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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANIEL MALAKHOV, an individual, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

CMGRP, INC., a New York corporation, d.b.a. ROGERS & COWAN, INC., THE INTERPUBLIC GROUP OF COMPANIES, INC., a Delaware corporation; and DOES 1 through 50, inclusive,

Defendants.

CASE NO. CV11-06605 GW (FMOx)
(Assigned to the Hon. George H. Wu, Courtroom. 10)

CLASS ACTION (FRCP 23) and COLLECTIVE ACTION (FLSA, 29 U.S.C. §§ 206 *et seq.*)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER (1) CONDITIONALLY CERTIFYING SETTLEMENT CLASS, (2) PRELIMINARILY APPROVING PROPOSED SETTLEMENT, (3) APPROVING FORM OF NOTICE TO CLASS MEMBERS, CLAIM FORM AND EXCLUSION FORM, and (4) SETTING HEARING FOR FINAL APPROVAL

Date: **November 19, 2012**
Time: **8:30 AM**
Courtroom: **10**

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MEMORANDUM OF POINTS AND AUTHORITIES

Proposed Class Representative, DANIEL MALAKHOV (hereinafter referred to as "Plaintiff" or "Class Representative") respectfully submits the following points and authorities in support of his motion for preliminary approval of the proposed class action settlement:

I. INTRODUCTION

The Parties hereto have reached a settlement subject to the approval of this Court. During a mediation on July 18, 2012 conducted by a widely respected mediator, Jeffrey Krivis, Plaintiff and the Defendants CMGRP, INC., a New York corporation d.b.a. Rogers & Cowan, THE INTERPUBLIC GROUP OF COMPANIES, INC., a Delaware corporation (hereinafter, "Defendants") entered into a comprehensive settlement agreement based upon the terms set forth in a memorandum of understanding executed at the time of mediation. The terms of this settlement were revised and finalized in a the Parties' **Stipulation and Agreement of Compromise, Settlement and Release** (**Exhibit 1** hereto, which is incorporated herein by reference, and sometimes hereinafter referred to as "Settlement Agreement" or "Stipulation of Settlement.")

Pursuant to the Stipulation of Settlement and this unopposed motion, Plaintiff requests the Court to enter an order: (1) preliminarily approving the proposed Settlement, (2) preliminarily certifying the proposed Settlement Class for purposes of settlement only, (3) preliminarily certifying Plaintiff as the Class Representative, (4) appointing Plaintiff's counsel as counsel for the Settlement Class, (5) directing that the Classes be given notice of the pendency of this action and the settlement, and (6) scheduling a hearing to consider final approval of the settlement, entry of a proposed final judgment, and Plaintiff's counsel's application for an award of attorneys' fees and reimbursement of costs and expenses, as well as an Enhancement Award to the Class Representative.

The currently pending action seeks to certify both (a) a Rule 23 Class based on California wage & hour claims and (b) a Collective Class based on the Fair Labor Standards Act, 29 USC §§ 201 et seq. (FLSA). At issue are approximately 37 full-time equivalent job positions that have been occupied by approximately 169 employees of Defendants during the relevant class periods from June 30, 2007 to the date of preliminary approval. The core claims in the putative class and collective action are nonpayment of minimum and/or overtime wages, meal and rest break violations, pay stub violations, waiting time penalties, and unfair business practices.

The two settlement classes are defined as follows:

Rule 23 Class Definition: All of Defendants' California-based employees who worked for Defendants during the Relevant Time Period (i.e. June 30, 2007 forward) and who were categorized by Defendants as non-exempt employees, including hourly-paid employees and overtime-eligible, salaried employees in the Rogers & Cowan, PMK + BNC, Axis, GolinHarris and Weber Shandwick business units in the following job positions: Account Coordinator, Temporary Account Coordinator, Assistant, Temporary Assistant, Receptionist, Temporary Receptionist, Administrative Assistant, Temporary Administrative Assistant, Executive Assistant, Publicity Assistant, Intern (paid), Media Relations Intern (paid), Design Intern (paid), and Entertainment Intern (paid).

FLSA Collective Class Definition: All of Defendants' employees who worked for Defendants during the Relevant Collective Action Time Period, which is 3 years prior to date of the filing of this amended complaint (i.e. June 20, 2008 forward) and who were categorized by Defendants as non-exempt employees, including hourly-paid employees and overtime-eligible, salaried employees in the Rogers & Cowan, PMK + BNC, Axis, GolinHarris and Weber Shandwick business units in the following job positions: Account Coordinator, Temporary Account Coordinator, Assistant, Temporary Assistant, Receptionist, Temporary

Receptionist, Administrative Assistant, Temporary Administrative Assistant, Executive Assistant, Publicity Assistant, Intern (paid), Media Relations Intern (paid), Design Intern (paid), and Entertainment Intern (paid).

The Settlement does not require a claims procedure for state law claims for the Rule 23 Settlement Class. However, because the FLSA requires class members to affirmatively opt in to be bound by any settlement, a claims procedure will be utilized for the FLSA claims. Only one claim form will be used. Thus, to obtain proceeds under the settlement, one need do nothing to obtain a monetary payment for settled state law claims; however, to receive additional compensation for claims under the FLSA, collective class members will have to submit a claim form.

This is a non-reversionary settlement. To the extent that not all members of the putative class participate, those monies that would otherwise be allocated to non-participating members will be redistributed on a pro-rata basis to participating class members. A true common fund is being created to settle this case. In addition to payment of the Gross Fund Value of $327,500.00, Defendants will be responsible for standard employer burdens (e.g. Social Security, SDI, etc.) on the portions of the settlement payment allocated to wages.

The Parties have agreed to the proposed Notice of Pendency of Class Action, Claim Form, and Request for Exclusion form – collectively referred to as the "Notice Packet" -- are attached as **Exhibits 2, 3 and 4** hereto. The Parties have further agreed to the following: (a) the terms and conditions under which notice will be provided, (b) the amount to be recovered by Class Counsel for attorneys' fees and costs (i.e. 1/3 of the Gross Settlement Fund), (c) an appropriate Enhancement Award for the Class Representative ($20,000), (d) a qualified, experienced claims administrator (CPT Group), (e) the estimated fees of the Claims Administrator (which the Parties agreed in the Stipulation would be approximately $20,000 but which the administrator has re-bid at $7400, with the class receiving the benefit of the difference).

The proposed settlement meets the criteria for preliminary approval set forth in the *Manual for Complex Litigation*, 4th Ed. It is well within the range of what is fair, reasonable, and adequate for this case; thus, Plaintiff requests that the Court preliminary approve the settlement.

II. SUMMARY OF THE LITIGATION

A. History of the Complaint

On June 30, 2011, Plaintiff DANIEL MALAKHOV initially filed his class action complaint in state court. The complaint asserted class claims against the Defendants, for "[a]ll of Defendants' California-based employees who worked for Defendants during the Relevant Time Period and who were categorized by Defendants as non-exempt employees." The complaint sought, *inter alia*, unpaid overtime compensation, unpaid minimum wages, meal and rest break penalties, and the standard derivative claims based thereon, it e.g. pay stub violations, waiting time penalties, and unfair competition. Plaintiff premised his theories for recovery of minimum wages and overtime wages on both state and federal law. Accordingly, Defendants removed the case to this Court.

On June 20, 2012, Plaintiff filed a First Amended Complaint replacing Defendant Rogers & Cowan, Inc. with the correctly named corporate Defendants, i.e., the Interpublic Group of Companies and CMGRP, Inc., the latter of which does business under the fictitious business name of Rogers & Cowan. Plaintiff also narrowed the class definition to include employees of the Defendants, who were employed in positions that Plaintiff had ascertained were more similar to the job held by Plaintiff herein, rather than seeking relief for all non-exempt employees, irrespective of the similarity of their job duties.

Plaintiff's core allegations against the Defendants were that Defendant's had maintained a practice of refusing to pay wages for time spent by Class members (1) attending company-sponsored events to accompany the company's clients and/or perform other labor to facilitate the production of such events, (2) attending

client-sponsored events to assist in developing client relationships, (3) performing various and sundry tasks for company clients, and (4) performing personal services for company managers and/or executives. In sum, Plaintiff alleged that junior employees, who wanted to move up and create a career from themselves in the Defendant companies, had to put in a lot of "volunteer" hours if they wished to succeed.

Although the litigation was sharply contested, the Parties did agree on perhaps the most basic issue in the case, that is, with respect to the job positions in dispute, Defendants unquestionably had to pay for employees to work at after-hours events. Before the implosion of the economy, there were multiple media events on a weekly basis that employees like Plaintiff were required to attend as part of their work for the Defendants. While it may have appeared to be fun cocktail Parties and/or "A List" celebrity events that many would pay to go to, Plaintiff and his coworkers were doing real labor at these events, labor for which they should have been paid. Defendants contended they had in fact paid for all such labor; whereas, Plaintiff contended that much of the time worked by persons occupying the job positions in question was off the clock and thus uncompensated.

While Plaintiff did not personally witness what happened in the other agencies, a survey of putative class members in these other agencies conducted by Plaintiff counsel confirmed that the same pressures as existed in Rogers & Cowan to work without compensation at after-hours events, existed elsewhere in the Defendants' agencies. Had this case not settled, both sides were prepared to submit declarations from dozens of witnesses they had interviewed, declarations addressing the quantum of off the clock work, if any, performed by putative class members in Defendants' various agencies. Similarly, the Parties were prepared to present numerous declarations regarding the Defendants' policies and practices with respect to the provision of meal and rest periods in conformity with California law. However, given the risks and costs attendant to continued litigation, the

Parties determined it would be in the best interests of all to resolve this matter by way of settlement.

B. Discovery and Investigation

Information was exchanged by the Parties through their Rule 26 Initial Disclosures. In addition, Class Counsel served written discovery upon Defendants and conducted depositions of three persons who responded to questions both in their individual capacity and as corporate designees pursuant to FRCP Rule 30(b)(6). In their corporate representative capacity, they were able to provide testimony regarding the duties and responsibilities of class members, the time worked by them, payroll administration, and much more with respect to not only Defendants' Rogers & Cowan business unit, but all of the other business units where the job positions in question existed, such as Axis, GolinHarris, and Weber Shandwick.

Plaintiff also propounded one set of written discovery, including requests for production on both of the Defendants of 73 categories of documents, form and special interrogatories. Unfortunately, obtaining responsive documents to the production process was anything but easy. It involved a protracted process involving an almost constant flow of multiple meet and confer letters exchanged between the Parties over several months addressing whether putative class member discovery would be allowed and the scope of such discovery. The extensive letter writing devolved into worked up motions to compel, which were ultimately avoided when the Parties agreed to detailed compromises, compromises that were reduced to stipulations regarding discovery procedures that the Parties submitted to this Court for approval.

As part of the discovery process (in response to pressure from Plaintiff), Defendants ultimately produced 29,566 documents, which documents were then individually reviewed by Plaintiff's Counsel and Plaintiff for evidence supportive

of Plaintiff's theory of liability. Individually reviewing these documents was no small task.

The Parties also sent out a *Belaire West* letter, and Plaintiff was thus provided a class list with all relevant contact information. Plaintiff's counsel succeeded in conducting interviews of approximately one third of the putative class members. The interviewees included both former and current employees in similar positions to Plaintiff. As such, Plaintiff's counsel was able to obtain a decent overview of the Defendant's operations to assess the uniformity of the pay practices Plaintiff had alleged were systematically applied to the class. Had this matter not settled, Plaintiff was prepared to present between 6 to 10 declarations to support Plaintiff's claims. Given the fact that there were only approximately 37 full-time equivalent positions at issue, Plaintiff expected the Court to give fairly heavy weight to these declarations.

Pursuant to the discovery stipulations outlined noted above, Defendants engaged an IT specialist to search a large number of e-mail accounts with specified keywords, such as "volunteer" and other terms that were utilized within the business to describe the uncompensated work that Plaintiff alleged the putative class of nonexempt employees were expected to perform outside of regular business hours. After having conducted this search, which was represented to have cost approximately $10,000, any e-mails and/or attachments thereto containing the keywords were produced for inspection by Plaintiff and his counsel.

As a consequence of Plaintiff's investigation and discovery, Plaintiff's counsel learned that the initial definition proposed by the Plaintiff was perhaps overly inclusive, in that it sought to represent *all* nonexempt employees in dozens of agencies that work in a semi-autonomous manner under the umbrella the Interpublic Group of Companies. The proposed class included many employees with job titles and duties that were quite different than Plaintiff's. The initial

class definition comprised multiple job classifications– some hourly, some salaried, some traditionally exempt, and even some high-level free lance workers. In light of the potential lack of cohesion among putative class members, Plaintiff willingly narrowed the proposed classes to those persons who occupied job positions that were similar to that which Plaintiff occupied as an Account Coordinator in the Defendants' agencies that were similar in nature to the Rogers & Cowan agency within which the Plaintiff had worked. By narrowing the focus of the proposed class and collective actions, Plaintiff substantially reduce the number of persons potentially affected by the action, but believed he had substantially improved the odds of certifying the class.

Subsequent to the filing of the FAC and the depositions of both Plaintiff and the key witnesses from the Defendants' operations, as well as all of the other discovery and investigation identified above, the Parties agreed to engage the services of a widely respected class action mediator, Jeffrey Krivis. In anticipation of the mediation, Defendants provided Plaintiff with approximately 10 declarations from putative class members in an effort to demonstrate to Plaintiff (and ultimately to this Court if necessary) that the practices of which Plaintiff had complained may not have been as uniform as purported in the allegations of the complaint.

III. SUMMARY OF THE SETTLEMENT

The settlement agreement was reached in arm's-length negotiations, where both sides had been fully apprised of the respective strengths and weaknesses of their case as a consequence of the substantial discovery and investigation they had already conducted. At the end of a full day of mediation, general terms of the settlement were agreed upon, and the same were reduced to a memorandum of understanding. Thereafter, another round of negotiations ensued during which the parties negotiated the terms of the substantially more detailed settlement agreement before this Court. Those negotiations revolved around details of

implementation, form of notice, methods for follow up contact with non-responsive class members, and the method of serving such notices. Again, due to persistence of all counsel, the Parties were successful in finalizing the Stipulation for Settlement now being presented to this Court for preliminary approval.

At all times, the Parties' settlement negotiations have been non-collusive, adversarial, and at arm's length. The above-described investigation and evaluation, as well as discovery and the information exchanged during the settlement negotiations, were and are more than sufficient to assess the merits of the Parties' respective positions, to ensure that the settlement is fair and equitable.

The terms of the settlement are set forth in the Stipulation for Settlement attached hereto as Exhibit 1 and incorporated herein by reference. The principal terms are:

A. Defendant shall pay to $327,500 (the "Gross Settlement Fund") to settle the case. Defendant shall be responsible for any and all social security and payroll taxes and related payroll tax expenses.

B. One-third (1/3rd) of the Gross Settlement Fund is to be allocated to attorneys fees and costs for the work already performed by Class Counsel in this case, and all of the work remaining to be performed in documenting the Settlement, securing Court approval of the Settlement, making sure that the Settlement is fairly administered and implemented, and obtaining dismissal of the action.

C. $20,000 is designated for the Class Representative, DANIEL MALAKHOV, as consideration for serving as a Class Representative.

D. Defendant will pay for the costs of claims administration, which, in the settlement agreement was contemplated to be approximately $20,000, but which has been competitively bid to $7400 with a reputable claims administrator, CPT Group. This is an administrator that has earned the confidence of counsel for both Parties based upon prior performance.

E. The balance of the Gross Settlement Fund after deductions (i.e. for attorney's fees and costs, the class representative enhancement fee, and the costs of administration) or the Net Settlement Fund is to be divided in a pro rata manner based upon workweeks worked by the participating class member compared to the aggregate number of workweeks worked by all class members during the Class Period.

F. The Settlement Class Members who complete a FLSA Consent Form and opt into the FLSA class will have their respective workweeks increased by 10% when calculating their portion from this fund.

G. The Parties have sought to rationally allocate the amounts in the settlement fund to the various claims in the causes of action in the operative complaint. The precise details of said allocation are set forth in the Stipulation for Settlement. However, generally speaking, monies are allocated for overtime claims under state law, meal and rest break violations, pay stub violation penalties, late payment penalties pursuant to Cal. Labor Code § 203, etc. Defendants will fund the settlement within five (5) days of the Effective Date of final approval by the Court, as that term is defined in the Settlement Agreement. Essentially, the Effective Date is the date on which the Court's ruling that final approval is actually final and not appealable. For example, if there are no objections filed settlement, the date of Final Approval shall be the Effective Date.

H. The Parties have agreed on the form of notice to be provided to the Class. **The Notice of Class Action Settlement ("Notice") is** attached hereto as **Exhibit 2.** The proposed **Claim Form is** attached as **Exhibit 3**, and a **Request for Exclusion Form** is attached as **Exhibit 4**. These three documents are collectively referred to as the "Notice Packet." The Claim Form will include a calculation of each Class Member's estimated payment based upon the assumption that the relief sought by way of this preliminary approval motion is granted final approval.

IV. THE SETTLEMENT MEETS THE STANDARDS FOR PRELIMINARY APPROVAL

Federal Rule of Civil Procedure 23(e) provides that any compromise of a class action must receive Court approval. In determining whether a proposed settlement should be approved, the Ninth Circuit has a "strong judicial policy that favors settlement, particularly where complex class action litigation is concerned." (*In re Heritage Bond Litigation*, 2005 WL 1594403, citing *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).) This policy is driven by "an overriding public interest in settling and quieting litigation. . .[t]his is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense." (*Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).)

This approval "involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." (*Nat'l Rural Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 524 (C.D. Cal. 2004). At the preliminary approval stage, the Court need only "determine whether the proposed settlement is within the range of possible approval." (*Gatreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982).) Ultimately, a class action should be approved if "it is fundamentally fair, adequate and reasonable." (*Class Plaintiffs v. Seattle*, 955 F.2d at 1276. *See also Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ["the court's intrusion on what is otherwise a private consensual agreement negotiated between Parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating Parties, and that the settlement, taken as a whole, is fair,

reasonable and adequate to all concerned"].) There is further a "strong initial presumption that the compromise is fair and reasonable." (*In re Microstrategy, Inc. Sec. Litigation*, 148 F. Supp.2d 654, 663 (E.D. Va. 2001).)

Although at this stage of preliminary approval, the Court is not expected to engage in the more rigorous analysis as is required for final approval (*see Manual for Complex Litigation*, Fourth, § 22.661 at 438 (2004)), the Court's ultimate fairness determination will include balancing several factors, including some or all of the following:

> . . . the strength of plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and the stage of the proceedings; the experience and views of counsel; the presents of a governmental participant; and the reaction of the class members to the proposed settlement. (*Officers for Justice*, *supra*, 688 F.2d 615, 625.)

Not all of the above factors apply to every class action settlement, and one factor alone may prove determinative in finding sufficient grounds for court approval. (*Nat'l Rural*, 221 F.R.D. at 525-26.)

A. The Settlement Resulted from Arm's-Length Negotiations

There is an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. *Williams v. Vukovich*, 720 F.2d 909, 922-923 (6th Cir.1983). The proposed settlement here is the product of many hours of arm's-length negotiations between counsel for Plaintiff and counsel for Defendant. The Parties have conducted significant investigation of the facts and law during the prosecution of this action as detailed above. While Plaintiff reasonably believed that he would prevail in class certification and on the merits, he also had to consider the evidence proffered by Defendants that had the potential to completely frustrate his efforts on behalf of the class. The assistance of a well-respected and highly experienced mediator in

complex class actions was invaluable in helping the Parties come to a meeting of the minds, notwithstanding the starkly divergent views as to the prospects of Plaintiff's success not just at certification, but also on the merits. Moreover, the fact that Plaintiff's counsel has been actively litigating wage and hour class-actions in California since 1998 lends credence to his opinion in determining the propriety of the proposed settlement herein. The opinion of experienced counsel supporting the settlement is entitled to considerable weight. (*In re First Capital Holdings Corp. Fin. Prods. Sec. Litig*., MDL Docket No. 901 All Cases, 1992 U.S. Dist. LEXIS 14337, at *8 (C.D. Cal. June 10, 1992) [finding belief of counsel that the proposed settlement represented the most beneficial result for the class to be a compelling factor in approving settlement].

Plaintiff has also taken into account the uncertainty and risk of the outcome of further litigation, and the difficulties and delays inherent in such litigation. Plaintiff is aware of the burdens of proof necessary to establish liability for the claims asserted in the action, Defendant's defenses thereto, and the difficulties in establishing damages.

Based on the foregoing, Plaintiff and his counsel determined that the settlement set forth in the Agreement was and is a fair, adequate and reasonable settlement, and it is in the best interests of Plaintiff and the proposed Settlement Class. Defendant has concluded that any further defense of this litigation would be protracted and expensive for all Parties. Substantial amounts of time, energy and resources of Defendant have been and, unless this settlement is made, will continue to be devoted to the defense of the claims asserted by Plaintiff. Defendant has, therefore, agreed to settle in the manner and upon the terms set forth in the Stipulation of Settlement, to put to rest the claims set forth in the operative complaint.

/ / /

B. The Settlement Has No Obvious Deficiencies

The proposed settlement has no obvious deficiencies. Under the terms of the settlement, Defendant has agreed to create a fund consisting of $327,500. The Settlement provides no preferential treatment for Plaintiff or other Class members. Plaintiff will receive a distribution from the settlement proceeds calculated in the same manner as the distributions to all other Class Members. Moreover, the Settlement does not mandate excessive compensation for Plaintiff's counsel. Plaintiff's counsel is authorized to apply for an award of attorneys' fees not to exceed one-third (1/3) of the Gross Settlement Fund, and reimbursement of expenses, and any award of fees and expenses is subject to Court approval. As one might expect, when costs advanced by Plaintiff's counsel are approximately $15,000, and only one third of the settlement is allocated for fees and costs together, only approximately $94,000 or 28.8 % is allocated for fees, barely over the benchmark 25% that is a standard minimum payment for Class Counsel working on a contingency fee. As noted above, the Settlement was reached only after the mediation efforts of a highly experienced mediator. Each side evaluated the strengths and weaknesses of their case and independently came to the conclusion that this settlement represents a responsible means of addressing the claims of Plaintiff and the Plaintiff class, and the defenses of Defendant. Accordingly, the settling Parties urge this Court to grant preliminary approval.

V. APPLICATION FOR CERTIFICATION OF CLASS FOR SETTLEMENT PURPOSES

This Court can certify a class where a plaintiff demonstrates that the proposed class and proposed class representatives meet the four prerequisites in *Federal Rules of Civil Procedure*, Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – and one of the three requirements of *Federal Rules of Civil Procedure*, Rule 23(b). This Settlement meets the criteria.

1. Numerosity – The numerosity requirement is satisfied if the proposed class is "so numerous that joinder of all members is impracticable." (*Fed.R.Civ.P.* Rule 23(a)(1)). Here there approximately 169 persons who occupied the approximately 37 full-time equivalent positions at issue in this litigation. It would be highly impracticable to seek joinder of all 169 settlement class members in a mass action. Having previously litigated a group action with 128 individual plaintiffs, Plaintiff's counsel here can readily attest to the fiscal impracticability of a mass action on these claims.

2. Commonality – commonality relates to whether there are "questions of law or fact common to the class." (*Fed.R.Civ P.* Rule 23(a)(2).) Commonality is satisfied if there is one issue common to class members. (*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).) Here, there are several common issues, including but not limited to whether (a). Whether the members of the Class received the legal minimum wage or agreed rate under California law for all hours during which they were subject to Defendants' control; (b). Whether Defendants failed and continue to fail to provide meal periods and paid rest periods, free of duty, to the members of the Class in violation of the Labor Code and Sections 11 and 12 of the applicable IWC Wage Order(s); (c). Whether the members of the Class are entitled to seek recovery of compensation pursuant to Labor Code § 558 and, if so, for what time period(s); (d). Whether Defendants failed to timely furnish accurate itemized statements to the members of the Class in conformity with Labor Code § 226(a) and, if not, whether liability for the same accrues under Labor Code § 226(e) and (g); (e). Whether the members of the Labor Code § 203 Subclass are entitled to penalties pursuant to Labor Code § 203; (f). The correct statute of limitations for the claims of the members of the Class; (g). Whether Defendants' conduct constitutes unfair competition and/or business practices within the meaning of B&PC §17200 et seq.; (h). Whether the members of the Class are entitled to compensatory damages, and if so, the means

of measuring such damages; (i). Whether the members of the Class are entitled to injunctive relief; (j). Whether the members of the Class are entitled to restitution; (k). Whether Defendants are liable for pre-judgment interest; and (l). Whether Defendants are liable for attorneys' fees and costs. Of course Plaintiff contends there are several other common issues, and Defendants, as one would expect, denies the same. However, for purposes of settlement, the Defendants have stipulated to commonality.

3. Typicality – typicality under Rule 23(a)(3) is satisfied if the representative plaintiff's claims share a common element with the Class because they arise from the same course of conduct that gave rise to the claims of other Class members. (*In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig*., 122 F.R.D. 251, 256 (C.D. Cal. 1988).) Plaintiff's claims here are typical of those of other Class members. Defendants treated both Plaintiff and all members of the Class in a virtually identical manner with respect to the violations of law asserted herein. These violations of law arise out of Defendants' common course of conduct in requiring members of the Class to (a) work hours for which they were not properly compensated (in terms of basic minimum wages, premium overtime wages, or agreed rates), (b) forego duty free meal breaks and rest periods to which they were entitled, (c) receive inaccurate wage statements, and (d) endure unfair business practices within the meaning of B&PC § 17200, et seq.

4. Adequacy of Representation – adequacy under Rule 23(a)(4) is satisfied if the named plaintiff has no disabling conflicts of interest with other members of the class and plaintiff's counsel are competent and well qualified to undertake the litigation. (*Lerwill v. Inflight Motion Pictures, Inc*., 582 F.2d 507, 512 (9th Cir. 1978).) Here, Plaintiff is represented by counsel who has extensive experience in complex litigation and has protected the interests of the Class. (See declaration of Paul T. Cullen, filed herewith.) Additionally, no conflict exists between the Plaintiff and the members of the Class, because Plaintiff has been

damaged by the same alleged conduct and has the incentive to fairly represent all Class members' claims to achieve the maximum possible recovery.

5. Questions of Law and Fact Predominate – Plaintiff has also established that common questions of law or fact predominate over individual questions pursuant to Rule 23(b)(3). Plaintiff alleges that Defendant improperly failed to pay Plaintiff and other members of the Class overtime and minimum wages, provide meal and rest breaks and code compliant wage statements. Because these are common issues, and these issues relate to each and every class member and predominate over all other legal or factual issues, this requirement is satisfied. Proof of that common course of conduct would establish Defendant's liability to all members of the Class. Of course and as with all other prerequisites for class certification, Defendant denies that questions of law and fact would predominate, but for purposes of settlement only it does not oppose this motion subject to its right to challenge the same if the settlement were not approved.

6. Superiority of Class Action – the requirement that a class action be superior to other methods of adjudication under Rule 23(b)(3) is also met. Courts have recognized that the class action devise is superior to other available methods for the fair and efficient adjudication of controversies involving large number of employees in wage and hour disputes.

Based upon the foregoing, it is respectfully requested that the Court certify the Class as defined herein for settlement purposes only. In the event final approval of the settlement is not granted, the Parties will occupy the same legal posture that they occupied at the outset of the litigation and be free to assert any claim or defense that they could have asserted at the outset of the litigation.

VI. ATTORNEYS' FEES AND COSTS

As part of the request for Final Approval of this settlement, Plaintiff's counsel will seek an award of attorneys' fees and costs amounting to one-third of the Gross Fund Value, or $109,166.00. Defendant will not object to this request.

(Settlement Agreement, p. 13, ¶ 7.1) As noted above, the Settlement Sum of $327,500 is a true common fund with no reversion of funds going back to Defendant. At a minimum, Defendant will expend approximately $327,500 to settle this matter as any amounts not originally paid out to class members will revert to participating class members, plus it will be obligated to pay all of the employer side social security and payroll tax expenses that is normally associated with payment of wages. This is significantly different from a settlement sum in which there is a reversion of unclaimed funds to Defendants. The attorneys' fees sought are based on very real, and very significant benefits provided by this common fund.

While it is sometimes considered a "common practice" for an attorney fee application in a class action to be made only in connection with the Final Fairness hearing, the counsel representing Plaintiff in this matter has traditionally presented the Court with some preliminary argument and information concerning the fee application as a courtesy to the Court, and as a basis for a clear disclosure in the Class Notice of the amount of fees being sought. Since *Federal Rules of Civil Procedure*, Rule 23, requires that the Class be given notice of any agreement of the Parties as to attorneys' fees and costs, and that Defendant will not oppose such application, it is thought that offering this preliminary discussion of the requested fees is an appropriate course of conduct.

In this case, Class Counsel has created a true common fund for the benefit of the class. The Common Fund Doctrine is predicated on the principle of preventing unjust enrichment. It provides that when a litigant's efforts create or preserve a fund from which others derive benefits, the litigant may require the passive beneficiaries to compensate those who created the fund. Both State and Federal courts in California have embraced this doctrine. *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.

Here, given that costs are approximately $15,000, counsel will seek final approval of a fee equal to 28.8% of the common fund created for the benefit of the class. Given that the proposed Class Counsel has substantial experience in this area, including helping create significant case law in California class actions (i.e. the *Belaire West* procedure), they would have had to have expended 171 hours to have earned the lodestar equivalent at $550 per hour of the amount provided herein for attorneys fees. The reality is, plaintiffs' counsel spent substantially more than 171 hours and is taking more than a bit of a haircut, as it were, on fees.

In light of the nature of this settlement - it is non-reversionary and will provide thousands of dollars in recovery to a class member who occupied his job position for the entire class period - the request is well within the accepted range of compensation. The Settlement provides approximately $8851 per each job position prior to deductions for fees and costs. This is the precise type of recovery which should yield a “normal” one third contingent fee in the legal marketplace, had each and every class member’s action been pursued individually. The goal in any case such as this is to set a fee that approximates the probable terms of that same contingent fee agreement as if it had been negotiated by a sophisticated attorney and client in comparable litigation, on an individual basis. A review of class action settlements over the past 10 years shows that the courts have historically awarded fees in the range of 20% to 50%, depending upon the circumstances of the case. Class Counsel’s requested fee comes to 331/3%, a percentage well within the range of reasonableness.

The percentage award sought herein is commensurate with (1) the risk Class Counsel took in litigating this action; (2) the time, effort and expense dedicated to the case; (3) the skill and determination they have shown; (4) the results they have achieved throughout the litigation; (5) the value of the

settlement they have achieved for Class members; and (6) the other cases counsel have turned down in order to devote their time and efforts to this matter.

The obvious risk, at the time these attorneys agreed to become counsel in this case, was that the theory of recovery raised by Plaintiff and his counsel would prove to be invalid. In addition, counsel knew that Defendant would mount a major challenge to the claims herein made by Plaintiff, and that Defendant had the resources to mount such a challenge, although at the perils listed above. Class Counsel faced risk and difficulty on numerous levels. It was clear from the outset that this case would be hotly contested and that significant manpower would be needed to litigate the case properly. Class Counsel knew that obtaining a remedy would be anything but easy. It is therefore respectfully requested that the Court grant preliminary approval to the request for attorneys' fees as noted herein and that the request for said fees be disclosed in the proposed class notice. In addition, at the time of the Final Fairness hearing, Class Counsel will present a detailed cost breakdown and request for reimbursement of the same.

VII. NATURE AND METHOD OF CLASS NOTICE

"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." (*Fed.R.Civ.P.* Rule 23(c)(2)(B).) "The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal or compromise." (*Fed.R.Civ.P.* Rule 23(e)(B).)

As noted, the Parties have agreed upon a Notice Packet, and the terms and conditions upon which the Notice Packet is to be served on members of the Plaintiff class by first class United States Mail. The majority of the long-term employee class members are current employees of Defendants, and Defendants will provide the Claims Administrator with sufficient contact information for all

class members to facilitate a very successful notification process. Moreover, the claims administrator will be performing a skip trace of all addresses prior to the mailing of the notice. The proposed method of providing notice and notice forms is reasonable, and provides the best practicable notice under the circumstances. It should be noted that the Parties have agreed to the procedure that it absolutely maximizes participation, i.e. the fact that no claim form need be submitted to obtain payment on all state law claims. Only if one wishes to obtain additional money for claims that could have been raised under the FLSA, does one need to submit a claim form.

VIII. CLAIMS ADMINISTRATION

Plaintiff seeks the appointment of CPT Group as the Claims Administrator. CPT Group is an experienced class administration company, and has acted as claims administrator in hundreds of wage and hour cases throughout the country. It has provided an estimate of $7,400 to perform administrative services as set forth in the Settlement Agreement, and counsel for both Parties have had positive experiences working with this administrator in the past.

IX. REQUEST FOR ENHANCEMENT AWARD

The Class Representative, Daniel Malakhov, has assisted Class Counsel in the prosecution of this action. He provided the names of witnesses and has provided insight and information to Class Counsel that has proven to be invaluable. The Class Representative, Mr. Malakhov had his deposition taken in two sessions. He also provided substantial assistance with responding to discovery, reviewing the voluminous document production by Defendants, and locating putative class members for interviews. Some of the details of his efforts are set forth in his declaration filed concurrently herewith. It is well recognized that ". . . retaliation against employees for asserting statutory rights under the Labor Code is widespread," and that "retaliation . . . cause(s) immediate

disruption of the employee's life and economic injury." (*Gentry v. Superior Court* (2007) 42 Cal. 4th 443, 461.) The California Supreme Court, in *Gentry*, took note that the Federal courts as well recognize the reality of retaliation. (*Gentry*, at 460 [citing to a number of cases including] *Mitchell v. Robert DeMario Jewelry, Inc.* (1960) 361 U.S. 288, 292, 80 S.Ct. 332, 4 L.Ed.2d 323 ["[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"].) Even though Mr. Malakhov is a former employee of the Defendant, fear of retaliation nevertheless still affects individuals who contemplate acting as a class representative, in part because even a former employer can affect one's prospects of future employment. The accompanying declarations of Paul T. Cullen and Daniel Malakhov provide details as to the invaluable assistance provided by Plaintiff in connection with the successful litigation of this matter. Without his assistance, this settlement would not have been achieved.

Class representatives are eligible for incentive payments." (*Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003).) "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." (*Cook v. Niedert*, 142 F. 3d 1004, 1016 (7th Cir. 1998); see also *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532, at *56 (E.D. PA. June 2, 2004) (Where "class representatives have conferred benefits on all other class members . . . they deserve to be compensated accordingly.").

> The purposes for which courts award incentive payments are threefold. First, incentive awards compensate class representatives for work done by them on behalf of the class under a quantum meruit theory. (Citations omitted.) This is the same reason attorneys' fees, expert fees, and other costs of litigation are generally deducted from the common fund – to prevent

> a windfall to the class. Second, incentive awards are used to compensate class representatives for risks undertaken by them in bringing the class action. (Citations omitted.) These risks include retaliation resulting in personal or financial harm, discrimination, trouble finding employment, and significant financial risk. (Citations omitted.) Third, some courts award incentive awards to class representatives in recognition of their willingness to act as a private attorney general. (Citations omitted.) (*Rodriguez v. West Publ. Corp.*, 2007 U.S. Dist. LEXIS 74767, *47, 2007 WL 2827379, *15 (C.D. Cal. Sep. 10, 2007); see also *In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) ["Incentive awards are recognized as serving an important function in promoting class action settlements, particularly where . . . the named plaintiffs participated actively in the litigation."].)

Numerous courts have approved enhancements awards which, like the enhancement in this case at 6.1%, constitute and imperceptibly small percentage of the total settlement fund from the perspective of participating class members. (See, e.g., *Brotherton v. Cleveland*, 141 F.Supp.2d 907 (S.D.Ohio, 2001) [approving $50,000 enhancement based on $5.25 million settlement]; *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) [awarding $300,000 in enhancements based upon $30 million settlement]; *In re Dun & Bradstreet Credit Services Customer Lit.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) [awarding $215,000 to several class representatives out of an $18 million fund].) There is no hard and fast rule that should be applied as to how much should be awarded to the Plaintiff here.

The Plaintiff, for whom an incentive award is being requested, provided invaluable assistance to Class Counsel in the litigation of this case, investing well over 100 hours in the same. He also undertook real risks that deserve real reward. In reviewing his declaration, it becomes clear that he took on the fiduciary duties incumbent upon him in his role as class representative and fulfilled them admirably. Unfortunately, he has paid dearly for the same. As such, $20,000 is relatively small comfort for having to retool one's entire career path and to be

blackballed in the very field for which he studied and sacrificed for years. Accordingly, as an incentive award, the Court is being asked to approve payment to him of an enhancement award of $20,000. Defendant has no objection to this award. (Settlement Agreement, para. 8, pg. 13.)

X. FINAL APPROVAL HEARING

Plaintiff requests that the Final Fairness Hearing be set approximately 90 to 100 days after preliminary approval is granted. That will permit the Claims Administrator to mail the notice, and for Class Counsel to prepare a report concerning any response to the same prior to the hearing.

XI. CONCLUSION

Counsel for the Parties have reached this settlement following extensive discussions and arm's-length negotiations. The Court need not determine at this stage whether the settlement is fair, reasonable and adequate. The Court is merely being asked to permit notice of the terms of the settlement to be sent to the Class and to schedule a final settlement hearing to consider the fairness of the settlement, entry of a proposed final judgment, and counsels' request for an award of fees and reimbursement of expenses. Plaintiff respectfully requests that the Court grant preliminary approval of the proposed settlement and enter the proposed Preliminary Approval Order submitted herewith, and for such additional relief as this Court should deem proper.

Dated: October 19, 2012

Respectfully submitted,

THE CULLEN LAW FIRM, APC

/s.s./

BY: PAUL T. CULLEN

Attorney for Plaintiff Daniel Malakhov