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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VERNON MICHAEL LAMBSON AND DINORA MARTINEZ, as an individual and on behalf of others similarly situated,

Plaintiff,

v.

THE RITZ-CARLTON HOTEL COMPANY, LLC, a Delaware corporation;, and DOES 1 THROUGH 100, inclusive,

Defendants.

CASE NO.: 3:11-CV-06669-CRB

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 8, 2013
Time: 10:00 a.m.
Judge: Hon. Charles R. Breyer
Place: Courtroom 6 -17th Floor

TO THE COURT AND ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE THAT on March 8, 2013 at 10:00 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Charles R. Breyer, United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiffs Vernon Micheal Lambson and Dinora Martinez, as individuals and as the representatives of the Class ("Plaintiffs") will and hereby does respectfully move the court for preliminary approval of the proposed class action settlement.

Specifically, Plaintiffs respectfully request that the Court: (1) grant preliminary approval for the proposed class action settlement; (2) authorize the mailing of the proposed notice to the class of the settlement and data confirmation form; and (3) schedule a "fairness hearing," i.e. a hearing on the final approval of the settlement.

Plaintiffs make this motion on the grounds that the proposed settlement is within the range of reasonableness for possible final approval, and notice should, therefore, be provided to the class. This Motion is based upon this Notice of Motion and Motion for Preliminary Approval of Class Action Settlement, the Memorandum of Points and Authorities in Support Thereof, the Declaration of Peter M. Hart, and the Exhibits attached thereto, the Declaration of and Kenneth H. Yoon any oral argument of counsel, the complete files and records in the above-captioned matter, and such additional matters as the Court may consider.

DATED: February 1, 2013

LAW OFFICES OF PETER M. HART

By: /s/ Peter M . Hart_____
Peter M. Hart
Attorney for Plaintiffs and the Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF AGREEMENT

Plaintiffs Vernon Michael Lambson and Dinora Martinez (collectively hereinafter "Plaintiffs"), seek preliminary approval of the settlement they have reached in the above-captioned matter with Defendant The Ritz-Carlton Hotel Company, LLC ("Defendant").

A. History of the Case

On November 22, 2011, Plaintiff Lambson filed a putative class action on behalf of himself and other current and former employees of Defendant in the Superior Court of California for the County of San Francisco. Defendant filed an answer on December 21, 2011 and the action was removed to the United States District Court, Northern District of California on December 28, 2011. (Docket No. 1). Plaintiff Lambson filed a First Amended Complaint on June 8, 2012. (Docket No. 25). Defendant filed an answer to the First Amended Complaint on June 22, 2012. (Docket No. 26). On October 25, 2012, Plaintiffs filed their Second Amended Complaint which added Plaintiff Martinez as a class representative. (Docket No. 35). Defendant answered the Second Amended Complaint on November 12, 2012. (Docket No. 39). The Second Amended Complaint is the current operative complaint and it alleges the following claims for relief: (1) Denial of Meal Periods; (2) Denial of Rest Periods; (3) Failure to Pay Minimum Wages; (4) Failure to Pay Overtime Wages; (5) Violation of Labor Code § 226 Relating to Recordkeeping; (6) Violation of Labor Code § 227.3 (Vacation); (7) For Continuing Wages and Penalties Pursuant to Labor Code § 203; (8) Unfair Business Practices (Violation of California Business & Professions Code § 17200 *et seq.*); (9) Violation of Labor Code § 2698, *et seq.* (Docket No. 35). The parties have agreed to file a Third Amended Complaint, that alleges the same claims for relief and same factual allegations for these claims as the SAC, as part of the class action settlement upon the grant of preliminary approval of the settlement with this Third Amended Complaint best representing the scope of the settlement and claims alleged as it is limited to the three Ritz Carlton properties that are part of this settlement and covers all non-exempt employees at these properties. (Joint Stipulation of Class Action Settlement and Release ("Settlement" or "Stipulation of Settlement") ¶ 8, attached as Exhibit 1 to the Declaration of Peter M. Hart ("Hart Decl.") ¶ 10).[1]

[1] Prior to the hearing on Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, the

Following the initial Case Management Conference in this matter on April 13, 2012, the Parties agreed to participate in an early mediation and exchanged substantial informal discovery, putting the substantial outstanding formal discovery on hold. On September 11, 2012, the Parties mediated the matter with a mediator experienced in class action matters, David Rotman, Esq. Though some progress was made the mediation, ultimately, a mediator's proposal was made and not accepted by both Parties. However, after the proposal was rejected, the Parties continued discussions with mediator Rotman's assistance for several months.

Following the unsuccessful mediation, the Parties restarted formal discovery. Inclusive of that, Plaintiffs filed a discovery motion after extensive meet and confer that resulted referral of the dispute to the Honorable Maria-Elena James. After referral to the Honorable James, the Parties', in conformance with the Honorable James' Standing Order, held an in-person meet and confer and had begun drafting letter briefs on the discovery dispute. During this time, the Parties' continued to work with Mr. Rotman in an effort to resolve the matter. Ultimately, on December 12, 2012, the Parties' accepted a second mediator's proposal and began the process of drafting and negotiating the long-form settlement agreement. The complete terms of the Parties' settlement are contained within the Joint Stipulation of Class Action Settlement and Release. (Hart Decl. ¶ 10).

Plaintiffs alleged that Defendant, on a class-wide basis, failed to provide proper meal periods and rest periods and implemented meal and rest period policies that were contrary to the provisions of the California Labor Code. (Hart Decl. ¶¶ 4-5). Plaintiffs also alleged that Defendant's class-wide policies deprived them of the payment of overtime wages. Defendant's class-wide policies, practices and procedures required that an employee receive "authorization" prior to working overtime or it would not be compensated. Defendant further deprived its employees of overtime by failing to account for shift deferential pay and bonuses when calculating the rate of pay for wages, including overtime wages. (Hart Decl. ¶¶ 4-5).

Plaintiffs allege that they and the Settling Class Members, pursuant to Defendant's class-wide vacation policies, did not properly accrue vacation wages, including vacation labeled

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Parties will submit a fully executed Stipulation of Settlement and all Exhibits, including the Proposed Order Granting Preliminary Approval and the Class Notice.

personal days and floating holidays, and were also not properly paid out all accrued vacation upon termination. (Hart Decl. ¶¶ 4-5).

Plaintiffs have alleged that Defendant, as a matter of practice, does not provide accurate wage statements as required by California Labor Code § 226. (Hart Decl. ¶¶ 4-5).

Defendant has denied all such allegations. (Hart Decl. ¶ 6; Joint Stipulation of Settlement ¶¶ 7, 60; *see generally*, KohSweeney Decl.).

After significant discovery, which included the production by Defendant of the relevant policies, procedures, and practices, and production of the time and payroll databases (which were analyzed by an expert consultant of Plaintiffs) of the Lake Tahoe Ritz Carlton, Half Moon Bay Ritz Carlton and the Ritz Carlton Residences, San Francisco, the Parties reached a resolution of Plaintiffs' claims on a class-wide basis and, as part of this motion, present the Joint Stipulation of Class Action Settlement and Release between Plaintiffs and Defendant for the Court's approval together with approval of related class papers, including the Notice to Class Members and the Claim Form. (Settlement Ex. B).

The Settlement provides a tremendous recovery for Plaintiffs and the Settling Class Members. Specifically, the Gross Settlement Amount total of $2 million is a guaranteed fund, with no reversion of funds to Defendant and that also provides for with payments to all Settling Class Members without their need of submitting a claim form. (Settlement ¶¶ 11, 46). This recovery is outstanding for a class of current and former employees that number approximately 1,500 persons (with approximately 800 of those being former employees) as of the time of the last data disclosure. (Hart Decl. ¶ 26).

The settlement of this matter was achieved after significant investigation was done by both Parties, including both informal and formal discovery, production and analysis of time and payroll data, a full-day mediation session, formal responses by Defendant to Plaintiffs' written discovery, interviews of current and former employees of Defendant, and formal and informal exchanges of information by Defendant regarding the policies and class data necessary for Plaintiffs to fully evaluate this case.

Plaintiffs believe that a class action can be certified for the class and subclasses and claims they have alleged. Plaintiffs believe that Defendant is liable for the claims alleged and that the

data and discovery that was produced make this liability clear. However, Plaintiffs also recognize the expense and length of continued proceedings necessary to litigate their disputes through trial and through any possible appeals. Plaintiffs have also taken into account the uncertainty and risk of the outcome of further litigation, and the difficulties and delays inherent in such litigation. Plaintiffs have also taken into account the extensive settlement negotiations conducted, including a full-day mediation session and numerous follow-up hours of telephonic conferences with a professional mediator, David Rotman, a well-known mediator with wage and hour class action mediation experience. (Hart Decl. ¶ 8).

Plaintiffs have also taken into account Defendant's agreement to enter into a settlement that confers substantial relief upon the members of the Settlement Class. Based on the foregoing, Plaintiffs and Plaintiffs' Counsel have determined that the settlement set forth in the Stipulation of Settlement is a fair, reasonable, and adequate settlement, and is in the best interests of the Plaintiffs and the Class Members. (Hart Decl. ¶¶ 23, 24; Declaration of Kenneth H. Yoon ("Yoon Decl.") ¶¶ 10, 11).

Defendant strongly disputes that it has any liability to Plaintiffs or the Class. (*See generally*, KohSweeney Decl.) However, Defendant, after discovery and investigation of this matter, and after mediation and settlement discussions, have agreed to settle Plaintiffs' claims on a class-wide basis as set forth in the Settlement.

B. Summary of the Current Settlement

The Settlement provides for $2,000,000.00 as the Gross Settlement Value, which is a guaranteed fund with "push out" recovery, meaning the Class Members do not need to submit a claim form in order to participate in the settlement as the money will be automatically paid to them unless they opt-out. (Hart Decl. ¶ 23; Settlement ¶ 46). There is no reversion of money from the $2,000,000 that will revert to Defendant. Pursuant to the terms of the Settlement, the Net Settlement Value (after deduction of attorneys' fees, costs, enhancement fees, and costs of administration) will be allocated based on the Class Members hours worked and rate of pay. (Settlement ¶ 50).

In addition, pursuant to the terms of the Settlement, **all** of the Net Settlement Value will be distributed via checks to all Class Members who do not opt-out. (Settlement ¶¶ 11, 43(6)). Thus, each Class Members' settlement amount could be further increased depending on the number of

persons who choose to not participate in the settlement. (Settlement ¶ 51).

Although Plaintiffs' Counsel believe Plaintiffs would prevail at certification and at trial on their claims, Plaintiffs are also aware of the risks they face. For example, while Plaintiffs believe their arguments regarding vacation, overtime, paystubs, meal and rest breaks fairly reflect the law surrounding payments for such wages, it also allows for contrary arguments by Defendant. (Hart Decl. ¶¶ 19, 33).

Additionally, the Settlement provides for a limited release. (Settlement ¶ 53). The Settlement only provides for a release of the facts and legal claims raised in the Third Amended Complaint and the prior complaints filed with this Court. Further, the settlement is limited to only those non-exempt employees who worked at Ritz Carlton properties located at Lake Tahoe, Half Moon Bay, and the Ritz Carlton Residences in San Francisco for only the periods of time they worked at these properties. The Settling Class Members can be easily ascertained from Defendant's payroll records. (Hart Decl. ¶ 26).

The estimated number of Class Members is 1,500 at this time. (Settlement ¶ 12). Class Members have the choice to opt-out of the Settlement if they so choose. (Settlement ¶¶ 22-26). Class Members will have an estimated settlement amount provided to them in the Data Confirmation Form. (Settlement, Ex. D.) Class Members may also dispute the information the Claims Administrator has for them, upon which it bases their estimated payment under the Settlement by using the individualized Data Confirmation Form that they will receive along with the Class Notice. (Settlement ¶ 46). They may object to the Settlement as well. (Settlement ¶¶ 22, 23).

C. The Settlement Is Fair, Reasonable, and Adequate

Based on their own respective independent investigations and evaluations, the Plaintiffs and their counsel are of the opinion that settlement for the consideration and on the terms set forth in their Settlement is fair, reasonable, and adequate and is in the best interests of the Class in light of all known facts and circumstances and the expenses and risks inherent in litigation. (Hart Decl. ¶¶ 23, 44; Yoon Decl. ¶ 11).

According to discovery and expert analysis conducted prior to the mediation and according to continuing analysis of discovery and formal and informal exchanges provided by

Defendant, Plaintiffs are able to make informed estimations and calculations of the value of the claims alleged in this matter. Plaintiffs base these calculations on the class size of 1,500 employees with 800 of them being former employees and with the average hourly rate of $13.11 per hour. Plaintiffs' estimates reflect a high end exposure assuming a win on liability and the proof of these damages at trial. Plaintiffs note initially, that Defendant would contend that it has no liability, thus, the damages should be zero, and would argue that even if liability goes against it, it would dispute damages at trial or to this Court, thus, disputing the high-end exposure calculated by Plaintiffs.

That all said, Plaintiffs estimate that the total amount of forfeited vacation wages is $850,000 based on vacation wages being owed to the group of former employees. Plaintiffs estimate that the meal break exposure is $2,050,000. Plaintiffs estimate the rest break exposure to be $3,400,000. Plaintiffs estimate unpaid overtime to be $500,000 due to overtime being unpaid in shifts spread over two work days, other unpaid time, and not calculating overtime properly. (Hart Decl. ¶ 29). These were the calculations used by Plaintiffs to negotiate the settlement; Defendant maintains that these figures were unrealistically high based on Defendant's analysis. (Hart Decl. ¶ 31).

The total of this exposure is $6,800,000 and the settlement agreed to in this matter is $2,000,000, which is guaranteed to be paid out in full by Defendant with no reversion to Defendant, which represents an approximately 29.4% recovery for the class members. (Hart Decl. ¶ 30). This is a significant recovery given the wealth of risks, including at trial, and through years long appeals. It is also well within the realm of reasonableness when considering other settlements that have been achieved. *See e.g., Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *4 (N.D. Cal. Jan. 26, 2007) (finding settlement of wage and hour class action for 25%–35% of claimed actual loss reasonable in light of uncertainties involved in litigation).

Furthermore, Defendant made a number of arguments and had a number of defenses that they would likely have raised to liability or to damages. Defendant could raise a "de minimus" defense for the overtime, that Defendant substantially complied with the Labor Code and the damages owed to Plaintiffs and the Class Members were significantly less than Plaintiffs' figures. Defendant contended that it did provide meal and rest breaks to employees. Defendant further contended that with respect to vacation there was no forfeiture and that certain types of paid time off days Plaintiffs argued were

vacation were not vacation days under the law. Plaintiffs considered all of Defendant's arguments when determining whether to agree to the Settlement. (Hart Decl. ¶ 33). Some of these issues could present new issues for the Court to determine or to be decided after years long appeals. Defendant also contended that based on the state of law for meal and rest breaks, with the *Brinker* decision coming out after the filing of this lawsuit, and with a dispute on vacation forfeiture and law, that there is no penalty exposure given the heightened standards for applying penalties. (*See generally*, KohSweeney Decl.)

In agreeing to the Settlement, Plaintiffs reviewed and analyzed the discovery provided by Defendant, including the number of employees under the various job titles during the Class Period. This enabled Plaintiffs to calculate the class size and negotiate the settlement sum based on a clear understanding of the maximum exposure in this case.

Defendant denies any liability or wrongdoing of any kind associated with the claims alleged by Plaintiffs, and further deny that, for any purpose other than that of settling this lawsuit, this action is appropriate for class treatment. (Settlement ¶ 60). Defendant maintains, among other points, that they paid out all earned wages to their employees. Defendant also maintain that they do not have liability for late payment of wages and penalties associated with such late payment of wages or for penalties or damages based on improper wage statements and record keeping violations.

Each Class Member's settlement amount will be vary depending on whether the Class Member worked for longer or shorter relative periods of time, and whether the Class Member earned a greater or small relative rate of pay, and may increase depending on if Class Members choose to opt-out. This is fair, as it directly allocates greater recovery to individual Class Members who have suffered greater harm. Furthermore, Class Members may challenge their employment dates and rate of pay if they believe the figures used by the Claims Administrator to be incorrect and may also completely exclude themselves from this settlement. (Settlement ¶¶ 22, 23, 46).

Although the gross recovery will be reduced due to deductions for class administration costs, attorneys' fees and any class representative enhancement, these costs are fairly attributed as they were incurred for the benefit of the class.

II. LEGAL ANALYSIS

A. The Class at Issue and the Settlement Fund

Defendant has agreed to provide the Claims Administrator information regarding the identity of the estimated 1,500 members of this proposed settlement Class. The settlement Class is defined as:

> All non-exempt employees (i.e., overtime eligible) who were employed by Ritz-Carlton at The Ritz-Carlton, Lake Tahoe, The Ritz-Carlton, Half Moon Bay, and The Ritz-Carlton Club and Residences, San Francisco anytime during the Class Period. (Settlement ¶ 12).

As set forth in the Settlement, the Parties have agreed that **all** of the Net Settlement Value shall be distributed via checks to all Class Members who do not opt out of the Settlement. (Settlement ¶ 43(5)). Subject to this Court's approval, the amount of any settlement checks not cashed shall be paid to America's Promise Alliance or shall escheat to the State of California subject to the procedures set forth in the California Code of Civil Procedure section 1300, *et seq*. (Settlement ¶ 43(6)).

B. Two-Step Approval Process

Any settlement of class litigation must be reviewed and approved by the Court. This is done in two steps: (1) an early (preliminary) review by the court; and (2) a final review and approval by the court after notice has been distributed to the class members for their comment or objections. The Manual for Complex Litigation, Fourth states:

> Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties. If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b). If there is a need for subclasses, the judge must define them and appoint counsel to represent them. The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing. In settlement classes, however, it is often prudent to hear not only from counsel but also from the named plaintiffs, from other parties, and from attorneys who

represent individual class members but did not participate in the settlement negotiations. *Manual for Complex Litigation Fourth* ("*Manual*") (Fed. Judicial Center 2004), § 21.632 (internal citations omitted).

Thus, the preliminary approval by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. As Professor Newberg comments, "[t]he strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final hearing." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Action*s, § 11.26 (4th ed. 2010). A court should grant preliminary approval of a class action settlement where it is within the "range of reasonableness."

The procedures for the parties' submission of a proposed settlement for preliminary approval by the court also are discussed in Newberg on Class Actions:

> When the parties to an action reach a monetary settlement, they will usually prepare and execute a joint stipulation of settlement, which is submitted to the court for preliminary approval. The stipulation should set forth the essential terms of the agreement, including but not limited to the amount of settlement, form of payment, manner of determining the effective date of settlement, and any recapture clause.

Id. at § 11.24.

Here, the Parties have reached such an agreement and have submitted it to the Court in connection with this Motion. The Settlement sets forth all terms of the agreement reached by the Parties. (Hart Decl. ¶ 10).

C. Standards for Preliminary Approval

As a matter of public policy, settlement is a strongly favored method for resolving disputes. *See Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989). This is especially true in complex class actions such as this case. *See Officers for Justice v. Civil Serv. Comm'n of City & County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982); *Wilkerson v. Martin Marietta Corp*., 171 F.R.D. 273, 284 (D.Colo. 1997).

Preliminary approval does not require the Court to make a final determination that the

settlement is fair, reasonable and adequate. Rather, that decision is made only at the final approval stage, after notice of the settlement has been given to Class Members and they have had an opportunity to voice their views of the settlement or to exclude themselves from the settlement. *See* 5 James Wm. Moore et al., *Moore's Federal Practice* §23.165 (3d ed. 2010). In considering the Settlement, the Court need not reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute and need not engage in a trial on the merits. *See Officers for Justice*, 688 F.2d at 625. Preliminary approval is merely the prerequisite to giving notice so that "the proposed settlement ... may be submitted to members of the prospective class for their acceptance or rejection." *Philadelphia Hous. Auth. v. Am. Radiator & Standard. Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970).

"The judge should raise questions at the preliminary hearing and perhaps seek an independent review if there are reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys." *Manual* § 21.633.

The proposed settlement does not pose such issues. This was highly-contentious litigation with the Parties each being represented by very competent counsel. As discussed above, the Parties engaged in substantial discovery and investigation into the claims and defenses alleged in this case. Furthermore, the proposed settlement was reached after the Parties utilized the assistance of an experienced mediator and after substantial arms-length negotiations between the Parties.

The proposed Settlement satisfies the standard for preliminary approval as it is well within the range of possible approval and there are no grounds to doubt its fairness. Counsels for Plaintiffs and Defendant have extensive experience in employment law, particularly wage and hour litigation and reached settlement only after a full-day mediation session and subsequent protracted settlement discussions which included two mediator proposals. The settlement negotiations were both extensive and conducted at arm's-length.

D. Procedures for Settlement before Class Certification

The parties also may, at the preliminary approval stage, request that the court provisionally approve certification of the class – conditional upon final approval of the settlement. Settlements are highly favored, particularly in class actions. *Util. Reform Project v. Bonneville Power*

Admin., 869 F.2d 437, 443 (9th Cir. 1989). This is especially true in complex class actions such as this case. *Officers for Justice*, 688 F.2d at 625; *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D.Colo. 1997). Plaintiffs request such provisional approval at the preliminary approval hearing:

> The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal . . . . may be set out in conditional orders granting tentative approval to the various items submitted to the court. Three basic rulings are often conditionally entered at this preliminary hearing. These conditional rulings may approve a temporary settlement class, the proposed settlement, and the class counsel's application for fees and expenses.

4 *Newberg on Class Actions* at §11.26. Further, there is an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. *See Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983) ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs"); *In re Excess Value Ins. Coverage Litig.*, No. M-21-84 (RMB), 2004 WL 1724980, at *10 (S.D.N.Y. July 30, 2004) ("Where 'the Court finds that the Settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness.'") (citation omitted); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 380 (N.D. Ohio 2001) ("When a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair").

For reasons set forth in greater detail below, Class Counsel is of the opinion that this case can be certified for settlement purposes.

E. The Settlement Is Fair and Reasonable And Not The Result Of Fraud Or Collusion

1. The Settlement May be Presumed Fair and Reasonable

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *National Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp. 1087, 1093-1094 (D.D.C.

1990); *Steinberg v. Carey*, 470 F. Supp. 471, 478 (S.D.N.Y. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n*, 79 F.R.D. 571, 576 (E.D. Pa. 1978).

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account, particularly where, as here, they have been involved in informal and formal discovery and negotiations for some period of time, appear to be competent, have experience with this type of litigation, and have exchanged substantial evidence from the opposing party. *See Newberg on Class Actions* at §11.47; *Nat'l Rural Telecomms. Coop*., 221 F.R.D. at 528 (quoting *In re Paine Webber Ltd. P'ships Litig*., 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("[s]o long as the integrity of the arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement . . . [citations] and 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation")).

a. Experience of Class Counsel

Here, both Plaintiffs' and Defendant's counsel have a great deal of experience in wage and hour class action litigation. Plaintiffs' Counsels have been approved as class counsel in a number of other wage/hour class actions. (Hart Decl. ¶¶ 34-42, 44; Yoon Decl. ¶ 17). Moreover, as detailed herein, Plaintiffs' Counsel conducted a thorough investigation of the factual allegations involved in this case. (Hart Decl. ¶ 16; Yoon Decl. ¶¶ 6, 7). Thus, based upon such experience and knowledge of the current case, Plaintiffs' Counsel believe that the current Settlement is fair, reasonable and adequate. (Hart Decl. ¶ 23; Yoon Decl. ¶ 11).

b. Investigation and discovery prior to settlement

Each side has apprised the other of their respective factual contentions, legal theories and defenses, resulting in extensive arms-length negotiations taking place.

In addition, extensive formal and informal discovery was conducted in this case. Plaintiffs have received, reviewed and analyzed substantial documentary evidence necessary to evaluate the risks for liability on the amount of wages owed, as well as damages data for the Class, which has been used to calculate the damages exposure for the class and allocation of payments, including Defendant's policies, practices and procedures as applied to all Class Members.

Accordingly, Plaintiffs have obtained detailed discovery on both liability and damages. This information allows Plaintiffs to provide this Court sufficient evidence to determine adequacy of the settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 131-33 (2008); *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002).

The settlement for each participating Class Member is fair, reasonable, and adequate, given the inherent risk of litigation, the risks and time of appeal, and the costs of pursuing such litigation. It is the result of extensive investigation and negotiations. It was reached only after a full-day mediation session with an experienced mediator and substantial arm's-length negotiations. (Hart Decl. ¶¶ 8-9).

Fairness of the settlement is also demonstrated by the uncertainty and risks to Plaintiffs involved in not prevailing on the causes of action or theories alleged in their Complaint and the risk of paying costs and attorney's fees to Defendant as the Defendant adamantly disputes the ability of Plaintiffs to certify a class as well as the merits of Plaintiffs' claims. (Hart Decl. ¶¶ 21-22).

The Settlement reached is a compromise for the damages of absent Class Members for the alleged violations. It also compensates Plaintiffs for their claims and provides an additional enhancement award payment, thus taking into consideration the risks, time, effort and expenses incurred by the class representative in coming forward to provide invaluable information, negotiate, and litigate this matter on behalf of all Class Members. (Hart Decl. ¶ 43).

Based on their own independent investigations and evaluations, the Parties and their respective counsel are of the opinion that the settlement for the consideration and on the terms set forth in this Settlement is fair, reasonable, and adequate and is in the best interest of the Class Members and Defendant in light of all known facts and circumstances and the risks inherent in litigation, including the risk of potential appeals. (Hart Decl. ¶ 23, 44; Yoon Decl. ¶¶ 8, 11).

Despite the asserted fairness of the Settlement, should any potential Class Member, upon reviewing the Class Notice, object to the terms of the settlement as set forth in the Settlement, each has the right to file an objection or seek exclusion from the Settlement. By such procedure, Class Members, upon providing proper notice to the Parties and the Court, may attend the final fairness and approval hearing for the purpose of objecting to one or more of the terms set forth in the Settlement.

Alternatively, potential Class Members can exclude themselves from the Class and seek their own separate remedy. Additionally, Class Members who wish to participate in the Settlement but dispute the amount due to them under the Settlement will be given the opportunity to challenge or dispute their settlement utilizing the Data Confirmation Form they will be provided with the Notice. (Settlement ¶ 46, Ex. D).

2. A Review of the Settlement Factors Establishes it is Fair, Reasonable and Adequate

The settlement for each participating Class Member is fair, reasonable and adequate, given the inherent risk of litigation, the risk of appeals, the risks in an area where it is argued that the law is unsettled, and the costs of pursuing such litigation.

a. Risk of continued litigation.

To assess the fairness, adequacy and reasonableness of a class action settlement, the Court must weigh the immediacy and certainty of substantial settlement proceeds against the risks inherent in continued litigation. *See In re General Motors Corp*., 55 F.3d 768, 806 (3d Cir. 1995) ("present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement."); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel Corp*., 485 F. Supp. 610, 616-17 (N.D. Cal. 1979); *Manual* § 21.62 at 316.

This factor supports final approval here, where the Settlement affords the Class prompt, fair relief, while avoiding significant legal and factual battles that otherwise may have prevented the Class from obtaining any recovery at all. While Class Counsel believe the Class' claims are meritorious Defendant vigorously contests this, and Class Counsel are experienced and realistic, and understand that the outcome of a trial, and the outcome of any appeals that would inevitably follow if the Class prevailed at trial, are inherently uncertain in terms of both outcome and duration.

As part of this narrow lawsuit and settlement of wage claims and recordkeeping violations, Plaintiffs maintain primarily five theories of liability.

i. *Meal Periods*

Plaintiffs allege that Defendant fails on a class-wide basis to provide meal periods in

compliance with the requirements set forth by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012). There, the California Supreme Court established the minimum legal standard that an employer "relieve [employees] of all duty for an uninterrupted 30-minute meal period." *Id.* at 1038. Defendant's policy, however, mandates that employees take meal periods but does not provide that the meal periods shall be uninterrupted and free of all duty. Defendant contends that its policies for meal periods are lawful and that it does provide meal periods to its non-exempt employees in compliance with California law. (*See generally*, KohSweeney Decl.)

ii. *Rest Periods*

Plaintiffs contend that Defendant fails to authorize and permit rest periods that conform to the requirements of California law and *Brinker*. Contrary to what California law requires, for a portion of the class period, Defendant's written policy was to give one ten minute rest break for every 3.5 hours worked. When an employer fails to provide an employee with the legally mandated rest period, the employer must pay the employee a premium payment of one additional hour of pay for each work day that a rest period is not provided. *See* Cal. Lab. Code § 226.7. Furthermore, rest breaks must be uninterrupted and Plaintiffs contend that rest breaks were interrupted and also not properly provided under California law. *Brinker*, 53 Cal. 4th at 1033. Defendant contends that it complied with California law. (*See generally*, KohSweeney Decl.)

iii. *Overtime Wages*

Plaintiffs contend that Defendant, as a matter of policy and practice, had a recordkeeping system that resulted in employees not being compensated for all hours worked, including not paying overtime wages for all hours worked over 8 hours and not paying double-time wages for all hours worked over 12 hours per day. Additionally, Plaintiffs contends that Defendant, have a further policy that deprives employees of overtime pay at the proper rate of pay because Defendant fails to account for incentive pay. This too would be amenable to class-wide resolution. Plaintiffs' position is that such a pay and bonuses must be included in the calculation of the hourly rate of pay, including the overtime rate—and at a minimum is a class-wide legal issue supporting certification. Defendant, on the other hand, contends it complied with California law. (*See generally*, KohSweeney Decl.)

iv. *Vacation Forfeiture*

As a matter of policy, Defendant provides vacation benefits to its employees including "personal days", "floating holidays" and "vacation." Section 227.3 requires that when "an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with . . . [the] employer policy respecting eligibility or time served. . . ." Lab. Code § 227.3. In *Suastez v. Plastic Dress-up Co.*, 31 Cal.3d 774, 784 (1982), the California Supreme Court unambiguously stated:

> [A] proportionate right to a paid vacation "vests" as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay.

Under California law, earned and unused vacation days, may not be forfeited – rather, an employer must allow an employee to carry over all earned and unused vacation from prior years and must pay out the vacation accrued at the end of employment. *Id.* Furthermore, benefits such as Defendant's "personal days" which permit employees to take paid time off for any purpose, are to be treated just like vacation days, regardless of the title such benefits are given. *See* D.L.S.E. Opinion Letters dated October 28, 1986, March 11, 1987, and April 27, 1992. Defendant denies any liability regarding vacation wages, arguing that their policies are valid under California law. Defendant further argues that any damages owed are minimal and far less than Plaintiffs' calculations even if Plaintiffs' legal theory was correct. (*See generally*, KohSweeney Decl.)

v. *Wage Statements*

Employers are required to keep accurate records and provide itemized wage statements every pay period, which include:

> (1) gross wages earned, (2) total hours worked . . . (5) net wages earned . . . (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Cal. Lab. Code § 226(a).

Defendant's written meal period, rest period and overtime policies all result in violations of Labor Code § 226 violations and would be amenable to class-wide treatment and liability.

Defendant argues that their payroll practices comply with California labor laws and that

in the event there was a violation then there was no damage done to the Class Members. Defendant also contend that any alleged violation would not satisfy the "knowing and intentional" requirement of Labor Code § 226(e).

b. The settlement is within the range of reasonableness.

The standard of review for class settlements is whether the Settlement is within a range of reasonableness. As Professor Newberg comments:

> Recognizing that there may always be a difference of opinion as to the appropriate value of settlement, the courts have refused to substitute their judgment for that of the proponents. Instead the courts have reviewed settlements with the intent of determining whether they are within a range of reasonableness.…

4 *Newberg on Class Actions*, at §11.45.

Here, the $2,000,000.00 settlement fund requires distribution of the entire Net Settlement Value to all Class Members who do not opt-out. Furthermore, the settlement fund will be paid out entirely in cash (as opposed to a voucher, coupon, etc.). The settlement amount paid to each Class Member is based upon their productive hours worked and their final rate of pay, is provided in exchange for an limited and tailored release. (Settlement ¶¶ 19, 46).

For these reasons, and for the reasons set forth above relating to the total liability and the risks of prevailing on the theories of liability alleged, Plaintiffs believe that the current Settlement is fair, reasonable, and adequate.

c. The complexity, expense, and likely duration of continued litigation against the settling defendant favors approval

Another factor considered by courts in approving a settlement is the complexity, expense, and likely duration of the litigation. *Officers of Justice*, 688 F.2d at 625; *Girsh*, 521 F.2d at 157. In applying this factor, the Court must weigh the benefits of the Settlement against the expense and delay involved in achieving an equivalent or more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433-34 (5th Cir. 1971).

The Settlement provides to all Class Members, regardless of their means, fair relief in a prompt and efficient manner. Were the parties to engage in continued litigation of this matter, after class certification, the losing party could seek an appeal of the certification decision. Following a

decision by the trier of fact, the losing party would have the right to appeal. As the claims alleged by Plaintiffs are almost entirely legal issues, it makes the likelihood of multiple appeals almost certain. Given the realities of appellate practice, this process places ultimate relief several years away (indeed it can easily be five years or more).

The idea of balancing a fair recovery now, with settlement dollars being paid out now, versus a years-long appeal process regarding various potential issues, is a significant factor to be considered. See *DIRECTV*, 221 F.R.D. at 526 (held proper "to take the bird in hand instead of a prospective flock in the bush"), and at 527 ("Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation.").

Furthermore, were the case to be denied class approval, the Class Members could be left without a remedy as a practical matter and courts across the state would have to address the issues presented here in a piecemeal, costly, and time-consuming manner. The Settlement in this case is therefore consistent with the "overriding public interest in settling and quieting litigation" that is "particularly true in class action suits." *See Van Bronkhorst v. Safeco Corp*., 529 F.2d 943, 950 (9th Cir. 1976); 4 *Newberg on Class Actions,* at § 11.41.

d. Non-admission of liability by defendant

Finally, as discussed herein, Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in this lawsuit, and further denies that, for any purpose other than that of settling this lawsuit, this action is appropriate for class treatment. (Settlement ¶ 60). Defendant maintains, among other things, that they have complied at all times with California wage and hour laws. Because of such denial, if this case is not resolved, it will likely continue to be a long and protracted litigation.

F. The Proposed Settlement Class Satisfies the Elements For Certification

The proposed settlement class meets all the requirements for class certification in the settlement context:

1. Numerosity

The numerosity requirement is satisfied if the proposed class is "so numerous that

joinder of all members is impracticable." FED. R. CIV. PROC. 23(a)(1). Impracticable does not mean impossible, only that it would be difficult or inconvenient to join all members of the class. *See Harris v. Palm Springs Alpine Estates, Inc*., 329 F.2d 909, 913-14 (9th Cir. 1964). The class consists of approximately 1,500 total persons. (Hart Decl. ¶ 18). Here, the class size shows that numerosity is easily satisfied.

2. Ascertainability

The Class is ascertainable as it has already been identified based on Defendant's records. (Hart Decl. ¶ 26).

3. Typicality

Typicality under Rule 23(a)(3) is satisfied if the representative plaintiff's claims share a common element with the class: i.e., those claims arise from the same course of conduct that gave rise to the claims of other settlement class members. *In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec. Litig.*, 122 F.R.D. 251, 256 (C.D. Cal. 1988). Plaintiffs' claims are typical of those of other Class Members for purposes of settlement because Plaintiffs allege they have suffered injury from the same specific actions that they allege harmed other members of the class, specifically Plaintiffs were denied off-duty meal and rest breaks, were denied proper overtime wages, did not properly accrue vacation wages and received inaccurate wage statements, just like the rest of the Class. The named representatives' claims are typical of the class as a whole for purposes of settlement because they arise from the same factual basis and are based on the same legal theory as those applicable to the Class Members. (Hart Decl. ¶ 43).

4. Commonality

Commonality relates to whether there are "questions of law or fact common to the class." Fed. R. Civ. Proc. 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, Plaintiffs contend the common issues include: (1) whether Defendant's policies and practices regarding vacation and other PTO entitlements violated Labor Code section 227.3; (2) whether Defendant maintained the same vacation and PTO policies, practices, or procedures for all Class Members; (3) whether Defendant failed to timely pay final wages, including vacation and personal day wages, at the termination of

employment; (4) whether Defendant failed to provide off-duty meal breaks for Class Members; (5) whether Defendant failed to provide off-duty rest breaks; (6) whether Defendant properly compensated its employees for all earned overtime wages; and (7) whether Defendant failed to provide accurate itemized wage statements in accordance with their corporate policies, practices, and procedures. Although Plaintiffs believe there are many additional common issues, there are sufficient common issues described herein to satisfy this requirement for purposes of settlement. (Hart Decl. ¶ 20).

The class shares common legal and factual issues for the same reasons that Plaintiffs' claims are typical. The unlawful policies and practices alleged by Plaintiffs are the same ones that apply to all the Class. For example, the vacation policies at dispute in this case are the same exact policies that applied to all of the Class Members and were applied in the same manner. Similarly, the meal period and rest period policies at issue here are the same policies that applied to all Class Members in the same manner. Accordingly, the claims alleged by Plaintiffs are common to all of the Class Members for purposes of settlement. (Hart Decl. ¶¶ 5-6, 20, 43).

5. Adequacy

Adequacy under Rule 23(a)(4) is satisfied if the named plaintiffs have no disabling conflicts of interest with other members of the class and Class Counsel are competent and well qualified to undertake the litigation. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). No conflict exists between Plaintiffs and the members of the class because Plaintiffs contend they have been damaged by the same alleged conduct and have the incentive to fairly represent all Class Members' claims to achieve the maximum possible recovery. (Hart Decl. ¶ 43). Plaintiffs are fully informed of their duties as class representative and that they assumed a fiduciary obligation to the members of the class and that they surrendered any right to compromise the group action for their own individual gains. (Hart Decl. ¶ 43). Plaintiffs have spent considerable efforts in this case, including assisting with discovery. Plaintiffs were and remain willing to vigorously prosecute this action to the benefit of the class. (Hart Decl. ¶ 43).

Furthermore, Plaintiffs are represented by counsel who have extensive experience in complex wage and hour litigation and have protected the interests of the Class Members. Indeed, Class Counsel carefully reviewed hundreds of pages of documents and tens of thousands of line items of time

and payroll data in connection with this lawsuit, which included numerous policies and procedures pertaining to Defendant's payroll practices with respect to the putative class members as well as electronic payroll records for the entire class. (Hart Decl. ¶¶ 13, 15). As an example, Class Counsel have consistently protected the interests of the putative class members, as evidenced by the release provided to Defendant as detailed in the Settlement, specifically that the release is focused on the claims made in Plaintiffs' operative Complaint and the previous complaints filed in this action. (Hart Decl. ¶ 25).

6. Questions of Law and Fact Predominate

Here, common questions of law or fact predominate over individual questions pursuant to Rule 23(b)(3). These issues of fact and law raised in this action are common to all members of the classes and predominate in this case for purposes of settlement. Here, Plaintiffs contend that Defendant failed to provide proper meal and rest breaks, failed to properly pay overtime, failed to properly accrue and pay vacation and personal day entitlements upon termination, failed to provide accurate itemized wage statements, and failed to pay all wages in a timely manner upon termination. Based on discovery obtained in this action, Plaintiffs believe and assert that Defendant committed these violations as to Plaintiffs in the same manner as to all Class Members. **7. Superiority of Class Action**

The requirement that a class action is superior to other methods of adjudication under Rule 23(b)(3) is also met. Courts have recognized that the class action device is superior to other available methods for the fair and efficient adjudication of controversies involving large number of employees in wage and hour disputes. *See, e.g. Hanlon*, 150 F.3d at 1022.

Thus, the Court should certify the Classes as defined herein for settlement purposes only, appoint the named Plaintiffs as Class Representatives, and appoint Peter M. Hart of the Law Offices of Peter M. Hart, and Kenneth H. Yoon of the Law Offices of Kenneth H. Yoon, as Class Counsel.

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 (e.g., this provisional class certification will be vacated) and be free to assert any claim or defense that they could have asserted at the outset of the litigation, including Defendant's arguments against class certification.

G. The Notice To Be Given Is The Best Practical

"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. Proc. 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. Proc. 23(e)(B).

Paragraph 20 of the Settlement provides that the court-appointed claims administrator will send by first class mail a copy of the court-approved notice to all Class Members. (Settlement ¶ 20). The Claims Administrator will utilize the U.S. Postal Service's Change of Address Database prior to the mailing. *Id*. If there are undeliverable Notices, the Claims Administrator and Ritz Carlton shall work together to obtain updated addresses from the Class Members who are still employed. *Id.*

The Notice provides the Class everything they need to know in order to make an informed decision. It provides an explanation of the proposed settlement and procedures on how to object and appear. The documentation provides a brief explanation of the case, the exclusion date and procedure for exclusion, the attorney's fees to be paid and the individual members' estimated recovery under the settlement net of expenses, which are all included in the notice papers. It also states that those who do not opt out will be bound by the Settlement. (Settlement Ex. B (the "Class Notice") at 2, 8-9). Furthermore, along with the Notice Class Member will receive a Dispute Form which will be individualize for each Class Member and will reflect the time periods during the Class Period in which the Class Member was employed in a class-qualifying capacity, and the number of hours worked, their final rate of pay and their primary occupational code. (Settlement ¶ 46).

H. Attorney's Fees, Costs, And Class Representative Enhancements

1. The Requested Attorney's Fees and Costs are Reasonable

Class Counsel will seek an award of attorney's fees of 30% of the Gross Settlement Value and reimbursement of litigation costs of up to $35,000.00 simultaneous with Plaintiffs' motion seeking final approval of this class action settlement. Defendant has agreed not to object to this request.

While it may be common practice for an attorney's fees application in a class action to

be made only in connection with the final approval hearing, Class Counsel have traditionally presented the Court with some preliminary information concerning the fee application as a courtesy. Since Federal Rule of Civil Procedure 23 requires that the Class be given notice of the agreement of the parties that Class Counsel will seek a 30% fee and that Defendant will not oppose such application, Class Counsel make preliminary disclosure of the basis for the requested fees.

Class Counsel will apply to the Court for a contingent award of attorney's fees in an amount equal to 30% of the Gross Settlement Value, as set forth in the Settlement. This fee of $600,000.00 is from a Gross Settlement Value of $2,000,000.00—a guaranteed fund. This award is commensurate with (1) the risk Class Counsel took in commencing this action; (2) the time, effort and expense dedicated to the case; (3) the skill and special knowledge of Class Counsel; and (4) the value of this guaranteed settlement achieved for Class Members.

Class Counsel faced risk and difficulty on numerous levels. First, it was clear from the outset that this case could be strongly contested and that the case would require the dedication of significant attorney resources to litigate the case properly and successfully. Second, the issues were complex and the relief sought was California-wide. At the time this case was commenced, there was a risk that the theory of recovery raised by Plaintiffs and their counsel could be defended successfully, including the possibility of Defendant being able to successfully assert defenses to claims which had two-way attorney's fees provisions. In addition, Class Counsel knew that they would be challenging a company that believed that claims were meritless and would be represented by extremely experienced counsel. Class Counsel knew that obtaining a remedy would be difficult. (Hart Decl. ¶ 44).

As previously stated, Plaintiffs arranged for informal discovery prior to mediation and formal discovery following the mediation and received voluminous data and documents from Defendant, which Plaintiffs' Counsel diligently reviewed and analyzed. Just prior to reaching the Settlement, Plaintiffs filed a Motion to Compel and were in the process of finalizing discovery letter briefs for submission to Magistrate Judge James. Without the detailed work performed, Plaintiffs and Class Counsel would not have been able to fairly negotiate the Settlement, nor would Plaintiffs and Class Counsel be able to explain to the Court the range of exposure for its analysis of the fairness of the Settlement. The amount of time necessary to arrive at the exposure number may not be readily

apparent as Plaintiffs only provide the final number to the Court, but for purposes of mediation and in order to arrive at that final number, numerous hours of time were spent reviewing records and compiling the results into work product necessary to be prepared for mediation, certification, and this Motion. (Hart Decl. ¶ 32).

In addition, Class Counsel met at length with each other in connection with this case, engaged in the extensive legal research and prepared the motion to compel and the motion for preliminary approval. (Hart Decl. ¶ 45). Significant time also was expended by Class Counsel in reaching this Settlement, including mediating this case in a full-day mediation session with a private experienced mediator, David Rotman, who has mediated numerous class action and wage and hour cases and is one of the pre-eminent mediators in California. The mediation ended with a mediator's proposal, which rejected but further discussions continued with mediator Rotman's assistance and lead ultimately to a second mediator's proposal which was accepted on December 12, 2012. In the meantime, discovery was ongoing and disputes were arising which lead to significant and continued meet and confer efforts, including further lengthy conference calls among counsel for Plaintiffs and Defendant and in person meet and confers.

Finally, based upon prior experience, Class Counsel anticipate additional work as part of preliminary approval and final approval, including work necessary as part of the claims process and work necessary explaining to all the Class Members the terms of the Settlement. Assuming Preliminary Approval is granted, all Class Members will be clients and Class Counsel thus has the duty, obligation and personal practice of communicating with each Class Member (as a client) to the satisfaction of each Class Member. (Hart Decl. ¶ 45).

Class Counsel seek a fee award for their successful prosecution and resolution of this action, calculated as a percentage of the total value of benefits afforded the Class Members by the settlement. Federal courts have recognized that an appropriate method for determining an award of attorney's fees is based on a percentage of the total value of benefits to Class Members by the settlement. *See 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." *Vincent*, 557 F.2d at 769.

The goal in a case such as this is to set a fee that approximates the probable terms of a contingent fee contract negotiated by a sophisticated attorney and client in comparable litigation. A review of class action settlements over the past ten years shows that the courts have historically awarded fees in the range of up to 50%, depending upon the circumstances of the case. Class Counsel's requested fee comes to 30%, a percentage well within the range of reasonableness. In discussing the range of fees, the Court in the *Activision* litigation stated:

> In *In re Warner Communications Sec. Lit*., 618 F. Supp. 735, 749-50 (S.D.N.Y. 1985), aff'd 798 F.2d 35 (2d Cir. 1986), Judge Keenan concluded that the fees range from 20% to 50%. The average of the fees in the sixteen cases listed in Warner is 30.6%.

In re Activision Sec. Litig., 723 F. Supp. 1373, 1378 (N.D. Cal. 1989). Professor Newberg is in accord:

> No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.

Newberg on Class Actions, § 14.6 (4th ed. 2010).

Further, Class Counsel litigated this case and achieved what they believe is a tremendous recovery for Plaintiffs and the Class Members. The Settlement amount is a guaranteed fund, and Class Members need not file any claim forms to receive their money—the payments will automatically be sent to those Class Members who do not opt out. The release is focused on just the claims alleged. Indeed, this recovery is outstanding and is the result of dedication and hard work of Plaintiffs and Class Counsel. Class Counsel believe that this settlement is an absolutely excellent result for the class. Recovery of a raw gross average of $1,333 per person, which means that the recovery per person is *significant to each person.* The settlement shares to be distributed will make a difference to each Class Member who worked an appreciable amount of time.

It is respectfully requested that the Court grant preliminary approval to the request for attorney's fees as noted herein. 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.

The Court should preliminarily approve the requested attorney's fees and costs, which

are justified by the results achieved, the complexity of the issues, the difficulty of the case, and the great risk undertaken by Class Counsel. The requested attorney's fees will not be opposed by Defendant, and are well within established guidelines.

2. The Class Representatives' Enhancements are Reasonable and Fair in Light of (1) Risks of Costs and Attorney's Fees, (2) Future Adverse Employment Consequences, and (3) the Time and Effort Put Into this Case

Pursuant to the terms of the Agreement, Defendant agreed not to oppose an enhancement payment payable to each of the named Plaintiffs of $15,000.00, which Plaintiffs request this Court preliminary approve.

Incentive awards for representative plaintiffs are both proper and routine. For example, in *Enterprise Energy Corp. v. Columbia Gas Transp. Corp.*, 137 F.R.D. 240, 250-51 (S.D. Ohio 1991), each representative plaintiff was granted a $50,000.00 incentive award. *See also, In re Dunn & Bradstreet Credit Servs. Customer Litig*., 130 F.R.D. 366, 377 (S.D. Ohio 1990), where the various representative plaintiffs received incentive awards ranging from $35,000.00 to $55,000.00. Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate to induce individuals to step forward and assume the burdens and obligations of representing the class. In deciding the amount of an enhancement award for a class representative, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions and the amount of time and effort the plaintiff expended in pursuing the litigation. *See Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Van Vranken v. Atlantic Richfield Co*., 901 F. Supp. 294, 299-300 (N.D. Cal. 1995); *Bogosian v. Gulf Oil Corp*., 621 F. Supp. 27, 32 (E.D. PA 1985).

Particularly in employment class actions, such as discrimination or wage claims, named plaintiffs should be entitled to an enhancement award as an incentive to take the risks associated with pursuing employment claims on behalf of other employees. An award is justified where the plaintiff is a "present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril." *Roberts v. Texaco*, 979 F. Supp. 185, 201 (S.D.N.Y

1997). "We also think there is something to be said for rewarding those drivers who protect and help to bring rights to a group of employees who have been the victims of discrimination." *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974).

The amount sought by Plaintiffs is warranted in this case. Plaintiffs conferred with Class Counsel on numerous occasions, engaged in telephone discussions on many occasions, provided detailed and crucial information in providing many pages of documents regarding the case, and providing information on the alleged policies and practices of Defendant that formed the substance of this litigation.

In particular, Plaintiffs also plan on performing additional work for the betterment of the class after notice is sent out by talking with members who have questions. Plaintiff Martinez is a current employee of Defendant and will almost certainly be asked questions about the Settlement by her co-workers and will be prepared to answer them.

In addition, the named Plaintiffs ran the risk of not prevailing in this matter and thereby facing a cost bill and the possibility of payment of attorney's fees to Defendant, as the claim for vacation wages carries a two-way attorney's fees provision per California Labor Code § 218.5. This is a real risk that Plaintiffs took at their own expense alone for the benefit of the classes of current and former employees of Defendant and a risk that other of Defendant's employees did not have to face in order to get this settlement.

Further, by being the named Plaintiffs, Mr. Lambson and Ms. Martinez put their names forward on the public record at the risk of possible future adverse employment consequences by future or potential employers who might not choose to hire them because they took the lead in this lawsuit. This, too, is a significant risk that they have borne for the class of employees who have reaped the benefits of this case without having to face this risk personally themselves. *See Roberts*, 979 F. Supp. at 201. Class Counsel believe this also should be considered in the award of the Class Representative Enhancement. (Hart Decl. ¶ 43).

Finally, and as mentioned previously, as part of the Settlement, Plaintiffs were required to provide Defendant with a full and general release of any and all claims, something that the class members did not have to surrender in order to receive the benefits under this Settlement. Plaintiffs

Lambson and Martinez, thus, give up much more than Class Members by providing this general release of claims. (Settlement ¶¶ 54, 55).

The amount of $15,000.00 to each of the named Plaintiffs is extremely reasonable given the risks that they took and bore for the class and the benefits they conveyed on the other class members.

Based on the foregoing, Plaintiffs request that the Class Representatives service payments of $15,000.00 to each of the Plaintiffs be conditionally approved.

III. CONCLUSION

Based on the foregoing, the Parties request the Court, as part of their preliminary approval of the Settlement, to do the following:

1. Review and approve the proposed Settlement;

2. Consider and determine that the proposed Settlement preliminarily appears to be fair, reasonable and adequate, and whether the proposed class of settling plaintiffs preliminarily appears to meet the applicable certification criteria.

3. Approve Plaintiffs Vernon Michael Lambson and Dinora Martinez as the Class Representatives and approve Class Counsel as: Peter M. Hart, Esq. of the Law Offices of Peter M. Hart; Kenneth H. Yoon, Esq. of the Law Offices of Kenneth H. Yoon; with Peter M. Hart as the Lead Class Counsel and preliminarily approve the attorneys' fees and costs sought by Class Counsel and the service payments to the Class Representatives.

4. Approve the requested Settlement Administrator.

5. Enter an Order preliminarily approving the proposed class for settlement purposes only, approve notice forms to be distributed to the Class, direct notice to be given to the Class and set the following schedule of settlement proceedings:

6. Enter an Order setting the following deadlines:

a. Enter an Order that Defendant shall provide the administrator, in electronic form, within fifteen (15) calendar days upon granting of the preliminary approval Order by this Court, with all information necessary for the Administrator to be able to mail Notices to the Class. Within ten (10) days of after the receipt of this information from Defendant, the Administrator shall

mail out the Class Notice and Dispute Form to the Class Members.

b. Deadline for Objection: Within sixty (60) calendar days after first mailing of notice to class.

c. Deadline for Opt-Out: Within sixty (60) calendar days after first mailing of notice to class.

e. Deadline for Plaintiffs to motion for attorney's fees and costs and class representative incentive award: Within fifty (50) calendar days after the first mailing of class notice.

f. Deadline for Plaintiffs to file motion for final approval: Thirty-five (35) calendar days prior to the final fairness and approval hearing.

g. Final fairness and approval hearing: [to be determined by the Court at the hearing for preliminary approval of Class settlement].

DATED: February 1, 2013 LAW OFFICES OF PETER M. HART

By: /s/ Peter M. Hart
Peter M. Hart
Attorney for Plaintiffs Vernon Michael Lambson and Dinora Martinez