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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - CENTRAL DISTRICT-UNLIMITED – CENTRAL CIVIL WEST COURTHOUSE

ROBERT JAROS and WILLIAM B. ROSE, on behalf of themselves and all others similarly situated, Plaintiffs, v. LOUIS VUITTON NORTH AMERICA, INC., a Delaware corporation; and DOES 1 to 100, inclusive, Defendants.	Case No.: BC444011 Honorable Anthony J. Mohr Department 309 **CLASS ACTION** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** Date: October 20, 2011 Time: 10:00 a.m. Dept: 309 Action filed: August 18, 2010 Trial Date: None set

This Memorandum is submitted in support of the Plaintiffs' Motion for Final Approval of Class Action Settlement. The proposed settlement before this Court will dispose of the action as to Defendant Louis Vuitton North America. (hereinafter referred to as "Defendant" or "Louis Vuitton ").

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FEDERAL STATUTES

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I.

INTRODUCTION

Class Counsel has achieved an excellent result in this litigation, embodied in the Settlement Agreement. The proposed Settlement provides substantial benefits to the Class and is the product of aggressive litigation of Class Counsel to obtain the best possible result for the Class Members. **100% of the money will be paid out as there is no reversion to Defendant and 97.3% of the class members will be paid. There are also no objections and only one opt out of the settlement. The average class member award is $8,754.39 and highest award is $24,429.07**. The settlement of this action is fair, reasonable, and adequate and in the best interests of the Class. Accordingly, final approval should be granted.

II.

PROCEDURAL HISTORY OF THE CASE

On August 18, 2010, Plaintiff Robert Jaros filed a class action Complaint against Defendant Louis Vuitton North America, Inc., in the Los Angeles County Superior Court entitled Jaros v. Louis Vuitton North America, Inc. The Complaint alleged causes of action for (1) Failure to pay overtime wages; (2) Failure to provide meal periods; (3) Failure to authorize and permit rest periods; (4) Failure to timely furnish accurate itemized wage statements; (5) Violations of Labor Code section 203; (6) Penalties pursuant to Labor Code section 2699; (7) Unfair Business Practices; and (8) Declaratory relief. On or about August 25, 2010, Plaintiff filed a First Amended Complaint, adding Plaintiff William Rose as a plaintiff. Plaintiffs alleged the same eight causes of action in the First Amended Complaint as were alleged in the original complaint.

Class Representative Robert Jaros was formerly employed by Defendant as an Accessory Manager. Class Representative William Rose was formerly employed by Defendant as an Operations Manager. Class Representatives have alleged claims against Defendant on behalf of all "Assistant Managers"(Assistant Manager shall mean any person employed as an exempt or hourly manager below the level of Store Manager, including but not limited to Operations Managers, Accessory Managers, Ready to Wear Managers, Shoe Managers, Client Relations

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Directors, Watch and Jewelry Managers, Sales Managers, and Leather Goods Managers).

The parties engaged in pre-certification discovery and motion practice. Class representatives propounded interrogatories and requests for production of documents on Defendant. Defendant responded to the discovery and produced documents, including the Class Representative personnel files, time records and payroll records, as well as company policies with respect to payment of wages and overtime and provision of meal periods. Class Representatives filed a motion to compel the names and contact information of all putative class members and Defendant opposed such motion. Defendant propounded discovery requests on Plaintiffs. While the motion to compel was pending, the Parties agreed to participate in a mediation. In anticipation of the mediation, the Parties engaged in a confidential exchange of documents and information. Defendant provided Plaintiffs' counsel with time records and payroll information for a 10% sample of the putative class, the aggregate number of workweeks worked by the putative class members, and the number of terminated putative class members. Defendant produced approximately 1,770 pages of documents in formal and informal discovery prior to the mediation. On March 29, 2011, the Parties participated in a mediation with a well-respected mediator, Jeffrey Krivis. The mediation reached the conditional agreement reflected in this Stipulation. Subsequent to the mediation, Class Representatives took the deposition of Defendant's Person Most Qualified with respect to Defendant's timekeeping policies and practices for its Assistant Managers, and Defendant produced an additional 663 pages of time records and timekeeping documents.

III.

ACTUAL SETTLEMENT VALUE

The settlement is $1,500,000. Additionally, Defendant agreed to pay the employer's share of payroll taxes in addition to this settlement value. The settlement is all the more advantageous for the Class because it covers four (4) years of overtime payments, rather than three (3); that is, the settlement was based on the four (4) year statute of limitations pursuant to California Business & Professions Code §§17200, *et seq.*, rather than a three (3) year period under the Labor Code. The total settlement is divided as follows:

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A. CLAIMANT COMPENSATION

Salary Exempt Assistant Manager Class: Each class member of this class who was a salary exempt Assistant Managers who worked for Louis Vuitton in California during the Class Period August 18, 2006 through preliminary approval will receive approximately $90 per week after deductions for attorneys' fees, litigation costs, and Class Representative Enhancements.

Hourly Assistant Manager Class: Each class member of this class who was a hourly Assistant Managers who worked for Louis Vuitton in California during the Class Period November 21, 2010 through preliminary approval will receive approximately $10 per week after deductions for attorneys' fees, litigation costs, and Class Representative Enhancements.

B. ATTORNEYS' FEES AND COSTS

Attorneys' Fees of Attorneys' Fees: $450,000 and costs of $13,996.17 as verified by Class Counsel and approved by the Court and $17,000 for claims administration.

C. CLASS REPRESENTATIVE ENHANCEMENTS

A Class Representative Enhancement of $15,000 to each Class Representative. This enhancement takes into consideration the time, effort and risks incurred by the named Plaintiffs in coming forward to litigate this matter on behalf of all Class Members.

IV.

PRELIMINARY APPROVAL

At the Preliminary Approval Hearing on July 18, 2011, the Court granted Preliminary Approval of this settlement, conditionally certified the Class for settlement purposes only, approved the Notice of Pendency of Class Action and Exclusions forms, appointed the Class Representatives, designated Class Counsel, appointed Rust Consulting, Inc. as the Claims Administrator, and set time lines for the claims and settlement procedure.

V.

STATUS OF CLAIMS PROCEDURE

Pursuant to the Court's Order signed on July 21, 2011, Notice was sent to every Class Member via first-class mail by the Claims Administrator. The name, last known address, and

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social security number of each Class Member was provided by Defendants through a review of its personnel files. Rust Consulting performed further searches on returned mail in an effort to locate each and every Class Member. Rust Consulting followed up with additional mailings after updating address as a result of returned mail.

Class Counsel have personally corresponded with Rust Consulting and defense counsel (on numerous occasions) to 1) obtain the most current claims reports, 2) confirm receipt of the Notice and forms, and 3) answer questions regarding the claims procedure. Class Counsel, through their own efforts, the efforts of their immediate staff, and the Claims Administrator have made every effort to ensure that each and every Class Member has received Notice and the accompanying forms via the most direct and cost effective manner possible. A true and correct copy of the declaration of Stacy Roe of Rust Consulting is marked and attached to the Declaration of Kevin T. Barnes as Exhibit No 1.

VI.

OUTSTANDING CLAIMS PARTICIPATION

100% of the money will be paid out as there is no reversion to Defendant and 97.3% of the class members will be paid. There are also no objections and only one opt out of the settlement. The average class member award is $8,754.39 and highest award is $24,429.07. This response speaks to the fairness, reasonableness, and adequacy of the Settlement.

VII.

FINAL SETTLEMENT APPROVAL IS APPROPRIATE

Pursuant to both state and federal rules of civil procedure, "a class action shall not be dismissed or compromised without the approval of the Court, and notice of the proposed dismissal or compromise shall be given to all members of the Class in such manner as the Court directs . . . " CCP §1781(f); Fed. R. Civ. P. 23(e). In deciding whether to grant final approval to a proposed class action settlement under CCP §382, the Court's overriding concern is whether the proposed settlement is "fair, adequate, and reasonable." Dunk v. Ford Motor Company (1996) 48 Cal.App.4th 1794, 1801 (quoting Officers for Justice v. Civil Service Com. 688 F.2d 615, 625, (9th Cir. 1982), cert. Denied (1983) 459 U.S. 1217).

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In practical terms, the settlement of a class action follows three parts: 1) Preliminary approval of the proposed settlement; 2) Notice to Class Members, and 3) a Final Approval hearing or "Fairness Hearing" at which evidence and argument may be heard on the fairness, adequacy and reasonableness of the settlement. The Court has given preliminary approval of the settlement, Notice has been sent to all Class Members, and the claims procedure has been completed.

A. THE SETTLEMENT IS ENTITLED TO A PRESUMPTION OF FAIRNESS

A presumption of fairness exists where: 1) The settlement is reached through arm's length bargaining; 2) Investigation and discovery are sufficient to allow counsel and the Court to act intelligently; 3) Counsel is experienced in similar litigation; and 4) the percentage of objectors is small. Dunk v. Ford Motor Company *supra*, 48 Cal.App.4th at 1802.

To prevent fraud, collusion or unfairness to the Class, the settlement or dismissal of a class action requires Court approval. Malibu Outrigger Bd. of Governors v. Superior Court (1980) 103 Cal.App.3d 573, 578-579. The purpose of the requirement is the protection of those Class Members, including the named Plaintiffs, whose rights may not have been given due regard by the negotiating parties. Officers for Justice, *supra*, 688 F.2d at 624. The trial court has broad powers to determine whether a proposed settlement in a class action is fair. Mallick v. Superior Court (1979) 89 Cal.App.3d 434.

At the Final Approval Hearing, the Court should consider the relevant factors, such as the strength of the Plaintiff's case, the risk, expenses, complexity and likely duration of further litigation, the risk of maintaining class action status through 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. Officers for Justice, *supra*, 688 F.2d at 624. "This list is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a private consensual agreement between the parties." Dunk v. Ford Motor Company, *supra*, 48 Cal.App.4th at 1801.

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B. THE SETTLEMENT WAS REACHED THROUGH ARM'S LENGTH NEGOTIATIONS

This settlement was reached through arms length negotiations as exemplified by the contentious litigation. Likewise, the parties used a professional mediator, Jeffrey Krivis, Esq., who presided over the mediation which eventually resulted in the settlement.

C. SUFFICIENT DISCOVERY AND INVESTIGATION HAS BEEN COMPLETED TO WARRANT SETTLEMENT

The stage of the proceedings and the amount of discovery completed is an important factor which the Courts consider in determining the fairness, reasonableness, and adequacy of a settlement. In re Warner Communications Sec. Litig., 618 F.Supp.735, 741 (S.D.N.Y. 1985), affid., 198 F.2d 35 (2d Cir. 1986); Ellis v. Naval Air Rework Facility, 87 F.R.D.15, 18 (N.D Cal, 1980), affid, 661 F.2d 939 (9th Cir. 1981); Boyd v. Bechtel Corp., 485 F.Supp.610, 616-17 (N.D. Cal.1979). Plaintiffs' counsel conducted meaningful discovery. The litigation reached a stage where "the parties certainly have a clear view of the strengths and weaknesses of their cases." Warner, *supra*, 618 F.Supp. at 745; Ellis, *supra*, 87 F.R.D. at 18; Boyd, *supra*, 485 F.Supp. at 616-17.

The settlement that has been reached is the product of tremendous effort, and a great deal of expense by the Parties and their counsel. The settlement was reached after extensive factual and legal research, voluminous written discovery, law and motion practice, review of thousands of pages of documents, and a full-day mediation with the Jeff Krivis, Esq.

D. CLASS COUNSEL IS EXPERIENCED AND ENDORSES THE SETTLEMENT

Experienced counsel, operating at arm's length, have weighed all of the foregoing factors and endorse the proposed settlement. As the Courts have explained, the view of the attorneys actively conducting the litigation, is "entitled to significant weight." Fisher Bros. V. Cambridge-Lee Industries, Inc., 630 F.Supp.482, 488 (E.D. Pa. 1985); *see* also Ellis, *supra*, 87 F.R.D. at 18; Boyd, *supra*, 485 F.Supp. at 616-17.

Class Counsel has experience in class actions and employment litigation, and specifically in wage and hour class actions. (See Decls. of Kevin T. Barnes and Joseph Antonelli). Class

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Counsel are experienced and qualified to evaluate the Class claims and viability of the defenses Id. The recovery for each Class Member is substantial, given the risks inherent in litigation and the defenses asserted. This settlement is fair, adequate and reasonable and in the best interests of the Class. Id.

E. NO OBJECTION HAS BEEN MADE TO THE SETTLEMENT

There has not been a single objection and only one opt out to the settlement, which is a testament to the fairness, reasonableness and adequacy of the settlement.

VIII.

AN AWARD OF ATTORNEYS' FEES AND COSTS IS REQUESTED WHEN A COMMON FUND HAS BEEN CREATED FOR THE BENEFIT OF THE CLASS

Class Counsel's application for an award of attorneys' fees in an amount of 30% of the settlement value created on behalf of the Class is reasonable and fair. The requested fee falls on the lower end of the Ninth Circuit's historical benchmark for attorneys' fees of 20% to 50% of a common fund and is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis. Further, the numerous retained Class Members signed contingent fee agreements allowing from a thirty-three and one-third percent (33-1/3%) to forty- five percent (45%) of the total fund (*See* Decl. of Kevin T. Barnes). This is evidence of the Class Members believing that a higher attorney fee percentage is reasonable.

The requested fees are extremely reasonable and the results achieved for the Class Members are excellent. Class Counsel respectfully requests that the Court enter an Order to that effect.

Class Counsel seeks a fee award calculated as a percentage of the total value of settlement, for the successful prosecution and resolution of this action. California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to Class Members by the settlement, not the amount claimed. (Serrano v. Priest (1977) 20 Cal.3d 25, 34; Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980); Vincent v. Hughes Air West, Inc. 557 F.2d 759, 769 (9th Cir. 1977). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." Id. at 769.

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Under the "common fund" doctrine, "a litigant or a lawyer who recovers a common fund for he benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." Boeing, *supra*, 444 U.S. at 478. The Supreme Court explained:

> The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit. (Id. [citation omitted].)

Thus, the common fund doctrine ensures that each member of the class contributes proportionately to the payment of attorneys' fees recovered from monetary payments that the prevailing party recovered in the lawsuit. "Put another way, in common fund cases, a variant of the usual rule applies and the winning party pays his or her own attorneys' fees; in fee-shifting cases, the usual rule is rejected and the losing party covers the bill." Stanton v. Boeing, 327 F.3d 938 (9th Cir. 2003) at 967, citing Wininger v. SI Mgmt. L.P. 301 F.3d 1115 (9th Cir. 2002). In a typical "common fund" case, the defendant pays the entire lump sum settlement and has no further interest in the amount of the fee award, as any reduction in the fee award reverts to the class members. Stanton, *supra*, 327 F.3d at 971.

The Common Fund Doctrine is predicated on the principle of preventing unjust enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits, the court may spread litigation costs proportionally among all the beneficiaries to compensate those who created the fund. Further, the Rutter Group California Practice Guide: Civil Trials and Evidence acknowledges the applicability of the common fund doctrine and describes it as follows: "Where the lawsuit results in the recovery of a fund or property benefitting others as well as the plaintiff (e.g., a class action), the court has inherent equitable power to order Plaintiff's attorney's fees paid out of the common fund or property." [See Serrano, *supra*, 20 Cal.3d at 35.]

Such 'fee spreading' assures that all those benefited by the litigation pay their fair share of obtaining the recovery. Lealao v. Beneficial Calif., Inc. (2000) 82 Cal.App.4th 19, 26 ("Percentage fees have traditionally been allowed in such common fund cases." Id. at 27.

Despite dicta in one California court of appeal case critical of percentage fee awards, the Supreme Court has long approved of awarding fees as a percentage of the settlement. Serrano, *supra*, 20 Cal.3d at 35 describes percentage fee awards, has never been overruled, and remains good law.

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The most extensive California Court of Appeal discussion of class fee awards appears in Lealao, *supra*, 82 Cal.App.4th at 27. Lealao applied a lodestar analysis in favor of a percentage of the settlement recovery, but did not disapprove of percentage fee awards. Since Serrano, there has been a "groundswell of support for mandating the percentage-of-the-fund approach in common fund cases." Id. Bell v. Farmers Ins. Exchange (2004) 115 Cal.App.4th 715, 726, 765 recently approved a 25% fee award in wage and hour class case.

In a case affirming the denial of fees to a successful objector to a class action settlement, Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal.App.4th 387, recently discussed the common fund doctrine developed by the U.S. Supreme Court: "The common fund doctrine, frequently applied in class actions when the efforts of the attorney for the named class representatives produce monetary benefits for the entire class, to allow a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit." (Id. at 397.) Thus, two recent California cases affirm the continued validity of percentage fee awards in state cases. Under these principles, a percentage of the common fund fee award is properly based on the total settlement value of $1,500,000.

For Class Counsel, the fees here were wholly contingent in nature and the case presented far more risk that the usual contingent fee case. There was the prospect of the enormous cost inherent in class action litigation, as well as a long battle with a large corporate Defendant. That prospect has previously become reality, in both trial courts and the Court of Appeals in other wage and hour Class litigation. Class Counsel risked not only a great deal of time, but also a great deal of expense to ensure the successful litigation of this action on behalf of all Class Members.

IX.

AN AWARD OF ATTORNEYS' FEES AS REQUESTED IS APPROPRIATE UNDER THE LODESTAR METHOD

Under either theory of awarding fees, the case that should govern the court's decision is Lealao, *supra*, 82 Cal.App.4th 19 (2000). Lealao stands for the proposition that court-awarded attorneys' fees should approximate what counsel could get on the free market for the same services. Id. at 50.

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Specically, Lealao holds that if the Court sets fees under a lodestar, the multiplier should consider what counsel would have earned on the free market. The free market is determined by the percentage of the common fund, not the lodestar amount. (Id.) Accordingly, whatever method the Court uses to set fees, the Court should look to what the free market would bear under any circumstances. Even if the Court awards fees under the lodestar method, under Lealao, the lodestar fees should be adjusted by a multiplier to reflect the percentage of the fund. (Id. at 19 and 50.)

Here, Class Counsel earned the requested fee, as this case was vigorously litigated. This case was a lot of work. At least 350.7 hours will have been expended by The Law Offices of Kevin T. Barnes and Law Offices of Joseph Antonelli. The issue in this motion is not why the court should award a fee to commensurate with 30% of the fund, but why the court should not award such a fee. The settlement comes after productive litigation, all the while when the viability of wage and hour class action continues to be reviewed by the state Supreme Court. These facts, as well as others discussed below, warrant approval of the requested fee.

Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent on the case and the reasonable hourly compensation of the attorney. The base amount is then adjusted in light of various factors. (Serrano, *supra*, 20 Cal.3d at 48).

To summarize Plaintiffs' lodestar request, Plaintiffs' counsel's time summaries show that they will have worked 350.7 hours on this case . They request the Court find that their requests of a $700 hourly rate for Kevin T. Barnes and Joseph Antonelli and $550 an hour for Gregg Lander. At the requested rates, this results in a total lodestar amount of $225,332.50. The Plaintiffs request a multiplier of 1.99 to obtain the requested fee of $450,000.

A. COUNSELS' HOURLY RATE

Counsel requests an hourly rate of $700 for Kevin T. Barnes and Joseph Antonelli and $550 an hour for Gregg Lander.

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. The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the attorney's skill and experience, the nature of the work performed, the relevant area of expertise and the attorney's

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customary billing rates. Flannery v. California Highway Patrol (1998) 61 Cal. App. 4th 629, 632.

One difficulty in determining the hourly rate of attorneys of similar skill and experience in the relevant community is the scarcity of hourly fee paying clients in class action litigation. As a practical matter, few if any consumers pay attorneys' fees on an hourly basis for such extensive litigation, and thus retainer agreements in such cases are based on a contingency fee relationship. Although there is no customary billing rate, the nature of class action work should be strongly considered by the court (Decl. Kevin T. Barnes). Courts have upheld rates as high as $450[1] per hour (in 1993) in employment matters. Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, *overruled on other grounds*.

A survey conducted by The National Law Journal for the year 2002 provides a sample of a billing rate for California lawyers. In that survey, six California firms provided their hourly billing rates. Of those six firms, five regularly charge in excess of $500.00 per hour for their partners. In fact, four of the firms charge as high as $600.00, $620.00, $650.00, and up to $850.00 per hour. These firms are located in Orange County, Los Angeles County, San Francisco County and San Diego County. (*See* the National Law Journal Survey attached as Exhibit 3 to the Decl. of Kevin T. Barnes) the types of firms that Plaintiffs' counsel regularly opposes in these class action cases. The only difference is that these defense attorneys are paid on a monthly basis and do not have to advance any costs on a case. Likewise, plaintiff's counsel who handled an individual employment case that was amended $800.00 an hour in the case of Clifford v. American Drug Stores, Inc. (not officially published) (See Exh. 4 to the Decl. of KTB). To the contrary, Plaintiffs' counsel is only paid if they win, which in this case will result in payment approximately two and a half years after the case was originally signed filed.

Finally, Plaintiff attaches the Declaration of Richard M. Pearl in support of a Plaintiff's Motion for Final Approval in the case of Rosa Cantu, et al. v. Pacific Bell Telephone Company, Case No. BC 441237, dated January 4, 2011. (See Declaration of Richard M. Pearl attached as Exh. 5 to the Decl. of KTB). Mr. Pearl specializes in issues related to cost-award attorney's fees, including the representation of parties in fee litigation and appeals, serving as an expert witness and serving as a mediator and arbitrator in disputes concerning attorney's fees and related issues.

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[1] Adjusted for inflation, $450 in 1993 equals over $700 in 2011.

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Mr. Pearl is also the author of California Attorney's Fee Awards (3d ed Cal. CEB 2010), as well as the author of the Second Edition, years 1994 through 2008. He has also authored numerous other publications on attorney's fees, as set forth in his Declaration. (Id. at paragraph numbers 4 and 5).

Mr. Pearl has reviewed the comparable hourly rates of attorney fees in California. He confirms that courts have approved hourly rates of attorneys as follows:

- Rates up to $875.00 in Savaglio, et al. v. Wal-Mart, Alameda County Superior Court, Case No. C-835687-7 (before applying a 2.36 multiplier);
- Rates of up to $750.00 in Kashmiri, et al. v. Regents of UC, San Francisco County Superior Court (before applying a 3.7 multiplier);
- Rates of up to $750.00 in Environmental Law Foundation v. Laidlaw Transit, Inc., San Francisco Superior Court, Case No. CGC-06-451832 (before applying a 1.25 multiplier). (Id. at pages 4 and 5).

Additionally, Mr. Pearl has reviewed numerous declarations, depositions and surveys of legal rates on a non-contingent basis for the year 2009 and found hourly rates of up to $775.00, $795.00, $800.00, $855.00, $950.00, etc. (Id. at pages 6-12). These are non-contingent rates where payment in full is expected promptly upon billing. (Id. at page 13). These rates indicate that the requested hourly rate, as well as the multiplier, is reasonable in the case-at-hand in view of Plaintiff's counsel experience, the result achieved in this case and the contingent nature of the fees in class action cases.

All of counsels' skill and experience justify the requested rate. The Law Offices of Kevin T. Barnes and Joseph Antonelli practice litigation with a focus on representing employees in employment matters on class action cases (Decls. of Kevin T. Barnes and Joseph Antonelli).

In sum, Class Counsel are attorneys who command a high rate. They have had success in overtime class actions, are held in high regard by the legal community, and their practice is an unusual niche area. This case dealt with an area of the law that is very much in dispute and appellate cases pending before the California Supreme Court made this a very risky case. It required an attorney with great skills and financial backing as it involved a highly specialized area of employment law that

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requires skilled and experienced attorneys. To obtain such an attorney on the free market, a client must pay appropriate compensation. Therefore, Plaintiff's Counsels' requested rate is fair and reasonable.

B. COUNSELS' HOURS SPENT ON THE CASE

Counsel will spend 350.7 hours litigating this case and bringing it to fruition. This includes 20 hours which Counsel collectively expects to expend in administering the settlement including preparation for and attending the final approval hearing and settlement distribution. (Decls. of Kevin T. Barnes and Joseph Antonelli). Thus, counsel requests that the court find that these hours were reasonable expended in this litigation.

The courts are quite liberal in the evidence required to prove an attorney's hours. Detailed time records are *not* required. An attorney's testimony alone may suffice: "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." Martino v. Denevi (1986) 182 Cal. App. 3d 553, 559.

Reasonable hours include, in addition to time spent during litigation, the time spent before the action is filed, including time spent interviewing the clients, investigating the facts and the law, and preparing the initial pleadings. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 62, 100 S. Ct. 2024, 2030, 64 L. Ed. 2d 723 (1980). Further, the fee award should include fees incurred to establish and defend the attorneys' fee claim. Serrano v. Priest (1982) 32 Cal.3d 621, 639.

C. A MULTIPLIER OF THE LODESTAR SHOULD BE AWARDED TO ACCOUNT FOR THE SUCCESSFUL RESULT, THE CONTINGENT RISK OF LITIGATION AND THE PERCENTAGE OF FEES COUNSEL WOULD HAVE RECEIVED ON THE FREE MARKET

Once the court establishes the lodestar amount, it may enhance the fee award by a multiplier in order to make an appropriate fee award. (Serrano III, 20 Cal. 3d at 48.) The pertinent factors include the difficulty of the questions involved and the skill in presenting them, the contingent nature of the fee award, the extent to which the litigation precluded other employment, and the percentage-of-the-fund the attorney would have received on the fair market. (*Id.*, Lealao, *supra*, 82 Cal. App. 4th at 49.) However, this list is not exhaustive and the court can consider other factors it deems important in setting the multiplier. (*Id.* at 40.) A limitation in setting the multiplier is that the court cannot duplicate

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factors already included in the lodestar. (Ketchum v. Moses 24 Cal.4th 1122, 1139 (2001).)

In applying the multiplier, *Newberg on Class Actions* states that "[m]ultipliers ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied. A large common fund award may warrant an even larger multiplier." (*Newberg on Class Actions* Vol. 3, §14.03, p. 14-5, Dec. 1992.). Applying these factors to the instant action demonstrates that Plaintiffs' counsel should be awarded fees based upon a multiplier of 1.99.

1. The Court Should Increase the Multiplier Based on a Percentage-of-the-Fund to Ensure That the Fee Awarded is Within the Range of Fees Freely Negotiated in the Legal Marketplace in Comparable Litigation

If the Class Members paid the fees that the market would bear, they would pay a fee of 1/3-50% of any recovery. Since this is the market rate, Lealao v. Beneficial California, Inc., *supra*, indicates that the fee should be enhanced to reflect what the Class Members would pay on the open market. Lealao held a trial court should award lodestar fees by examining the percentage-of-the-benefit and adjusting the lodestar calculation accordingly. (*Id.* at 49, 53.) Lealao indicated that this is an upward adjustment and should be akin to a contingency fee recovery; the court stated, "An adjustment reflecting the amount of the Class recovery is not significantly different from an adjustment reflecting a percentage of that amount; and California courts have evaluated a lodestar as a percentage of the benefit." (*Id.* at 46.) The Lealao method appears particularly appropriate because class actions generally are contingency fee cases for Plaintiffs and the class action clients do not expect to pay an hourly fee.

The rationale of Lealao comports with the purpose of the multiplier. The multiplier is "primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases[.]" (Ketchum v. Moses, *supra*, 24 Cal.4th 1122, 1138.) Lealao reasons likewise that "the law should mimic the market":

> Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through Class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for Defendants to increase injurious behavior. [Citations.] It has therefore been urged (most persistently by Judge Richard Posner) that in defining a 'reasonable fee' in such representative actions the law should 'mimic the market.' [Citations].
> 'In the class action context, that would mean attempting to award the fee that informed private bargaining, if it were truly possible, might have reached. The simplest way for the law to duplicate the bargain that informed parties would reach if agency costs were low is

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to look to fee award levels in actions brought by sophisticated private parties under the same or comparable statutes.' (Lealao, *supra*, 82 Cal.App.4th at 47-48.)

2. An enhancement based on a percentage of the fund is justified based on factors stated in Lealao

Lealao contains several factors justifying an enhancement based on the percentage-of-the-benefit, and lack of objections by Class Members, (82 Cal. App. 4th at 51) and commendable conduct by counsel. (*Id.*) These factors are present in this case. **As in Lealao, the Class was notified of the settlement and attorney's fee with no objection and only one opt out filed.** The extreme effort undertaken by counsel, as shown by their hours, shows commendable conduct (Decls. Kevin T. Barnes and Joseph Antonelli).

Prompt settlement *cannot* be used to diminish the fee or the enhancement based on a percentage-of-the-fund. (Lealao, 82 Cal. App. 4th at 52 [the promptness of settlement "cannot be used to justify the refusal to apply a multiplier[.]") According to Lealao, the Supreme Court has placed "an extraordinarily high value" on settlement, and counsel should be rewarded, not punished, for achieving this goal. (*Id.*)

3. The Difficulty of the Questions Involved and the Skill in Presenting Them

This case involved numerous difficult questions, requiring counsel's skill to present, which weighs toward using the multiplier under Serrano III. (20 Cal. 3d at 48.) Plaintiffs' counsel used a high level of skill in addressing the difficult questions in this case. The proof of Plaintiffs' counsel skills in this area of the law lies in the size of the settlement and the recoveries of individual Class Members. "The large recovery in this case is thus a more authentic indication of the value of counsel's contribution than might otherwise be true." (Lealao, at 53.)

On the meal period claim, Plaintiffs knew there were great risks that the meal period claim would not be certified based on the appellate ruling in Brinker v. The Superior Court of San Diego (2008) 165 Cal.App.4th 25 (review granted by the California Supreme Court) as well as the recent Chipotle Mexican Grill case (Court of Appeal Second District, October 28, 2010, 2010 WL 4244583) (review granted by the California Supreme Court) and Lamps Plus Overtime Cases (Court of Appeal Second District, May 11, 2011, 2011 DJDAR 6615) and several other court of appeal decisions. The Brinker court held that employers could not impede, discourage or dissuade employees from taking meal periods. They need to only provide them and not insure

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they are taken. The Brinker court also held the analysis of whether a meal period was provided and reasons why a class member might not take such a meal break was not appropriate for class certification. This standard, if adopted by the California Supreme Court, could be extremely problematic for Plaintiffs meal period claim in this case. Several other state and federal appellate decisions have also adopted this same standard and in fact represent the overwhelming majority on this issue.

The same Brinker, Chipotle Mexican Grill, Lamps Plus Overtime Cases and other appellate decisions also state that rest break claims require individual analysis and cannot be verified since no time records are kept of rest periods.

Even with the significant risk and dispute of the laws at issue in this case, Class Counsel did an excellent job in discovery and preparation to obtain the settlement at hand. Thus, the multiplier should be enhanced by the difficulty of the questions involved and the skill in presenting them.

4. Contingent Risk of Litigation

The multiplier should be enhanced by the contingent nature of counsel's fee recovery. The risks of a class action case are enormous. Litigating a wage and hour class action through trial takes years and requires the investment of thousands of dollars (Decls. Kevin T. Barnes and Joseph Antonelli). Litigation costs in the present case are $13,996.17. Attorneys willing to undertake this risk deserve a high rate.

Second, overtime laws are still developing, and a change in the law always threatened to wipe out the Plaintiffs' recovery. In fact, during the pendency of this case, numerous appellate decisions have attacked the validity of class action wage and hour cases directly relevant to this case, which could have significantly affected its value. As set forth above. it is this contingent nature of these cases that justify an award when and if Plaintiffs' counsel is able to obtain a settlement or verdict, because often times no money is recovered in a case, including Plaintiffs' costs, let alone their time.

5. This Litigation Precluded Other Employment

A practice can only properly litigate so many cases at one time. The requirements of this were significant, requiring over 350.7 hours of attorney time. Counsel was precluded from other

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employment (Decl. of Kevin T. Barnes and Joseph Antonelli). This factor should be considered in enhancing the multiplier.

X.

THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

The request for reimbursement of costs is fair and reasonable. Plaintiffs' counsel's total costs are $13,996.17. Likewise, the Claims Administrator's total costs are $17,000. The costs are all litigation related costs (Decls. of Kevin T. Barnes, Joseph Antonelli and Stacy Roe). The authority for the court to award this is the parties' settlement agreement. This request should be approved.

XI.

THE CLASS REPRESENTATIVE ENHANCEMENT FEES ARE REASONABLE AND ARE STANDARD IN CLASS ACTIONS

The named Plaintiffs each request an enhancement of $15,000. This amount is proper because of the named Plaintiffs' involvement in this litigation.

The Class Representatives have been instrumental in keeping us advised of issues which are/were occurring and affected the Class Members and spend many hours working with class counsel on this case. The class representatives appeared at the full day mediation. Furthermore, the named Plaintiffs have been involved in this settlement process, have advised Class Counsel on circumstances relevant to settlement considerations, and have given their approval to it (Decl.'s of Kevin T. Barnes and Toma Barseghian).

Courts have routinely granted approval of settlements containing such enhancements. In League of Martin v. City of Milwaukee, 588 F.Supp.1004 (E.D. Wis. 1984), the court held that the proposal settlement properly granted the named Plaintiff individual relief. It is "not uncommon for Class Members...to receive special treatment in settlement...[The Plaintiff]...had been instrument in prosecuting this lawsuit since the date it was filed." *Id* at 1024. In Kyriazi v. Western Elec. Co., 527 F.Supp.18 (D.N.J. 1981), a named Plaintiff in a Title VII class action was awarded individual relief of back-pay and interest, reinstatement, punitive damages and counsel fees. Similarly, in Women's Committee for Equal Employment Opportunity v. NBC, 76 F.R.D. 173 (SDNY 1977), the court

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approved as fair a settlement that included awards to 16 named Plaintiffs of virtually all the damages they sought.

In Re Lo Re v. Chase Manhattan Corp., 1979 U.S. Dist. LEXIS 12210, 19 FEP Cas. (BNA) 1366 (SDNY 1979), the court approved payment of $229,000 out of a $1,579,000 settlement fund to the named Plaintiffs for their individual claims. One of the factors considered by the court in determining that such payments were fair was the fact that none of the absent Class Members objected to the enhancements. The court held that this fact showed that the Class Members were not offended by these enhancements. Id. at 17. In the present case, there have also been no valid objection to this settlement, and one can, therefore, infer that none of the Class Members have any disagreement with such individual enhancements. Furthermore, Class Counsel have settled other class action where such enhancements were granted. Class Counsel have received approval settlements in over seventy-five wage and hour class actions. These settlements included enhancements for the named Plaintiffs. This practice is not novel and is, in fact, increasingly common in such litigation. There is significant case law supporting such awards.

Here, this litigation has resulted in a valuable benefit to the 112 Class Members who are participating in the settlement because of the named Plaintiffs. The enhancement should be awarded for this commitment and dedication to the litigation. The Plaintiffs are entitled to the requested enhancement for their extensive work performed. They were unwilling to settle the class action until they felt it was in the best interests of the Class. The Plaintiffs always put the interests of the Class before their own interests (Decl.'s of Kevin T. Barnes, Robert Jaros and William B. Rose).

Additionally, the Class Representatives risked a potential judgment against them if this matter was unsuccessful. Case law holds that a losing party is liable for the prevailing party's costs. Therefore, the Class Representatives could have been liable for tens of thousands of dollars if this case were unsuccessful. Few individuals are willing to take this risk, and these people were champions on behalf of others' cause with potential monetary risks which were very significant. They both also signed a general release of all claims, not just wage and hour claims and felt harassed /affected by serving as a class representative in this case. Finally, there has been no objection to the requested enhancement, and

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defense counsel agrees that the enhancement is fair and reasonable. Accordingly, the enhancement is fair and reasonable (Decl.'s of Kevin T. Barnes, Robert Jaros and William B. Rose).

XII.

CONCLUSION

Plaintiff respectfully requests that the Court grant final approval of the class action settlement.

Dated: September 28, 2011

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