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13 **UNITED STATES DISTRICT COURT**  
14 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

15  
16 TROY M. LINDELL, ON BEHALF OF  
HIMSELF AND ALL OTHERS  
17 SIMILARLY SITUATED,

18 Plaintiff,

19 v.

20 SYNTHES USA, SYNTHES USA SALES  
LLC, SYNTHES SPINE COMPANY LP,

21 Defendants.  
22

Case No. 1:11-CV-02053-LJO-BAM

**PLAINTIFF'S NOTICE OF MOTION,  
MOTION, AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT  
OF FINAL APPROVAL OF CLASS ACTION  
SETTLEMENT**

**Court:** Hon. Barbara A. McAuliffe  
**Courtroom:** 8  
**Date:** December 16, 2016  
**Time:** 9:00 a.m.

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**NOTICE OF MOTION AND MOTION**

1  
2 TO DEFENDANTS SYNTHES USA, SYNTHES USA SALES LLC, AND SYNTHES SPINE  
3 COMPANY LP, AS WELL AS THEIR COUNSEL OF RECORD AND ALL OTHER  
4 INTERESTED PARTIES:

5 PLEASE TAKE NOTICE THAT on December 16, 2016, at 9:00 a.m., in Department 8 on  
6 the 6th floor of this Court located at 2500 Tulare Street, Fresno, CA 93721, Plaintiff Troy Lindell  
7 (“Plaintiff”) will move and hereby moves the Court for an order finally approving the Parties’  
8 proposed class action settlement by determining the proposed settlement to be a fair, reasonable,  
9 and adequate settlement of the claims encompassed by the settlement, directing the Parties and  
10 the Settlement Administrator to implement the terms of the Agreement pertaining to the  
11 distribution of the Net Settlement Amount, making findings of fact and stating conclusions of law  
12 in support of the foregoing, and directing the entry of judgment in accordance with the Parties’  
13 Agreement pursuant to Federal Rules of Civil Procedure 54 and 58.

14 This Motion is based on the Parties’ Settlement Agreement, the accompanying  
15 Memorandum of Points and Authorities, the Declaration of Darin Ranahan filed herewith, the  
16 Declaration of Stephen Donaldson filed herewith, the proposed findings and recommendations  
17 filed herewith, the other records and pleadings filed in this action, and such other documentary  
18 and oral evidence or argument as may be presented to the Court at the hearing of this Motion.

19  
20 Dated: November 18, 2016

Respectfully submitted,

21  
22 By: /s/ Darin Ranahan  
Darin Ranahan

23 FEINBERG, JACKSON, WORTHMAN &  
24 WASOW LLP

25 *Counsel for Plaintiff and the Certified Classes*

**MEMORANDUM OF POINTS AND AUTHORITIES**

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1 **I. INTRODUCTION**

2 Plaintiff Troy Lindell seeks final approval of a \$5,000,000 non-reversionary settlement on  
3 behalf of the certified Expense and Deductions Classes.<sup>1</sup> For the reasons set forth at preliminary  
4 approval, this settlement remains fair, reasonable, and adequate. The Deductions Class will  
5 receive *more* than the actual deductions taken during the class period, while the Expense Class  
6 will receive more than 47% of the estimated unreimbursed expenses for the pre-2013 period, or  
7 over 30% of total estimated unreimbursed expenses if the post 2013 period for which Plaintiff lost  
8 summary judgment is taken into account, and the narrow release is coterminous with the claims in  
9 the complaint. These figures—which are based on Synthes’ aggregate exposure—are the same  
10 even after the removal of 39 individuals who were previously included on the class list. The only  
11 function of the removal of these individuals was to raise the average distribution to class members  
12 to over \$17,000, rather than \$14,000, Plaintiff’s estimate when moving for preliminary approval.  
13 In addition, Plaintiff and the Certified Classes faced substantial risk, expense, and delay should  
14 the case have proceeded to trial, in particular with respect to the Expense Class claims, which  
15 faced uncertain liability, uncertain damages, and potential issues with maintaining the case as a  
16 class action. Moreover, as spelled out in the preliminary approval briefing, the procedural posture  
17 of the case—following substantial discovery and motion practice—and the experienced views of  
18 counsel weigh in favor of final approval.

19 Following the Court’s preliminary approval of the settlement and class notice, the  
20 response from the Classes has been overwhelmingly positive. As of the date of this filing, the  
21 Settlement Administrator and counsel have received *no* objections or opt-outs. In addition, they  
22 have only received a single challenge to the data from which distribution will be calculated,  
23 which was quickly resolved with agreement by the challenger and both Parties.

24 **II. FACTUAL AND PROCEDURAL HISTORY**

25 The relevant procedural and factual history is spelled out in greater detail in Plaintiff’s  
26

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27 <sup>1</sup> The Classes are defined according to the Court’s order granting Plaintiff’s motion for class  
28 certification (ECF No. 139, adopted by ECF No. 149), as modified for both Classes to include an  
end date of July 14, 2016 (Findings & Recommendations ¶ 3, ECF No. 259; Order Adopting  
Findings & Recommendations, ECF No. 259).

1 motion for preliminary approval. *See* ECF No. 249 at 2-4. Plaintiff has reproduced that history  
2 here for ease of reference, and supplemented it to include further procedural history since filing  
3 the preliminary approval brief.

4 **A. Pre-Settlement Litigation of This Matter.**

5 Plaintiff filed this Action on December 13, 2011 on behalf of two classes of Sales  
6 Consultants who worked for Synthes: (1) an Expense Class for whom Synthes maintained a  
7 policy that failed to reimburse them as required under California Labor Code § 2802, as  
8 interpreted in *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007); and (2) a  
9 Deductions Class from whom Synthes improperly deducted money from their wages in violation  
10 of California Labor Code §§ 221, 223, and 300. Decl. of C. Worthman in Supp. of Mot. for  
11 Prelim. Approval (“Worthman Prelim. Approval Decl.”) ¶ 18, ECF No. 249-3. Plaintiff also  
12 brought claims for waiting time penalties under California Labor Code §§ 201-03, for unfair  
13 business practices under the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code  
14 §§ 17200 *et seq.*, and for penalties under the California Private Attorney General Act (“PAGA”),  
15 Cal. Lab. Code §§ 2698 *et seq.*, that arise from the underlying expense and deductions claims. *Id.*  
16 Synthes denied liability on all claims. The Court certified these classes on March 4, 2014, and on  
17 January 6, 2016, denied Synthes’ decertification motion and granted in part and denied in part the  
18 Parties’ cross-motions for summary judgment. *See* ECF Nos. 139, 149, 232, 233.

19 As set forth in Plaintiff’s preliminary approval motion, the Parties engaged in substantial  
20 pre-resolution discovery. Plaintiff served Synthes with seven sets of requests for production,  
21 totaling 85 different requests, and five sets of interrogatories, totaling 27 different interrogatories.  
22 Worthman Prelim. Approval Decl. ¶ 19. In response, Synthes produced 73,690 pages of  
23 documents, as well as various native format spreadsheets, and answered the interrogatories. *Id.*  
24 Synthes served Plaintiff with two sets of requests for production, totaling 64 different requests,  
25 and two sets of interrogatories, totaling 20 different interrogatories, all of which Plaintiff  
26 answered. *Id.* Synthes also served document requests and interrogatories on four different Class  
27 Members represented by counsel for Plaintiff. *Id.* Plaintiff took three different depositions  
28 pursuant to Federal Rule of Civil Procedure 30(b)(6) and seven different depositions of current

1 and former Synthes employees. *Id.* Synthes took the depositions of Plaintiff and four different  
2 Class Members. *Id.* Lastly, Plaintiff conducted document discovery and depositions for of  
3 Synthes' two expert witnesses, while Synthes conducted document discovery and a deposition of  
4 Plaintiff's one expert witness. *Id.*

5 Settlement was reached only after the Parties participated in a mediation session with an  
6 experienced mediator, Michael Dickstein, on October 30, 2015 and again on May 6, 2016,  
7 followed in both cases by extensive telephonic negotiations. Worthman Prelim. Approval Decl.  
8 Ex. 1 ("Settlement Agreement") ¶ 9, ECF No. 249-4; *id.* Ex. 2 ("Term Sheet"), ECF No. 249-5;  
9 Worthman Prelim. Approval Decl. ¶ 20. Following the parties reaching settlement, counsel for  
10 Synthes mailed a copy of the proposed settlement to various Attorneys General on August 15,  
11 2016, pursuant to the Class Action Fairness Act ("CAFA"). Decl. of D. Ranahan in Supp. of Final  
12 Approval ("Ranahan Decl.") ¶ 8.

13 During this litigation, the underlying facts of the case changed in two ways that affected  
14 liabilities and damages. First, Synthes changed its compensation policies in January 2013 to  
15 explicitly state that a certain portion of Sales Consultants' compensation was allocated to  
16 expenses and a certain portion was allocated to wages, as Plaintiff had contended *Gattuso*  
17 requires. *See* Mem. Decision & Order re: Parties' Cross Mots. for Summ. J. ("MSJ Order") 19-20,  
18 ECF No. 232. The Court relied on this change in granting Synthes' motion for summary  
19 judgment with respect to the Expense Class claims from January 2013 forward. *See id.* at 20-21.  
20 Second, Synthes stopped taking the deductions Plaintiff challenged during the course of this case,  
21 including ceasing to take customer service deductions as of September 2013, and ceasing to take  
22 accounts receivable deductions after January 2016, when the Court granted summary judgment  
23 for Plaintiff on a portion of the deductions claims. *See id.* at 22; Worthman Prelim. Approval  
24 Decl. ¶ 19.

25 **B. Post-Settlement Litigation of This Matter.**

26 Following settlement, the Court granted preliminary approval of this matter in September  
27 2016. *See* Findings & Recommendations Granting Pl.'s Mot. for Prelim. Approval ("Prelim.  
28 Approval Findings & Recommendations"), ECF No. 257; Order Adopting Findings &

1 Recommendations & Granting Prelim. Approval, ECF No. 259. It modified the class definitions  
2 to include an end date of July 14, 2016, with the final class definitions being:

- 3 a. An “Expense Class” of all former and current sales consultants  
4 who were employed by Synthes in California from four years  
5 prior to the filing of this action (December 13, 2007) to July 14,  
6 2016, and who were subject to the following “straight  
7 commission” compensation policies:
- 6 i. The policy that sales consultants from the Trauma and  
7 Spine Sales Divisions who receive “straight commission”  
8 “are not eligible for an automobile allowance or in-  
9 territory business expense reimbursement”; and
  - 9 ii. The policy that sales consultants from the CMF Sales  
10 Division receive “a predetermined base salary of \$30,000,  
11 plus a higher level of commission with no expenses;” and
- 12 b. A “Deductions Class” of all former and current Sales Consultants  
13 who were employed by Synthes in California from four years  
14 prior to the filing of this action (December 13, 2007) to July 14,  
15 2016, who at some time during Synthes’ employ had a deduction  
16 assessed against them.

17 Prelim. Approval Findings & Recommendations ¶ 3, ECF No. 257.

18 The Court also ordered notice of the settlement to go out to the class, which the Settlement  
19 Administrator sent to the majority of the Classes on October 13, 2016. Decl. of S. Donaldson in  
20 Supp. of Final Approval (“Donaldson Decl.”) ¶ 6. A smaller, second round of notice went out to  
21 24 class members three days later on October 17, 2016. *Id.* ¶ 8.<sup>2</sup> As a result, the notices included  
22 deadlines of October 28, 2016 and November 1, 2016 for the 15-day data challenge, respectively  
23 and November 28, 2016 and December 1, 2016 for the 45-day opt-outs and/or objections. *See*  
24 Prelim. Approval Findings & Recommendations ¶¶ 10-11; Donaldson Decl. ¶¶ 6, 8. As of  
25 November 18, 2016, the Settlement Administrator has received only *one* data challenge, which it  
26 quickly resolved in the challenger’s favor with the agreement of the parties, and has received *no*  
27 opt-outs or objections. Donaldson Decl. ¶¶ 6, 8. Twenty notices were returned undeliverable, for  
28 which the Settlement Administrator was able to obtain seventeen new addresses and re-send  
notice. *See id.* ¶ 9. For those Class Members whose new addresses the Settlement Administrator  
did not discover, Class Counsel is currently attempting to locate them, as well. *See id.* ¶ 9;

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<sup>2</sup> This second round went out later due to an error in the dates of employment for these individuals, which was fixed prior to class notice going out. Donaldson Decl. ¶ 5.

1 Ranahan Decl. ¶ 4. Moreover, if the Settlement Administrator is unsuccessful in delivering  
2 settlement checks, Class Counsel will take efforts to track down individuals whose settlement  
3 distributions total \$3,000 or more. *See* Settlement Agreement ¶ 45.c, ECF No. 249-4.

4 While counsel will update the Court if it receives any objections or opt-outs between the  
5 date of filing this document and the final December 1, 2016 deadline for opting out or objection,  
6 at this point the response of the Certified Classes to the proposed settlement is overwhelmingly  
7 favorable.

8 In addition, as set forth in the parties' October 11 stipulation and proposed order to send a  
9 letter in lieu of class notice (ECF No. 260) and discussed at the November 2, 2016 telephonic  
10 status conference in this matter (ECF No. 264), while preparing class notice the Parties  
11 discovered that 39 individuals Synthes had previously included on class lists were not, in fact,  
12 part of either the Expense or the Deductions Class. Ranahan Decl. ¶ 5. As explained by defense  
13 counsel at the status conference, Synthes included on earlier class lists all Sales Consultants who  
14 were subject to the deductions policies at issue, but ultimately these 39 people did not have  
15 deductions taken before the end of the Class Period and thus were not in the certified classes. *See*  
16 Minute Order, ECF No. 264; Prelim. Approval Findings & Recommendations ¶ 3, ECF No. 257  
17 (requiring as part of the class definition for Deductions Class members to have actually had a  
18 deduction taken against them); Findings & Recommendations Granting Pl.'s Mot. for Class Cert.  
19 33:7-10, ECF No. 139 (same).<sup>3</sup> The Court on October 13 approved a letter to these individuals  
20 explaining that they are not members of either class and allowing them 30 days to submit  
21 evidence contradicting this conclusion. *See* Order, ECF No. 261; Class Notice, ECF No. 260-1.  
22 On October 14, 2016, the Parties sent out the court-approved letter to these individuals with a 30-  
23 day data challenge deadline expiring on November 14, 2016. Donaldson Decl. ¶ 7. As of  
24 November 18, 2016, *none* of these individuals have submitted data challenges arguing that they  
25

26 \_\_\_\_\_  
27 <sup>3</sup> The 39 people identified as not being in the Settlement Class were never subject to the expense  
28 policies that Plaintiff challenged here, in the sense that they did not work under a "straight  
commission" compensation policy, as set forth in the class definition.



1 should be considered part of the Settlement Class. *See id.*; Ranahan Decl. ¶ 5.<sup>4</sup>

2 As discussed at the hearing, the total exposure and the value of this settlement overall is  
3 not affected by these 39 individuals' non-participation. Plaintiff's calculations were and are based  
4 on aggregate exposure, including actual deductions taken and time worked by all Sales  
5 Consultants subject to the challenged expense policies specifically cited in the Court's class  
6 certification order. Thus, the exposure numbers provided to the Court at preliminary approval and  
7 the percentage values of the settlement (63% for the Expense Class and 37% for the Deductions  
8 Class) are the same at final approval. The only number that has changed is the average payout per  
9 class member, which is now over \$17,000 for the smaller number of actual class members.

### 10 III. KEY TERMS OF THE PROPOSED SETTLEMENT

11 The key terms of the proposed settlement, set forth in Plaintiff's preliminary approval  
12 briefing, are reproduced here for the convenience of the Court.

13 **\$5,000,000 Non-Reversionary Settlement Fund.** The settlement provides for Synthes to  
14 make a non-reversionary payment of \$5,000,000 to the Classes in settlement of all claims in the  
15 case ("Settlement Fund"). Settlement Agreement ¶ 34. In addition to the \$5 million Settlement  
16 Fund, Synthes will pay the employer's share of state and federal payroll taxes (*e.g.*, FICA,  
17 FUTA) on all amounts that are paid to Class Members for unpaid wages. *Id.* ¶ 35.

18 Class Members will not be required to submit claims or take any other affirmative action  
19 to receive their shares of the settlement proceeds; instead checks will be mailed to all Class  
20 Members based on the plan of allocation formula. *Id.* ¶ 39. Class Members will share in the  
21 settlement on a pro rata basis based on a formula that takes into account their time worked as  
22 Sales Consultants subject to the straight commission policies Plaintiff challenged in this case, the  
23 dollar amounts of deductions taken as reflected on their paystubs, and whether the Sales  
24 Consultant has a potential claim for waiting time penalties as a former employee. *See id.* ¶¶ 39-  
25 43.

26 Settlement Services, Inc. (SSI) is acting as the Settlement Administrator pursuant to the

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27 <sup>4</sup> These declarations are intended to satisfy the Court's order that counsel "file a supplemental  
28 declaration within seven (7) days of the response deadline advising the Court whether any  
eliminated class members submitted a written challenge to the revised class list." ECF No. 264.

1 Parties' agreement and the Court's order granting preliminary approval. *Id.* ¶ 29; Findings &  
2 Recommendations ¶ 5, ECF No. 257. SSI is an experienced and accomplished class action  
3 administrator. It also submitted the lowest of two bids requested by Class Counsel, estimating  
4 costs of administration at between \$12,600 to \$15,000. *See* Worthman Prelim. Approval Decl. ¶  
5 23.

6 **Attorneys' Fees and Costs.** As set forth in its fee brief, Class Counsel has applied to the  
7 Court for an award of 30% of the Settlement Fund, that is, \$1,500,000. This amount is  
8 substantially below Class Counsel's lodestar calculated at Class Counsel's litigation rates. *See*  
9 Decl. of C. Worthman in Supp. of Pl.'s Mot. for Attorneys' Fees & Costs and Class Rep. Service  
10 Award ("Worthman Fee Decl.") ¶¶ 4-5 & Exs. 1-2, ECF No. 265-1. Class Counsel has also  
11 applied to the Court for an award of costs of \$179,871, which includes expenses for mediation,  
12 experts, depositions, and other expenses, plus minor costs incurred between now and the time of  
13 distribution estimated to total less than \$185,000. *See* Pl.'s Mot. for Attorneys' Fees & Costs and  
14 Service Award 1, 13, ECF No. 265. Only those fees and costs awarded by the Court will be paid  
15 to Class Counsel from the Settlement Fund. Settlement Agreement ¶ 38. The amount of fees and  
16 costs Class Counsel are seeking is discussed in the Class Notice. *See* Class Notice § 6, ECF No.  
17 257-1. The settlement is not contingent on Class Counsel receiving the full amount of fees and  
18 costs for which they apply. *See* Settlement Agreement ¶ 38.

19 **Service Award.** The Representative Plaintiff, Mr. Lindell, has applied to the Court for a  
20 service award of \$10,000 in recognition of his service to the Class. He substantially contributed to  
21 the success of the case. In addition to regularly providing support to Class Counsel, he faced  
22 counterclaims and has contributed substantial time and expense to this litigation. By Mr. Lindell's  
23 estimate, he spent over 150 hours on this matter as a Named Plaintiff, including multiple trips  
24 from Iowa to California to participate in his deposition and the mediation of this matter,  
25 responding to written discovery, meeting and corresponding with Class Counsel regarding the  
26 litigation, reviewing documents related to the case, preparing his declarations, and  
27 communicating with other members of the Settlement Class regarding the litigation. Worthman  
28 Prelim. Approval Decl. ¶ 27; Decl. of T. Lindell in Supp. of Mot. for Award of Attorneys' Fees &

1 Costs and Class Rep. Service Award ¶ 6. If Mr. Lindell receives a service award, he shall provide  
2 Synthes a complete and general release of all known and unknown claims. Settlement Agreement  
3 ¶¶ 58-59. The maximum service award requested (i.e. \$10,000) represents a very small fraction of  
4 the total monetary relief to the Classes and is below the average amount that class members will  
5 recover. The amounts that the Representative Plaintiff seeks as service payment is discussed in  
6 the Class Notice. Class Notice § 10. The Settlement is not contingent on the Court awarding the  
7 service award.

8 **Payment to the Labor Workforce Development Agency for Claims Under the Private**  
9 **Attorneys General Act.** The settlement provides for an allocation of \$50,000 to claims for  
10 penalties under the Private Attorneys General Act (PAGA). As required, 75 percent of this  
11 amount will be paid to the Labor Workforce Development Agency, or \$37,500. The amount set  
12 aside is typical of wage and hour settlements and appropriate in light of the risks and inherent  
13 discretion of the Court over PAGA awards. *See, e.g., Torchia v. W.W. Grainger, Inc.*, No. 1:13-  
14 cv-01427-LJO-JLT, 2014 WL 3966292, \*2 (E.D. Cal. Aug. 13, 2014) (approving \$7,500 of a  
15 \$10,000 payment to LWDA in \$2,750,000 wage and hour settlement). The LWDA payment is  
16 discussed in the Class Notice. *See* Class Notice §§ 5-6. Plaintiff is providing notice to the LWDA  
17 of this application for approval of the settlement contemporaneously with filing this motion. *See*  
18 Ranahan Decl. ¶ 6.

19 **Distribution of the Net Settlement Fund to the Class Members.** The portion of the  
20 Settlement Fund remaining after amounts awarded to Class Counsel for fees and costs, as well as  
21 payments to the Representative Plaintiff, the Settlement Administrator, and the LWDA, is  
22 calculated to be approximately \$3.25 million. Ranahan Decl. ¶ 7. This amount (the Net  
23 Settlement Amount) will be distributed among all Class Members who do not opt out. Synthes  
24 has identified 186 total Sales Consultants in total who are part of either or both Classes.<sup>5</sup> Ranahan

25 \_\_\_\_\_  
26 <sup>55</sup> The total number of class members has shifted from the 225 listed in the preliminary approval  
27 papers as a result of (1) realizing that one member who had previously opted out had rescinded  
28 his opt-out (*see* Stip. & Proposed Order 3 n.1, ECF No. 260); (2) determining that 39 individuals  
previously included on the Class List were not in fact members of either class (*see id.* at 2:9-12;  
Minute Order, ECF No. 264); and (3) later discovery that former Named Plaintiff Mark Pope,  
whom the Court ordered removed from the class, was still included in the final class list (*see*  
Order Dismissing Mark Pope, ECF No. 50; Ranahan Decl. ¶ 7).

1 Decl. ¶ 7. The average payment to Class Members will thus be over \$17,000. *Id.*

2 Class Members do not need to take any action to receive their settlement shares. Checks  
3 will be mailed to Class Members pursuant to the plan of allocation. Settlement Agreement ¶ 45. If  
4 some Class Members do not cash their checks within 180 days after reasonable efforts to find  
5 them and encourage them to do so and there are more than three times the costs of administration  
6 remaining in the settlement fund, that amount will be redistributed *pro rata* to the participating  
7 Class Members who cashed their checks. *Id.* ¶ 44. If such funds do not exceed three times the  
8 costs of administration, or after one redistribution has been accomplished, the remaining funds  
9 will be paid in accordance with *cy pres* to the Legal Aid Society – Employment Law Center of  
10 the San Francisco Bay Area. *Id.*

11 **Plan for Distributing the Net Settlement Fund Among Participating Class Members.**

12 The Settlement sets forth a plan to distribute the Net Settlement Amount among  
13 participating Class Members on a modified *pro rata* basis. 63% of the Net Settlement Amount  
14 will be allocated to the Expense Class and 37% will be allocated to the Deductions Class.<sup>6</sup> For the  
15 Expense Class, 90% will be allocated to claims up to and including December 31, 2012, and 10%  
16 will be allocated to claims on and after January 1, 2013 (for which Synthes prevailed on summary  
17 judgment). Those amounts will be allocated to Class Members based on their pro rata shares of  
18 days of employment under Synthes' straight commission policies. For the Deductions Class, 60%  
19 will be allocated to deductions damages and 40% to waiting time penalties. Settlement  
20 Agreement ¶¶ 39-43. In distributing the deductions damages, deductions up to and including  
21 December 31, 2012, the period for which Plaintiff obtained summary judgment, will be given a  
22 weight of 1.25. Deductions on and after January 1, 2013, will be given a weight of 1. Distribution  
23 will then be pro rata among Deductions Class Members according to their share of total weighted  
24 deductions taken. The portion of deductions allocated to waiting time penalties will be distributed  
25 evenly among former employees through July 14, 2016.

26 **Release of Claims.** Under the terms of the Settlement, all Class Members who do not opt

27 \_\_\_\_\_  
28 <sup>6</sup> As discussed on the November 2, 2016 telephonic status conference, these amounts were derived from total aggregate exposure, and thus do not change as a result of removing individuals from the class list. *See* Minute Order, ECF No. 264; Ranahan Decl. ¶ 5.

1 out will, by operation of the entry of the Judgment and Final Approval, release Synthes from only  
2 those “claims based on the facts alleged in this case asserted on behalf of the classes in the  
3 lawsuit . . . .” Settlement Agreement ¶ 56.<sup>7</sup> The Representative Plaintiff, Mr. Lindell, has agreed  
4 to a general release and a waiver of rights under California Civil Code § 1542. *Id.* ¶¶ 58-59.

5 **Opt Out and Objection Rights.** The Notice made clear the rights of Class Members to  
6 opt out or object if they so desired. The Settlement provides that Class Members shall have the  
7 right to opt out or object within 45 days of the mailing of the Class Notice, and provides clear  
8 instructions for how to do so. *Id.* ¶¶ 52-53. As of November 18, 2016, no Class Members have  
9 objected or opted out. Donaldson Decl. ¶¶ 6, 8; Ranahan Decl. ¶ 3.

#### 10 IV. FINAL APPROVAL IS WARRANTED

##### 11 A. Legal Standard.

12 In order to approve a settlement that would bind class members, the court must find, after  
13 notice and a hearing, that the proposed settlement is “fair, reasonable, and adequate.” Fed. R.  
14 Civ. P. 23(e)(2). This evaluation is done against the backdrop of “a strong judicial policy that  
15 favors settlements, particularly where complex class action litigation is concerned.” *In re Synacor*  
16 *Erisa Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).

17 Looking to the settlement itself, “[w]hen seeking final approval, plaintiffs may establish a

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18 <sup>7</sup> The complete release in the Settlement Agreement, which is precisely coterminous with the  
19 claims in the operative complaint, provides that:

20 Upon the Final Effective Approval Date and being mailed a  
21 Settlement Award payment, the Class Representative and each  
22 Settlement Class Member shall release the Released Parties from all  
23 claims based on the facts alleged in this case asserted on behalf of  
24 the classes in the lawsuit, including, without limitation, (a) the  
25 claims for unpaid business expenses under California Labor Code §  
26 2802 and unlawful wage deductions under Labor Code §§ 221, 223,  
and 300 as well as the Private Attorney General Act penalties under  
Labor Code § 2698 *et seq.* and the violations of the Unfair  
Competition Law (Business & Professions Code § 17200) that arise  
from the claims under Labor Code §§ 2802, 221, 223, 300 and (b)  
to the extent permitted by law, claims for waiting time penalties  
under Labor Code §§ 201-03.

27 Claims for benefits arising under the Employee Retirement Income  
28 Security Act (“ERISA”) are expressly preserved.

Settlement Agreement ¶¶ 56-57.

1 presumption of fairness by demonstrating: ‘(1) [t]hat the settlement has been arrived at [through]  
2 arm’s-length bargaining; (2) [t]hat sufficient discovery has been taken or investigation completed  
3 to enable counsel and the court to act intelligently; (3) [t]hat the proponents of the settlement are  
4 counsel experienced in similar litigation; and (4) [t]hat the number of objectors or interests they  
5 represent is not large when compared to the class as a whole.’ *Trew v. Volvo Cars of N. Am.,*  
6 *LLC*, 2007 WL 2239210, \*2 (E.D. Cal. Jul. 31 2007) (quoting Alba Conte and Herbert B.  
7 Newberg, *Newberg on Class Actions* § 11:41 (4th ed. 2006)); *see also* *Newberg on Class Actions*  
8 § 13:45 (5th ed. 2014); *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, \*6 (N.D. Cal.  
9 Apr. 1, 2011) (Spero, M.J.) (initial presumption of fairness is usually established if settlement is  
10 recommended by class counsel after arm’s-length bargaining).

11 In addition, the Ninth Circuit has identified several factors the district court should  
12 consider, as applicable, in reaching its determination of whether a proposed class action  
13 settlement is fair, reasonable, and adequate:

14 The district court’s ultimate determination will necessarily involve  
15 a balancing of several factors which may include, among others,  
16 some or all of the following: (1) the strength of plaintiffs’ case; (2)  
17 the risk, expense, complexity, and likely duration of further  
18 litigation; (3) the risk of maintaining class action status throughout  
19 the trial; (4) the amount offered in settlement; (5) the extent of  
20 discovery completed, and the stage of the proceedings; (6) the  
21 experience and views of counsel; (7) the presence of a  
22 governmental participant; and (8) the reaction of the class members  
23 to the proposed settlement.

24 *Officers for Justice*, 688 F.2d at 625 (numerals added). “This list is not exclusive and different  
25 factors may predominate in different factual contexts.” *Torrise v. Tucson Elec. Power Co.*, 8 F.3d  
26 1370, 1376 (9th Cir. 1993). While “[t]he court must find that the proposed settlement is  
27 fundamentally fair, adequate, and reasonable . . . the court’s inquiry is ultimately limited ‘to the  
28 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.’ . . . The court, in evaluating the  
agreement of the parties, is not to reach the merits of the case or to form conclusions about the  
underlying questions of law or fact.” *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1040-41  
(N.D. Cal. 2008) (citation omitted; quoting *Officers for Justice v. Civil Serv. Comm’n of the City*

1 *and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)).

2 **B. The Settlement Is Entitled to a Strong Presumption of Fairness.**

3 This Settlement Agreement meets each of the four factors for obtaining a presumption of  
4 fairness, and thus merits such a presumption. First, it was “arrived at [through] arm’s-length  
5 bargaining,” facilitated by mediator Michael Dickstein on October 30, 2015 and again on May 6,  
6 2016, followed in both cases by extensive telephonic negotiations. *See Trew*, 2007 WL 2239210,  
7 at \*2; Settlement Agreement ¶ 9, ECF No. 249-4; Term Sheet, ECF No. 249-5; Worthman Decl.  
8 ¶ 20. Participation in mediation “tends to support the conclusion that the settlement process was  
9 not collusive.” *Dearaujo*, 2016 WL 3549473, at \*10 (taking judicial notice of Michael  
10 Dickstein’s role as mediator as a factor favoring preliminary approval).

11 Second, “sufficient discovery has been taken or investigation completed to enable counsel  
12 and the court to act intelligently,” including extensive written discovery, numerous depositions,  
13 expert discovery, and motion practice. *See Trew*, 2007 WL 2239210, at \*2; *supra* section II.A.

14 Third, “the proponents of the settlement are counsel experienced in similar litigation,” as  
15 demonstrated by the extensive curriculum vitae and experience described in their declarations  
16 submitted at the time of preliminary approval, and believe the settlement to be fair, reasonable,  
17 adequate, and in the best interest of the Class Members in light of all known facts and  
18 circumstances, including the risks of the outcome of trial and appeals as well as delay. *See Trew*,  
19 2007 WL 2239210, at \*2; Worthman Prelim. Approval Decl. ¶¶ 3-16, 21-22 & Exs. 3-4, ECF  
20 Nos. 249-3, 249-6, 249-7; Decl. of C. Taylor in Supp. of Prelim. Approval (“Taylor Prelim.  
21 Approval Decl.”) ¶¶ 3-10, ECF No. 249-8; *see also infra* § IV.C.4.

22 Lastly, “the number of objectors or interests they represent is not large when compared to  
23 the class as a whole,” given that there have been no objectors to date out of a class of 186 current  
24 and former Sales Consultants. *See Trew*, 2007 WL 2239210, at \*2; Donaldson Decl. ¶¶ 6, 8;  
25 Ranahan Decl. ¶ 3. Accordingly, it merits a presumption of fairness.

26 **C. The Settlement Is Fair, Reasonable, and Adequate.**

27 Regardless of whether the Court determines the presumption of fairness applies, all the  
28 relevant factors identified by the Ninth Circuit weigh in favor of settlement approval in this case.

1           **1. The Strength of Plaintiff’s Case and the Risk, Expense, Complexity and**  
2           **Likely Duration of Further Litigation.**

3           At the time of settlement, Plaintiff had partially succeeded in some claims, partially failed  
4           in others, and faced substantial uncertainty as to the remainder. *See supra* section II.A. While  
5           Plaintiff believes he has meritorious claims, he is also cognizant that the Classes face significant  
6           procedural, liability, and damages risks moving forward, including but not limited to the  
7           following: the risks of trial; the risk that the Classes would be decertified at or after trial; the risk  
8           of appeal; the risk that the Court or a jury would find the evidence insufficient to justify damages  
9           awards in the amounts claimed by the Classes, particularly as to the Expense Class where there is  
10          a risk the Court would require individual testimony or evidence to establish damages; the risk that  
11          Synthes would prevail on its affirmative defenses; and ultimately the risk that the Classes would  
12          recover less than the proposed Settlement or nothing at all. *See* Joint Status Report 2-11, ECF No.  
13          239 (outlining outstanding disputes following summary judgment, including Synthes’ intent to  
14          renew its motion to decertify the class).

15          In short, the Settlement provides a substantial and immediate benefit to the class which is  
16          “preferable to lengthy and expensive litigation with uncertain results.” *Morales v. Stevco, Inc.*,  
17          No. 09-00704 AWI JLT, 2011 WL 5511767, at \*10 (E.D. Cal. Nov. 10, 2011).

18           **2. The Settlement Amount and Individual Awards Provide Reasonable**  
19           **Compensation for Class Members’ Damages.**

20          The \$5 million settlement is a substantial economic recovery for the small Classes in this  
21          case. The total settlement—as well as the individual awards of an average estimated amount of  
22          over \$17,000—constitute substantial recoveries. Class Counsel believe that the Settlement  
23          provides for a significant portion of the likely recovery were Plaintiff to fully prevail as a Class at  
24          a trial on the merits. Worthman Prelim. Approval Decl. ¶ 23. By Plaintiff’s Counsel’s  
25          calculations, the amounts recovered will result in an allocation of about \$1.2 million for the  
26          Deductions Class—more than 100% of the deductions taken during the Class Period. The  
27          allocation for the Expense Class will be over \$2 million for the Expense Class, more than 47% of  
28          the estimated unreimbursed expenses for the pre-2013 period, or over 30% of total estimated  
                unreimbursed expenses if the post 2013 period for which Plaintiff lost summary judgment is



1 taken into account. *Id.* ¶¶ 23-25.

2 Given the procedural, liability and damages hurdles facing them, the total settlement and  
3 corresponding *pro rata* awards are very favorable to the Classes. *See, e.g., Officers for Justice v.*  
4 *Civil Serv. Commission*, 688 F.2d 615, 624 (9th Cir. 1982) (“Of course, the very essence of a  
5 settlement is compromise, a yielding of absolutes and an abandoning of highest hopes.”);  
6 *Chiaromonte v. Pitney Bowes, Inc.*, No. 06-1507, 2008 WL 510765, at \*6 (S.D. Cal. Feb. 25,  
7 2008) (in wage and hour settlement, noting that funds that are “only a fraction of the potential  
8 recovery” have been approved; citing approval of 6% of potential recovery).

9 **3. The Large Extent of Discovery Completed and the Late Stage of the**  
10 **Proceedings Favor Approval.**

11 This factor considers whether the parties have gathered “sufficient information to make an  
12 informed decision about the settlement.” *See, e.g., Morales*, 2011 WL 5511767, at \*11. Here,  
13 given the advanced stage of the proceedings and the extensive discovery completed, (Worthman  
14 Prelim. Approval Decl. ¶¶ 18-19) this factor weighs heavily in favor of approval. Moreover, the  
15 degree to which the parties understood and litigated their positions is highlighted by the fact that  
16 the case settled only after the Court had ruled on the parties’ cross-motions for summary  
17 judgment and Synthes’ motion for decertification, and after multiple mediation sessions.

18 **4. The Experience and Views of Counsel.**

19 Class Counsel are very experienced in class litigation, including in wage and hour cases,  
20 as the Court recognized in appointing them at Class Certification, an appointment in confirmed  
21 upon granting preliminary approval. Findings & Recommendations Granting Pl.’s Mot. for Class  
22 Cert. 20 n.14, ECF No. 139 (“Plaintiff’s counsel has a wealth of experience in employment class  
23 actions.”); Prelim. Approval Findings & Recommendations ¶ 4, ECF No. 257; *see also*  
24 Worthman Prelim. Approval Decl. ¶¶ 3-16; Taylor Prelim. Approval Decl. ¶¶ 3-8. Class  
25 Counsel’s endorsement of the settlement as fair, reasonable, and adequate in light of the risks of  
26 further litigation and recommendation that it be approved “is entitled to significant weight, and  
27 weighs in favor of settlement.” *See e.g. Morales*, 2011 WL 5511767, at \*11; *Clesceri*, 2011 WL  
28 320998, at \*10.

