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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA—SACRAMENTO DIVISION

11
12 KIMBERLY BURROWS, KURT
BRUNNER, and SUZANNE
13 TOWNSEND, individually, and on
behalf of other members of the
14 general public similarly situated,

15 Plaintiffs,

16 vs.

17 COMBINED INSURANCE
COMPANY OF AMERICA, an
18 Illinois corporation; AON SERVICE
CORPORATION, an Illinois
19 corporation,

20 Defendants.

Case No.: 2:08-CV-01752-JAM-KJM

[Assigned for all purposes to
the Hon. John A. Mendez]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: August 4, 2010
Time: 9:30 a.m.
Place: Courtroom 6

Complaint Filed: July 29, 2008

INITIATIVE LEGAL GROUP APC
1800 CENTURY PARK EAST, SECOND FLOOR, LOS ANGELES, CALIFORNIA 90067

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Kimberly Burrows, Kurt Brunner, and Suzanne Townsend
4 (“Plaintiffs”) seek preliminary approval of the proposed class action settlement
5 of state wage and hour claims against Defendants Combined Insurance Company
6 of America and AON Service Corporation (collectively “Combined Insurance”
7 or “Defendants”) (collectively with Plaintiffs, the “Parties”). Defendants do not
8 oppose Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement.
9 For the reasons discussed at length below, the settlement is fair, reasonable,
10 adequate, and in the best interest of prospective class members.

11 **II. FACTS AND PROCEDURE**

12 **A. Combined Insurance Is A Nationwide Leader In Supplemental**
13 **Insurance**

14 Combined Insurance Company of America was founded in 1922, and
15 quickly expanded to become a global leader in supplemental insurance. Today,
16 Combined Insurance Company offers its products in 10 countries in addition to
17 the United States. Until 2008, Combined Insurance was owned by AON Service
18 Corporation. In 2008, Combined was sold to ACE Limited, a company publicly
19 traded on the New York Stock Exchange (NYSE: ACE) and parent company to
20 the ACE Group of Companies, a global leader in insurance and reinsurance.

21 Defendants employ Sales Agents and Territory Directors who travel door-
22 to-door in various territories selling insurance policies, collecting premiums on
23 policies, and attempting to upsell or renew existing policies. Approximately 940
24 individuals have held one of these positions during the class period.

25 **B. Combined Insurance Employed Kimberly Burrows And Kurt**
26 **Brunner As Sales Agents And Susanne Townsend As A**
27 **Territory Director**

28 Combined Insurance employed Kimberly Burrows as a Sales Agent in

1 Butte County, California from August 2006 to August 2007. Plaintiff Kurt
2 Brunner was likewise employed by Combined Insurance as a Sales Agent, also
3 in Butte County, from September 2006 until August 10, 2007. Susanne
4 Townsend was employed as a Territory Director for Combined Insurance in
5 Sutter County, California from July 1999 until March, 2007. Throughout their
6 employment, Plaintiffs were compensated entirely on commissions they earned
7 on sales of policies and/or the sales of policies by Sales Agents serving under
8 them, which are termed “overrides” (in the case of Susanne Townsend).

9 **C. Plaintiffs Brought A Class Action Complaint Alleging Various**
10 **Wage And Hour Violations**

11 On July 29, 2008, Plaintiffs Kimberly Burrows and Kurt Brunner filed
12 *Burrows v. Combined Insurance Company, et al.* (“the Action”) in the United
13 States District Court, Eastern District of California, Sacramento Division, as
14 Case No. 2:08-CV-01752-JAM-KJM, alleging causes of action for: (1) unpaid
15 business-related expenses under California Labor Code¹ §§ 2800 and 2802;
16 (2) unlawful wage deductions under Section 221; (3) wages not paid upon
17 termination under Sections 201 and 202; (4) failure to pay wages under Section
18 204; (5) improper wage statements under Section 226(a); and (6) unfair business
19 practices under California Business & Professions Code §§ 17200, *et seq.*

20 On September 8, 2008, Plaintiffs filed a First Amended Complaint (the
21 operative complaint) adding Susanne Townsend as a plaintiff and seeking relief
22 under California Labor Code § 2698, *et seq.* (the “Labor Code Private Attorneys
23 General Act”, or “PAGA.”)

24 **D. The Parties Conducted Extensive Discovery**

25 Since the Action began in July 2008, Plaintiffs’ counsel Initiative Legal
26 Group APC (“Class Counsel”) has diligently pursued an investigation of the

27 _____
28 ¹ Unless otherwise indicated, section citations are to the California Labor
Code.

1 Class Members' claims against Defendants, including: (a) review of relevant
2 documents, including but not limited to, Plaintiffs' personnel files, various wage
3 statements issued to Plaintiffs, various Employee Manuals given to employees
4 by Defendants, and conducting extensive surveys of Class Members' experiences
5 in working for Defendants; (b) research with respect to the applicable law and
6 the potential defenses thereto; and (c) propounding written discovery on
7 Defendants and conducting a PMQ deposition of Defendants' corporate
8 representative.

9 **E. Class Counsel Filed A Motion For Class Certification**

10 Following extensive investigation into the claims at issue, Plaintiffs moved
11 for class certification pursuant to Rule 23 on March 24, 2010. (Declaration of
12 Gene Williams In Support of Motion for Preliminary Approval of Class Action
13 Settlement ["Williams Decl.,"] ¶ 3.) The motion was based on the allegations
14 that Defendants (1) failed to reimburse insurance salespersons for their expenses
15 related to door-to-door sales and (2) issued identically formatted non-compliant
16 wage statements, and Plaintiffs therefore sought to certify a class defined as all
17 persons who worked as Sales Trainees, Sales Representatives, Sales Managers,
18 or Territory Directors or held similar titles or performed similar duties who have
19 been employed by Defendants in the State of California within four years prior to
20 the filing of the complaint to certification of the class. (*Id.*)

21 While the motion was pending, the Parties continued their ongoing
22 settlement negotiations. (Williams Decl. ¶ 4.) After finalizing the terms of the
23 Settlement, the Parties stipulated to vacate the hearing on the motion for class
24 certification. (*Id.*) On April 6, 2010, the Court vacated the hearing. (*Id.*)

25 **F. The Parties Engaged in Mediation and Ultimately Settled The**
26 **Litigated Claims**

27 On January 7, 2010, the parties participated in mediation with Mark Rudy
28 of Rudy, Exelrod, Zieff & Lowe, LLP. At all times, the parties' negotiations

1 were adversarial, non-collusive and conducted at arm's-length. Although the
2 mediation did not result in a settlement on that day, the parties made progress
3 and continued to negotiate while Plaintiffs prepared their motion for class
4 certification.

5 Ultimately, with the assistance of a mediator's proposal from Mr. Rudy
6 and extensive negotiation over the various material terms, the parties settled.
7 When precise and complete terms were finally agreed upon, the parties executed
8 the written Joint Stipulation of Class Action Settlement and Release ("Settlement
9 Agreement" or "Settlement").

10 Counsel for both Plaintiffs and Defendants are experienced in wage and
11 hour and complex litigation, and effectively represented their clients' interests
12 during the course of negotiations. Counsel for the parties vigorously advocated
13 their respective positions, and reached a compromise only after contentious and
14 arms-length negotiations.

15 **G. The Proposed Settlement Fully Resolves The Claims**

16 **1. Composition of the Class**

17 The Settlement Agreement provides for the certification of a class
18 composed of all persons who work or worked for Defendants in the state of
19 California in position(s) generally described as commissioned insurance agents,
20 *e.g.*, "sales agents," "sales managers," and "territory directors" at any time from
21 July 29, 2004 through May 2, 2010. (Settlement Agreement ¶ 8.)

22 **2. Settlement Consideration**

23 The Settlement was made on a class-wide basis. Defendants will pay a
24 total of \$6,000,000 to settle the class-wide claims of the instant action
25 ("Maximum Settlement Amount"). (Settlement Agreement ¶ 14.) Depending on
26 the number of claims submitted, as set forth below, Class Members will receive
27
28

1 the \$6,000,000 settlement amount² less the following: (1) \$60,000 in PAGA
2 penalties, of which 75% paid to LDWA; (2) \$2,000,000 (33 percent) as
3 attorney's fees to Class Counsel; (3) up to \$100,000 in costs to be paid to Class
4 Counsel as warranted; (4) \$10,000 to each named Plaintiff as a Class
5 Representative Enhancement Award and (5) Claims Administration Costs.
6 (Settlement Agreement ¶¶ 6, 9, 13, 14, and 45.)

7 **3. The Release Is Limited to Claims in the Complaint**

8 The Plaintiffs and Class Members' proffered consideration is in the form
9 of a release of the claims alleged in this matter ("Release"). The released claims
10 are all applicable claims, rights, demands, liabilities, and causes of action of
11 every kind and description, whether known or unknown, arising from or relating
12 to the Action, including the following allegations, claims, and statutory code
13 sections: (1) all claims for unpaid business expenses pursuant to Sections 2800
14 and 2802; (2) all claims for unlawful wage deductions pursuant to Section 221;
15 (3) all claims for the failure to timely pay wages upon termination pursuant to
16 Sections 201 and 202; (4) all claims for the failure to timely pay wages pursuant
17 to Section 204; (5) all claims for the failure to issue properly itemized wage
18 statements pursuant to Section 226(a); and (6) incorporated or related claims
19 asserted through California Business and Professions Code §§ 17200 *et seq.* The
20 Released Claims are those that accrued from July 29, 2004 through May 2, 2010.

21 **4. Notice to the Class**

22 Within 14 days of preliminary approval, Defendants will provide the
23 claims administrator with a list containing each Class Member's full name; last
24 known home address and last known telephone number to the extent available in
25 Defendants' business records; Social Security number; dates of employment as a
26

27 _____
28 ² The only limitation to this term is that Class Members will not be entitled
to receive more than 200% of their Minimum Individual Settlement Payment as
defined below.

1 non-exempt employee in California during the Class Period; and the number of
2 weeks each Class Member worked during the Class Period (“Class List”).
3 (Settlement Agreement ¶¶ 7, 31(a).) The claims administrator will mail the
4 Notice of Pendency of Class Action Settlement (“Notice”), Claim Form, and
5 Exclusion Form (collectively, the “Notice Packet”) to all Class Members on
6 Defendants’ Class List. (Settlement Agreement ¶ 31(b).) This notice process
7 satisfies the standards set by the Rules of Federal Procedure. *Eisen v. Carlisle &*
8 *Jacqueline*, 417 U.S. 156, 173 (1974).

9 The claims administrator will perform address updates and verification as
10 necessary prior to the first mailing by searching the National Change of Address
11 Database. (*Id.*) Within 10 days of receipt of the information from Defendants,
12 the claims administrator will mail the Notice Packet by first class mail. (*Id.*)
13 The claims administrator will perform a computer/Social Security Number and
14 “skiptrace” search to obtain an updated address on returned mail and will
15 promptly re-mail the Notice Packet to an updated address. (Settlement
16 Agreement ¶ 31(c).)

17 Class Members will have 60 days from the date the Notice Packet is
18 mailed to return a Claim Form or an Exclusion Form. (Settlement Agreement
19 ¶¶ 32, 33.) No more than 30 days, but not less than 20 days, after the initial
20 mailing of the Notice Packets, the claims administrator shall send a reminder
21 postcard to all Class Members who have not submitted a Claim Form or Request
22 for Exclusion to remind them that the claim period is ending. (*Id.*) Class
23 Members shall have the right to object. (Settlement Agreement ¶ 34.)

24 If a timely submitted, but facially deficient, Claim Form is received, the
25 claims administrator will send a deficiency letter to the Class Member explaining
26 any irregularity. The Class Member will be provided 15 days from the mailing
27 of the cure letter (or until the deadline for postmarking a Claim Form, whichever
28 date is later) to address any irregularities. (Settlement Agreement ¶ 32(b).)

1 **5. Formula to Pay Participating Class Members**

2 The Settlement Class Members’ Individual Settlement Payments shall be
3 managed and administered as follows: Defendants will calculate the total number
4 of weeks that all Class Members were employed by Defendants during the
5 Settlement Class Period (“Settlement Workweeks”). (Settlement Agreement
6 ¶ 35.) The Claims administrator will divide the Net Settlement Proceeds by the
7 total number of Settlement Workweeks Class Members were employed during
8 the Settlement Class Period, multiplied by three (to replicate the scenario of all
9 Class Members submitting valid Claim Forms claiming the highest level of
10 mileage driven, as defined below) to derive an estimated payment per workweek.
11 (*Id.*)

12 As set forth in paragraph 35 of the Settlement Agreement, the Claim Form
13 received by each Class Members shall set forth his or her estimated Individual
14 Settlement Payment, which will equal the estimated payment per workweek
15 times that Class Member’s Settlement Workweeks. The Claim Form and
16 accompanying Notice shall indicate that the estimated payment will be subject to
17 upward or downward adjustment, depending upon the class’ response rate and
18 the range of mileage driven per workweek by those Class Members who
19 respond.

20 Each Settlement Class Member who submits a Claim Form will check one
21 of three boxes on the form indicating a range of mileage driven per workweek on
22 behalf of Defendants during the Settlement Class Period. Box 1 will provide the
23 lowest range of mileage (under 250 miles per week). Box 2 will provide the
24 middle range of mileage (250-500 miles per week). Box 3 will provide the
25 highest range of mileage (in excess of 500 miles per week).

26 The Workweek Point Value will be determined based on which of the
27 three boxes a Settlement Class Member marks. Settlement Class Members who
28 mark Box 1 will be assigned one Workweek Point per workweek worked during

1 the Settlement Class Period. Settlement Class Members who mark Box 2 will be
2 assigned two Workweek Points per workweek worked during the Settlement
3 Class Period. Settlement Class Members who mark Box 3 will be assigned three
4 Workweek Points per workweek worked during the Settlement Class Period. For
5 purposes of calculating workweek point values, any Class Member who (a) does
6 not submit a claim form, or (b) submits a claim form but fails to mark a box,
7 shall be deemed to have marked Box 1. Also for purposes of calculating
8 workweek point value, those Class Members who submit Request for Exclusion
9 shall be assigned zero (0) workweek points.

10 The Claims Administrator will total the Workweek Points of all Settlement
11 Class Members (“Total Workweeks Points”). The Net Settlement Proceeds will
12 be divided by the Total Workweek Points and the resulting number will be the
13 “Workweek Point Value.”

14 For each Class Member who submits a valid Claim Form, that Settlement
15 Class Member’s Workweek Points will be multiplied by the Workweek Point
16 Value, and the resulting number will equal each participating Settlement Class
17 Member’s “Minimum Individual Settlement Payment.”

18 If the total claimed Minimum Individual Settlement Payments would equal
19 less than the Minimum Total Settlement Payment (\$1,950,000), the Claims
20 administrator will proportionately increase the Individual Settlement Payment
21 for each Participating Class Member up to the Minimum Total Settlement
22 Payment; provided, however, that no Participating Class Member shall receive
23 more than 200% of his or her Minimum Individual Settlement Payment. If the
24 Minimum Total Settlement Payment is more than 200% of the total Minimum
25 Individual Settlement Payments, the difference shall be split between the
26 following charities: Public Counsel and the Ace Rule of Law Fund, provided that
27 neither charity shall receive more than One Hundred Thousand Dollars
28 (\$100,000.00). If the difference between the Minimum Total Settlement

1 Payment and 200% of the total Minimum Individual Settlement Payments
2 exceeds Two Hundred Thousand Dollars (\$200,000.00), the remainder shall be
3 paid to the LWDA. Any unclaimed amounts above the Minimum Total
4 Settlement Payment shall be the exclusive property of Defendant.

5 **6. Class Representative Enhancement Awards to Plaintiffs**

6 The Settlement Agreement includes a provision that Class Counsel will
7 request, and Defendants will not object to, an award to each of the named
8 Plaintiffs of \$10,000 each for their services, efforts, and risks taken on behalf of
9 the class. (Settlement Agreement ¶ 9.) These Class Representative
10 Enhancement Awards are in addition to the amounts Plaintiffs are entitled to
11 receive as Class Members.

12 **7. Attorneys' Fees and Costs**

13 The Settlement Agreement includes a provision that Class Counsel will
14 request, and Defendants will not object to, a fee award of not more than
15 \$2,000,000, which is 33 percent of the settlement fund (Settlement Agreement ¶
16 3.) The Settlement Agreement also provides that Class Counsel will request, and
17 Defendants will not object to, an award of costs up to \$100,000. (*Id.*)

18 **8. Costs of Administration**

19 The Settlement Agreement includes a provision that provides for the
20 claims administrator to be paid out of the Maximum Settlement Amount.
21 (Settlement Agreement ¶ 6.)

22 **III. ARGUMENT**

23 **A. Class Action Settlements Are Subject To Court Review And**
24 **Approval Under Federal Law**

25 When a class action settles, the terms of settlement must be approved by
26 the Court and notice of the settlement must be provided to all class members
27 before the action can be dismissed. Fed. R. Civ. P. 23(e). Settlement approval
28 occurs after three distinct steps are taken:

- 1 1. Preliminary approval of the proposed settlement, including (if the
- 2 class has not already been certified) conditional certification of the class for
- 3 settlement purposes;
- 4 2. Dissemination of mailed and/or published notice of the settlement to
- 5 all affected class members providing them an opportunity to exclude themselves;
- 6 and
- 7 3. A “formal fairness hearing” (or Final Approval Hearing) at which
- 8 class members may be heard regarding the settlement, and at which evidence and
- 9 argument concerning the fairness, adequacy, and reasonableness of the
- 10 settlement is presented. Herr, *Manual for Complex Litigation*, Third (Fed.
- 11 Judicial Center 1995) (“Manual”) section 30.41.³

12 Plaintiffs currently move for preliminary approval and for the

13 dissemination of a notice of settlement to all Class Members, steps 1 and 2

14 above. At preliminary approval, the Court should first determine whether a class

15 exists. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Where the

16 class as defined in the settlement has not been certified yet, but meets the

17 requirements for certification, the Court should grant conditional class

18 certification. See Conte & Newberg, *Newberg on Class Actions*, § 11.22 (4th

19 ed.) Conditional class certification facilitates distribution of notice to the class,

20 conveying to class members the settlement terms and the date and time of the

21 final approval hearing. See Manual § 30.41.

22 Next, the Court should evaluate whether the settlement is within the

23 “range of reasonableness,” and whether notice to the class and the scheduling of

24 a final approval hearing should be ordered.⁴ See Newberg § 11.25.

25 _____

26 ³ This procedure safeguards class members’ procedural due process rights

27 and enables the court to fulfill its role as the ultimate guardian of class interests.

28 Newberg, §§ 11.22 *et seq.*

⁴ The additional rulings sought in this motion (approving the form and

content of the class notice) are also typically made at the preliminary approval

stage. See Newberg § 11.26.

1 **B. Conditional Class Certification Is Appropriate**

2 **1. The Class as Defined by the Settlement Agreement Should**
 3 **Be Conditionally Certified**

4 The class, as defined in the Settlement Agreement, should be certified for
 5 settlement purposes. Fed. R. Civ. P. 23(b)(3). Under Rule 23(a), the
 6 requirements for class certification are as follows: numerosity of plaintiffs,
 7 commonality, typicality of the class representative’s claims, and adequacy of
 8 representation. In addition, a class action for monetary damages must satisfy the
 9 Rule 23(b)(3) “predominance” requirement that the questions of law or fact
 10 common to the class members predominate over questions affecting only
 11 individual members⁵; and the “superiority “ requirement that a class action is
 12 superior to other available methods for the fair and efficient adjudication of the
 13 controversy. The class in the present action meets all these prerequisites.

14 **2. The Proposed Class Is Sufficiently Numerous and**
 15 **Ascertainable**

16 The numerosity requirement is met if the class is so large that joinder of
 17 all members would be impracticable. Fed. R. Civ. P. 23(a)(1). Generally, courts
 18 will find a class sufficiently numerous when it consists of 40 or more members.
 19 *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1121 (E.D. Cal.
 20 2009) (“numerosity” is presumed at a level of 40 members); *Consolidated Rail*
 21 *Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (same); *Ansari v.*
 22 *New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y. 1998) (same). Here,
 23 Defendants’ records show that the class consists of approximately 1,000
 24 individuals. Accordingly, joinder of all Class Members would be impracticable,
 25 and the class is ascertainable from Defendants’ records.

26
 27
 28 _____

⁵ To avoid repetition, the analysis for commonality and predominance are merged.

3. Common Issues Predominate Over Individual Issues

Class certification is authorized where common questions of law and fact predominate over individual questions and where class-wide treatment of a dispute is superior to individual litigation. *See* Fed. R. Civ. P. 23(a)(2), (b)(3). The test is whether the proposed class is sufficiently cohesive to warrant adjudication by representation. *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). The proposed class in this case is sufficiently cohesive because all Class Members share a “common nucleus of facts and potential legal remedies.” *Hanlon v. Chrysler*, 150 F.3d 1011, 1022 (9th Cir. 1998). Common claims have been found to predominate where a company-wide policy governed how employees spent their time or how they got paid. *See, e.g., Wright v. Linkus Enterprises, Inc.*, 259 F.R.D. 468, 473 (E.D. Cal. 2009) (finding predominance despite minor factual difference among individual class members where the case involved “policies that required class members to work without compensation, meal and rest periods, and/or reimbursement for expenses.”).

Here, Defendants have a written policy, common to all Class Members, that expressly precludes reimbursement for business-related expenses, and Plaintiffs and prospective Class Members seek identical remedies for Defendants’ alleged failure to reimburse those business-related expenses. Further, individualized issues do not predominate over the issues of law and fact that are common to the class as a whole. The California statutes involved in each cause of action alleged in the operative complaint apply with equal force and effect to each Class Member. Factually, Defendants’ policies and practices apply class-wide.

4. The Class Representatives’ Claims Are Typical of the Class

Typicality requires that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” Fed. R. Civ. P.

1 23(a)(3). The typicality requirement is met if the claims of the named
2 representative are typical of those of the class, though “they need not be
3 substantially identical.” *Hanlon*, 150 F.3d at 1020. Plaintiffs’ claims are typical
4 of the claims of the whole class because they arise from the same factual basis
5 and are based on the same legal theories as those applicable to the other Class
6 Members. *See Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987).
7 Thus, the typicality requirement is also satisfied.

8 **5. The Class Representatives and Class Counsel Are**
9 **Adequate**

10 To meet the adequacy of representation requirement in Rule 23(a)(4),
11 Plaintiffs must show that (1) that the putative named plaintiff has the ability and
12 the incentive to represent the claims of the class vigorously, (2) that he or she has
13 obtained adequate counsel, and (3) that there is no conflict between the
14 individual’s claims and those asserted on behalf of the class.” *See General*
15 *Telephone Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). The adequacy of
16 representation requirement is met here because Plaintiffs have the same interests
17 as the members of the Settlement Class, there is no conflict between the named
18 Plaintiffs’ claims and those of the other Class Members, and Plaintiffs are
19 represented by experienced and competent counsel who have experience in
20 litigating wage and hour class action cases. (Declaration of Marc Primo In
21 Support of Motion for Preliminary Approval of Class Action Settlement [“Primo
22 Decl.”] ¶¶ 3-5.)

23 **6. Class Settlement Is Superior to Other Available Means of**
24 **Resolution**

25 Particularly in the settlement context, class resolution is superior to other
26 available methods for the fair and efficient adjudication of this controversy. *See*
27 *Hanlon*, 150 F.3d at 1023. The superiority requirement involves a “comparative
28 evaluation of alternative mechanisms of dispute resolution.” *Id.* Here, as in

1 *Hanlon*, the alternative method of resolution is individual suits for relatively
2 small amounts. *See id.* These claims “would prove uneconomic for potential
3 plaintiffs” because “litigation costs would dwarf potential recovery.” *Id.* For
4 this reason, in this case, as in *Hanlon*, a class action is the superior method of
5 resolution.

6 **C. The Settlement Is Fair, Reasonable And Adequate**

7 **1. The Decision to Approve a Proposed Settlement Is**
8 **Committed to the Court’s Discretion**

9 The decision to approve a proposed settlement is committed to the court’s
10 sound discretion. *Hanlon*, 150 F.3d at 1026. The Court must determine whether
11 a settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(1).

12 To make this determination at preliminary approval, the Court may
13 consider some or all of the following factors: the extent of discovery completed,
14 and the stage of proceedings; the strength of the plaintiff’s case and the risk,
15 expense, complexity, and likely duration of further litigation; the risk of
16 maintaining class action status throughout trial; the amount offered in settlement;
17 and the experience and views of counsel. *Molski v. Gleich*, 318 F.3d 937, 953
18 (9th Cir. 2003).

19 At the preliminary approval stage, the Court need only review the parties’
20 proposed settlement to determine whether it is within the permissible “range of
21 possible judicial approval” and thus, whether the notice to the class and the
22 scheduling of the formal fairness hearing is appropriate. Newberg, § 11:25.

23 **2. The Settlement Was Based on Facts Uncovered Through**
24 **Pre-Litigation Investigation, Formal Discovery and**
25 **Preparation for Mediation**

26 Class Counsel gathered sufficient information to make an intelligent
27 decision about settlement. *See Linney v. Cellular Ala. P’ship*, 151 F.3d 1234,
28 1239 (9th Cir. 1998) (“in the context of class action settlements, formal

1 discovery is not a necessary ticket to the bargaining table”). Class Counsel’s
 2 investigation of the Class’ claims against Defendants included: (a) a review of
 3 relevant documents, such as Plaintiffs’ personnel files, Defendants’ written
 4 employment policies and relevant class member data; (b) research with respect to
 5 the applicable law and the potential defenses thereto; (c) propounding written
 6 discovery on Defendants; and (d) deposing Defendants’ Persons Most Qualified.
 7 (Williams Decl. ¶ 2.) In preparing for mediation, Plaintiffs analyzed class-wide
 8 data and conducted many interviews of prospective Class Members. (*Id.*) The
 9 combination of data produced by Defendants, deposition testimony from
 10 Defendants’ PMQ, and information gathered from witness interviews enabled
 11 Class Counsel to create a damages analysis which assisted in the ultimate
 12 settlement of the claims at issue. (*Id.*)

13 **3. The Settlement Was Achieved After Evaluating the**
 14 **Strength of Plaintiffs’ Case and the Risk, Expense,**
 15 **Complexity and Likely Duration of Further Litigation**

16 Class Counsel evaluated the strengths of the class claims at issue, and
 17 assessed the range of potential outcomes of the litigation, in light of the risk,
 18 expense, complexity, and likely duration of the litigation. (*Id.* at ¶ 5.)

19 **Business Expense Reimbursement**

20 Plaintiffs alleged that Defendants did not reimburse Class Members for
 21 any expenses necessarily incurred by employees in the execution of their duties,
 22 particularly for mileage. (*Id.* at ¶ 6.) Defendants claimed that a large percentage
 23 of the miles driven by Class Members were from their home to their morning
 24 meeting or to their first appointment, and that this mileage constituted their daily
 25 “commute” and was therefore non-compensable under the California Labor
 26 Code. (*Id.*)

27 Class Counsel determined through discovery and interviews with
 28 prospective Class Members that the prospective class consisted of approximately

1 940 former and current employees who individually drove tens of thousands of
2 miles every year in connection with their job responsibilities. (*Id.* at 7.)
3 Compensation for such mileage was calculated by reference to the Internal
4 Revenue Service Standard Mileage Rate, the average of which was 47.4 cents
5 per mile during the class period. (*Id.*)

6 **Wage Statements**

7 Plaintiffs alleged that Defendants issued Class Members non-complaint
8 wage statements that failed to report the inclusive dates of the period for which
9 the employee is paid (§ 226(a)(6)), or the social security number (or the last four
10 digits of the social security number after January 1, 2008) (§ 226(a)(7)). (*Id.* at ¶
11 8.)

12 Section 226(e) states that an employee suffering injury as a result of a
13 knowing and intentional failure by an employer to comply with subdivision (a) is
14 entitled to recover the greater of all actual damages or fifty dollars for the initial
15 pay period in which a violation occurs and one hundred dollars per employee for
16 each violation in a subsequent pay period, not exceeding an aggregate penalty of
17 four thousand dollars. (*Id.* at 9.) Through the course of discovery, Class
18 Counsel determined that there were approximately 940 individuals who were
19 employed during the Class Period, and approximately 141 pay periods. (*Id.*)
20 With this information, Class Counsel was able to approximate Defendants'
21 maximum class-wide exposure. (*Id.*) Class Counsel, however, recognized that it
22 was unlikely that they would be able to obtain anywhere near the maximum
23 exposure because a number of courts have required plaintiffs to demonstrate that
24 wage statement errors produced actual injuries, a requirement that generally
25 forecloses the possibility of certifying wage statement claims. (*Id.*)

26 **Late Final Pay**

27 Plaintiffs alleged that, by virtue of Defendants' failure to reimburse their
28 employees for business expenses, all former employees did not timely receive all

1 their wages at the time of separation. (*Id.* at ¶ 10.) Under Section 203:

2 If an employer willfully fails to pay, without abatement
3 or reduction . . . any wages of an employee who is
4 discharged or who quits, the wages of the employee
5 shall continue as a penalty from the due date thereof at
the same rate until paid or until an action therefor is
commenced; but the wages shall not continue for more
than 30 days.

6 Through discovery, Class Counsel determined that Class Members earned
7 on average several hundred dollars per month. (*Id.* at ¶ 11.) Based on this
8 information, and the estimate that there were approximately 830 former
9 employees, Class Counsel was able to determine a reasonable estimate of
10 Defendants' liability for late final payment of wages. (*Id.*)

11 **4. The Settlement Was the Result of Arm's-Length**
12 **Negotiation by Counsel Experienced in Wage and Hour**
13 **Class Actions**

14 Counsel for the Parties both have considerable experience and have
15 demonstrated competence with litigating wage and hour class actions. (Primo
16 Decl. ¶¶ 3-5.) The Parties participated in mediation before a well-known class
17 action mediator, Mark Rudy. Mr. Rudy was extremely helpful in managing the
18 expectations of the Parties and providing a useful, neutral analysis of the issues
19 and risks to both sides. Counsel for both sides came to the mediation well-
20 prepared and knowledgeably presented their positions regarding the claims, and
21 the legal theories and competing valuations of potential class-wide damages.
22 Class Counsel acknowledged that Defendants' arguments had merit and that
23 Defendants' positions would be vigorously defended at certification and trial.
24 Throughout the day, the Parties continued to work through the mediator to re-
25 evaluate their respective positions. (Williams Decl. ¶ 12.)

26 In short, the mediation was conducted at arm's-length and the resulting
27 settlement was the outcome of an informed and educated analysis of Defendants'
28 liability and total exposure in relation to the costs and risks attendant to Plaintiffs

1 and the class. Based on the foregoing data, Class Counsel's own independent
2 investigation and evaluation, and the mediator's proposal, Class Counsel opines
3 that the settlement with Defendants for the consideration and on the terms set
4 forth in this Settlement Agreement is fair, reasonable, and adequate and is in the
5 best interest of the Settlement class in light of all known facts and circumstances,
6 including the risk of significant delay and uncertainty associated with litigation,
7 various defenses asserted by Defendants, and numerous potential appellate
8 issues.

9 **5. The Class Representative Enhancement Awards Are**
10 **Reasonable**

11 It is customary and appropriate to provide a payment to the named plaintiff
12 for services to the class as class representative. *See Van Vranken v. Atl.*
13 *Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995); *see also Bogosian v. Gulf*
14 *Oil Corp.*, 621 F. Supp. 27 (E.D. Pa 1985). Here, the named Plaintiffs each
15 spent considerable time and effort in the prosecution of this action, including
16 providing documents, preparing and sitting for an all day deposition and
17 consulting with Class Counsel. Plaintiffs have served effectively throughout the
18 duration of their role as Class Representatives. As a direct result of Plaintiffs'
19 efforts, Class Members stand to benefit. Class Counsel, therefore, fully supports
20 the enhancement award of \$10,000 as being fair, reasonable, and appropriate.

21 **6. The Class Counsel Award for Attorneys' Fees and Costs Is**
22 **Reasonable**

23 Plaintiffs contend, and Defendants do not contest, that a 33 percent
24 contingency fee to Class Counsel for payment of its attorneys' fees is reasonable.
25 Additionally, up to \$100,000 is requested from the Maximum Settlement
26 Amount for costs and expenses incurred by Class Counsel.
27
28

1 California law, which governs here,⁶ has no set fee “benchmark” with
 2 respect to its common benefit percentage analysis, but awards of 33 percent have
 3 been regularly approved in California wage and hour class actions, including
 4 settlements involving Class Counsel.⁷

5 Additionally, courts in the Ninth Circuit frequently take into account the
 6 size of the fund. *Craft v. County of San Bernardino*, Case No. 05-00359, 2008

7
 8 ⁶ “Federal courts are required to apply state law in diversity actions with
 9 regard to the allowance or disallowance of attorney fees.” *Michael-Regan Co. v.*
 10 *Lindell*, 527 F.2d 653, 656 (9th Cir. 1975). *See also, e.g., Kern Oil & Refining*
 11 *Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1388-89 (9th Cir. 1986) (state law
 12 establishes the required showing for attorney’s fees in an action in diversity);
 13 *Helfand v. Gerson*, 105 F.3d 530, 536 (9th Cir. 1997) (A federal court sitting in
 14 diversity applies the law of the forum state regarding an award of attorneys’
 15 fees.); *In re Larry’s Apartment, L.L.C.*, 249 F.3d 832, 837-38 (9th Cir. 2001) (in
 16 a diversity case, the law of the state in which the district court sits determines
 17 whether a party is entitled to attorneys fees, and the procedure for requesting an
 18 award of attorney fees is governed by federal law.).

19 ⁷ The settled-for fee award is consistent with the average fee award in
 20 class actions. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008)
 21 (“Empirical studies show that, regardless whether the percentage method or the
 22 lodestar method is used, fee awards in class actions average around one-third of
 23 the recovery.”) *Also see, e.g., Bejarano v. Amerisave Mortgage Corp.*, No. CV
 24 08-00599 (E.D. Cal. June 22, 2010) (33% award); *Blair et al. v. Jo-Ann Stores,*
 25 *Inc.*, BC 394795 (L.A. Super. Ct. June 11, 2010) (33% award); *Weisbarth and*
 26 *List v. HR Block Financial Advisors, Inc.*, No. 07-00236 (C.D. Cal. May 24,
 27 2010) (33% award); *Perez and Comeaux v. Standard Concrete*, No. 30-2008-
 28 00211820 (Orange County Super. Ct. Apr. 29, 2010) (33% award); *Ward v.*
Doyon Sec. Servs., LLC, BS 9000517 (San Bernardino Super. Ct. Apr. 23, 2010)
 (33% award); *Clymer and Benton v. Candle Acquisition Co.*, No. BC328765
 (Super. Ct. L.A. County Feb. 3, 2009) (33% award); *Winzelberg v. Liberty*
Mutual Ins. Co., No. CV 07-460 (C.D. Cal Oct. 17, 2008) (33% award); *Perry v.*
SunAmerica, No. CV 07-1193 (C. D. Cal. Sept. 8, 2008) (33% award); *Barrett v.*
The St. John Companies, No. BC354278 (Super. Ct. L.A. County July 10, 2008)
 (33% award); *Simpson v. e*Trade*, No. CV 06-156 (C. D. Cal. June 2, 2008)
 (33% award); *Gunter v. Fidelity Nat’l Fin.*, No. CV 07-4284 (C.D. Cal. Jan. 30,
 2008) (30% award); *Taylor v. Ross Stores, Inc.*, No. RCV 065453, JCCP 4331
 (Super. Ct. San Bernardino County Feb. 21, 2007) (33% award); *Case v.*
Toyohara America Inc., No. BC328111 (Super. Ct. L.A. County May 31, 2006)
 (33% award); *Malone v. Connex West LLC*, No. BC328781 (Super. Ct. L.A.
 County May 30, 2006) (31% award); *Sunio v. Marsh USA, Inc.*, No. BC328782
 (Super. Ct. L.A. County Apr. 28, 2006) (33% award); *Kenemixay v. Nordstroms,*
Inc., No. BC318850 (Super. Ct. L.A. County Dec. 20, 2005) (50% award);
Vivens v. Wackenhut Corp., No. BC290071 (Super. Ct. L.A. County Jan. 12,
 2005) (31% award); *Chalmers v. Elecs. Boutique*, No. BC 306571 (Super. Ct.
 L.A. County Dec. 15, 2004) (33% award); *Marroquin v. Bed Bath & Beyond,*
 No. RG04145918 (Super. Ct. Alameda County June 22, 2004) (33% award); *In*
re Milk Antitrust Litig., No. BC070061 (Super. Ct. L.A. County Nov. 23, 1999)
 (33% award).

1 U.S. Dist. LEXIS 27526 (C.D. Cal. Apr. 1, 2008). Although there are no bright-
2 line rules in this area, twenty to fifty percent is commonly awarded as attorneys'
3 fees depending in part on the size of the common fund. Often, but not always,
4 attorneys' fees of less than 25 percent will be awarded in "megafund" cases
5 (cases of \$50 million or more). *Id.* Cases settling for less than \$10 million, as
6 here, will often result in higher percentage fee awards such as the requested 33
7 percent. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 297-98
8 (N.D. Cal. 1995) ("[m]ost of the cases Class Counsel have cited in which high
9 percentages such as 30-50 percent of the fund were awarded involved relatively
10 smaller funds of less than \$10 million"); *In re Warner Commc'n Sec. Litig.*, 618
11 F. Supp. 735, 749-50 (S.D.N.Y. 1985) ("Traditionally, courts in this Circuit and
12 elsewhere have awarded fees in the 20%-50% range in class actions"); *In re*
13 *Ampicillin Antitrust Litig.*, 526 F. Supp. 494 (D.D.C. 1981) (awarding attorney's
14 fees consisting of 45% of \$7.3 million settlement).

15 In order to properly handle and prosecute this case, Class Counsel was
16 precluded from taking other cases, and in fact, had to turn away other
17 meritorious fee generating cases. When this case was taken on a contingent fee
18 basis, with the firm fronting litigation costs, the ultimate result was far from
19 certain.

20 Moreover, practicing in the narrow area of wage and hour litigation
21 requires skill and knowledge concerning the constantly evolving substantive law,
22 state and federal, as well as the procedural law of class action litigation, and
23 involves a great deal of risk in that these cases can be lost on both class action
24 procedural rulings as well as on the merits. Further, due to the high stakes
25 involved in terms of both retroactive and prospective relief, wage and hour class
26 actions are vigorously defended, and this case was no exception.

27 In light of these factors and awards in similar cases, the requested fees
28 should receive preliminary approval.

1 **D. The Proposed Notice Is Proper**

2 The proposed class notice satisfies due process. Rule 23(c)(2) of the
3 Federal Rules of Civil Procedure requires the Court to direct to Class Members
4 the “best notice practicable” under the circumstances, including “individual
5 notice to all members who can be identified through reasonable effort.” *Eisen v.*
6 *Carlisle & Jacqueline*, 417 U.S. 156, 165 (1974). As the United States Supreme
7 Court has held, notice by mail provides such “individual notice to all members”
8 in accordance with Rule 23(c)(2). *Id.* Where the names and addresses of the
9 Class Members are easily ascertainable, individual notice through the mail is
10 “clearly the ‘best notice practicable.’” *Id.* at 175.

11 Class Counsel intends to provide notice to Class Members of the terms of
12 the Settlement by mailing the Notice Packet to all known and reasonably
13 ascertainable Class Members by First Class U.S. Mail. (Settlement Agreement
14 ¶ 1.) Defendants will provide a list of the names, last known home address and
15 last known telephone number to the extent available in Defendants’ business
16 records; Social Security number; dates of employment as a non-exempt
17 employee in California during the Class Period; and the number of weeks each
18 Class Member worked during the Class Period. (Settlement Agreement ¶ 31.)
19 The claims administrator will utilize the National Change of Address database
20 and will endeavor to update this database via “skiptraces” before mailing Notice
21 Packets and when Notice Packets are returned. (*Id.*) Additionally, the Parties
22 have agreed to mail a reminder postcard to all Class Members who have not
23 responded to the Notice Packet. (*Id.*)

24 The proposed Class Notice is accurate and informative. The proposed
25 Class Notice provides information on the meaning and nature of the Settlement
26 Class, the terms and provisions of the Settlement, the consideration for the
27 Settlement, the application of Class Counsel for reimbursement of costs and
28 attorneys’ fees, the date, time and place of the final approval hearing, and the

1 procedure and deadlines for participating in the Settlement, electing not to
2 participate in the Settlement, or submitting objections.

3 The Notice Packet also fulfills the requirement of neutrality in class
4 notices. *See* Newberg § 8.39. It summarizes the proceedings and the terms and
5 conditions of the Settlement in an informative and coherent manner, complying
6 with the statement in *Manual for Complex Litigation, supra*, that “the notice
7 should be accurate, objective, and understandable to Class Members”
8 *Manual for Complex Litigation*, Third (Fed. Judicial Center 1995) (“Manual”)
9 § 30.211. The Notice Packet states that the Settlement does not constitute an
10 admission of liability by Defendant and recognizes that the Court has not ruled
11 on the merits of the action. It also states that Final Approval has yet to be made.
12 Accordingly, the Notice Packet complies with the standards of fairness,
13 completeness, and neutrality required of a settlement class notice disseminated
14 under authority of the Court. Fed R. Civ. P. 23(c)(2) and (e); *Manual* §§ 8.21,
15 8.39; *Manual* §§ 30.211, 30.212.

16 The last step in the settlement approval process is the final approval
17 hearing, at which time the Court may hear all evidence and arguments necessary
18 to evaluate the Settlement. At that hearing, proponents of the Settlement may
19 explain and describe its terms and conditions and offer arguments in support of
20 settlement approval. Class Members may be heard in support of or in opposition
21 to the Settlement. The Parties request that the hearing be held on December 8,
22 2010.

23 **IV. CONCLUSION**

24 The Parties have negotiated a fair and reasonable settlement of a case that
25 provides relief that likely would never have been realized but for this class
26 action. Accordingly, Plaintiffs move the Court to approve the Settlement
27 Agreement; conditionally certify the class for purposes of settlement; direct that
28 the Notice Packet be mailed to Class Members; and preliminarily approve the

1 Class Representative Enhancement Award, Class Counsel’s attorneys’ fees and
2 costs, and the Claims Administrator’s expenses. Additionally, the Parties request
3 a Final Approval hearing date on December 8, 2010, or the earliest available date
4 that the Court’s calendar will accommodate.

5
6 Dated: July 7, 2010

Respectfully submitted,

Initiative Legal Group APC

7
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9 By:



10 Gene Williams
11 Mark P. Pifko
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APPENDIX A

The following table sets forth the relevant events and corresponding deadlines, predicated on the Court's preliminary approval of the class action settlement.

Timing	Event
August 18, 2010 (14 calendar days after preliminary approval of Settlement)	Last day for Defendants to provide Class Members' names, addresses, telephone numbers, Social Security Numbers, and the dates of employment that each Class Member worked during the applicable Class Period in a readable Excel spreadsheet.
August 28, 2010 (10 calendar days after Defendants provide Class Members' information to Claims Administrator)	Last day for Claims Administrator to mail Notice and Claim Form to Class Members.
October 27, 2010 (60 days after Claims Administrator mails Notice and Claim Form to Class Members)	Last day for Class Members to submit Claim Forms, Requests for an Exclusion, or objections to the Settlement.
November 10, 2010	Last day for Plaintiff to file Motion for Final Approval of Class Action Settlement.
December 8, 2010	Final Approval Hearing.