interests in maximizing their fee ahead of class counsel's responsibility to maximize the class's recovery." *Id* at 552. Notwithstanding, the California Court of Appeal noted that such fee arrangements are common, and generally serve to facilitate settlement and allow the parties to avoid unnecessary conflict over attorneys' fees. Accordingly, the Court declined to reject such provisions, finding instead that the propriety of such agreements, like all requests for attorneys' fees, are to be determined on a case by case basis by the trial judge: "[The] experienced trial judge is the best judge of the value of professional services rendered in his court . . . ." *Id*. at 556.

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[27] The lone authority cited in the entire section of the Williams Objection that takes issue with negotiating fees and settlement terms separately is *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002), a much-cited case that, while it does endorse judicial scrutiny of class action settlements, consistent with the directive of Rule 23, has nothing to say, pro or con, about the segregation of settlement term and fee term negotiations.

[28] "Far from condemning the practice of separate agreements on fees, the [Manual for Complex Litigation] acknowledges such provisions, and merely requires that that the total settlement amount, including fees, be used as a yardstick to measure the reasonableness of fees." *Consumer Privacy Cases*, 175 Cal. App. 4th at 554.

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Accordingly, it is precisely the separate negotiation of fees and settlement terms that is endorsed as the approach most likely to guard against any potential conflict. Here, under the direction and supervision of mediator Mark Rudy, the parties separately negotiated the settlement terms and the attorneys' fees. (Williams Decl. ¶¶ 15-16.) The Williams Objection's contention that the settlement terms and fees ought to have been part of the same negotiation is without merit.

The Williams Objection couples its vague denigration of Class Counsel's efforts with an even more amorphous and completely untenable aggrandizement of some imagined "value" that the Williams Objection is said to have added to the case. The drafter of the Williams Objection offers the fanciful notion that the mere fact of filing the objection somehow "provided additional value." Williams Obj. at 7:24-29. That announcement of "additional value" comes at the end of page 7, with the implication that the value will be specified on page 8. However, there is no page 8, leaving the error-riddled brief as the most vivid symbol of the Williams Objection's "additional value" to the Class Members.

Finally, the Williams Objection's contention that "the Court may not rely on Class Counsel's assessment of fairness" (Williams Obj. at 2:29) has no basis in authority, and the Williams Objection cites none. Class Counsel naturally neither intends nor expects that the Court will "rely" solely on its own assessment. As such, this briefing and the preliminary approval papers that have preceded it set forth an objective factual summary of the litigation and attempt to analogize to other, similar wage and hour class action settlements in which the class members have received comparable payments and their counsel have been similarly compensated, as well. Per Rule 23 and the jurisprudence following from it, the ultimate assessment of the Settlement's fairness is the Court's.

V. CONCLUSION

Class Members have embraced this Settlement, which resulted from

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unusually challenging litigation, and provides Class Members both monetary relief for the wage statements that they previously received and, in perpetuity, provides Class Members and all future employees with injunctive relief in the form of revised wage statements that plainly show all statutorily required information. Rather than opting for a nominal settlement or abandoning the case altogether in the face of challenges that included class certification defeat on the first attempt, Class Counsel persisted, and for that persistence and success is properly compensated. Accordingly, Plaintiff respectfully requests that this Court grant final approval of the Settlement Agreement.

Dated: December 19, 2011

Respectfully submitted,

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