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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS LEYVA on behalf of himself and others similarly situated. PLAINTIFF, vs. MEDLINE INDUSTRIES, INC., a California Corporation; and DOES 1 to 50, Inclusive. Defendants.	Case No.: CV-00164-RGK-MAN **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: March 31, 2014 Time: 9:00a.m. Courtroom: 850 Before Hon. R. Gary Klausner, United States District Judge

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On or about October 29, 2010, Plaintiff filed the original Complaint in California Superior Court for San Bernardino County, Case No. CIVDS 1015046, captioned *Leyva v. Medline Industries, Inc.* On January 26, 2011, Defendant removed the action to the U. S. District Court for the Central District of California. On August 15, 2011, the United States District Court for the Central District of California denied class certification in this action.

On October 20, 2011, Plaintiff appealed the denial of class certification. On May 28, 2013, the Ninth Circuit Court of Appeals reversed the order denying class certification and remanded with directions for the district court to grant the motion for class certification. On August 1, 2013, the District Court granted Plaintiff's Motion for Class Certification.

As a result of the Settlement Agreement, Plaintiff will be filing a First Amended Complaint, seeking damages, penalties, restitution, injunctive relief, costs, attorney fees, and any further relief deemed appropriate by the Court on the basis that Defendant failed to pay overtime and double-time at the proper rate, failed to pay minimum wages due for all time worked, failed to pay overtime and double-time wages, failed to provide accurate wage statements, failed to timely pay all final unpaid wages, and violated California Unfair Competition law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* A copy of the First Amended Complaint is attached as Exhibit A to the Declaration of Joseph Lavi, filed concurrently with this motion. Defendant denies each allegation asserted in the operative Complaint and asserts that it has no liability for the claims of the Representative Plaintiff or the Class.

Plaintiff propounded written discovery, Interrogatories and Request for Production of Documents, which required Defendant to spend substantial time and effort in gathering the requested information. (Lavi Decl. ¶¶ 6-7.) The parties also agreed to conduct informal discovery wherein Defendant provided the Plaintiff with

class members' bonuses during the class period in order to allow the parties to evaluate their positions and/or claims, discussions and meetings between representatives of the Parties. (*Id.* ¶¶ 6-7.) Once the parties had sufficient time to analyze the data and armed with sufficient information to assess their relative strengths and weaknesses, the parties thereafter agreed to mediate and participated in a day-long mediation on December 16, 2013, before Jeff Krivis, Esq. (*Id.* ¶ 6.)

The mediation involved extensive, arms-length negotiations, wherein numerous offers and counter offers were exchanged without the parties agreeing to any of the offers. (*Id.* ¶¶ 6.) Although, the parties reached a settlement, it took them six additional weeks to finally agree to the terms of the settlement. (Lavi Decl. ¶ 6.) The assistance and experience of Jeff Krivis was essential to the resolution of the matter due to the contentious negotiations.

Considering all of these and other factors, Defendant concluded that the future costs and expenses involved in continuing litigation are substantial and chose to eliminate any further expenses, attorney fees, and risks associated with the continuation of the action via this Settlement. (Lavi Decl. ¶ 8.)

Plaintiff considered the facts of the case, probability of prevailing on the claims, Defendant's defenses, recent case law developments, additional potential appeals, delays (*Id.* ¶ 7.) Plaintiff and Class Counsel concluded, after taking into account the disputed factual and legal issues involved in this case, the risks attending further prosecution, including risks related to a contested motion for class certification, and the substantial benefits to be received pursuant to a compromise and settlement of the case as set forth in the Agreement, that settlement on the terms agreed to are in the best interest of Plaintiff and the settlement class. (*Id.* ¶ 12.)

The Settlement contemplates (i) entry of an Order preliminarily approving the Settlement and approving certification of a provisional settlement class, contingent upon final approval of the Settlement; (ii) the mailing of a Notice of Settlement to all Class Members; (iii) the processing of any claims, objections, and opt-outs by the

Claims Administrator, as well as payment of any valid claims after final approval of this Agreement by the Court; and (iv) entry of a Judgment and Order granting final approval of the Settlement and dismissal of the Action with prejudice ("Judgment").

II. BACKGROUND

The Statutes and/or Wage Orders applicable to the pending action are as follows:

A. Overtime and Double-Time Calculation Violations:

California law requires an employer to pay "one and one-half times the regular rate of pay" for work in excess of eight hours in a workday, 40 hours in a workweek, or the first eight hours on a seventh day of work in a workweek and twice the regular rate of pay for work "in excess of 12 hours in one day." Cal. Lab. Code § 510, subd. (a); Cal. Lab. Code § 1194, subd. (a); IWC Order No. 1-2001, subd. 3(A). Under California law, in determining the regular rate of pay for purposes of calculating the proper overtime premium pay (and double-time premium pay) the employer must consider not only straight hourly wage compensation but also other forms of compensation including bonuses, commissions, and other incentive compensation. *Marin v. Costco Wholesale Corp.,* 169 Cal.App.4th 804, 806-807 (2008). In his first and third causes of action of the First Amended Complaint, Plaintiff contends that Defendant failed to pay California non-exempt employees overtime and double-time wages and failed to pay overtime and double-time wages at the proper rate because bonuses, commissions or other incentive compensation were not included in calculating the overtime pay rate.

B. Minimum Wage and Earned Rate Violations:

California law requires an employer to pay at least a minimum wage to employees for all hours worked. Cal. Lab. Code § 1194; IWC Order No. 1-2001, subd. 2(G). California Industrial Welfare Commission Wage Order 1-2001, Subdivision 2(G) defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is

suffered or permitted to work, whether or not required to do so." IWC Order No. 1-2001, subd. 2(G). In his second cause of action of the First Amended Complaint, Plaintiff contends that Defendant failed to pay wages to its California non-exempt employees for all hours worked at a minimum wage rate or earned wage rate due to Defendant's time-shaving practices.

C. Itemized Wage Statements

California Labor Code Section 226, subdivision (a), requires California employers to provide non-exempt employees with itemized wage statements accurately stating information including gross wages earned, net wages earned, total hours worked, all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. Plaintiff alleges that Defendant failed to provide accurate wage statements since it did not accurately reflect the applicable hourly rate concerning all the overtime and/or double-time hours that Plaintiff (and others similarly-situated) worked; the gross wages earned; the net wages earned; and the total hours worked.

D. Failure to Provide Timely Wages

California law requires an employer to provide employees with payment of all earned and unpaid wages at the time of termination or within 72 hours of an employee's resignation. Cal. Lab. Code §§ 201, 202.) If an employer fails to timely pay earned and unpaid wages after an employee's separation of employment, the employer is liable for statutory penalties. Cal. Lav. Code § 203. Plaintiff alleges that Defendant's hourly non-exempt employees did not receive compensation for all of their wages within the statutory time period when they resigned and/or were terminated due to Defendant's failure to pay unpaid minimum/earned wages.

Defendant denies all of Plaintiffs' claims.

III. DISCOVERY AND MEDIATION

The Parties have conducted a significant amount of law and motion practice during the prosecution of this case, including appealing the denial of class

certification. (*Id.* ¶ 5.) After the parties exchanged substantial amounts of discovery and allowed for time to analyze the documents and data, the parties engaged in mediation. (*Id.*) Plaintiff and Defendant mediated for a full day before an experienced and well-regarded mediator, Mr. Jeffrey Krivis of First Mediation, on December 16, 2013. (*Id.* ¶*6*). The settlement culminated in the Stipulation and Settlement Agreement which the Parties are now seeking preliminary approval.

Through discovery and in the context of mediation, the Parties conducted an extensive investigation into the facts and law at issue. (*Id.*) For example, Defendant produced information regarding class data including putative Class Members' bonuses received, timesheets, and other payroll information. (Lavi Decl. ¶ 7.) In addition, Defendant conducted an extensive investigation into the facts and law, including conducting extensive review of the policies, claims and applicable law. (*Id.* ¶ 8.) The parties had an opportunity to engage each other on the merits of the claims and defenses as well as potential exposure. (*Id.*)

IV. SUMMARY OF SETTLEMENT TERMS

The full terms of the Settlement are set forth in the "Stipulation and Settlement Agreement" (hereinafter, "Settlement Agreement ") filed concurrently herewith as Exhibit 1 to the Declaration of Joseph Lavi. The material terms are as follows:

A. Definition of Proposed Settlement Class

Under the terms of the proposed settlement, "Class" or "Class Member" or "Class Members" shall be defined as any current or former hourly, non-exempt employee of Medline who were non-exempt employees in California during the Class Period (from October 29, 2006, up to and including the Preliminary Approval Date). If such person is incompetent or deceased, "Class" or "Class Member" or "Class Members" means the person's legal guardian, executor, heir or successor in interest. (Lavi Decl. ¶ 9.)

B. Settlement Terms

In exchange for a release of claims against Defendant, as set forth more fully

in the Settlement Agreement, the payment terms of the Settlement Agreement are as follows:

1. *Gross Settlement Amount*: Defendant shall pay the maximum amount of Settlement compensation of One Million Six Hundred Thousand Dollars and No Cents ($1,600,000.00) (the "Gross Settlement Amount") in addition to its share of employer payroll taxes. (Lavi Decl. ¶ 10.)

a. *Net Settlement Amount*: Under the terms of the proposed settlement, "Net Settlement Amount" shall be defined as the total portion of the Gross Settlement Amount that is distributable to the Class (to the extent claimed), and equals the Gross Settlement Amount less Class Counsel Fees, Class Counsel Costs, Enhancement Payment, LWDA Payment and Settlement Administration Costs. (Lavi Decl. ¶ 10.) If the requested amounts are approved, this would result in a total class payout of approximately One Million Eighty-Six Thousand Dollars and No Cents ($1,081,000.00).

Gross Settlement Amount:	**$1,600,000.00**
Class Counsel Fees (minus):	$465,000.00
Class Counsel Costs (minus):	$17,000.00
Enhancement Payment (minus):	$5,000.00
75 % of LWDA Payment (minus):	_ $2,000.00
Estimated Settlement Administration Costs (minus):	$25,000.00
Estimated Net Settlement Amount:	**$1,086,000.00**

(Lavi Decl. ¶ 10.) Defendant further agrees to distribute a minimum of fifty percent (50%) of the Net Settlement Amount ("Settlement Floor"). In the event that the claims of the Settlement Class Members who timely submit a valid claim form as described herein do not result in a total payment from the Net Settlement Amount equal to or exceeding the Settlement Floor, the Claims Administrator shall proportionately increase the individual settlement payments for each participating class member to ensure that the total of all individual settlement payments equals

50% of the Net Settlement Amount.

b. *Class Counsel Fees and Costs*: Class Counsel will request payment of Four Hundred Sixty-Five Thousand Dollars and No Cents ($465,000.00) for Class Counsel Fees and an amount not to exceed Seventeen Thousand Dollars and No Cents ($17,000.00) for Class Counsel Costs even though the costs to date are in excess of $17,000.00. (Lavi Decl. ¶ 10.)

c. *Settlement Administration Costs*: The parties have selected Simpluris to act as the Claims Administrator in this action. (Lavi Decl. ¶ 10.) An amount not to exceed Twenty-Five Thousand Dollars and No Cents ($25,000.00) is allocated to compensate all reasonable costs incurred by the Claims Administrator in administration of the Settlement. (Lavi Decl. ¶ 10.)

d. *Representative Plaintiff Enhancement*: Subject to Court approval, the Representative Plaintiff will make an application for Five Thousand Dollars and No Cents ($5,000.00) as an enhancement and compensation for his general release pursuant to California Civil Code Section 1542 and for his time and effort in prosecuting the matter.

e. *LWDA Payment*: Two Thousand Dollars and No Cents ($2,000.00) shall be allocated to penalties paid to the Labor & Workforce Development Agency (LWDA) in satisfaction of claims for penalties owed to the agency under the Private Attorneys General Act ("PAGA"), Cal. Lab. Code §§ 2698, *et seq.*, with 25% of the amount to be distributed to the Class Members. Cal. Lab. Code § 2699, subd. (i).

2. *Formula for Determining Value of Individual Settlement Payments*: Individual "Settlement Payment" means the amount from the Distributable Amount that shall be paid to the Authorized Claimants less any payroll taxes owed. The Settlement Payment to each Authorized Claimant, Class Members who do not opt out and who timely submit a valid Claim Form, will be based on Authorized Claimant's Individual Total Workweeks. The amount payable to each Authorized Claimant will

be proportionate to each Authorized Claimant's Individual Total Workweeks. To determine the estimated "Individual Settlement Payment" for each Class Member, subject to the guaranteed floor, the Claims Administrator will use the following formula: Estimated Individual Settlement Payment =

Individual Workweeks ÷ Class Workweeks × Net Settlement Amount. The Individual Settlement Payments will be reduced by any required legal deductions for each Participating Class Member. In the event the Court awards an amount less than any of the amounts sought above, the difference will become part of the Distributable Amount. (Lavi Decl. ¶ 11.)

Defendant will be responsible for its share of employer taxes in addition to the settlement amount. (Lavi Decl. ¶ 12.)Each Class Member shall be responsible for any tax consequences of the Settlement or payment of funds pursuant to this Agreement, including the payment of any applicable tax deductions or obligation as if paying through payroll. (Lavi Decl. ¶ 12.)

3. *Release by Class Members*:

Under the terms of the Joint Stipulation, Class Members who join in the settlement, or who fail to submit valid and timely Requests for Exclusion (Opt-Outs), release all claims that were alleged in the Operative Complaint or could have been alleged "based on the facts" in the Operative Complaint. (*See* Stipulation and Settlement Agreement, §VI, at page 25.) Class Members will also be releasing all claims which they do not know or suspect to exist in their favor under California Civil Code section 1542, except that this release is explicitly limited in time to the Class Period and is limited to only those causes of action that were alleged in the Operative Complaint. (*See* Stipulation and Settlement Agreement, §VI, at page 26.)

As provided in the Stipulation and Settlement Agreement, this is a compromised settlement and the release is sufficiently tailored to the Class Members and the claims of the Complaint.

C. Notice to Settlement Class Members, Claim Forms, Objection and Opt-Out Rights

Federal Rules of Civil Procedure, Rule 23(c)(2) provides: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." It is well settled law that distribution of class notice by U.S. mail satisfies the requirements of Rule 23 and due process rights are not violated if a Class Member does not receive actual notice of settlement in time to opt out before a deadline. *See Silber v. Mahon*, 18 F. 3d 1449, 1452-54 (9th Cir. 1994) (approving notice sent by first class mail as the "best notice practicable"); *Hunt v. Check Recovery Sys., Inc.*, No. 05-4993, 2007 WL 2220972, at *3 (N.D. Cal. Aug. 1, 2007) (notice by first-class mail satisfies the best notice practicable requirement when class members can be identified through reasonable efforts). Furthermore, "best efforts" and not actual success of personal service of the notice of settlement, is all that is required to satisfy due process. *McCubbrey v. Boise Cascade Home & Land Corp*., 71 F.R.D. 62, 73-74 (N.D. Cal. 1976); *Mullane v, Central Hanover Bank & Trust Co*., 339 U.S. 306, 319 (1950) ("Therefore, notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since the objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.").

In this case, the manner of notice provide to Class Members exceeds due process requirements. Defendant will provide to the Claims Administrator a list containing the Class Members' names, last known addresses, social security number, dates of employment of Class Members, and the respective number of Workweeks that each Class Member worked during the applicable Class Period in a readable Microsoft Office Excel spreadsheet (collectively "Class List and Data"), which will be used to send the Notice of Settlement and Claim Form to Class Members. The

proposed notice and claim form are attached as Exhibits B and C to the Declaration of Joseph Lavi, filed concurrently herewith. Using this list, the Claims Administrator shall, within ten (10) days of receipt from Defendant of the Class List and Data, mail the Notice of Settlement via First-Class mail using the United States Postal Service to the most recent address known for each Class Member. Before mailing the Notice of Settlement, the Claims Administrator shall review the national change of address registry for all Class Members and/or skip trace to determine the most up-to-date addresses of all Class Members. If any Notices of Settlement are returned with a forwarding address, the Claims Administrator will re-mail the Notice Packet to the Class Member whose notice was returned. These additional steps ensure that all Class Members receive adequate notice of the Settlement and satisfy the requirements of due process, such that all Class Members who do not opt-out or submit Requests for Exclusion from the Class are bound by the Release.

V. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

A class action may not be dismissed, compromised or settled without the approval of the Court. Fed. R. Civ. P. 23(e). Federal Rules of Civil Procedure, Rule 23(e) sets forth a "two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004) (citing Manual for Complex Litigation (Third) § 30.41 (1995)). The settlement approval procedure includes the following steps: (1) preliminary fairness review of the proposed Settlement; (2) dissemination of mailed and/or published notice of the Settlement and formal fairness review to all affected class members; and (3) a formal fairness hearing, or final settlement approval hearing, at which class members may be heard and evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement may be presented. Manual for Complex Litigation (Fourth) §§ 21.632-21.635 (2004).

The primary concern of judicial supervision at this stage of the settlement process is to ensure that "(1) the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, (2) has no obvious deficiencies, (3) does not improperly grant preferential treatment to class representatives or segments of the class, and (4) falls with the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (quoting *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570 n 12 (E.D. Pa. 2001)); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (the court's task is to "balance a number of factors," including "the risk, expense, complexity, and likely duration of further litigation," the extent of discovery completed and the stage of the proceeding," and "the amount offered in settlement"); *see* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Action* § 11.22 (4th ed. 2002) *("Newberg").*

The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost and rigors of formal litigation. *See* 4 *Newberg* § 11.41, at pp. 87-88 (and cases cited therein); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). These concerns apply in this action where the alleged practice affected hundreds of employees. To make this fairness determination, courts must give "proper deference to the private consensual decision of the parties" since "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *See Hanlon*, 150 F.3d at 1027. Indeed, because "a settlement is the offspring of compromise," the question upon preliminary approval "is not whether the final product could be prettier, smarter or snazzier, but whether it

is fair, adequate and free from collusion." *Id.* When examining settlements, a presumption of fairness exists where: (1) settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and court to act intelligently and (3) counsel is experienced in similar litigation. 4 Newberg § 11.41.

A. The Proposed Settlement is Fair, Reasonable, and Adequate

No single criterion determines whether a class action settlement meets the requirements of Rule 23(e). The Ninth Circuit has directed district courts to consider a variety of factors without providing an "exhaustive list" or suggesting which factors are most important. *See Staton v. Boeing*, 327 F.3d 938, 959 (9th Cir. 2003). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Service Commission of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

Due to the impossibility of predicting any litigation result with certainty, a district court's evaluation of a settlement essentially amounts to "nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" *Officers for Justice*, 688 F.2d at 625. The ultimate touchstone, however, is whether "class counsel adequately pursued the interests of the class as a whole." *Staton*, 327 F.3d at 961. As the Ninth Circuit explained in *Officers for Justice*, the district court's role in evaluating a class action settlement is therefore tailored to meet that narrow objective. Review under Rule 23(e) "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties."

Here, as shown below, the proposed settlement falls well within the range of reasonableness. The terms of the Settlement are fair and adequate. Parties engaged in extensive discovery, conducted themselves in informed, good faith arm's-length

negotiations with adequate access to necessary information, and did so with the assistance of a professional mediator experienced in wage and hour class action litigation, Jeffrey Krivis. Moreover, Class Counsel and Defendant's counsel are experienced in employment class action matters and are capable, and have assessed the claims' strengths and weaknesses, the benefits of the Settlement in a private, consensual agreement. Thus, Preliminary approval of the Settlement is appropriate.

The Parties engaged in substantial arm's length, informed negotiations to reach the proposed Settlement. Ultimately, a settlement should stand or fall on the adequacy of its terms. Extensive formal discovery is unnecessary in determining whether a settlement agreement is fair, reasonable and adequate. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981) (holding that formal discovery is no a "ticket to the bargaining table" as long as there is the "desired quantum of information necessary" to inform counsel's judgment in reach a settlement agreement). Here, the Parties engaged in significant formal and informal discovery. The court must determine whether the proposed Settlement is within the acceptable range of reasonableness without conducting an investigation tantamount to a trial on the merits. *Id.* at 212-213.

The proposed Settlement commits Defendant to (i) a maximum $1,600,000 settlement amount, (ii) payment of all claims administration costs (up to $25,000); (iii) payment of a court approved Class Representative Enhancement Payment (up to $5,000); (iv) payment of court approved Class Counsel Fees (up to $465,000); (v) payment of court approved Class Counsel Fees (up to $17,000), is adequate and within the acceptable range of reasonableness. These results are the product of informed, arm's length negotiations which factored in: (1) the comprehensive claims investigation conducted; (2) Defendant's available legal and factual grounds for defending the claims; (3) the risks, expenses and likely duration of further litigation; (4) the cash payment considered in light of possible defenses, to adequately and fairly provide for the alleged damages to the Class Members; (5) the burdens of

proof necessary to establish liability; and (6) the probability of appeal of a favorable judgment balanced against the merits of the Plaintiff's claims.

The Rounding Class consisted of 311 people, the Bonus/OT class consisted of 872 people, the Waiting Time Penalty Class consisted of 359 people, and the Wage Statement Class consisted of 828 people. (Lavi Decl. ¶ 15.) The analyzed punch card analysis showed the following results:

Total unpaid hours	36,121
Total overpaid hours	4,161
Net unpaid hours	31,960
Regular unpaid hours	259
Overtime unpaid hours	31,701
Underpaid hours due to meals	9,937
Average rate of pay	$12.65

Based on this data, Plaintiff estimated the following damages for the class period:

1. Regular Rate

OT [($7,196,742)/(3,336,143)] X 1.5 X 338,052= $1,093,870.00

DT [($7,196,742)/(3,336,143)] X 2.0 X 8,430 =$36,370.00

Total: $1,134,240.000

2. Rounding

259 underpaid hours X $12.65=$3,276

31,701 underpaid hours X 1.5 X $12.65= **$601,526.00**

3. Labor Code § 203

457 (former employees) X 8 X 30 X $12.65=**$1,387,452.00**

4. Labor Code § 226

410 (current employees) X $4,000=**$1,640,000.00**

As such, the maximum potential exposure excluding attorneys' fees, cost and interest is approximately $4,731,452.00. (Lavi Dec. ¶15). Defendant, however, claimed that even though that the case was certified, the trial could not proceed since each class member had to testify individually as to whether they worked during the times reflected on their timecards.

The settlement reached in this matter is approximately 33.8% of the maximum potential recovery. As such it is reasonable in light of the risks involved in this case—including the prospect of a potential adverse summary judgment ruling, defenses to the case and potential appeal.

Class Counsel is convinced that the proposed Settlement is in the best interest of the class based on the negotiations and a detailed knowledge of the issues present in this action. The length and risks of trial and other normal perils of litigation that may have impacted the value of the claims. In addition, the affirmative defenses asserted by Defendant, potential adverse summary judgment ruling, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, were also carefully considered by Class Counsel in agreeing to the proposed Settlement. In light of the aforementioned circumstances and the significant benefit obtained for the Class, the proposed Settlement is well within the "ballpark" of reasonableness and should be granted preliminary approval.

The compensation sought for Plaintiff's counsel is also fair and reasonable. The Ninth Circuit has directed that, to determine what constitutes a fair and reasonable percentage of the settlement for purposes of calculating common fund attorneys' fees, the courts should use a "benchmark" percentage of 25% of the total fund. *Paul, Johnson, Alston & Hunt v. Graulty* 886 F.2d 268, 272 (9th Cir. 1989); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). Accordingly, Plaintiff's counsel's fee request of 29% is fair and reasonable fee. The Gross Settlement Amount obtained through the efforts of Plaintiff's counsel is $1,600,000.00. Adhering to the benchmark, Plaintiff's counsel is seeking 29% or $465,000 for fees and $17,000 for costs, which were primarily mediation costs.

Although Plaintiffs will provide the Court with information for the purposes of calculating attorney fees under the lodestar method should the Court so desire, Plaintiff submits that an attorney fee award based on a lodestar calculation would not

be appropriate in this case. Several courts have expressed frustration with the lodestar approach for deciding fee awards, which usually involves wading through voluminous and often indecipherable time records. *In re Activision Securities Litigation*, 723 F. Supp. 1373, 1375 (N.D. Cal 1989) (commenting that cost-benefit analysis finds that lodestar approach consumes undue court time and may detrimentally affect class members who have to wait for a lengthy analysis of voluminous time records. In addition, the adoption of a percentage award provides incentive for the attorneys to come to early settlement while avoiding protracted litigation to justify fees.)The Ninth Circuit has similarly recognized that the lodestar method "creates incentives for counsel to spend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *Vizcaino v. Microsoft Corp.*, 290 F.3d at 1050, n.5. The Ninth Circuit has thus cautioned that, while a lodestar method can be used as a cross check on the reasonableness of fees based on a percentage of recovery method if a district court in its discretion chooses to do so, a lodestar calculation is not required and it did "not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly." *Id.*

In accordance with Ninth Circuit precedents, district courts within the Ninth Circuit have recognized that a lodestar cross check need not be performed where plaintiff's counsel achieves a significant result through an early settlement. For example, in *Glass v. UBS Financial Services, Inc.*, 2007 U.S. Dist. LEXIS 8476, *44-45, 2007 WL 221862 (N.D. Cal. Jan. 26, 2007) the court declined to conduct a lodestar cross check and approved a request for fees based only on the percentage of recovery method, because it recognized that premising attorney's fees on a lodestar calculation would have unfairly penalized plaintiff's counsel for settling the case without protracted litigation. *See also In re Mfrs. Life Ins.*, 1998 WL 1993385, *10 (S.D. Cal. 1998) (court concluded that lodestar analysis was unnecessary and attorney's fee was reasonable solely on percentage-recovery method).

If Plaintiff's counsel spends significantly less time on this case prior to final approval than would result in a low lodestar multiplier, a lodestar calculation would conflict with the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litigation*, 516 F.3d 1095, 1101 (9th Cir. 2008). Moreover, a lodestar calculation under these circumstances would undermine the equitable considerations that dictate the percentage of recovery method for calculating attorney's fees in common fund cases. The percentage of recovery method "rests on the presumption that persons who obtain benefits of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Staton v. Boeing*, 327 F.3d at 967. This rule, known as the "common fund doctrine," is designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d at 271.

It is only fair that every class member who benefits from the settlement pay his or her pro rata share of attorney's fees, and Plaintiff's request for fees at the rate of 29% is reasonable. Plaintiff seeks fees less than the amount Plaintiff's counsel would be entitled to if they represented each class member individually under a regular contingent fee contract. It would be unfair to compensate Plaintiff's counsel at a lesser rate because they obtained relief for more than 800 class members. To the contrary, equitable considerations dictate that Plaintiff's counsel be rewarded for achieving a settlement that confers benefits among so many people, especially without protracted litigation. The excellent result achieved by Plaintiff's counsel merits an award of attorney's fees equal to 29% of the common fund in this case.

Finally, the incentive payment to Plaintiff is reasonable. Incentive payments serve to reward named plaintiff for the time and effort expended on behalf of the class, and for exposing themselves to the significant risks of litigation. "Courts routinely approve incentive awards to compensate named plaintiffs for the services

they provided and the risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001); *In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997). Here, Plaintiff seeks an incentive award of less than 1% (0.31%) of the total settlement amount or $5,000 for his relentless dedication in prosecuting this matter as well as having to provide the Defendant with a general release.

B. The Class Notice

Rule 23(c)(2)(B) provides that, in any case certified under Rule 23(b)(3), the court must direct to class members the "best notice practicable" under the circumstances. Rule 23(c)(2)(B) does not require "actual notice" or that a notice be "actually received." *Silber v. Mabon,* 18 F.3d 1449, 1454 (9th Cir. 1994). Notice need only be given in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Here, the parties have agreed to provide notice through first class mail, in English and Spanish to class members, whose last known addresses are known to Defendants. This method of notice clearly suffices. Moreover, the proposed notice attached as Exhibit B to the Declaration of Joseph Lavi, filed concurrently herewith, complies fully with Rule 23(c)(2)(B) requirements regarding the content of the notice. Courts routinely approve class notices even when they provide only general information about a settlement. *See, e.g., Mendoza v. United States*, 623 F.2d 1338, 1351 (9th Cir. 1980) ("very general description of the proposed settlement" sufficient); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (notice "need only describe the terms of the settlement generally.") The class notice drafted by the parties provides more than adequate notice about the Settlement.

VI. THE COURT SHOULD SCHEDULE A FAIRNESS HEARING

The last step in the settlement approval process is the fairness hearing, where members of the Settlement Class who timely submit objections to the Settlement may be heard, and the court makes a final determination about the propriety of settlement. Based on the timetables for giving notice and submitting objection to the Settlement, Plaintiff request that the fairness hearing in this case be scheduled for at least 120 days after preliminary approval of the Settlement is granted.

VII. CONCLUSION

The parties reached a fair compromise that does not excessively reward class members for weak claims, or sell them short for strong claims. Since the Settlement is fair, reasonable and adequate in all respects, the Court should grant Plaintiff's motion for preliminary approval of the Settlement in its entirety and adopt the proposed order submitted herewith.

Dated: March 3, 2014

Respectfully submitted,

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