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ENDORSED
FILED
ALAMEDA COUNTY
MAR -2 2017
CLERK OF THE SUPERIOR COURT
By Lanette Buffin, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

JORDAN WILLEY, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

TECHTRONIC INDUSTRIES NORTH AMERICA, INC., a corporation; R&B SALES & MARKETING INC., a corporation; and DOES ONE through TEN inclusive

Defendants.

Case No.: RG16806307

ASSIGNED FOR ALL PURPOSES TO HON. WINIFRED Y. SMITH
DEPARTMENT 21

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT

Date: March 24, 2017
Time: 11:00 a.m.
Dept: 21
Reservation No: R-1808445

Complaint Filed: March 3, 2016

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I. INTRODUCTION

Plaintiff Jordan Willey seeks preliminary approval of a $3.5 million non-reversionary, checks-mailed class action settlement of state and federal wage and hour claims against Defendants Techtronic Industries North America Inc. ("TTI") and R & B Sales and Marketing, Inc. ("R&B") (separately, "Defendant" and collectively, "Defendants"). The proposed settlement includes all individuals, numbering approximately 345, employed by Defendants as "Field Representatives" (who went by a variety of similar job titles) in California from March 3, 2012 through January 31, 2017.[1] Defendants assign "Field Representatives" to one or more Home Depot stores, where they assist with the merchandising of TTI's and its related companies' products (primarily power tools). Plaintiff alleges that, among other things, Defendants required him and other Field Representatives to perform overtime work "off the clock" without compensation, failed to reimburse them for business expenses including mandatory home internet expenses, failed to provide them with meal periods, failed to provide them with accurate wage statements, and failed to pay them all wages owed at discharge. Plaintiff also brings a claim under the Unfair Competition Law, California Business and Professions Code section 17200 *et seq.* ("UCL"), as well as representative claims under the Private Attorneys General Act, California Labor Code section 2698 *et seq.* ("PAGA"). Defendants contend that their employment policies and practices, including those prohibiting off-the-clock work, requiring employees to take compliant meal breaks, and reimbursing for business expenses are lawful and appropriate.

Approximately one year after the case was filed, and after a full-day mediation session, the parties have entered into a Stipulation and Agreement to Settle Class and Collective Action ("Settlement Agreement" or "Settlement"), which is now presented to the Court for preliminary approval. *See* Exhibit A to Declaration of Laura L. Ho ("Ho Decl.") (Settlement Agreement cited hereafter as "Ex. A"). Under the Settlement, Field Representatives who have worked the full class period in the "multi-store representative" position will receive approximately $45,000 – significantly more than a typical year's pay. *See* Ho Decl. ¶ 21. Participating Settlement Class Members should

[1] Plaintiff contends that both R&B and TTI were and are employers of the Settlement Class Members. Defendants deny that there was any joint employer relationship between R&B and TTI. Plaintiff refers to both Defendants as the employer throughout this brief – Defendants' position is that R&B is the sole employer.

receive their settlement awards approximately twenty months after the Complaint was filed. *Id.* ¶ 36. In addition, after the Complaint was filed, Defendants implemented new policies addressing violations alleged in the Complaint. *Id.* ¶ 9.

In this Motion, Plaintiff requests the Court to (1) conditionally certify the proposed Settlement Class, (2) conditionally appoint Plaintiff and Plaintiff's Counsel as Class Representative and Class Counsel for the Class, (3) grant preliminary approval of the proposed Settlement, including the settlement amount and the plan for allocation and distribution of settlement funds, (4) preliminarily approve the requested payments of attorneys' fees and litigation costs to Class Counsel and an enhancement award to the Named Plaintiff, (5) approve the proposed notice plan and the dates by which Settlement Class Members must opt out or object to the Settlement, and (6) schedule a hearing for final approval. Defendants do not oppose this motion.

II. PRE-SETTLEMENT PROCEEDINGS AND STATUS OF THE LITIGATION

A. Factual Background

TTI and/or its subsidiaries, design, manufacture, and market power equipment, hand tools, outdoor equipment, and floor care equipment, largely selling such products to Home Depot for sale to end customers. TTI's subsidiaries' brands include Ryobi, Milwaukee, Homelite, Hoover, AEG, Dirt Devil, and others ("Products"). *See* Compl. ¶ 1. R&B is a related company of TTI that partners with Home Depot to supply such Products in Home Depot stores. Defendants employ Field Representatives throughout California to merchandise the Products in Home Depot stores. *Id.* ¶ 2. These in-store responsibilities include tasks such as installing displays and other marketing materials, performing demonstrations of tools, moving and rearranging Product displays, ensuring that the Products are fully stocked, organizing shelves where the Products are displayed, cleaning Product displays, and speaking with Home Depot's customers and employees about the various Products. *Id.* ¶ 15. Field Representatives also regularly perform "re-sets," during which they remove Products from the shelving, alter and rebuild the shelving, and re-arrange the Products according to Defendants' instructions. *Id.* ¶ 25. Plaintiff contends that Field Representatives also perform work outside of Home Depot stores, including preparing and assembling marketing materials at home for deployment in Home Depot stores, preparing power tools for in-store demonstrations, entering data into the

1 computer system from a home computer, and cleaning and maintaining company vehicles . *Id.* ¶¶ 2,
2 17. Some Field Representatives are responsible for a single Home Depot store ("Single-Store Reps" or
3 "SSRs"), and others are responsible for a territory of multiple Home Depot stores ("Multi-Store Reps"
4 or "MSRs"). *Id.* ¶ 15.

5 Defendants classify all Field Representatives as non-exempt employees under California and
6 federal overtime laws, and require them to use a time-recording system. *Id.* ¶¶ 3, 18. Plaintiff alleges
7 that Defendants require and are aware that Field Representatives regularly work greater than 8 hours in
8 a workday and greater than 40 hours in a workweek without recording or being compensated for such
9 additional time. *Id.* ¶¶ 19-27. For example, Plaintiff alleges that Field Representatives are required to
10 spend a minimum of 8 hours each day doing "in-store" work at Home Depot stores, and are instructed
11 to enter 8 hours of time for such days, even though Defendants require them also to do "out-of-store"
12 work, including frequently receiving packages of merchandising materials or demonstration tools that
13 they must prepare and organize at home, performing mandatory computer work at home, and
14 completing online training programs. *Id.* ¶¶ 21-22. Plaintiff also alleges that Field Representatives are
15 instructed to complete all of their assigned in-store work and not to record overtime, even if (as is often
16 the case) such work requires more than eight hours to complete. *Id.* ¶ 21. Plaintiff alleges that Field
17 Representatives must attend work meetings with managers at which they work longer than eight hours,
18 and that the managers are aware that the Field Representatives are not compensated for time worked
19 beyond eight hours. *Id.* ¶ 32. Defendants contend that they had explicit policies instructing employees
20 to record all time worked which were fully compliant with all applicable laws. Defendants contend
21 that Field Representatives generally work without any on-site supervision, and that Defendants
22 necessarily rely on Field Representatives to accurately record all time worked in accordance with
23 Company policies. As such, Defendants contend that Settlement Class Members were properly paid
24 for all time worked, and that any claim by any Settlement Class Member that he or she was not paid
25 for all time worked was an individualized claim.

26 Plaintiff also alleges that Defendants regularly fail to provide meal periods to Field
27 Representatives during their standard workdays and during re-sets. *Id.* ¶ 28. Plaintiff alleges that
28 Defendants are aware that the Field Representatives' duties prevent them from taking meal periods,

1 and that Defendants' managers encourage Field Representatives not to take meal periods. *Id.*
2 Defendants contend that the meal period policies and practices were and are compliant with California
3 law.

4 Plaintiff alleges that he and Settlement Class Members were required to have home internet
5 access to perform their jobs, but were not reimbursed for any portion of their home internet expenses.
6 *Id.* ¶ 33. Plaintiff also alleges that Field Representatives were required to devote a substantial portion
7 of their home garages to storing Defendants' packages and were required regularly to wash company
8 vehicles, without receiving any reimbursement for such costs. *Id.* ¶¶ 34-35. Defendants contend that
9 Settlement Class Members had access to and used Home Depot computers and smart phones provided
10 by Defendants and were not required to use home internet services to perform their jobs. Defendants
11 also contend that Settlement Class Members were provided trucks in which they could store any of
12 Defendants' materials. As a result, Defendants contend that they have fully compliant reimbursement
13 policies and a practice of properly reimbursing Settlement Class Members for all valid business
14 expenses.

15 Plaintiff alleges that Defendants' wage statements are inaccurate as a result of the foregoing
16 violations, and also because the name and address of Defendant TTI do not appear on the statements.
17 *Id.* ¶ 36. Plaintiff also asserts that the foregoing wage violations resulted in other derivative Labor
18 Code violations, including the failure to pay all wages owed at time of discharge and PAGA violations.
19 *Id.* ¶ 37. Defendants contend that the wage statements are fully compliant and that R&B is the sole
20 employer of the Settlement Class Members, and is therefore the only entity that is required to be listed
21 on the wage statements.

22 **B. Procedural Background**

23 On November 19, 2015, Plaintiff gave written notice by certified mail of Defendants' alleged
24 violations of various provisions of the California Labor Code to the Labor and Workforce
25 Development Agency ("LWDA") and TTI. *See* Compl. ¶ 94 & Ex. B thereto. The LWDA did not
26 indicate an intention to investigate the alleged violations. *Id.* ¶ 94. On March 3, 2016, Plaintiff filed
27 suit in Alameda County Superior Court. Plaintiff's Complaint alleges claims against Defendants on
28 behalf of the following state-law class:

> All FRs [*i.e.*, Field Representatives] employed by TTI in California at any time from four years prior to the date this Complaint was filed through trial.

Id. ¶ 39. The Complaint also alleges claims under the federal Fair Labor Standards Act ("FLSA") against Defendants on behalf of the following collective-action class:

> All FRs employed by TTI in California at any time from three years prior to the date this Complaint was filed through trial.

Id. ¶ 46.

The Complaint asserts nine causes of action: (1) failure to pay overtime wages (Cal. Lab. Code §§ 510, 558 & Cal. Indus. Welfare Comm'n Wage Order No. 7 ("Wage Order No. 7")); (2) failure to pay overtime wages (FLSA, 29 U.S.C. § 207); (3) failure to pay minimum wage for all hours worked (Cal. Labor Code §§1194, 1197, 1197.1 & Wage Order No. 7); (4) failure to provide accurate itemized wage statements (Cal. Lab. Code § 226(a)); (5) failure to provide meal periods (Cal. Lab. Code §§ 226.7, 512 & Wage Order No. 7); (6) failure to reimburse business expenses (Cal. Lab. Code § 2802); (7) failure to pay all wages due upon termination (Cal. Lab. Code § 203); (8) violation of the UCL (Cal. Bus. & Prof. Code §17200 *et seq.*); and (9) claims under PAGA (Cal. Lab. Code § 2698 *et seq.*).

Defendants filed their Answer on April 27, 2016. The Answer generally denied the claims and raised numerous affirmative defenses. Defendants continue to deny that they engaged in any conduct giving rise to liability.

The Parties agreed to engage in private mediation to determine whether the case could be resolved. *See* Ho Decl. ¶ 7. The Parties signed a tolling agreement to stop running of any statute of limitations while they pursued mediation. *Id.* Defendants produced detailed information for mediation purposes only, as further described below. *Id.*¶ 8. In addition, Plaintiffs' Counsel undertook substantial independent investigation, including in-depth discussions with approximately ten Field Representatives from various parts of the state, both before and after the filing of the Complaint. *Id.* ¶¶ 3-4. Based on such information, Class Counsel performed analyses, described below, to reach realistic estimates of Defendants' exposure in this case. *Id.* ¶¶ 27-28, 35, 37.

In approximately mid-October 2016, Plaintiff learned that Defendants had, subsequent to the

filing of the case, issued new policies that gave examples of working off the clock and addressed "compensable" time and reporting requirements, and implemented a meal period policy. *See* Ho Decl. ¶ 9. These policies, which Plaintiff believes were issued in response to the allegations in the Complaint, define compensable time to include various tasks that Plaintiff alleged had previously been uncompensated "off-the-clock" work, including: receiving and organizing work-related packages at home, completing online training courses, working during a meal period, communicating for work purposes via email or phone, traveling to and attending off-site meetings, and engaging in vehicle maintenance. *Id.*

The Parties' mediation took place on December 1, 2016 in San Francisco, with experienced and well-respected employment-law mediator Hunter S. Hughes. *See* Ho Decl. ¶ 12. Plaintiff Jordan Willey travelled from Fresno, California to attend and participate in the mediation, which lasted approximately eleven hours, and resulted in a signed, binding Memorandum of Understanding. *Id.* On March 2, 2017, the Parties executed a detailed Settlement Agreement. *See* Ex. A.

C. The Terms of the Settlement.

The Settlement resolves the claims of Plaintiff and the proposed Class against Defendants. The basic terms of the Settlement are:

1. Settlement Fund – Subject to the occurrence of the Settlement Effective Date, Defendants will pay the Settlement Sum of $3.5 million, which will satisfy their obligations for all payments, fees, and costs identified in the Settlement Agreement. *See* Ex. A § (III)(E)(1). This is a fixed common fund settlement amount and none of the Settlement Fund shall revert back to Defendants. *Id.* § (III)(E)(1), (5), (7).

2. Class Definition and Class Period – The Class is defined as "All persons who are or were employed (1) in California; (2) by either Defendant; (3) in a Covered Job Position; (4) at any point during the Class Period." *Id.* § (I)(V). The Class Period is March 3, 2012 to January 31, 2017. *Id.* § (I)(B). The covered Job Positions are Single Store Representative, Field Sales, Field Sales Representative, Field Sales and Marketing Representative, Field Service Representative, and Multi-Store Representative. *Id.* § (I)(D).

1 3. Reserve Fund – A Reserve Fund of $10,000 is set aside from the Settlement Fund to
2 pay any Class Members who are not initially located, or to pay additional amounts determined to be
3 due to Participating Settlement Class Members. *Id.* § (I)(R). Any remaining funds in the Reserve
4 Fund not expended for disputed payments pursuant to the Settlement Agreement shall be added back
5 into the Class Member Settlement Fund before the Final Individual Payment Amounts are calculated.
6 4. Attorneys' Fees, Costs, and Named Plaintiff's Enhancement – The Settlement provides
7 for payment of up to one-third of the Settlement amount, or $1,166,666.67, to Class Counsel as
8 attorneys' fees, and $15,000 to Class Counsel to reimburse litigation costs. *Id.* ¶ 3. It also specifies
9 that $10,000 shall be paid to the Named Plaintiff Class Representative as a Service Award payment.
10 *Id.* ¶ 4.
11 5. Settlement Administrator and Administration Costs – The Settlement proposes
12 appointment of Kurtzman Karson Consultants ("KCC") as Settlement Administrator and allocates an
13 estimated $25,000 for payment of administration expenses. *Id.* § (III)(E)(9). Plaintiff's Counsel
14 sought bids from three reputable claims administration companies, received two bids, and selected
15 what they viewed as the best option for the Class. *See* Ho Decl. ¶ 17. Any funds allocated but not paid
16 to the Settlement Administrator will be distributed to the class pro rata. *See* Ex. A § 3.
17 6. PAGA Allocation – The Settlement allocates $20,000 to PAGA penalties, with 75% of
18 that amount ($15,000) to be paid to the LWDA. *See* Ex. A ¶ 6. The LWDA shall receive notice of the
19 settlement at the same time the Settlement is provided to the Court, as well as notice of the date, time,
20 and location of the preliminary approval hearing at least ten calendar days prior to the date set for the
21 preliminary approval hearing. *Id.* Prior to serving the motion for final approval, Plaintiff's Counsel
22 will notify the LWDA of the date, time, and location of the final approval hearing. *Id.*
23 7. Class Member Settlement Fund – The Class Member Settlement Fund – *i.e.*, the amount
24 remaining of the Settlement Fund after deductions for attorneys' fees and costs, settlement
25 administration expenses, and the Class Representative service award (but not the Reserve Fund, which
26 will be distributed to the Class) – will total approximately $2,268,333.33. *See* Ho Decl. ¶ 19. This
27 amount will be distributed pro rata based on the number of work-weeks that each Settlement Class
28 Member worked during the class period, with work-weeks during which Settlement Class Members

held a "multi-store" Field Representative position valued at three times the work-weeks in which Settlement Class Members held a "single-store" Field Representative position, for the reasons set forth below. Ex. A § (III)(E)(10).

8. Settlement Administration and Notice Procedures – The Settlement Administrator will, among other things, distribute the Class Notice and Statement of Weeks Worked Form, including skip-tracing and remailing when necessary for delivery; calculate payouts for each Settlement Class Member; resolve any disputes over Settlement Class Members' Weeks Worked in the Class Period; draw and distribute checks to the Settlement Class Members; administer the Settlement Fund; mail any necessary tax reporting forms issued by Defendants to Settlement Class Members, the Parties and the Settlement Fund; and report to the Court on the notice/opt out process and payment of the Settlement Fund. *Id.* § (III)(E)(1). Within 20 days of preliminary approval, Defendants will provide the Settlement Administrator with the contact information of the Settlement Class Members, their social security numbers, dates worked and compensable weeks worked during the Class Period, and whether each Settlement Class Member is a current or former employee. *Id.* § (III)(B)(a). Individual notice will be mailed to all Settlement Class Members within 7 business days after the Settlement Administrator receives the foregoing information. *Id.* § (III)(B)(c).

9. Class Notice – The proposed Class Notice explains the terms of the Settlement and how to receive a Settlement Payment, object, and/or opt out. *See* Ex. A at Ex. 1 (proposed Notice and Statement of Weeks Worked Form). All objections and requests for exclusion must be completed and post-marked no later than sixty (60) days after the initial mailing of the Notice. *See Id.* § (III)(C)(1-2). Each Settlement Class Member will be informed of the number of Weeks Worked for such Settlement Class Member during the Class Period and how many are "single store" vs. "multi store" Work Weeks based on Defendants' records of their dates of employment, as well as the Settlement Class Member's estimated pro rata share of the Net Settlement Fund. *Id.* § (III)(E)(10) & Ex. C thereto. Settlement Class Members will have the right to challenge the number of Weeks Worked as shown on the Statement of Weeks Worked Form. *Id.* Such challenges will be resolved by the Settlement Administrator, based on Defendants' records and any documents or other information presented by the Settlement Class Member, Class Counsel, or Defendants. *Id.* The Settlement Administrator's

determination will be made without a hearing, and will be final and binding without the right to appeal. *Id.* Ex. A § (III)(E)(11). All challenges to the number of Weeks Worked must be postmarked no later than sixty days after the initial mailing of Class Notice. *Id.* § (III)(C)(1-2).

10. Tax Consequences of Settlement Payments – All Individual Settlement Payments will be paid in a net amount after applicable state and federal tax withholdings, including payroll taxes have been deducted. The $3.5 million settlement includes the employer's share of payroll taxes. *Id.* § (III)(E)(1). For tax purposes, 50% of the payment made to each Settlement Class Member will be allocated to wages and 50% will be allocated to non-wage income (*id.* (III)(E)(5), for the reasons explained below. The administrator shall issue to Settlement Class Members the appropriate tax reporting form(s) for payments made to the Class. *Id.*

11. Scope of Release and Final Judgment – The release contemplated by the proposed Settlement corresponds to the claims made against Defendants in the Complaint (as well as a claim for rest period violations identified in Plaintiff's PAGA notice, which Plaintiff ultimately decided not to assert as a cause of action). *Id.* § (II)(C). The Released Claims include all claims arising from or based on "facts alleged in the litigation." *Id.* § (II)(C)(13). The Named Plaintiff, unlike Settlement Class Members, will give a general release of all potential claims against Defendants, as part of the consideration for his proposed service award of $10,000. *Id.* § (II)(C)(4).

III. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE.

Express judicial policy favors maintaining wage and hour actions as class actions. *Sav-on Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 340 (2004). The decision to certify a class is a procedural one that does not ask whether the action is legally or factually meritorious. *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1023 (2012). A court may certify a provisional settlement class after the preliminary settlement hearing. *See* Cal. Rule of Court 3.769(d).

In California, a Class is certifiable if (1) it is ascertainable and sufficiently numerous; (2) there exists a well-defined community of interest among the class members; and (3) a class action would be a superior method of adjudication. *Brinker*, 53 Cal. 4th at 1021. Plaintiff contends, and Defendants do not dispute for settlement purposes only, that all of the elements are met here.[2]

[2] Defendants do not concede that certification is appropriate outside of this Settlement and have

A. The Class Is Ascertainable and Sufficiently Numerous.

A class is ascertainable if it "identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description. *See Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290, 1299-1300 (2015); *Aguiar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121, 136 (2006) ("The members of plaintiffs' proposed class are ascertainable from Cintas's payroll records, which identify each employee by name, job code, dates of employment and rate of pay."). A class is sufficiently numerous if joinder of all class members would be impracticable. *See Hendershot v. Ready to Roll Transp., Inc.*, 228 Cal. App. 4th 1213 (2014).

Here, Defendants have ascertained the approximately 345 Settlement Class Members from Defendants' employment records. *See* Ho Decl. ¶ 40. Joinder of so many parties would be impracticable.

B. A "Community of Interest" Exists Among Settlement Class Members

The "community of interest" requirement includes three elements: (1) predominant common questions of law or fact; (2) a class representative whose claims are typical of those of the class; and (3) a class representative who can adequately represent the class. *See Brinker*, 53 Cal. 4th at 1021. Plaintiff meets each element here.

1. Common Questions of Law and Fact Predominate

To establish classwide liability for their off-the-clock claims, Plaintiff and the class must prove that (1) they performed work for which they did not receive compensation; (2) that Defendant knew or should have known that plaintiffs did so; and that (3) Defendants stood "idly by." *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (applying California law); *see also Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584-85 (2000) (employer who knows or should know of overtime work must comply with overtime payment requirements). Off-the-clock claims are certified when, as

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(continued …)

preserved all rights to oppose certification if, for any reason, the settlement does not become effective. Plaintiff's contentions throughout this brief that the action is appropriate for settlement are subject to Defendants' position that certification is appropriate for settlement purposes only.

here, there is evidence that a common practice of off-the-clock work existed with the employer's knowledge. In *Williams v. Superior Court*, 221 Cal. App. 4th 1353 (2013), an insurance company employing field adjusters "presume[d] each adjuster's eight-hour workday beg[an] when the adjuster arrive[d] at his or her first vehicle-inspection appointment of the day," but did "not take into account any work the adjuster may have performed before the day's first appointment," even though the employer knew that such work was necessary. *Id.* at 1357. In *Williams*, the evidence showed that adjusters were required to, among other things, spend time in the morning logging onto their computers and downloading the day's assignments. *Id.* The court held that the "alleged commonality was the practice of adjustors working [off the clock] in order to complete their daily work," and that the case would turn on common evidence about whether the "employer knew, or should have known," that such work was taking place. *Id.* at 1369; *see also Jones v. Farmers Ins. Exchange*, 221 Cal. App. 4th 986, 996-97 (2013) (certifying off-the-clock claims where employees performed uncompensated "computer sync time" at home before shifts began). Here, if Plaintiff's allegations are proved at trial – *i.e.*, that Field Representatives worked off the clock, that Defendants knew of such tasks, and that Defendants stood idly by without providing compensation – then classwide liability will be established. Likewise, Plaintiff's claim that Defendants had an unofficial policy of instructing Field Representatives to record only eight hours of work for in-store time, regardless of the fact that Defendants knew that Field Representatives often worked longer than eight in-store hours to complete their assigned tasks, if proven at trial, would establish classwide liability. *See, e.g.*, *Brinker*, 53 Cal. 4th at 1051 (evidence of a "systematic company policy to pressure or require employees to work off-the-clock" would support class certification); *Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 415 (2015) (reversing denial of certification where plaintiffs alleged that employer required them to complete paperwork even though employer knew they could not do so within recorded hours).

Claims for reimbursement of business expenses under California Labor Code section 2802 are certified when employees assert that an employer adopted a uniform unlawful reimbursement policy. *See, e.g.*, *Cochran v. Schwan's Home Serv., Inc.*, 228 Cal. App. 4th 1137, 1144 (2014) (reversing denial of class certification for employees who alleged that they were required to make work-related calls on personal cell phones, and where employer's policy was not to reimburse for personal cell

phone expenses). Here, Plaintiff alleges that Field Representatives are required by Defendants to perform certain tasks using a home computer connected to the internet, to devote significant space to storing Defendants' packages at their homes, and to bear the costs of washing the company vehicles they drove. *See* Compl. ¶¶ 33-35. Plaintiff contends that Defendants' uniform policy was not to reimburse for these expenses. *Id.* Whether this policy is lawful is a common, predominant question.

Common questions also predominate with respect to Plaintiff's meal break violation claims. Plaintiff alleges that Defendants had an informal policy of encouraging or requiring Field Representatives work instead of taking a 30-minute off-duty meal period. *See* Ho Decl. ¶ 28. Until May 2016, Defendants had no formal meal break policy. *Id.* The absence of a meal break policy itself presents a common issue supporting class certification. *See Bradley v. Networkers Int'l, LLC*, 211 Cal. App. 4th 1129, 1149-54 (2012) ("[W]hen an employer has not authorized and not provided legally-required meal and/or rest breaks, the employer has violated the law and the fact that an employee may have actually taken a break or was able to eat food during the work day does not show that individual issues will predominate in the litigation."). Plaintiff contends that he would demonstrate at trial that even after such a policy was adopted, Defendants "implemented an unofficial policy of pressuring [their] employees to refrain from taking meal breaks." *Hoffman v. Blattner Energy, Inc.*, 315 F.R.D. 324, 339 (C.D. Cal. 2016) (certifying meal break class based on declarations by class members describing unofficial policy).

Plaintiff's wage-statement claims are amenable to class certification because they either allege facial violations that are uniform with respect to all class members (*i.e.*, failure to identify TTI on wage statements) or because they are derivative of the off-the-clock claims above.

The foregoing common questions predominate, notwithstanding the fact that a trial of the class's claims might require individualized analysis at the damages phase. *See Brinker*, 53 Cal. 4th at 1022 (if "liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages" (quotation omitted)).

2. Plaintiff's Claims Are Typical of the Proposed Class's Claims.

The test of typicality is whether other class members have the same or similar injury, whether the action is based on conduct that is not unique to the named plaintiff, and whether other class

members have been injured by the same course of conduct. *See Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007). Here, Plaintiff's claims are typical because he alleges that he suffered injury as a result of the same off-the-clock, meal break, and non-reimbursement policies that allegedly applied to the class as a whole. The relief Plaintiff seeks is the same sought on behalf of the class.

3. Plaintiff and His Attorneys Will Adequately Represent the Class.

"Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 669 n.21 (1993) (quotation omitted). Here, proposed Class Counsel are deeply experienced in complex class wage-and-hour litigation. *See* Ho Decl. ¶¶ 37, 42-44. Plaintiff has committed to represent the interests of the Class, and does not have any conflict with the interests of the class. *Id.* ¶ 40 & Ex. B (Willey acknowledgement of duties of class representative.

C. A Class Action Is a Superior Method of Adjudicating this Case.

Plaintiff's and Settlement Class Members' claims are based on Defendants' uniform policies and practices, and involve common evidence. It would be inefficient to resolve these claims at separate trials. *See Bufil v. Dollar Fin. Grp., Inc.*, 162 Cal. App. 4th 1193, 1208 (2008). In addition, the relatively small size of the individual claims at issue weighs in favor of class litigation. *See* Ho Decl. ¶ 41.

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT AS REASONABLE AND FAIR, AND AUTHORIZE NOTICE TO THE CLASS

A. The Two-Step Settlement Approval Process

A class action settlement requires approval of the court after a hearing. Cal. Rule of Court 3.769(a). Court approval is a two-step process. First, the court conducts a preliminary review of the settlement, the proposed notice to class members, and the proposal to certify a settlement class. *Id.* at 3.769(c), (d); *In re Cellphone Term. Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2009). At the preliminary approval stage, courts make a "preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *See* Manual for Complex Litig. § 21.632 (4th ed.). "The goal of preliminary approval is for a court to determine whether notice of the proposed settlement should be

sent to the class, not to make a final determination of the settlement's fairness." *See* Rubenstein, Newberg on Class Actions (5th ed. 2011) ("Newberg") § 13:13. Courts merely require at the preliminary approval stage that the proposed settlement be "within the range of possible approval." *Id.* (quotations omitted).

Then, after notice of the settlement has been distributed, the court takes into account any objections by class members and the extent to which class members have elected to opt out of the settlement, and makes a final determination whether to approve the settlement. Cal. Rule of Court 3.769(f), (g); *Cellphone Term. Fee Cases*, 180 Cal. App. 4th at 1118. In deciding whether a settlement is reasonable at the final fairness stage, courts consider a number of factors: (1) the strength of plaintiff's case balanced against the settlement amount; (2) "the risk, expense, complexity and likely duration of further litigation, including the risk of maintaining class action status through trial;" (3) "the extent of discovery completed and the stage of the proceedings;" (4) "the experience and view of counsel;" and (5) "the reaction of the class members to the proposed settlement." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (citing *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996)) (quotations omitted).

The trial court has broad discretion in determining whether a settlement is fair, *see In re Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 504-05 (2009), but the court must "independently satisfy[] itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." *Kullar*, 168 Cal. App. 4th at 129. This requires a record that "allows 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.'" *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal. App. 4th 399, 409 (2010) (quoting *Kullar*, 168 Cal. App. 4th at 120).

A "presumption of fairness" exists when: (1) a settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the Court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 245 (2001).

California public policy "generally favors the compromise of complex class action litigation," and therefore supports approval of settlements when possible. *Cellphone Term. Fee Cases*, 180 Cal. App. 4th at 1118. Other than to evaluate the settlement "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," a court should "give[] regard to what is otherwise a private consensual agreement between the parties." *Id.* (quotations omitted).

B. The Settlement Merits a Preliminary Finding of Reasonableness.

As to each factor that the Court will ultimately consider at the final fairness hearing, the Settlement is within the range of reasonableness, and thus preliminary approval is appropriate.

1. The Settlement Amount Is Favorable in Light of the Strength of Plaintiff's Case and the Potential Recovery at Trial.

The amount of the settlement in light of the strength of the plaintiff's case is the most important "reasonableness" factor. *See Kullar*, 168 Cal. App. 4th at 130. The $3.5 million non-reversionary Settlement will provide Settlement Class Members with significant payments. As explained below, Settlement Class Members' work-weeks will be valued differently depending on whether they were working as "multi-store" Reps – *i.e.*, covering a territory of approximately three to five stores – or "single-store" Reps – *i.e.*, covering a single store. *See infra* § IV.D (explaining that multi-store work-weeks are valued at three-times single-store work-weeks because the multi-store role is alleged to have required more off-the-clock work, more missed meal periods, and more unreimbursed business expenses). Many Reps worked in both the single-store position and the multi-store position, so their awards will be calculated according to the number of Work Weeks they spent in each position. As shown in the following chart, the awards are significant. For example, a Settlement Class Member who worked exclusively as a Multi-Store Rep and who worked for the entire class period is expected to receive (pre-tax) approximately $45,000 – more than a full year's pay for these workers.

	Multi-Store Work-Weeks	Single-Store Work-Weeks
Estimated Class Work-Weeks	7,225	17,036
Estimated Award/Week	$ 176	$ 59
Estimated Average Award	$ 8,820	$ 3,899
Estimated Maximum Award	$ 45,077	$ 15,026

See Ho Decl. ¶ 21 (explaining calculations; dollar amounts are before withholding of employer and employee payroll taxes on wage portion of award).

Because the Settlement is non-reversionary, Defendants will be paying the full Settlement amount. *See* Ex. A § (III)(E)(1). And because there is no requirement to submit a claim form, checks will be mailed to all Settlement Class Members who do not opt out. *Id.*

The settlement monetary relief compares favorably with Plaintiff's counsel's estimated full relief for the class. In accordance with this Court's "Procedural Guidelines for Preliminary Approval of Class Action Settlements," Plaintiff provides below, and in even greater detail in the declaration and accompanying chart submitted by Plaintiff's counsel, "the value of each claim that is being settled, as well as the value of other forms of relief, such as interest, penalties, and injunctive relief," broken out "by claims, injuries, and recoverable costs and attorneys' fees." In sum, Plaintiff's counsel estimates that success at trial would result in a realistic recovery of $8,564,440, including overtime, meal premium, and expense reimbursement claims, wage statement penalties, waiting time penalties, and FLSA liquidated damages, but not including interest, PAGA penalties, and recoverable fees and costs, such that the gross settlement of $3.5 million amounts to 41% of such a potential recovery. Although Plaintiff believes that he and the class have strong claims, each claim faces significant challenges at both the class certification and merits stages. The risks of each claim will be addressed in turn, along with a comparison of the estimated potential recovery at trial on each claim, as compared to the discounted settlement amount attributable to each claim.

a. <u>Off-the-Clock Overtime Claim</u>

With respect to "out-of-store" off-the-clock work, Plaintiff expects to establish that Defendants

knew or should have known that he and the class were required to perform tasks at home, over and above the eight hours of "in-store" time that they were expected to work. *See* Ho Decl. ¶¶ 24-25. Such tasks included opening and organizing packages of merchandising materials on a near-daily basis, assembling, charging, and otherwise preparing "demo" tools to be used in demonstrations at the stores, and performing certain online training and other computer work. *Id.* With respect to "in-store" off-the-clock work, Plaintiff expects to establish that Defendants had an unofficial policy of requiring Field Representatives to work as many hours as were required to complete their tasks – often more than eight hours per day – but still to record exactly eight hours each day. *Id.* Plaintiff also expects to establish that Field Representatives routinely worked through their lunch periods, which resulted in additional unpaid overtime work. *Id.*

Defendants are likely to raise a number of merits challenges to these claims. *First*, they will likely point to Defendants' numerous written policies, which existed throughout the class period, requiring Field Representatives not to work off the clock – policies that required Field Representatives to affirm that they would report all hours worked. *See* Ho Decl. ¶ 25. Such policies will likely be used in an attempt to undermine Plaintiff's contention that Defendants knew or should have known about the off-the-clock work, especially given that Field Representatives generally worked without on-site supervision. *Second*, Defendants will likely attempt to demonstrate that at-home computer work was not required or expected, given that computers were available to Field Representatives in the Home Depot stores. *Id.* *Third*, they will likely argue that the out-of-store task of opening and organizing packages at home required a "de minimis" amount of time, and that the packages could simply be placed in the employee's company-provided truck and opened during the work-day at the store. *Id.* And *fourth*, Defendants will likely argue that many Settlement Class Members did, in fact, record overtime hours and receive overtime pay on a sporadic basis, in an attempt to undercut Plaintiff's argument that the class was pressured not to record, and did not record, overtime work. *Id.*

The foregoing challenges present not only merits risks, but class certification risks, as well. Defendants may be able to persuade the Court, for example, that an individual inquiry would be required to determine which employees were "violating" the written policy against working off the clock, which managers did or did not pressure Field Representatives to work off the clock or through

meal periods, which employees were using work computers rather than home computers, and which employees, if any, were unable to avoid spending more than "de minimis" time opening and organizing packages. *See* Ho Decl. ¶ 26. Although Plaintiff has cited cases certifying off-the-clock claims, *see supra* § III.B.1, Defendants will be able to cite numerous cases that denied certification of such claims, with courts concluding that individual determinations would be required. *See* Ho Decl. ¶ 26. Thus, Plaintiff and his counsel recognize significant risk on the off-the-clock claims.

Plaintiff estimates that Defendants' maximum wage exposure on the overtime claims is approximately $3.5 million, plus an additional $2.7 million in liquidated damages under the Fair Labor Standards Act (which would be available only to Field Representatives who affirmatively opt in to the case under 29 U.S.C. § 216(b), and only if the Court found that Defendants' violations were not made in good faith). *See* Ho Decl. ¶ 27.[3] Thus, of the gross settlement amount of $3.5 million, Plaintiff estimates that $2.55 million is attributable to the off-the-clock wages and penalties claims. *Id.* The settlement value of these claims therefore represents 41% of the total exposure on these claims, which Plaintiff's counsel believes is an outstanding result in light of the risks discussed above and the efficiency with which the case was resolved.

b. Meal Break Violation Claim

As noted above, Plaintiff alleges that Defendants had an unofficial policy of pressuring and encouraging Field Representatives to work through their meal periods. Plaintiff expects that Defendants would put forth evidence that many Field Representatives did, in fact, take meal breaks, and that any assessment of whether meal break violations occurred would require an individualized inquiry. *See* Ho Decl. ¶ 28. Courts have declined to certify meal period cases in similar circumstances. *See, e.g.*, *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974, 1000-02 (2013).

Plaintiff believes that the realistic exposure Defendants face if the class were to prevail on the meal period claims at trial is approximately $1,025,000. *Id.* Of the $3.5 million gross settlement, Plaintiff's counsel estimates that approximately $420,000 is attributable to the meal period claim,

[3] This includes damages from Plaintiffs' argument that TTI undercalculated the applicable overtime rate by failing to include non-discretionary bonuses in the "regular rate" for overtime calculation purposes. *See* Ho Decl. ¶ 27.

resulting in a recovery of approximately 40% of estimated full relief. *Id.* Plaintiff's counsel views this discount as reasonable. *Id.*

c. **Expense Reimbursement Claim**

Plaintiff alleges that Field Representatives were not reimbursed for home internet expenses, despite being required to perform certain duties from home. As noted, Plaintiff expects Defendants to argue that Field Representatives had the option of completing their computer work using computers in Home Depot stores. *See* Ho Decl. ¶ 29. This argument presents risk both on the merits and on class certification. *Id.*

Plaintiff also alleges that Field Representatives were required to bear the expense of devoting a portion of their homes or garages to storing boxes sent to them by Defendants. Plaintiff expects Defendants to argue that such boxes could simply have been stored in the company-provided vehicle. *See* Ho Decl. ¶ 30. Plaintiff's theory is a novel one, with no controlling case law on point. Similarly, Plaintiff's theory that Field Representatives should have been reimbursed for washing their company cars is a novel one, and, in any event, amounts to little exposure. *Id.* Thus, this claim also presents risk on both the merits and class certification.

Plaintiff estimates that full relief on these expense reimbursement claims would amount to approximately $175,000, as explained in counsel's declaration. *See* Ho Decl. ¶ 31. Of the settlement amount, approximately $70,000 is attributable to the reimbursement claims. *Id.* Plaintiff's counsel views this as a reasonable discount. *Id.*

d. **Wage Statement and Derivative Violations**

Plaintiff alleges that Defendants' wage statements failed to include the name and address of Defendant TTI, but Defendants will likely argue that Defendant R&B Sales and Marketing Inc., whose name and address appear on the wage statements, was the correct and sole employer. There is risk that Plaintiff would fail to establish that TTI is a joint employer that was required jointly to be listed on the wage statements. Plaintiff's other wage statement claims and waiting time claims are derivative of the alleged violations discussed above. Thus, the exposure on these claims – approximately $1,095,000 – is properly discounted to approximately $440,000. *See* Ho Decl. ¶ 32. This result (an average gross settlement of over $1,300 per class member) compares favorably with other recent settlements. *See,*

e.g., *Teruel v. Sky Chefs, Inc.*, No. 2014-1-cv-268343, 2016 WL 6822256, at *2 (Santa Clara Cnty. Super. Ct. Oct. 14, 2016) (preliminarily approving settlement of waiting time and inaccurate wage statement claims where average net recovery per class member was $150); *Longstreth v. PAQ, Inc.*, No. 15-cv-206, 2016 WL 7163981, at *1 (San Luis Obisbo Cnty. Super. Ct. Oct. 20, 2016) (settlement of wage statement violations, waiting time penalties, overtime violations, meal and rest breaks, and PAGA penalties provided average of $1,162 per class member).

e. PAGA Claims

Plaintiff estimates that the total exposure on his representative PAGA claims could be substantial depending on the number of Labor Code violations he succeeded in proving at trial. *See* Ho Decl. ¶ 33. The penalties could stem from overtime violations, meal period violations, waiting time violations, wage statement violations, unreimbursed business expenses, failure to keep accurate records, and failure to pay all wages twice per month. *Id.* The award of such penalties is a matter of discretion for the Court, and a full award of such penalties could be denied as "oppressive" under § 2699(e)(2). The fact that Defendants have improved their pay policies and practices also increases the risk that the Court would award reduced PAGA penalties. Given these risks, which must be added to the risk that Plaintiff will lose on some or all of the underlying claims giving rise to PAGA penalties, Plaintiff views the allocation of $20,000 of the settlement to PAGA penalties to be reasonable. When the parties have "negotiated a good faith amount" for PAGA penalties, and "there is no indication that this amount was the result of self-interest at the expense of other Class Members," such an amount is generally considered reasonable. *See Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009); *see also, e.g.*, *Bararsani v. Coldwell Banker Res. Brokerage Co.*, No. BC495767, 2016 WL 1243589, at *5 (L.A. Cnty. Super. Ct. Jan. 13, 2016) (granting final approval to settlement with PAGA allocation of $10,000 from a gross settlement of $4.5 million); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575, at *3 (E.D. Cal. Oct. 31, 2012) (approving PAGA allocation of $10,000 in gross settlement of $3.7 million).

f. Interest, Penalties, and Attorneys' Fees

The Parties agree that for taxation purposes, one-half of the settlement payment will be considered wages, and the other half will be considered non-wage income. *See* Ex. A § (III)(E)(5).

This estimate is reasonable, because penalty claims (including liquidated damages, waiting time penalties, wage statement violations, and PAGA penalties, as discussed above) are a significant portion of the estimated damages exposure, and because interest is 10 percent. *See* Ho Decl. ¶ 35; *Bell v. Farmers Ins. Exch.*, 135 Cal. App. 4th 1138, 1150 (2006) (affirming 10 percent prejudgment interest rate on unpaid wages). Plaintiff estimates that Defendants' current exposure for interest is approximately $1.2 million. *See* Ho Decl. ¶ 35. If Plaintiff prevailed on the merits, he would be entitled to recover his attorneys' fees, the lodestar for which, as discussed below, is expected to be approximately $321,920 as of the completion of the settlement, as well as his costs. Absent a settlement, Plaintiff and the class would be at risk of failing to recover interest, penalties, and attorneys' fees, and costs, in full or in part. In addition, by reaching an efficient settlement, Plaintiff and the class avoid incurring the large attorneys' fees and costs expenditures that would result if the case proceeded to trial, including the risk of non-recovery of those expenditures.

2. The Risk and Delay Plaintiff and the Class Would Face Absent Settlement Are Considerable.

Absent settlement, Plaintiff and the class would face real risks on both the merits and class certification, as detailed in the preceding section. In addition, they would face a lengthy delay before receiving any potential recovery. Absent settlement, Plaintiff would have to prevail on a motion for class certification, complete classwide merits discovery, defeat a likely motion for summary adjudication, and prepare for and prevail at trial. *Id.* ¶ 36. If Plaintiff and the class prevailed on some or all of their claims at trial, they would almost certainly face an appeal. *Id.* Class Counsel estimates that even if the class was 100% successful at every stage, they would not receive any relief until approximately 2020. *Id.* By contrast, if the settlement is approved, Plaintiff and the class will receive substantial relief within approximately twenty months of the filing of the Complaint. *Id.* Thus, this settlement confers an advantage on the Class by ensuring significant and timely relief for their claims. *Id.*

3. The Settlement Is Well-Informed Based on Plaintiff's Investigation and Information Produced by Defendants.

As a condition for engaging in mediation, Plaintiff demanded, and Defendants produced, information that would be needed to assess the value of Plaintiff's and the class's claims, including

information detailing the number of class members, the number of class work-weeks in the multi-store Rep and single-store Rep positions, detailed pay and bonus information, detailed information pertaining to clock-in and clock-out and time-keeping records, records pertaining to resets and Sales Representative meetings, and key policy documents related to the claims at issue. *See* Ho Decl. ¶ 8.

In addition, Plaintiff and his counsel conducted an in-depth investigation of the case before filing it, with additional fact investigation and development after the filing of the case, including in preparation for the mediation. *See* Ho Decl. ¶¶ 3-4. Plaintiff's counsel interviewed in detail approximately ten Settlement Class Members, in addition to the named Plaintiff, to determine the nature of their duties, the amount of off-the-clock work they performed, and the costs they expended for work purposes that were not reimbursed, and to confirm the allegations in Plaintiff's Complaint. *See* Ho Decl. ¶ 4. Plaintiff's counsel described in detail the information they required from Defendants in order to engage in mediation, carefully analyzed the materials provided by Defendants, demanded and received additional materials as needed to accurately assess the value of the claims, and prepared a detailed mediation submission that the mediator probed for weaknesses. *Id.* ¶¶ 8, 10.

Thus, despite the early stage in the litigation, Plaintiff has quickly and efficiently obtained substantial, adequate information upon which to base the decision to settle this case. *Cf. Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 503 (2016) (approving "encouragement" of plaintiffs' "counsel to seek an early settlement and avoid unnecessarily prolonging the litigation"); *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 29 & n.4 (2000) (noting that "early settlement" and how "efficiently [resolving] the matter" are "desirable objective[s]" to be promoted). Given the nature of the claims alleged, with which Plaintiff's counsel has extensive experience, the foregoing documentary and witness information was sufficient to arrive at a reliable estimate of the risk facing Plaintiff's claims and the approximate exposure that Defendants faced. *Id.*

4. Experienced Counsel Support the Reasonableness of the Settlement.

Proposed Class Counsel have been appointed to represent employees as class counsel in many class-action lawsuits involving wage-and-hour violations in California. *See* Ho Decl. ¶ 37. The firm has extensive experience in class action litigation, and, in particular, wage-and-hour class actions alleging the type of overtime, expense reimbursement, and wage statement claims at issue here. *Id.*

The view of "qualified and well-informed counsel" that a class action settlement is fair, adequate, and reasonable "is entitled to significant weight." *Richison v. Am. Cemwood Corp.*, No. CIV.A 005532, 2003 WL 23190948, at *5 (San Joaquin Cnty. Super. Ct. Nov. 18, 2003); *see also Kullar*, 168 Cal. App. 4th at 133 (trial court "may and undoubtedly should continue to place reliance on the competence and integrity of counsel"); *Dunk*, 48 Cal. App. 4th at 1802.

Class Counsel consider the settlement to be an excellent result for the class, and to be a fair, reasonable, and adequate resolution of the class's claims. *See* Ho Decl. ¶ 37. As stated above, the gross settlement amount constitutes about 41% of Defendants' realistic exposure at trial. *Id.* The substantial relief that Settlement Class Members will receive from the settlement of this case compares favorably with other settlements in similar cases which have obtained preliminary and final approval of settlements of similar claims. *See, e.g.*, *Cabrera v. Advantage Sale & Mktg., LLC*, No. BC485259, 2013 WL 1182822 (L.A. Cnty. Super. Ct. Mar. 12, 2013) (preliminarily approving settlement of off-the-clock overtime, missed meal and rest period, waiting time, and wage statement claims for nearly 3,000 employees in the net amount of $550,000, resulting in an average pre-tax payment of $184 per class member); *Martinez v. Chatham Carlsbad HS LLC*, No. 37-2012-96221, 2013 WL 12140597, at *2 (San Diego Cnty. Super. Ct. Oct. 25, 2013) (preliminarily approving settlement of off-the-clock, meal and rest period, and derivative claims for a *gross class* pre-tax total of $50,000 – approximately the same as the *net* pre-tax total received by *individual class members* in this case).[4]

C. The Settlement Merits a Preliminary Finding of Fairness.

The requirements giving rise to a "presumption of fairness" exist here, justifying a preliminary determination that the Settlement is fair. As noted above, this presumption applies when: (1) a settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Wershba*, 91 Cal. App. 4th at 245. The second and third factors have been satisfied, as described in detail above. The fourth factor can be assessed only after notice is distributed.

[4] The fifth "reasonableness" factor – the reaction of the class to the Settlement – can be assessed only after Notice is provided.

The first factor is satisfied, as well, because the settlement is the result of arm's-length negotiations between the parties. Ho Decl. ¶ 37. After Plaintiff filed suit, Defendants changed certain policies relating to the allegations in the complaint. Defendants agreed to produce substantial information in connection with mediation. Plaintiff detailed the factual and legal support for his and the class's claims in an 18-page mediation brief supported by exhibits documenting Defendants' policies. Defendants likewise detailed their positions in a mediation brief, and the Parties exchanged briefs. *Id.* ¶ 11. Prior to the mediation, counsel for the Parties discussed the analysis in their respective mediation briefs, which led to further factual and legal refinement of both Parties' positions at the mediation. *Id.* The mediation lasted approximately 11 hours, and resulted in a settlement with the assistance of Mr. Hughes, who is a skilled and well-respected mediator with extensive experience mediating wage-and-hour cases.

Nothing in the record calls into question the presumption of fairness, and Class Counsel are aware of no facts that would do so. *See* Ho Decl. ¶ 37.

D. The Allocation Among Settlement Class Members Is Fair and Reasonable.

The allocation among Settlement Class Members is pro rata based on the number of work-weeks worked within the relevant time-period, with the exception that the value of weeks worked by Multi-Store Representatives will be deemed to be three times the value of weeks worked by Single-Store Representatives. *See* Ex. A § (III)(E)(10). This differential recognizes that the claims of Multi-Store Representatives are significantly more valuable than those of Single-Store Representatives for several reasons. First, because Multi-Store Representatives were assigned to three to five Home Depot stores, they received proportionately more marketing and merchandising material at home, which Plaintiff contends required substantially more off-the-clock work. *See* Ho Decl. ¶ 20. This larger amount of marketing material also meant that, under Plaintiff's theory of the case, Multi-Store Representatives had to devote more space within their homes to storing Defendants' Products than Single-Store Representatives did, resulting in larger claims for non-reimbursement of business expenses. *Id.* Their more numerous stores meant that they had more computer work to complete, which Plaintiff contends was completed at home. *Id.* In addition, because they were responsible for completing tasks at many different stores, they had more demanding schedules that Plaintiff contends

1 required, on average, significantly more off-the-clock work, and resulted in significantly more meal
2 break violations. *Id.* Many Settlement Class Members worked as both MSRs and SSRs in different
3 periods of time, so their settlement allocations will be based on the number of workweeks they spent in
4 each position. *Id.* Proposed Class Counsel believe that this is the most equitable allocation of
5 settlement fund among Settlement Class Members. *Id.* There are approximately 7,200 MSR Work-
6 Weeks at issue within the class period, and approximately 17,000 SSR Work-Weeks. *Id.* ¶ 21. The
7 estimated average award per Work-Week under the settlement, assuming zero opt-outs, will be $176
8 for weeks worked in the MSR position and $59 for weeks worked in the SSR position. *Id.*

9 **E. The Scope of the Proposed Release Is Appropriate**

10 When the judgment becomes final, Plaintiff and each Settlement Class Member who does not
11 opt out will release all wage and hour claims through the settlement date that relate to the claims
12 asserted in the lawsuit – except for the FLSA claims of any Settlement Class Member who does not
13 deposit his check. *See* Ex. A § (II)(G). This release is narrowly tailored to the facts alleged in the
14 Litigation. As noted above, the release includes a rest period claim that Plaintiff identified in his
15 PAGA letter but ultimately decided not to assert in the Complaint. *See* Ho Decl. ¶ 5. The named
16 Plaintiff will also execute a general release of his claims against Defendants, along with a waiver of the
17 protection of Civil Code section 1542 – a greater release that also supports Plaintiff's claim for a
18 service award for the named Plaintiff. *See infra* § IV.G.

19 **F. The Proposed Class Notice Content and Procedure Are Appropriate.**

20 Constitutional due process requires that class members be provided with notice sufficient to
21 give them an opportunity to be heard in the proceedings. *Mullane v. Cent. Hanover Bank & Tr.*, 339
22 U.S. 306, 314 (1950). Proper notice must provide class members with sufficient information to make
23 an informed decision about whether to participate in and/or object to the settlement. *Id.* at 314; *see*
24 *also Wershba*, 91 Cal. App. 4th at 251-54; Cal. Rule of Court 3.766.

25 Here, the proposed Class Notice and Statement of Weeks Worked Form ("Notice") provides all
26 the information a reasonable person would need to make a fully informed decision about the
27 settlement. It will notify all Settlement Class Members of the terms of the settlement, that their rights
28 may be affected by the settlement, that they may participate, object, or opt out of the settlement within

60 days, that if they choose to opt out they must follow a certain procedure, that if they chose to participate they may appear through their own counsel, and how to obtain additional information. *See* Cal. Rule of Court 3.766 & Exs. A and B to Settlement Agreement.

In addition, the proposed Notice will provide each Settlement Class Member with his or her estimated award, along with an explanation of how the allocation was calculated and how to challenge the data used in calculating the distributions. *See* Ex. B at 2. The Notice will explain that the $3.5 million settlement is inclusive of the employer's share of payroll taxes, meaning that such taxes, along with the employee's share of payroll taxes, will be withheld from the settlement payment. *Id.*

The procedure for distribution of notice meets the standard requiring that the notice has "a reasonable chance of reaching a substantial percentage of the class members." *Cartt v. Super. Court* 50 Cal. App. 3d 960, 974 (1975); *see also Wershba*, 91 Cal. App. 4th at 251. Here, Notice will be sent by first class mail to the last known address of each Settlement Class Member. *See* Ex. A § (III)(B)(1)(c). If any Notices are returned as undeliverable, the Claims Administrator will use skip tracing and attempt to resend the Notice. *Id.* As such, the Notice is likely to reach most, if not all, Settlement Class Members.

The Parties have selected claims administrator KCC to distribute the Notice and process any opt-outs and share challenges. *See* Ho Decl. ¶ 39. KCC is a well-known, well-regarded administrator that Plaintiff's counsel have retained in the past with good results, and which Plaintiff's counsel selected after obtaining competitive bids from two administrators. *Id.* In Plaintiff's counsel's experience, KCC's bid was reasonable. *Id.*

G. The Service Award to the Class Representative Is Preliminarily Reasonable.

Although this Court does not decide the amount of any incentive award until the final approval hearing (*see* Prelim. Appr. Guidelines § 11), notice of the requested service award of $10,000 should be provided to the Class. As a named Plaintiff, Mr. Willey is eligible for a service award that reasonably compensates him for undertaking and fulfilling a fiduciary duty to represent absent class members. *See Cellphone Term. Fee Cases*, 186 Cal. App. 4th at 1393-94; *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 725-26 (2004) (affirming service payments to class representatives); Manual for Complex Litigation § 21.62, n.971 (service awards are warranted).

As will be argued in more detail in the motion for final approval, Mr. Willey has, to date, expended approximately 110 hours on this case. *See* Decl. of Jordan Willey, submitted herewith. Without his initiative and efforts, the class would have recovered $0 on these valuable claims. In addition to sacrificing his time for the good of the class, Mr. Willey placed himself in the spotlight, incurring the risk that future potential employers will learn of his role in this case and look unfavorably on it. *Id.* ¶ 15. Mr. Willey will also execute a broader release than the rest of the class. Under the applicable authority, which will be briefed in more detail, the requested award is reasonable. *Rogers v. Kindred Healthcare, Inc.*, No. RG14729507, Order Granting Final Approval (Alameda Cnty. Super. Ct. Oct. 7, 2016) (Smith, J) (granting $10,000 service awards to named plaintiffs in similar wage and hour case); *Castellanos v. Pepsi Bottling Grp.*, No. RG07332684 (Alameda Cnty. Super. Ct. Mar. 11, 2010) (approving service award of $12,500 in a wage and hour class action settlement); *Novak v. Retail BrandAlliance, Inc.*, No. RG 05223254 (Alameda Cnty. Super. Ct. Sept. 22, 2009) (approving service award of $12,500 each to four class representatives in wage and hour class action).[5]

V. THE COURT SHOULD PROVIDE NOTICE OF PLAINTIFF'S REQUEST FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION COSTS

Plaintiff and the class, having reached a favorable settlement of this wage and hour class action, are "prevailing parties" entitled to recover reasonable attorneys' fees and costs. *See* Cal. Lab. Code §§ 218.5, 226, 1194, & 2699(g)(1); Cal. Civ. Proc. Code § 1021.5(a) (awarding reasonable attorneys' fees and costs where plaintiff's action resulted in the enforcement of an important right, conferred a significant benefit to a large class of persons, and private enforcement was necessary); *Maria P. v. Riles*, 43 Cal. 3d 1281, 1290-91 (1987) (fee award justified when legal action produced its benefits by way of voluntary settlement); *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (plaintiff is prevailing party when he obtains a successful settlement). Here, Plaintiff's Counsel will seek final approval of an award of attorneys' fees of $1,166,666.67, which amounts to one-third of the Total Settlement, and reimbursement of litigation costs not to exceed $15,000. Plaintiff will fully brief these requests when moving for final approval. At this stage, Plaintiff asks the Court to hold that the requests are

[5] Authority not available on Westlaw is submitted in the Appendix of Authority, filed herewith.

preliminarily reasonable, such that notice of the requested award of fees and costs may be provided to the Settlement Class.

A. The Requested Attorneys' Fees Award Is Reasonable.

The California Supreme Court recently confirmed that trial courts may award attorneys' fees from a common fund in a class action pursuant to either the "percentage" method or the "lodestar-multiplier" method. *Laffitte*, 1 Cal. 5th at 489; *id.* at 503 ("[W]hen class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.").

When a settlement results in both monetary and non-monetary relief for the class, courts recognize the appropriateness of awarding fees of up to one-third of the fund to account for the benefit conferred by the non-monetary relief. *See, e.g.*, *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 62, 66 n.11 (2008) (noting that fee awards of one-third are average, and that for purposes of assessing the reasonableness of a fee award, "success achieved … could include changes in company policies that were not part of the settlement"). Here, Plaintiff, through Class Counsel, achieved a high level of success both in monetary and non-monetary results on behalf of the Settlement Class, which justifies the requested fee award. After this lawsuit was filed – and, Plaintiff contends, as a result of this lawsuit – Defendants implemented changes to their definition of compensable time and adopted a meal period policy. These changes will benefit hundreds of Defendants' employees going forward in a meaningful way – a benefit that is over and above the substantial monetary recovery. Courts take such additional non-monetary relief into account when assessing the reasonableness of attorneys' fee requests. *See id.*; *see also, e.g.*, *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 922-23 (9th Cir. 2014) *later vacated as moot by settlement* (approving requested fee award as a reasonable percentage of the constructive common fund that included the monetary value of the settlement's injunctive relief).

Under the percentage method, fee awards of one-third of the common fund (or more) are common in class actions. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."); Newberg § 15:73 ("[F]ee awards in class

1 actions average around one-third of the recovery."). A review of the state case law provides many
2 examples of fee awards of one-third (or more) of a common fund in wage and hour class actions of a
3 similar magnitude. *See, e.g.*, *Parker v. City of L.A.*, 44 Cal. App. 3d 556, 567-68 (1974) (affirming fee
4 award to counsel of one-third of recovery achieved); *Longstreth v. PAQ, Inc.*, 15-cv-0206, 2016 WL
5 7163981, at *2 (San Luis Obispo Cnty. Oct. 20, 2016) (awarding one-third of $6 million common fund
6 in wage-and-hour case); *Penaloza v. PPG Indus. Inc.*, No. BC471369, 2013 WL 2917624 (L.A. Cnty.
7 Super. Ct. May 20, 2013) (approving fee of 33.3% of $1.3 million common fund in wage and hour
8 action); *Saberi v. BFS Retail & Commercial Operations, LLC*, No. RG0806555, 2010 WL 5172447
9 (Alameda Cnty. Super. Ct. Sept. 19, 2010) (approving fee of one-third of $14 million common fund in
10 wage and hour class action); *Barrett v. St. John Cos.*, No. BC 354278 (L.A. Cnty. Super. Ct. July 10,
11 2008) (33% award in wage and hour class action); *Tokar v. GEICO*, No. GIC 810166n (San Diego
12 Cnty. Super. Ct. July 9, 2004) (same); *Davis v. Money Store, Inc.*, No. 99AS01716 (Sacramento Cnty.
13 Super. Ct. Dec. 26, 2000) (same, in $6,000,000 settlement). The same is true of recent California
14 federal court decisions. *See, e.g.*, *Bennett v. SimplexGrinnell LP*, No. 11-cv-1854-JST, ECF No. 278
15 (N.D. Cal. Sept. 3, 2015) at 11 (order approving attorneys' fees of 38.8% of $4.9 million settlement in
16 prevailing wage case); *Lee v. JPMorgan Chase & Co.*, No. 13-cv-511-JLS, ECF No. 95 (C.D. Cal.
17 Apr. 28, 2015) at 14-18 (approving attorneys' fee of one-third of $2.4 million settlement in
18 misclassification case); *Boyd v. Bank of Am.*, No. 13-cv-561-DOC, 2014 WL 6473804, at *10-11 (C.D.
19 Cal. Nov. 18, 2014) (awarding one-third of $5.8 million settlement in misclassification case); *Stuart v.*
20 *Radioshack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645, at *8 (N.D. Cal. Aug. 9, 2010) (awarding
21 one-third of $4.5 million settlement in employee expense reimbursement case); *Fernandez v.*
22 *Victoria's Secret Stores, LLC*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, at *16 (C.D. Cal.
23 July 21, 2008) (awarding 34% of $8.5 million common fund); *Birch v. Office Depot, Inc.*, No. 06-cv-
24 1690-DMS (WMC), ECF No. 48 (S.D. Cal. Sept. 28, 2007) ¶ 13 (awarding a 40% fee on a $16 million
25 wage and hour class action settlement); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92
26 (E.D. Cal. 2010) (citing five recent wage and hour class actions where federal district courts approved
27 attorney fee awards ranging from 30% to 33%).
28

When a court begins by using the percentage method, the court may, in its discretion, choose to "conduct a lodestar cross-check," and if the effective "multiplier" of the attorneys' hourly rate, as "calculated by means of a lodestar cross-check" is "extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." *Id.* at 506.

A "lodestar-multiplier" cross-check confirms that the requested fee award justifies preliminary approval. Plaintiff's Counsel have expended 490 hours in this litigation to date, as documented by detailed and contemporaneous billing records maintained by Counsel. Plaintiff's counsel expects to incur approximately 100 additional hours of time to see this case through completion of the settlement, including: finalizing and filing these preliminary approval papers; appearing for the hearing on the preliminary approval motion; finalizing the Court-approved Notice forms; working with Defendants and the Settlement Administrator to distribute the Notice; supervising the Notice distribution; responding to Settlement Class Member inquiries or challenges; responding to any request for exclusion or objections; preparing and filing final approval papers, including a final motion for a class representative enhancement award and an attorneys' fee and costs award; attending the final approval hearing; working with Defendants and the Settlement Administrator on the distribution of awards to the Class; monitoring the award distributions to the Class; ensuring that any residual is paid to the Court-approved *cy pres* beneficiaries; and reporting to the Court that the distribution of settlement funds has been completed. *See* Ho Decl. ¶ 45. The hours spent (and to be spent) reflect time spent reasonably litigating this case, in which Class Counsel sought to manage and staff efficiently. *Id.* ¶ 46. This 590 hours of work amounts to an estimated final lodestar of $320,000.

The applied hourly rates are commensurate with the rates of practitioners with similar experience within the California legal market. *Id.* ¶ 47. Class Counsel's hourly rates have been previously approved by numerous courts, including the Alameda County Superior Court. *See, e.g.*, *Barnes v. Sprig, Inc.*, No. CGC-15-548154 (S.F. Cnty. Super. Ct. Dec. 20, 2016) (in final approval order, finding "that [GBDH's] 2016 hourly rates are reasonable and commensurate with the prevailing rates for wage and hour class actions"); *Mayton, et al. v. Konica Minolta Business Solutions, U.S.A., Inc.*, No. RG12657116 (Alameda Cnty. Super. Ct. June 22 2015); *see also* Ho Decl. ¶ *Id.* (citing

additional examples). Class Counsel have also been paid at prevailing hourly rates for work done on a non-contingent basis for work outside of this matter. *Id.* At final approval, Plaintiff's Counsel will provide updated lodestar information to the Court.

The requested fee award represents a multiplier of less than 3.7 times Plaintiff's Counsel's anticipated final lodestar. This multiplier is reasonable, given that Plaintiff's counsel efficiently obtained an outstanding result for the class, and litigated the case on a purely contingent basis, taking the risk that their work on behalf of the class would be 100% uncompensated. Plaintiff's Counsel's thorough investigation, effective presentation of the claims, and experience in matters like this one obtained the excellent result here – a $3.5 million non-reversionary settlement one year from the filing of the complaint on behalf of a class of approximately 345 people, many of whom will receive a settlement award greater than an average year's pay.

The requested multiplier is in line with guidance from recent decisions. *See, e.g.*, *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir. 2007) (multiplier of 6.85 "falls well within the range of multipliers that courts have allowed"); *Buccellato v. AT&T Operations, Inc.*, No. C10-00463-LHK, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (approving multiplier of 4.3); *Wershba*, 91 Cal. App. 4th at 255 ("Multipliers can range from 2 to 4 or even higher."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 & n.6 (9th Cir. 2002) (affirming lodestar multiplier of 3.65 and surveying 34 class common fund settlements to find that 83% of multipliers were in the 1x- to 4x-range); *see also Zeltser v. Merrill Lynch & Co., Inc.*, No. 13 Civ. 1531 (FM), 2014 WL 4816134, at *10 (S.D.N.Y. Sept. 23, 2014) (awarding multiplier of 5.1, because "[w]hile this multiplier is near the high end of the range of multipliers that courts have allowed, this should not result in penalizing Plaintiff's counsel for achieving an early settlement, particularly where, as here, the settlement amount is substantial"); *In re Xcel Energy, Inc., Secs., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (4.7 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) ("modest multiplier of 4.65").

B. The Requested Reimbursement of Costs Is Reasonable.

Class Counsel have incurred approximately $15,000 in litigation costs to date. *See* Ho Decl. ¶ 49. These costs include court-filing and process-serving fees, mediation costs ($6,750), travel and

meal expenses related to the mediation, online research costs, postage and federal express costs, and copying costs. *Id.* This amount of costs is modest and reflects efficient litigation of the case. Plaintiff's counsel will provide the Court with updated costs information and additional briefing in the final approval motion. *Id.*

VI. AT FINAL APPROVAL, THE SETTLEMENT OF FLSA CLAIMS SHOULD BE APPROVED AS FAIR AND REASONABLE.

Similar to the requirement that courts approve class action settlements, when an employee brings a private action for wages under the FLSA, 29 U.S.C. § 216(b), the parties must present any proposed settlement to the Court for approval. *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1353 (11th Cir. 1982). If the settlement is a "fair and reasonable resolution of a bona fide dispute over FLSA provisions," a stipulated judgment is appropriate. *Id.* at 1355. Settlements of FLSA claims are permissible because initiation of the action "provides some assurance of an adversarial context." *Id.* at 1354. In such instances, the employees are likely to be represented by an attorney who can protect their rights, and thus, "the settlement is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought about by an employer's overreaching." *Id.* If the settlement reflects a reasonable compromise over issues that are actually in dispute, approval is permissible. *Id.*

In a case like this one, where FLSA overtime claims are brought in conjunction state overtime claims, courts typically engage in the same, overlapping analysis as to both claims. *See, e.g.*, *Talamantes v. PPG Indus., Inc.*, 13-cv-4062 (N.D. Cal. Jan. 6, 2016) at (Final Approval § 4, finding that wage-and-hour settlement in case asserting state and FLSA overtime claims was a fair and reasonable resolution of the dispute). Here, for all of the reasons set forth above, the settlement is an outstanding result on the class's FLSA claims, which are duplicative of their state law overtime claims, except that the FLSA claims give rise to liquidated damages, as discussed above. Each Settlement Class Member will release his or her FLSA claim only if he or she deposits the settlement check, as the back of the check will explain. *See* Ex. A § (V). This Settlement of FLSA claims is fair and reasonable and should be approved at the Final Approval Hearing.

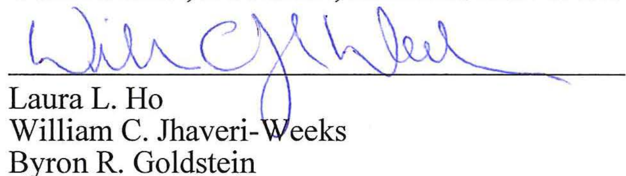
VII. CONCLUSION

The settlement is within the range of acceptable settlements, with substantial monetary relief to the Settlement Class Members. Plaintiff respectfully requests that the Court certify the class for settlement purposes, grant preliminary approval of the settlement terms and notice process, order the issuance of notice, and set a date for the final fairness hearing, as set forth in the accompanying proposed order.

Dated: March 2, 2017

Respectfully submitted,

GOLDSTEIN, BORGEN, DARDARIAN & HO



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