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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SARMAD SYED and ASHLEY BALFOUR, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

M-I, L.L.C., a Delaware Limited Liability Company, doing business as M-I SWACO; and, DOES 1 through 10, inclusive,

Defendants.

CASE NO.12-CV-01718 DAD (MJS)

CLASS ACTION

UNOPPOSED

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND ENTERING JUDGMENT

DATE: July 6, 2017
TIME: 9:30 a.m.
DEPT: Courtroom 5 (7th Floor)
JUDGE: Hon. Dale A. Drozd

Filed: October 18, 2012
Trial date: None set

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MISCELLANEOUS AUTHORITIES

I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs and appointed Class Representatives, Sarmed Syed and Ashley Balfour, ("Plaintiffs") seek final approval of a non-reversionary common fund Settlement of $7,000,000 on behalf of 468 individuals employed by Defendant M-I, LLC, dba M-I Swaco ("Defendant" or "M.I. Swaco") in a Covered Position[1] at during the relevant Class Period[2] who were misclassified as "exempt" from the requirements of overtime wages either under California law or under the Federal Labor Standards Act ("FLSA"). Declaration of Isam C. Khoury ("Khoury Decl.,") ¶8.

On February 22, 2017, following extensive briefing and oral argument, the Court granted preliminary approval of the proposed Settlement finding that, "based on the information provided by plaintiffs in their moving papers that the settlement award in this case appears to be fair and reasonable." [Doc. No. 84 at 15-16]. After receiving notice of the settlement, *not a single member of the Class has objected to any term of the Settlement and only one (1) Class Member has requested exclusion*. The Class has overwhelming embraced the Settlement which will pay FLSA Class Members, on average $3,648.79 and highest payment of $8,949.21 and pay California Rule 23 Class Members, on average $11,016.07 and highest payment of $34,475.81. Declaration of Tim Cunningham (on behalf of CPT Group ("Cunningham Decl.,"), ¶¶18, 19.

II. BACKGROUND

A. Defendant, M-I, LLC dba M-I Swaco. Defendant provides services and products related to drilling for hydrocarbons. It has employed hundreds of Class Members in the Covered Positions throughout the United States. The positions held by members of the Class are collectively referred to in this motion as "Mud Men". Khoury Decl., ¶9.

B. Plaintiffs Sarmad Syed and Ashley Balfour. Named Plaintiff Sarmad Syed was a

[1] "Covered Position" includes drilling fluid specialist, mud engineer, mud man trainee, and consultant mud man and the like. Settlement Agreement and Release of Claims, ("Settlement Agreement") [Doc. No. 76-2, ¶ I.O.-Appendix 1].

[2] The "California Class Period" means the period from October 18, 2008 through November 30, 2016, (four years back from the date of filing this Action); the "FLSA Class Period" means the period from August 5, 2010 through November 30, 2016 [Doc. No. 84, fn 2.]

mud engineer in training working for Defendant from August 15, 2011 to September 19, 2011. Plaintiff Syed was assigned to work and to study in California. As a new recruit, he was assigned to "ride along" for two to six weeks prior to going to Houston, Texas to attend training school. Plaintiff Ashley Balfour worked for Defendant from August, 2011 through November, 2012 at numerous drilling sites in California, i.e., Elk Hills, Kern River, Lost Hills and San Ardo. Khoury Decl., ¶10.

C. Class Members, Their Duties, Responsibilities and Some Background.

There are 117 Class Members employed in states outside of California (the "FLSA Class") from August 5, 2010 through November 30, 2016 (the "FLSA Class Period") [Doc. No. 86, fn. 2], and 351Class Members employed in California (the "California Class")[3] from October 18, 2008 through November 30, 2016 (the "California Class Period"). Khoury Decl., ¶11. Details concerning the Class' duties and responsibilities are set forth in Plaintiffs' Motion for Preliminary Approval. [Doc. No. 76-1 at 3:11 – 4:17.]

III. PROCEDURAL BACKGROUND AND DISCOVERY HISTORY

A. Litigation History

On October 18, 2012, Plaintiffs filed a complaint alleging wholesale and systematic misclassification of those persons employed in a Covered Position who were classified as "exempt" from the overtime provisions of the FLSA and/or the applicable state wage and hour laws of California. The complaint asserts claims on behalf of a collective action under the Fair Labor Standards Act ("FLSA"), pursuant to Section 16(b), 29 U.S.C. § 216(b), and putative state law classes pursuant to Fed. R. Civ. P. 23, with attendant subclasses, for: (1) failure to pay overtime in violation of the FLSA; (2) failure to pay overtime pursuant to state law; (3) failure to pay premium wages for noncompliant meal and rest periods in violation of California Labor Code §§ 226.7 and 512; (4) failure to provide accurate wage statements in violation of California Labor Code §§ 226 and 1174; (5) failure to timely pay wages upon termination in violation of California Labor Code §§ 201-203; (6) unfair competition in violation of California Business and Professions

[3] The FLSA Class and California Class are sometimes collectively referred to as the "Class." Khoury Decl., ¶13.

Code § 17200; and (7) civil penalties for violation of the Labor Code Private Attorneys General Act of 2004 ("PAGA") §2699, et seq. Khoury Decl., ¶12.

On December 7, 2012 Defendant answered the complaint by generally and specifically denying all material allegations. Khoury Decl., ¶14.

On July 8, 2013, Plaintiffs filed their motion to conditionally certify this action as a collective action pursuant to the FLSA [Dkt. No. 12]. The Court continued the hearing from March 28, 2014 [Dkt. Nos. 13, 15, 20]. Khoury Decl., ¶15.

On July 30, 2014, the Court issued its Findings and Recommendation to Grant Motion for Collective Certification [Dkt. No. 30-"FR"] recommending Plaintiffs' FLSA collective action be certified. The Court further recommended that Defendant release to Plaintiffs the contact information for all FLSA Collective Action Class Members. Khoury Decl., ¶16.

On November 26, 2014, District Court Judge Anthony Ishii issued his Order Re: Findings And Recommendations Regarding Motion To Certify Class [Dkt. No. 36] conditionally certifying the FLSA collective class. Khoury Decl., ¶17. After notice of certification was given to the Class, on October 20, 2015 Plaintiff lodged 168 Class Members' Consent to Join forms [Dkt. No. 52]. Khoury Decl., ¶18.

On March 8, 2016, Plaintiffs filed their Fed. R. Civ. P. 23 Motion for Class Certification seeking to certify a Plaintiff Class of "drilling fluid specialists" who performed work for Defendant in California during the period from October 18, 2008 to the present [Dkt. Nos. 62 through 62-15]. Khoury Decl., ¶19. Concurrent with the certification motion, Plaintiffs moved for leave to file a first amended complaint to add Joshua Lynd as a named Plaintiff and representative for the proposed California Rule 23 Class [Dkt No. 61, 64]. Khoury Decl., ¶20.

On April 7, 2016, the Parties submitted a stipulation to continue the dates related to Plaintiffs' motion for leave to amend the complaint and the Fed.R.Civ.P Rule 23 certification motion until after the Parties had had an opportunity to attend mediation set for September 1, 2016. [Dkt. No. 66]. On April 8, 2016, the Court granted the Parties' request [Dkt. No. 67]. Khoury Decl., ¶21.

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B. Investigation And Discovery Conducted.

Plaintiffs propounded their opening round of discovery on or about July 15, 2013, serving Interrogatories and Request for Production of Documents, and noticed Defendant's Fed.R.Civ.P. 30(b)(6) deposition. Defendant served its responses to all outstanding discovery on October 7, 2013. Khoury Decl., ¶22.

On January 6, 2014 Class Counsel took the deposition of Defendant's Fed.R.Civ.P. 30(b)(6) deposition, Reginald Stanfield, the operation manager for the West Coast District. Depositions were also taken of Plaintiffs Ashley Balfour and Sarmad Syed on January 7 and 8, 2014, respectively, and of FLSA Class Members Alan Crane and Adam Doherty on February 18 and 19, 2014, respectively. Khoury Decl., ¶23.

Upon FLSA Collective Class Certification and pursuant to Court Order [Dkt. No. 46], on March 11, 2015, the third-party administrator, mailed the Court-approved FLSA Notice of a Collective Action and Consent to Join Form to 1,435 members of the Class. In response, at the close of the submission deadline on June 9, 2015, 168 individuals consented to join the FLSA collective action [Dkt. No. 52].[4] Khoury Decl., ¶24.

Plaintiffs propounded a second set of Document Production Requests on April 16, 2014, to which Defendant responded on June 6, 2014. Khoury Decl., ¶26.

Throughout the litigation, an estimated 4,244 documents were exchanged, with 2,864 pages produced by Defendant and 1,380 by Plaintiffs. These documents included Plaintiffs' personnel files, various job descriptions and guidelines, multiple company handbooks and policies, company training manuals and materials, redacted drilling reports, emails, among other numerous and relevant documents. Khoury Decl., ¶27.

In conjunction with Plaintiffs' Fed.R.Civ.P Rule 23 motion, Plaintiffs informally interviewed over 80 Class Members and ultimately obtained 17 declarations in support of their certification motion. In preparation for filing its opposition, Defendant deposed four declarants: Jimmy Cook, Romein Hernandez-Martinez, Joshua Lynd, and Cory Pruett on June 30, 2016 and

[4] Of these, 53 were California Class Members, and 115 were FLSA Class Members. Khoury Decl., ¶25.

July 1, 2016. Khoury Decl., ¶28.

To allow for an informed and meaningful mediation once agreement was reached to explore the possibility of settlement, Defendant produced an excel file containing over 7,700 lines of data reflecting Class Member salary data and workweek information. This information and data, together with the information gathered from dozens of informal Class Member interviews, declarations and depositions was sufficiently quantitative to permit Plaintiffs' professional consultant to calculate and extrapolate Class-wide damages for use at mediation. Khoury Decl., ¶29.

IV. MEDIATION AND SUMMARY OF PROPOSED SETTLEMENT TERMS

A. Mediation. With sufficient investigation, extensive written and oral discovery, research, Class Member interviews, briefing of Plaintiffs' FLSA Collective Certification and Plaintiffs' Fed.R.Civ.P Rule 23 motion, document analysis and extrapolation of damages for the Class for the Class Periods**,** on September 1, 2016, the Parties attended mediation facilitated by Jeffrey Krivis in Encino, California, and engaged in serious and informed arms'-length negotiations. Each side represented by its counsel, recognized the substantial risk of an adverse result and agreed to a compromised settlement of the Action by day's end. The proposed Settlement is memorialized in the Settlement Agreement [Doc. No. 76-2]. Khoury Decl., ¶30.

B. Proposed Settlement. Subject to and contingent upon approval of this Court, this action may be settled and compromised for the Gross Settlement Amount, ("GSA") of **$7,000,000**, which includes (a) attorneys' fees of **$2,333,333** (one-third of the GSA); (b) Class Counsels' litigation costs of **$49,857.37**[5]; (c) Class Representative Service Payments of **$15,000** to Plaintiff Ashley Balfour and **$20,000** to Plaintiff Sarmad Syed in consideration of (i) their initiation and prosecution of this action, (ii) service as representatives of the Class, (iii) work performed, (iv) risks undertaken for the payment of costs in the event the case had not concluded successfully, (v) general releases of all claims, and (vi) the substantial benefits conferred upon all other members of

[5] Litigation costs were estimated at $40,000, but increased by the payment to a consultant, Torrey Partners, which invoice was received late, and the retention of a private investigator, People Hunter, to locate 31 Class Members (whose Class Notices were not delivered) at a fixed cost of $250 per person. These 31 Class Members stand to receive an aggregate of $184,974.90. Khoury Decl., ¶32; Cunningham Decl., ¶9.

the Class; (d) administration expenses to CPT Group, Inc., of **$11,500**, and (e) PAGA payment to the Labor Workforce and Development Agency ("LWDA") in the amount of **$75,000** (75% of $100,000). [Doc. No. 76-2, at 35-39.] Khoury Decl., ¶31.

C. Net Settlement Amount, ("NSA"). After all Court-approved deductions, the NSA estimated at **$4,282,532.61** less employer-sided payroll taxes estimated at **$212,776.69**, will be distributed to 467 Class Members, on a proportionate basis, without the need to return a claim form. No portion of the NSA reverts to Defendant under any circumstances. Khoury Decl., ¶33.

D. Formula for Distribution of NSA to Class Members. Each Class Member will receive a proportionate share of the NSA based on the number of weeks worked as a FLSA Class Member or as a California Class Member during the relevant Class Period in relation to the number of weeks worked by all members of either FLSA Class or the California Class during the relevant Class Period. Khoury Decl., ¶34. The 117 members of the FLSA Class worked 15,735.01 weeks during the FLSA Class Period, and 350 members of the California Class worked 47,370.23 actual weeks (142,110.69 adjusted weeks) during the California Class Period[6]. Cunningham Decl., ¶¶¶17, 18, 19; Khoury Decl., ¶35. To account for the greater value of California Class Members' claims for overtime wages (one and one-half times their hourly rates), the violation of the various California Labor Code claims asserted, and the additional year of damages under Business & Professions Code §17200, the weeks worked by California Class Members during the California Class Period were multiplied by 3.0.[7] Khoury Decl., ¶37.

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[6] The Settlement Agreement [Doc. No. 76-2 at 10], provides Class Members will receive a Settlement Payment based on the number of weeks worked during their respective Class Periods. The Settlement Agreement indicated the FLSA Class worked 6,074 weeks, and the California Class worked 23,880 weeks. These numbers inadvertently reflected the number of "pay periods" rather than the number work weeks. As Class Members were paid every two weeks in a pay period, the actual number of weeks worked essentially doubled. Following preliminary approval, and based on the data received, the Administrator calculated the correct number of weeks (rather than pay periods), to calculate the pay rates shown in the Class Notice. Khoury Decl., ¶36.

[7] Distributing the NSA between the FLSA Class and the California Class is consistent with other hybrid settlements approved in this district court. See *Millan v. Cascade Water Servs., Inc*., No. 1:12-cv-01821-AWI-EPG, 2016 WL 3077710, at *1 (E.D. Cal. May 31, 2016) (approving settlement agreement where FLSA settlement group received 34% of the NSA, and the Rule 23 settlement group for California labor claims received 66% of the NSA).

V. PRELIMINARY APPROVAL AND CLASS NOTICE

Following consideration of Plaintiffs' Motion for Order Granting Preliminary Approval [Doc. No. 76], oral argument heard February 7, 2017, and Plaintiffs' [Supplemental] Response to the Court's Request for Additional Information [Doc. No., 80], on February 22, 2017, the Court entered its Order Granting Plaintiffs' Motion for Preliminary Approval of the Class Action Settlement and Preliminary Class Certification finding the requirements for certification had been met [Doc. No. 84 at 8-12], and based on the information set forth in the preliminary approval motion, that the Gross Settlement Amount appeared to be fair and reasonable [*Id*. at 12-16]. The Court also approved the Notice of Class Action Settlement, Employment Information Sheet, Change of Address Form, and pre-printed return envelope, ("Class Notice") and the manner of distribution to the Class. (*Id*. at 22-23; Doc. No. 86 at 2). Khoury Decl., ¶38.

On April 4, 2017, and May 1, 2017, the Class Notices were mailed[8] to the Class. Cunningham Decl., ¶6, 7, Exhs. A, B; Khoury Decl., ¶39. The Class Notice notified Class Members of their rights (1) to receive their share of the Settlement without a claim form, (2) to object to the Settlement and the May 19, 2017 deadline to submit an objection; (3) to appear at the Final Approval Hearing, and (3) if a California Class Member, the May 19, 2017 deadline and manner in which to submit a request for exclusion from the Settlement. The Employment Information Sheet individualized each Class Member's number of weeks worked during the Class Period, and the included the estimated amount of their payment. Khoury Decl., ¶41; Cunningham Decl. Exhs. – A, B. Through the present time, not a single member of the Class has filed an objection and only one (1) member of the California Class has requested exclusion. Khoury Decl., ¶42; Cunningham Decl., ¶¶ 12, 14.

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[8] Class Counsel learned most recently that M-I Swaco was unable to provide addresses for an estimated 24 members of the California Class whose aggregate pay-out was estimated to be $140,500.12. Class Counsel, with the assistance of a private investigator, has undertaken efforts to locate not only these 24 for whom addresses could not be found, but also the 7 whose Class Notices were returned as undeliverable after the NCOA database search and an additional skip-trace. These 7 have an aggregate pay-out of $44,474.75. Khoury Decl., ¶40; Cunningham Decl., ¶¶8, 9.

VI. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. Class Action Settlements are Subject to Court Review and Approval Under the Federal Rules of Civil Procedure.

Rule 23(e) of the Federal Rule of Civil Procedure provides that "[a] class action shall not be dismissed, settled, or compromised without the approval of the Court, and notice of the proposed dismissal, settlement or compromise shall be given as the Court directs." The Ninth Circuit has stated that in order to approve a final settlement in a class action, the district court must find that the proposed settlement is fundamentally fair, adequate, and reasonable. *Id*. at Rule 23(e)(1)(C); *Staton v. Boeing Co.*, 327 F. 938, 952 (9th Cir. 2003).

B. The Settlement Is Fair, Reasonable and Adequate.

This Court now must make a final determination of whether the proposed Settlement memorialized in the Settlement Agreement is fair, reasonable, and adequate. (Manual for Complex Litigation (4th ed. 2004) § 21.61 at 308, *Officers for Justice v. Civil Serv. Comm'n. of the City and County of San Francisco* (9th Cir. 1982) 688 F. 2d 615, 625, cert. denied (1983) 459 U.S. 1217.) The decision to approve or reject a proposed settlement is committed to the Court's sound discretion. *Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir. 2000) (citing *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1238 (9th Cir. 1998)).

The Rule 23(e) settlement approval procedure includes three distinct steps: (1) preliminary approval of the proposed settlement; (2) dissemination of a notice of the settlement to all affected class members; and (3) a formal fairness hearing at which class members may be heard regarding the settlement and at which counsel may introduce evidence and present argument concerning the fairness, adequacy, and reasonableness of the settlement. *Murillo v. Pac. Gas & Elec. Co.*, 266 F.R.D. 468, 473 (E.D. Cal. 2010). This procedure safeguards class members' due process rights and enables the Court to fulfill its role as the guardian of class interests. *See* Alba Conte & Herbert Newberg, *4 Newberg on Class Actions* (2002) ("*Newberg*"), §§ 11.22, *et seq*. By way of this motion, Plaintiffs request the Court now take the final step in the Settlement process and finally approve the proposed Settlement.

Courts must give "proper deference" to settlement agreements, because "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 the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988) (quotations omitted.)

The Court's determination of whether a proposed settlement is fair, adequate, and reasonable is often said to require a balancing of several factors. These factors may include, among others: "the strength of plaintiff's case; the risk, expense, complexity, and the likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.' This list is not exclusive and different factors may predominate in different factual contexts." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (citation omitted). Some of these factors were addressed in the Preliminary Approval Motion, Doc. No. 76-1 at 21:3 to 26:11, and supporting declarations Doc. No. 76-2, 76-3, 76-4, and 76-5, as well as above in Sections III.B, IV. 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 Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1275 (9th Cir. 1992).

In the Ninth Circuit, a Court affords a presumption of fairness to a settlement, if: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery to allow counsel to act and the Court to review their actions in an informed manner; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected. *Rodriguez v. West Publishing Corp*., No. CV-05-3222 R(MCx) 2007 U.S. Dist. LEXIS 74849 at 33 (C.D. Ca. Sept. 10, 2007). At the preliminary approval stage, the Court was provided with sufficient information to satisfy three of the four *Rodriquez* factors, leaving the fourth factor, the number of objectors, unknown until after the Class had had an opportunity to respond to the Settlement

following dissemination of the Class Notice.[9] Subject only to the Class' reaction to the Settlement, the Court preliminarily presumed the Settlement was fair, adequate and reasonable [Doc. No. 84]. Khoury Decl. ¶45.

Following the close of the May 19, 2017 deadline to submit objections through to the present time, not a single Class Member has objected to any term of the Settlement, and only one Class Member has requested exclusion. Cunningham Decl., ¶¶12, 14. The absence of objections supports a strong presumption of fairness and that the Settlement is fair, adequate and reasonable. *Martin v. AmeriPride Servcs*., 2011 WL 2313604, at *7(S.D. Cal. 9, 2011); *see also In re: Omnivision Techs.*, 559 F. Supp.2d, 1036, 1043 (N.D. Cal. 2007), ("By any standard, the lack of objection of the Class Members favors approval of the Settlement."); *see also Brown v. American Honda Motor Co., Inc*., 2010 WL 9499072, at *15 (C.D. Cal. July 29, 2010) ("The comparatively law number of opt-outs … indicates that generally, class members favor the proposed settlement and find it fair.").

The Class has overwhelming embraced and approved the proposed Settlement which will pay, upon final approval and the effective date of settlement, **$81.39** for each week worked by a California Class Member, paying on average **$11,016.07** and highest payment of **$34,475.81**, and of **$27.13** for each week worked by a FLSA Class Member, paying on average **$3,648.79** and highest payment of **$8,949.21**. Cunningham ¶¶18, 19; Khoury Decl. ¶46.

Class Counsel is convinced the Settlement is in the best interest of the Class based on a detailed knowledge of the issues presented in this action and the negotiations. The length and risks of trial and perils of litigation that affect the value of the claims were all carefully weighed. In addition, the affirmative defenses asserted by Defendant, the uncertainty of Rule 23 certification, the prospect of a potential adverse summary judgment ruling, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, were

[9] See, Points and Authorities in Support of Motion for Preliminary Approval [Dkt.76-1 and Class Counsel's Declarations: 76-2, 76-3, 76-4, 76-5. In addition to the *Rodriquez* factors, Class Counsel detailed other factors such as the strengths of Plaintiffs' case, risks and costs of further litigation, and the reasonableness of the GSA, *Id.* at 14:3 – 20:11. The GSA was estimated to be approximately 35% of the major damage components, *Id*. at 18. Khoury Decl. ¶44.

also carefully considered by Class Counsel in arriving at the proposed Settlement. Khoury Decl. ¶47. Class Counsel respectfully requests the Court find the proposed Settlement to be fair, adequate and reasonable and grant final approval and enter final judgment accordingly.

VII. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEES AND LITIGATION EXPENSES AND THE CLASS REPRESENTATIVE SERVICE PAYMENT AWARDS

With the guiding principle that early class action settlements are favored and may not diminish an award of attorneys' fees, Class Counsel submits the $2,333,333.33 fee request, representing one-third of the GSA, is fair and reasonable and should be awarded, in light of the substantial hours expended by Class Counsel to achieve this result, the litigation risks and complexity of prosecuting a misclassification case, the contingent nature of their fee, their experience in handling these wage and hour cases, the fees commonly awarded in cases of this type, and vindication of the Class' rights by securing a $7,000,000 Settlement which will now provide Settlement Payments averaging $3,648.79 to FLSA Class Members and $11,016.07 to California Class Members.

A. Percentage of a Common Fund.

The Supreme Court has consistently recognized that "a litigant or lawyer who recovers a fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Auto-Lite Co.*, 396 U.S. 375, 392-93 (1970). The common fund doctrine is a well-recognized exception to the general American rule that a litigant must bear his or her own attorney's fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975).

The Ninth Circuit has held the common fund doctrine applies when: (1) the class of beneficiaries is sufficiently identifiable; (2) the benefits can be accurately traced; and, (3) the fee can be shifted with some exactitude to those benefitting. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989). These criteria are easily met when each member of the class has an "undisputed and mathematically ascertainable claim" to part of a lump-sum settlement recovered on his behalf. *Id*. at 271, *citing Boeing*, 444 U.S. at 479. Under the three factors set forth in *Paul, Johnson, Alston & Hunt*, the common fund doctrine applies in this case. First, the class of

beneficiaries is identifiable. The Parties have identified a 468 member Class by reviewing Defendant's employment records, and to whom Court-approved Class Notices were provided. Second, the benefits are easily traceable. The benefits consist entirely of monetary payments to each Class Member upon final approval of the Settlement. Each Class Member has an "undisputed and mathematically ascertainable claim" to a share of the Settlement based on the number of weeks he worked for Defendant during the Class Period. Third, the fee can be shifted with exactitude since Class Counsel is claiming a specific, lump-sum percentage of the Gross Settlement Amount.

Historically, attorneys' fee awards have ranged from 20% to 50% of the total settlement, depending on the circumstances of the case. *Newberg on Class Actions*, 4th Ed. 2002, § 14.6, p. 550. However, the Ninth Circuit established a "benchmark" fee of 25% in common fund cases. *Six Mexican Workers*, 904 F.2d at 1311; *Williams v. MGM-Pathe Communications Co.*, (9th Cir. 1997) 129 F.3d 1026, 1027. The exact percentage varies depending on the facts of the case, and in "most common fund cases, the award exceeds that benchmark." *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010); *In re Activision Sec. Litig.*, (N.D. Cal. 1989) 723 F. Supp. 1373, 1377 ("[a] review of recent reported cases discloses that nearly all common fund awards range around 30%); *In re Omnivision Techs.*, 559 F. Supp.2d 1036, 1047.

Under the common fund doctrine, Courts typically award attorneys' fees based on a percentage of the total settlement. As the Ninth Circuit wrote in *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), "[a]lthough statutory awards of attorneys' fees are subject to 'lodestar' calculation procedures, a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery." *Id.* at 1311. Supreme Court cases that have considered the award of attorneys' fees under the common fund doctrine have determined those fees as a percentage of the recovery. *See Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991), *citing Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (noting the percentage of recovery method is the appropriate method to award attorney's fees in common fund cases); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Central R. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885); *Trustees v. Greenough*, 105 U.S. 527, 532 (1881).

District courts in California have held the percentage-of-the-fund method is far preferable

to the lodestar method because: (1) it aligns the interests of Class Counsel and the Class; (2) it encourages efficient resolution of the litigation by providing an incentive for early, yet reasonable, settlement; and, (3) it reduces the demands on judicial resources. *In Re Oracle Secs. Litig*., 131 F.R.D. 688, 689 (N.D. Cal. 1990) (Walker, J.) (noting the lodestar method has been "thoroughly discredited by experience"); *In Re Activision Secs. Litig*., 723 F.Supp. 1373, 1375, 1378-79 (N.D. Cal. 1989) (Patel, J.).

The California Supreme Court recently affirmed that trial courts may grant attorneys' fees in a common fund case based on a percentage of the recovery. *Laffitte v. Robert Half International Inc.*, 1 Cal.5th 480 (2016). An attorney fee based on a percentage of the common fund fairly replicates the fair market value of such services and is fair and reasonable in view of the typical common fund attorneys' fees awards and similar California class action wage and our settlements. *Laffitte* at 483. Furthermore, such a fee award is proper as the award serves to spread the attorney fee among all beneficiaries of the fund, aligns the incentives between plaintiff's counsel and the class, is a better approximation of the market conditions in a contingency case, and encourages class counsel to seek an early settlement and avoid unnecessarily prolonging the litigation. *Laffitte* at 483.

B. Recovery of One-Third of the Common Fund Constitutes a Reasonable Fee.

Attorneys' fees in the amount of 33-1/3% of the common fund are commonly awarded in the Eastern District. *Barbosa v. Cargill Meat Solutions Corp*., 297 F.R.D. 431, 450-51 (E.D. Cal. July 2, 2013) (awarding one-third of the settlement in a wage and hour class action because there were "sufficient reasons to exceed [the benchmark] considering the risk of litigation, the contingent nature of the work, the favorable reaction of the class, and fee awards in other wage and hour cases"); *Vasquez*, 266 F.R.D. at 491-92 (awarding one-third percent in wage and hour class actions.)

Class Counsel's one-third fee request is justified under the facts of this misclassification case for undertaking a complex, risky, expensive, and time-consuming litigation on a contingency fee basis. *In re Pacific Enterprises Security Litigation*, 47 F.3d 373, 379, (1995 U.S. App. LEXIS 2330); *In re Activision Securities Litigation*, 723 F. Supp. at 1375. First, Class Counsels' expertise

in class actions weighed heavily in negotiating and providing a benefit to each member of the Class relatively early in this litigation (following certification of the FLSA Class and the briefing of Plaintiffs' Rule 23 certification motion.) Given the complexities and uncertainties of litigating a misclassification case and for obtaining a relatively early settlement, a downward deviation from the 25% benchmark would be unwarranted. "Indeed, one purpose of the percentage method is to encourage early settlements by not penalizing efficient counsel, ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation." Manual for Complex Litigation (Fourth), § 14.121, p. 193.

Second, this is not a case where a substantial settlement and a recovery of a large attorneys' fee was a foregone conclusion. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-339 (1980) (recognizing the importance of a financial incentive to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk nonpayment). In light of the risks of loss at any stage of this litigation, i.e., denial of Rule 23 certification, unfavorable result on the merits of summary judgment or at trial and/or appeal, the recovery for the Class, much less attorneys' fees, was never a foregone conclusion.

C. Ninth Circuit Factors for Evaluating Reasonableness of the Fee Request.

Whether the Court uses the percentage approach or the lodestar method, the main inquiry is whether the end result is reasonable. *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000). The Ninth Circuit has articulated five factors as pertinent criteria for evaluating the reasonableness of a fee request: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of the work; (4) the contingent nature of the fee and the financial burden carried by the Plaintiffs; and (5) awards made in similar cases. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002).

1. The Results Achieved Support the Fee Request.

The most critical factor to be considered in granting a fee award is the success obtained. *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), 2005 U.S. Dist. LEXIS 13627, at *27 (C.D. Cal. June 10, 2005) (*citing Hensley v. Eckerhart*, 461 U.S. 424 (1983)). In the face of the uncertainties associated with the misclassification claims, and

Defendant's vigorous assertions the Mud Men were properly classified, there is little question but that the results achieved by were extraordinary, and are fair, adequate and reasonable to the Class.

Furthermore, the Settlement is not to be judged against a speculative measure of what might have been achieved, nor does the settlement have to provide 100% of the damages to be fair and reasonable. *Linney v. Cellular Alaska Pshp*, 151 F.3d 1234, 1242 (9th Cir. 1998). In re Mego Fin. Corp. Sec. Litig., 213 F. 3d 454, 459 (9th Cir. 2000). The adequacy of the amount recovered must be judged as "a yielding of absolutes…Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation ..." *Officers for Justice v. Civil Serv. Comm'n. of the City and County of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted), "[I]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not ... render the settlement inadequate or unfair," *Id.* at 628. Class Counsel submits that the Settlement provides an excellent recovery for the Class and that an analysis of this factor militates heavily in favor of approving the fee request.

2. Strength of Plaintiffs' Case and the Risk, Expense, Complexity and Likely Duration of Further Litigation.

While Plaintiffs believe in the merits of their case, they also recognize the inherent risks and uncertainty of litigation and understand the benefits of providing significant settlement payments to the Class now as opposed to risking (i) the denial of their FRCP Rule 23 certification motion; and (ii) an unfavorable result on the merits on summary judgment or at trial and/or on an appeal, a process that can take several more years to litigate. Khoury Decl. ¶48. Plaintiffs' claims involve complex and disputed legal issues and fact-specific arguments that the Parties have litigated fiercely since inception of the action. Plaintiffs firmly believe in the strength of their claims, but M-I Swaco also has strong defenses to liability and objections to Plaintiffs' ability to obtain certification of the California Class. Khoury Decl. ¶49. M-I Swaco had maintained the claims were inappropriate for class treatment due to variations in the work duties and demands of the varied oil company clients that Class Members worked with who generally determined how much or how little break or sleep time was permitted; and in the amount of testing performed,

some of which was done based purely on contract (i.e. twice per 24-hour period, versus some more complicated geography where additional monitoring and testing of fluid was required.) While the testing itself was generally automated, the geography could vary, and depending on how much weight was placed on such variations, it presented serious risks to certification. There was also some evidence of the use of pairs of Mud Men wherein the senior employee was both trainer and mentor to less experienced Mud Men, and on some rigs that meant that only the less-experienced employee was able to take breaks and sleep time as the rig operators were generally hesitant to accept junior recommendations without confirmation from more senior Mud Man. Khoury Decl. ¶50. Finally, while there are substantial records, actually retracing work time on the rig versus off the rig posed a substantial forensic challenge such that even assuming a potential class-wide misclassification of the Mud Men positions, reassembling the potential amount of overtime recovery would have required significant expert oriented work and statistical analysis just to obtain a fair and just (and admissible) amount of damage recovery. As such, Defendant asserted Rule 23 certification would be inappropriate. Defendant also asserts obstacles faced by Plaintiff in seeking Rule 23 certification and maintaining certification are all the greater given the United States Supreme Court's rulings in *Dukes v Wal-Mart, Inc*., 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct.1426 (2013). As a result of *Dukes* and *Comcast*, along with many other cases, Defendant believes Plaintiffs will not be able to obtain certification outside of the Settlement context. Defendant further contends *Dukes* explicitly disapproved the use of sampling and surveys to determine class-wide practices, and *Comcast* overturned a certification ruling based on the named representative's failure to identify a reliable damages model that could be used on a class-wide basis. *Dukes*, 131 S. Ct. 15 2561; *Comcast*, 133 S. Ct. at 1432-33. Khoury Decl. ¶51. Thus, while Plaintiffs believe and continue to believe this is a strong case for Rule 23 certification, there is always a risk and enormous expense associated with certification proceedings. Similarly, while Defendant believes Plaintiffs will face several steep hurdles going forward should this matter not resolve, it is also mindful that there are risks and significant expenses associated with proceeding

further in the case.[10] Khoury Decl. ¶52.

3. The Contingent Nature of the Fee and the Financial Burden Carried.

Class Counsel undertook all of the risks of this litigation on a contingent fee basis – the potential risks of surviving dispositive motions, obtaining certification, and maintaining it, proving liability and damages, prevailing in the "battle of the experts," winning at trial, and surviving post-trial motions and appeals – at the same time that they faced the significant risk that they could litigate this case for years, expend many thousands of hours of work, at great expense, and never be paid. Khoury Decl. ¶54. Class Counsel understood from the outset they were embarking on a complex, expensive and lengthy litigation, and one which would require the investment of hundreds, if not thousands, of hours of attorney time, without any guarantee of being compensated for the investment of time and money the case would require. In undertaking that responsibility, Class Counsel had to assure that sufficient attorney resources were dedicated to the successful prosecution of this litigation. Khoury Decl. ¶55.

Importantly, many contingent fee cases do not result in compensation to Plaintiff's counsel because the cases are dismissed at the pleadings stage, lost at certification, summary judgment or after a trial on the merits, or reversed on class certification after expenditure of hundreds or thousands of hours of attorney and staff time and money. Many hard-fought lawsuits ultimately produce no fee because of the discovery of facts unknown when the case was commenced, changes in the law while the case was pending, or decisions of judges or juries following a trial on the merits, despite the tremendous efforts of members of the Plaintiffs' bar. Khoury Decl. ¶56.

The contingent nature of Class Counsel's compensation militates in favor of Plaintiffs' attorneys' fee request. District Courts within the Ninth Circuit recognize that "[t]he rationale behind awarding a percentage of the fund to counsel in common fund cases is the same that justifies permitting contingency fee arrangements in general." *In re Quantum Health Resources,*

[10] At the time of the mediation, a federal judge in Texas had recently granted summary judgment in favor of MI SWACO against individuals suing for overtime pay. See, *Dewan v. M-I Swaco* 2016 WL 695717, United States District Court, S.D. Texas (February 22, 2016). The court ruled that the administrative exemption applied under the FLSA and the employees were found to be exempt. This ruling was factored into Class Counsel's evaluation of the potential likelihood of success on liability had certification of the Class been granted. Khoury Decl. ¶53.

Inc. Sec. Litig., 962 F. Supp. at 1257 (citing *Skelton v. General Motors Corp.*, 860 F. 2d 250, 252 (7th Cir. 1988). "The underlying premise is the existence of risk—the contingent risk of non-payment." *In re Quantum Health Resources, Inc., supra* at 1257. Because payment is contingent upon receiving a favorable result for the class, an attorney should be compensated both for services rendered and for the risk of loss or nonpayment assumed by accepting and prosecuting the case." *Id*. (*citing*, 1 Alba Conte, Attorney Fee Awards (3d ed. 2004) § 1.09).

Here, unlike counsel for Defendant, who are paid a fair-market hourly rate and paid regularly, Class Counsel has received no compensation for their services in prosecuting this Action for nearly five years nor have they received reimbursement of the expenses to prosecute the case. The significant outlay of cash and personnel resources has been completely at risk and wholly dependent upon obtaining a recovery for the Class. In this atmosphere, the contingent nature of the representation takes on an even greater risk and fully warrants judicial approval of the fee request before the Court.

4. Awards in Similar Cases.

Courts often look to fees awarded in comparable cases to determine if the fee requested is reasonable. *Vizcaino*, 290 F.3d at 1050 n.4. In analogous wage and hour lawsuits and settlements, California District Courts have awarded attorneys' fees in amounts equal to or greater than Class Counsel's fee request. Khoury Decl. ¶57. Moreover, if this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, in the range of one-third to 40% of the recovery. In short, Class Counsel's fee request is in line with, if not lower than, awards in similar cases. This factor also supports Class Counsel's fee request. Khoury Decl. ¶58.

5. The Reaction Of The Class Supports The Fee Request.

District courts in the Ninth Circuit may also consider the reaction of the Class when deciding whether to award the requested fee. *In Re Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *48 ("The presence or absence of objections from the class is also a factor in determining the proper fee award."). Here, the Class Notice stated Class Counsel's intention to apply for an award of attorneys' fees of $2,333,333.33, (one-third of the common fund), and also provided the manner and deadline to file objections. Not a single member of the Class filed an objection to the

Settlement or to the fee request. The absence of objections supports the fee request.

Class Counsel respectfully submits the foregoing discussion, which provides an overview of the extensive litigation and exceptional results, justifies and supports the one-third of the common fund fee request.

D. Class Counsel's Fee Request is Reasonable when Cross-Checked Using the Lodestar-Multiplier Methodology.

Although Class Counsel seek approval of a fee on a percentage of the recovery, "[a]s a final check on the reasonableness of the requested fees, courts often compare the fee counsel seeks as a percentage with what their hourly bills would amount to under the lodestar analysis." *In re Omnivision*, 559 F. Supp. 2d at 1048. Courts often cross-check the reasonableness of a percentage fee award against the lodestar-multiplier method. See, e.g. *In re Bluetooth Headset Products Liab. Litig*., 654 F.3d 935, 941-42 (9th Cir. 2011). Where the cross-check is utilized, the "calculation need entail neither mathematical precision nor bean-counting" and is not intended to be a "full-blown lodestar inquiry." As the Eastern District has stated, "Where the use of the lodestar method is used as a cross-check, it can be performed with a less exhaustive cataloguing and review of counsel's hours." *Barbosa v. Cargill Meat Solutions Corp.,* 297 F.R.D. 431, 451 (E.D. Cal. July 2, 2013); see also *Laffitte*, 1 Cal.5th at 505. ("Courts generally have not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to 'focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys' ". [Citations omitted]).

The lodestar method is calculated by multiplying the number of hours reasonably expended on the litigation … by a reasonable hourly rate. *In re Bluetooth Headset Products Liab. Litig*., 654 F.3d 935, 941 (9th Cir. 2011). A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095, more recently, *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900. Courts may adjust the lodestar figure upward by using a positive multiplier to reflect numerous "reasonableness" factors, including the (1) quality of representation, (2) class benefits, (3) complexity and novelty of issues presented, and (4) risk of nonpayment. *Id.*

State and federal courts often grant multipliers of four or more. (*See, Vizcaino*, 290 F.3d at 1051 ("[M]"multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.")).

Here, Class Counsel has spent **1,561.4** hours of attorney and para-professional time prosecuting the case, resulting in a lodestar fee of **$1,083,048.60**. The hours expended were reasonable in light of the complexity of the litigation. Khoury Decl. ¶59, Exh. "1" – Summary of Hours and Lodestar Fee, and Exh. "2" – Individual Attorney Time Records; Declarations of Class Counsel: Ira Spiro, ¶3, Exh.1A-1C ; Lonnie Blanchard III, ¶¶2, 3, Exh.2 ; and Jeffrey D. Holmes, ¶12, Exh. A .

E. Class Counsel's Hourly Rates Are Reasonable.

Class Counsel is entitled to hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Ketchum v. Moses*, 24 Cal.4th 1122, 1133 (2001); *Children's Hospital and Med. Center v. Bonta*, 97 Cal. 4th 740, 783 (2002) (affirming rates that were "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work"). When determining a reasonable hourly rate, Courts may consider factors such as the attorney's skill and experience, the nature of the work performed, the relevant area of expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 632 (1998). Prior determinations of counsel's rates are strong evidence of their reasonableness. *See Margolin v. Regional Planning Commission*, 134 Cal.App.3d 999, 1005 (1982).

Here, Class Counsel's skill and experience support their hourly rates. Their hourly rates are between $550 and $850 and are in line with rates typically approved in wage and hour class action litigation in California and have been approved by numerous state and federal courts in California. Khoury Decl. ¶60. Their practice is limited exclusively to litigation, focusing on the representation of employees and consumers in wage and hour and consumer class action matters and have been appointed class counsel or co-class counsel in over 225 of these cases. Khoury Decl. ¶61. As leading attorneys in the field, Plaintiffs' counsel continually monitors the prevailing market rates charged by both defense and plaintiff law firms and set the billing rates of their attorneys and

paralegals/law clerks to follow the prevailing market rates in the private sector for attorneys and staff of comparable skill, qualifications and experience. Khoury Decl. ¶62. Other wage and hour attorneys working as class counsel before California courts charge comparable if not higher rates. Khoury Decl. ¶63, Exh. 3 – Westlaw Court Express's Legal Billing Report, Volume 14, Number 4, California Region for December 2012; Exh. 4 – 2012 National Law Journal survey of hourly billing rates for Partners and Associates, and Exh. 5 – Declaration of Richard M. Pearl.

F. Class Counsel's Total Hours and Modest Multiplier are Reasonable.

Under California law, every hour reasonably spent on the plaintiffs' case is compensable: "Absent special circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for all the hours reasonably spent, including those relating solely to the fee." *Ketchum*, 24 Cal.4th at 1133; *Serrano v. Priest*, 32 Cal.3d 621, 633, 639 (1982) ("*Serrano IV*") (parties should recover for all hours reasonably spent). Hours are reasonable if "at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982). "[T]he standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed." *Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990); *see also*, *Norman v. Housing Auth.*, 836 F.2d 1292, 1306 (11th Cir. 1988) ("The measure of reasonable hours is determined by the profession's judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done").

Here, the time spent by Class Counsel on this litigation was necessary, reasonable, and non-duplicative. Although four firms worked on this case, Class Counsel minimized duplication of efforts. Khoury Decl., ¶64. Multiplying Class Counsel's hourly rates by hours billed to the litigation to date yields a lodestar fee of **$1,083,048.60**, to which Plaintiffs' Counsel requests the application of a modest **2.15** risk multiplier. *Id.*

The *Laffitte* court explains that the lodestar cross-check is simply to guard against an unreasonable windfall to plaintiffs' attorneys and therefore "emphasized that the cross-check does not override the trial court's primary determination of the fee as a percentage of the common fund

and thus does not impose an absolute maximum or minimum on the fee award." *Laffitte*, 1 Cal. 5th at 505. On a lodestar cross-check, only when the multiplier is extraordinarily high or low [should] the trial court [] consider whether the percentage method should be adjusted so as to bring the imputed multiplier within a justifiable range." *Id*. The *Laffitte* Court affirmed a multiplier on a lodestar cross-check of between 2.03 and 2.13 as reasonable. *Laffitte*, 1 Cal. 5th at 488, 506.[11]

The decision to settle this action at the time the Parties did should be commended. Class Members will now avoid the risks of additional litigation and are assured of substantial and immediate monetary recovery. Under California law, "the promptness of settlement cannot be used to justify the refusal to apply a multiplier to reflect the size of the class recovery without exacerbating the disincentive to settle promptly inherent in the lodestar methodology." *Lealao v. Beneficial California, Inc.* 82 Cal.App.4th 19, 53 (2000). According to *Lealao*, to not apply a multiplier under these circumstances would be deleterious to California policy, as "awards that are too small [will] chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims." *Id*. at 53.

The modest lodestar adjustment is also justified in light of the delayed payment. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989) ("an appropriate adjustment for delay in payment" should be factored into the calculation of a fee award); see also *Fischel v. Equitable Life Assur*. Soc. 307 F. 3d 997 (9th Cir. 2002) (in common fund cases, delay in obtaining payment must be compensated.) Under federal case law, delay must be considered separately from any enhancement for contingency. *See, Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U.S. 711 (1987). This also supports the requested multiplier.

G. Class Counsel's Out of Pocket Litigation Expenses Should be Reimbursed.

"There is no doubt that an attorney who has created a common fund for the benefit of the

[11]Many district courts in California have declined to apply a lodestar cross-check when parties settle early in the case. See, e.g. *Glass v. UBS Financial Services, Inc*., No. 06-4066-MMC, 2007 WL 221862 (N.D. Cal. Jan. 26, 2007) (finding "no need to conduct a lodestar cross-check [as] [c]lass counsel's prompt action in negotiating a settlement while the state of the law remained uncertain should be fully rewarded"); *Lopez v. Youngblood*, No. 07-0474-DLB, 2011 WL 10483569 (E.D. Cal. Sept. 2, 2011) ("A lodestar cross-check is not required in this circuit, and in a case such as this, is not a useful reference."

class is entitled to reimbursement of reasonable litigation expenses from that fund." *West v. Circle K Stores, Inc.*, No. Civ. S-04-0438, 2006 U.S. Dist. LEXIS 76558, at *25 (E.D. Cal. Oct. 19, 2006); *see also In Re Businessland Secs. Litig*., No. C-90-20476-RFP, 1991 U.S. Dist. LEXIS 8962 at *6 (N.D. Cal. June 14, 1991) (overruling objection that litigation expenses should be within the requested 30% fee).

Class Counsel has incurred costs through the present of **$49,857.37**. Khoury Decl., ¶65, Exh. 1. These expenses were incidental and necessary to the effective representation of the Class. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *In Re DJ Orthopedics, Inc. Secs. Litig*., No. 01-CV-2238-K (RBB), 2004 U.S. Dist. LEXIS 11457, at *21 (S.D. Cal. June 21, 2004). These costs were incurred for such things as filing fees, consultant's fee, deposition fees, deposition transcripts, postage, copying, messenger services, preparing for and participating in mediation, mediation fees, travel, court fees, attorney service fees, private investigator to search for Class Members, etc. Khoury Decl., ¶66, Exh. 6. *See also*, Declarations of Class Counsel: Ira Spiro, ¶5, Exh. 5; Lonnie Blanchard III, ¶4, Exh. 3; and Jeffrey D. Holmes, ¶13, Exh. E. Class Counsel respectfully requests approval of their out-of-pocket litigation costs as they were reasonable and necessarily incurred during the pendency of this action.

H. The Class Representative Service Payment Awards Are Reasonable.

At the Court's discretion, a district court may award incentive payments to named plaintiffs in class action cases. *Rodriguez v. West Publ'g Corp.,* 563 F.3d 948, 958-59 (9th Cir. 2009). The purpose of incentive awards is to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaking in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d at 958-59.

Subject to this Court's approval, Class Counsel requests the modest sums of **$15,000** to be awarded to Plaintiff Ashley Balfour (.2% of the common fund), and **$20,000** (.3% of the common fund) to Plaintiff Sarmad Syed for their commitment to prosecuting this case for nearly five years, their efforts, risks undertaken for the payment of attorneys' fees and costs if this action had been lost, general releases of all claims arising from their employment, stigma upon future employment

opportunities for having sued a former employer, as well as the substantial recoveries to be enjoyed by every member of the Class. Khoury Decl. ¶67; Declaration of Ashley Balfour [Doc. No. 76-6], and Declaration of Sarmad Syed [Doc. No. 76-7], both filed December 21, 2016.

Plaintiffs have invested much personal time and effort into the investigation, both before and after this class action was commenced, in the prosecution, and in the settlement of the case, as detailed in each of their declarations. Khoury Decl. ¶68; *See*, Balfour and Syed Declarations. These Service Payments, in the sums requested, is justified, fair and reasonable, particular in light of the significant and substantial Settlement Payments to be disbursed to the Class, all without a Claim Form.

I. The Administration Expenses Are Reasonable and Should be Approved.

Class Counsel also seeks payment of the **$11,500** to CPT Consulting, Inc., the appointed Administrator for its work in administering the Settlement. Cunningham Decl. ¶20. The Cunningham Declaration details the extensive work it performed and will continue to perform following final approval to calculate settlement payment awards, print and mail settlement payment checks, tax reporting to the appropriate agencies, and to respond to inquiries as set forth in the Cunningham Declaration. The requested amount is fair and reasonable and should be awarded. Khoury Decl. ¶69.

J. The Proposed PAGA Settlement is Reasonable.

Pursuant to the Settlement Agreement, $100,000 from the GSA is allocated to the resolution of the PAGA claim, of which **$75,000** (75%) will be paid directly to the Labor Workforce and Development Agency. This result was reached through good-faith negotiations facilitated by the mediator. This allocation was preliminarily approved by this Court and nothing has changed to render this allocation inappropriate. Thus, the requested PAGA allocation be approved. [Doc. No. 84 at 21:10 to 22:12.]

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VIII. CONCLUSION

Class Counsel respectfully requests the Court to grant final approval of the proposed Settlement, and to award the Class Representative Service Payments, Class Counsels' attorneys' fees and litigation expenses, the Administrator's expenses, and the PAGA payment, all in the amounts requested herein.

Dated: June 8, 2017

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