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THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

VANESSA BULCAO, an individual, on behalf of herself, the proposed class(es), all others similarly situated, and on behalf of the general public

Plaintiff,

v.

TAYLOR MADE GOLF COMPANY, INC. (d/b/a TaylorMade-adidas Golf Company), a Delaware corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No. 37-2015-00028124-CU-OE-CTL

DECLARATION OF ROSS H. HYSLOP IN SUPPORT OF PLAINTIFF VANESSA BULCAO'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

[IMAGED FILE]

[CCP § 382 & CRC Rule 3.769]

Date: March 24, 2017
Time: 1:30 p.m.
Judge: Hon. Timothy Taylor
Dept: 72

Unlimited Civil Case

Complaint Filed: August 19, 2015
Amended Complaint Filed: March 7, 2016

I, Ross H. Hyslop, declare:

1. I am a partner at the law firm of Pestotnik LLP, counsel for Plaintiff Vanessa Bulcao in the above-referenced matter, and a member of the Bar of this Court. I make each of the statements below based on my personal knowledge, and if called as a witness, I could and would competently testify as to their truthfulness.

2. I submit this declaration in support of the Motion for Final Approval of Class Action Settlement by Plaintiff Vanessa Bulcao, on behalf of herself, the proposed classes and all others similarly situated.

A. INTRODUCTION

3. This is a putative class action lawsuit filed by Plaintiff Vanessa Bulcao ("Plaintiff") against her former employer, Defendant Taylor Made Golf Company, Inc. d/b/a TaylorMade-adidas Golf Company ("TMaG"). The lawsuit alleges TMaG violated various wage and hour laws and regulations, and seeks class action status. After 15 months of intensive investigation and litigation, the parties reached a provisional class action settlement with the assistance of mediator and retired Superior Court Judge Steven R. Denton. Plaintiff seeks preliminary approval of the proposed settlement through this motion.

4. The terms of the proposed Settlement were preliminarily approved by this Court, as reflected in the Preliminary Approval Order ("PAO") issued on December 16, 2016. The parties have complied with all the notice and claims administration requirements ordered by the Court in the PAO. No Class Member has objected to the Settlement and no one opted-out. If the Court approves the Settlement, 253 class members will receive all of the Net Settlement Amount pursuant to the Stipulation.

5. In the PAO, the Court approved the engagement of Phoenix Settlement Administrators ("PSA") to act as claims administrator, for the purpose of issuing class notice and administering the proposed class settlement. As described in detail in the Declaration of Melissa A. Meade ("Meade Dec."), Vice President of Operations and a Shareholder of PSA, PSA has:

- received from TMaG all of the pertinent Class Member contact information and related data in order to carry out its duties;
- prepared preliminary calculations based on the allocation formula as reflected in the Settlement Stipulation ("Stipulation") (attached as Exhibit A to the Declaration of Ross H. Hyslop submitted in support of Plaintiff's motion for preliminary approval – hereafter, "Hyslop PA Dec.");
- mailed 693 Court-approved Notices and Claim Forms ("Notice Packets") by first class mail to the last known address for each Class Member, using the procedures set forth in the Stipulation;
- performed skip-traces and re-mailed Notice Packets for forty-eight (48) Class

Members whose Notice Packets were initially returned as undeliverable, with the result that only one (1) Notice Packet of out 693 was not deliverable;

- set up and administered a website (www.TMaGsettlement.com), which informed Class Members of all applicable deadlines and also gave Class Members (and anyone else having internet access) the ability to download PDFs of all settlement-related documents;
- received and processed 253 valid Claim Forms from Class Members, representing an aggregate total of 51,388.41 eligible workweeks out of 110,927.43 weeks worked for TMaG, which accounts for 46.33% of all workweeks covered by the Settlement; and
- prepared a list of all Class Members who submitted timely and valid Claims, and calculated the gross settlement payments for each Class Member according to the plan of allocation which was provisionally approved in the PAO.

See, *generally*, Meade Dec.

6. The complete absence of any objection indicates that the proposed Settlement has been received favorably by the Class. Moreover, as indicated in the Stipulation, if the Settlement receives final approval, those Class Members who submitted valid and timely Claim Forms will receive the *entire* Net Settlement Amount ($577,500)[1] on a pro-rata basis according to the allocation plan set forth in the Stipulation. *See*, Meade Dec., ¶ 6. Thus, the 253 claimants will receive *all* of the net Settlement funds associated with the aggregate total of 110,927.43 workweeks. *See*, Meade Dec., ¶ 6.

7. Given the terms of the proposed Settlement, and the facts, circumstances, allegations, and defenses in this case, and the inherent risks of the litigation process, including the real risk that continued litigation could result in no money for the proposed class, Plaintiffs request

[1] Since the costs sought by Plaintiff are $14,053.57, which is $946.43 less than the $15,000 cost cap specified in the PAO, the actual Net Settlement Amount that will be distributed to participating Class Members (as calculated by PSA) is $578,446.43.

that the proposed Settlement receive final approval and be deemed fair, adequate and reasonable. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235.

B. CASE BACKGROUND AND PREVIEW OF KEY LEGAL ISSUES

8. TMaG is a golf club, golf equipment, and golf accessory company headquartered in the County of San Diego, California. *See*, *e.g.*, http://taylormadegolf.com/. Plaintiff is a resident of California, and was employed in California by TMaG as a non-exempt executive/administrative assistant. Plaintiff was hired by TMaG on or about February 11, 2015, and was involuntarily terminated on or about May 19, 2015. Plaintiff's putative class action complaint was filed against TMaG on August 19, 2015.

9. Plaintiff's complaint alleges that, during the course of her employment, she was subjected to various wage and hour and Labor Code violations by TMaG, including unlawful/non-compliant meal and rest period policies and practices, unlawful forfeitures of earned but unpaid meal and rest period premiums, unlawful/non-compliant and/or inaccurate wage statements, and unlawful withholding of her final pay upon termination.

10. The complaint was been amended once, on March 7, 2016, and now alleges these seven claims:

a. meal period violations (Labor Code §§ 226.7, 512; Industrial Welfare Commission ("IWC") Wage Order No. 1-2001/8 C.C.R. § 11010);

b. rest break violations (Labor Code § 226.7; Wage Order No. 1-2001/8 C.C.R. § 11010);

c. failure to properly itemize pay stubs (Labor Code § 226(a));

d. failure to pay all wages due on termination (Labor Code § 203);

e. improperly obtained wage/general releases (Labor Code § 206.5);

f. unfair competition (Business & Professions Code § 17200 *et seq.*); and

g. PAGA violations (Labor Code § 2699 *et seq.*).

11. TMaG's alleged liability is primarily based on Plaintiff's allegations that TMaG:

a. established and maintained statutorily non-compliant meal period and rest break policies;

b. failed to immediately pay meal period/rest break premiums to employees when otherwise due;

c. failed to include earned but unpaid meal period/rest break premiums in its wage statements;

d. failed to include meal period/rest break premiums in the final wages paid to employees who separated from employment; and

e. presented employees with wage releases without paying them the wages "concededly due" to them in the form of earned but unpaid meal period/rest break premiums.

12. For purposes of this litigation, there were two key TMaG policies:

a. Meal Periods: As stated in its Employee Handbook, TMaG's meal period policy (which was in effect during the Class Period until March 2016) said:

> [N]on-exempt Employees are entitled to a meal period of not less than thirty (30) minutes for **time worked of five (5) hours or more**. … Non-exempt Employees are entitled to a second meal period of not less than thirty (30) minutes for a work period of more than ten (10) hours per day. [Emphasis added.]

b. Rest Breaks: As stated in its Employee Handbook, TMaG's rest period policy (which was in effect during the Class Period until March 2016) said:

> Non-exempt Employees are entitled to a minimum ten (10) minute rest period per every four hours of time worked.

13. In contrast to these two key policies, which Plaintiff claimed were *facially* improper under California, California law requires:

a. Meal Periods: California's meal period rules require that "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes … ." *See*, *e.g.*, 8 C.C.R. § 11010(11)(A); Labor Code § 512(a). This means that, absent waiver, "an employer's obligation is to provide a first meal period after no more than five hours of work and a

second meal period after no more than 10 hours of work." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049. Thus, California law requires that a meal break be provided *during* the first five hours of an employee's shift. *Brinker*, *supra*, 53 Cal.4th at 1048–1049. **In this respect, Plaintiff asserted TMaG's meal period policy facially required employees to *complete* five hours of work before they would be eligible to take a meal period, contrary to California law as stated in *Brinker*.**

b. Rest Breaks: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours *or major fraction thereof*." (Emphasis added) *See also*, Labor Code § 226.7(b). Thus, California law requires employers to provide, as the California Supreme Court held in *Brinker*, *supra*, "10 minutes rest for shifts from three and one-half to six hours in length, 20 minutes for shifts more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." *Brinker*, *supra*, 53 Cal.4th at 1029; *e.g.* 8 C.C.R. § 11010(12)(A). *See also*, *Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1037. **In this respect, Plaintiff asserted that, by failing to give due regard to the "*or major fraction thereof*" language, TMaG's rest period policy was facially non-compliant with California law because it only "authorized and permitted" rest breaks for complete (i.e., non-fractional) four hour increments (i.e., for four hours of work, eight hours of work, twelve hours of work,**

etc.). *See*, *Brinker*, *supra*, 53 Cal.4th at 1033 (finding that plaintiffs' claim that employer adopted a uniform rest break policy that failed to give full effect to the "major fraction" language of the applicable Wage Order was the sort of claim "routinely, and properly, found suitable for class treatment").

14. In *Brinker*, *supra*, the California Supreme Court expressly acknowledged this theory of liability, saying: "The theory of liability – that Brinker has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law – is by its nature a common question eminently suited for class treatment." *Brinker*, *supra*, 53 Cal.4th at 1040.

15. Under 8 C.C.R. § 11010(11)(D)/(12)(B) and Labor Code §§ 226.7(c) and 512(a), the "remedy" for such violations is an "additional hour of pay" (*United Parcel Serv., Inc. v. Superior Court* (2011) 196 Cal.App.4th 57, 70), which constitutes a "premium wage intended to compensate employees," as opposed to a penalty (*Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1114).

16. *Brinker* also contained an important qualification, though, and one that is critical to the risk assessment in any case of this nature. Specifically, *Brinker* held:

> An employer's duty with respect to meal breaks under both section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30–minute break, and **does not *impede or discourage* them from doing so**. … **On the other hand, the *employer is not obligated to police meal breaks* and ensure no work thereafter is performed.** Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay under Wage Order No. 5, subdivision 11(B) and Labor Code section 226.7, subdivision (b).

Brinker, *supra*, 53 Cal.4th at 1040-1041 (emphasis added).

17. For its part, TMaG continually asserted and argued throughout the litigation that it had never impeded, discouraged, or prevented its employees from taking compliant meal periods and/or rest breaks. TMaG also continually asserted and argued that, even if its policies were somehow non-compliant (which it denied), it had never *implemented* its policies in a manner that

deprived any employee of lawful meal periods or rest breaks. On this basis, TMaG reasoned that that no employee had been "damaged" by its policies, and therefore that no employee was eligible to recover any "premium pay." These issues created heavy factual (and legal) disputes in the litigation, as well as challenges for both sides. Class Counsel carefully considered these issues, and others as described herein, as part of its risk analysis to determine whether settlement on the terms proffered by this motion was a better alternative than continuing with risky and expensive litigation that may not achieve an optimal result for the Class.

18. As Plaintiff learned in discovery, TMaG had never paid any premium wages to any employee, ostensibly because no employee had ever been impeded, discouraged, or prevented from taking compliant meal periods and/or rest breaks. Likely as a direct result of this lawsuit, though, TMaG's has since changed its meal period, rest break, and premium pay policies. Specifically: (a) TMaG's new meal period policy now provides meal periods to employees within the first five hours of work, as required by *Brinker*, *supra*, 53 Cal.4th at 1048–1049; (b) TMaG's new rest break policy now accounts for "major fraction[s]" of four hour work periods, and thus authorizes and permits rest breaks on the schedule contemplated in *Brinker*, *supra*, 53 Cal.4th at 1029; and (c) TMaG's newly-enacted premium pay policy regularly pays its employees meal period and/or rest break premiums if they have been impeded, discouraged, or prevented from taking meal periods and/or rest breaks.

C. DISCOVERY AND INVESTIGATION BY PLAINTIFF

19. Before the action was filed, we conducted a substantial pre-filing investigation, including factual and legal research/analysis of Plaintiff's claims. Since the inception of this action in August 2015, TMaG has vigorously denied all of the allegations in their entirety. The case was actively investigated and litigated for well over 18 months. For example:

a. Plaintiff conducted substantial deposition discovery of TMaG, included taking extensive, multi-day person most qualified ("PMQ") depositions, including deposing four TMaG employees – Marcie Faraimo, Tim Nau, Amber Hagen, and Jennie Jagoda – on 16 detailed PMQ topics and subtopics. During much of the putative class period, Ms. Faraimo – one of

TMaG's key PMQ witnesses produced on many of the 16 topics and subtopics – held the position of Vice President of Global Human Resources at TMaG, making her the highest ranking HR executive at the company and therefore ultimately responsible for the development, implementation, and/or enforcement of many of the same policies and procedures that Plaintiff alleges were improper and/or unlawful.

b. Plaintiff's PMQ deposition notice also requested that TMaG produce documents in 36 specific categories. The vast majority of TMaG's document production in response to the PMQ deposition notice was completed well in advance of the taking of the depositions, which allowed me a sufficient amount of time to review and analyze TMaG's production, prepare relevant questions, and create/organize exhibits.

c. Plaintiff also took the deposition of Jennie Jagoda (the lead HR representative of TMaG) in her personal (non-PMQ) capacity. Ms. Jagoda was directly involved in Plaintiff's termination and was also personally responsible for coordinating a rather massive reduction in force at TMaG (beginning approximately 2015) that resulted in the involuntary termination as many as 150 or more putative class members, many of whom signed general release agreements in exchange for additional compensation and/or benefits.

20. Once the deposition transcripts were prepared, I reviewed and analyzed them in detail, created notes, and made annotations.

21. Plaintiff also obtained substantial written discovery from TMaG, in multiple document productions. Plaintiff's written discovery included: (a) Form Interrogatories; (b) 8 Special Interrogatories; (c) 81 Requests for Production of Documents; and (d) 52 Requests for Admission. TMaG responded to all of Plaintiff's written discovery, and produced almost 2,200 pages of documents. Included in TMaG's document productions were, among other things, the following:

a. Plaintiff's personnel, administrative, employment, time-keeping, phone, and TMaG company store purchase records;

b. all of TMaG's records relating to Plaintiff's termination;

c. numerous email and text message communications relating to Plaintiff, including those about her, as well as those by and between her, her supervisors, her co-workers, and others;

d. all of TMaG's employee handbooks covering the putative class period;

e. all of TMaG's policies and procedures relating to:

i. meal periods;

ii. rest breaks;

iii. timekeeping by non-exempt personnel;

iv. payment of wages to non-exempt personnel;

v. termination and separation of employment, both voluntary and involuntary;

vi. payment of final wages upon separation of employment;

vii. payment of severance and/or preparation of (proposed/potential) severance agreements for departing employees;

viii. settlement and release agreements applicable to terminated employees;

ix. accrual/payment of premium pay;

x. inclusion (or non-inclusion) and/or itemization (or non-itemization) of premium pay on wage statements;

xi. employee codes of conduct;

xii. other policy/procedure documents related to Plaintiff's allegations.

f. electronic announcements, memos, emails, correspondence and/or notices provided to the putative class members relating to TMaG's:

i. meal period and rest break policies, procedures, and practices;

ii. premium pay;

iii. payment of final wages; and

iv. work schedules.

g. work, meal-period, and/or rest break schedules for hundreds of putative class members;

h. electronic time-keeping records;

i. job descriptions applicable to Plaintiff's position;

j. settlement and release agreements executed by over 60 class members;

k. documents supporting TMaG's denials of material allegations, and affirmative defenses, as specified in TMaG's answer to Plaintiff's first amended complaint;

l. documents supporting and/or referenced in TMaG's responses to Special Interrogatories and/or Requests for Admission; and

m. other materials related to the allegations of Plaintiff's first amended complaint.

22. I personally reviewed and analyzed all of TMaG's discovery responses and its extensive production of documents. I also engaged in meet and confer efforts with TMaG's counsel concerning the nature and breadth of TMaG's various document productions, as well as TMaG's responses and objections to written discovery. Generally speaking, my meet and confer efforts resulted in TMaG providing substantial additional documentation and/or information.

23. Plaintiff also initiated a stipulated "Belaire" notice process, which resulted in Plaintiff obtaining the names and addresses of over 100 former employees of TMaG. As part of our investigation, I personally conducted several interviews of former TMaG employees.

24. In addition, and in anticipation of settlement and mediation discussions, TMaG also informally produced thousands of additional pages of documents, data, and/or information. For example, among other materials, TMaG voluntarily produced the following for mediation and settlement purposes:

a. thousands and thousands of pages of class member time records;

b. compensation information/data for putative class members, segregated by job category/classification (*e.g.*, assembly, shipping, customer service, retail and wholesale sales, executive assistant, design, finance, marketing, human resources, operations, credit, etc.);

c. class member headcount data, including headcounts by year for the various non-exempt personnel employed by TMaG in various job categories/classifications, as referenced directly above;

d. termination dates and job classification/category for terminated class members;

e. identity of class members who had signed releases upon termination of employment;

f. and otherwise.

25. I personally reviewed and analyzed all of TMaG's extensive informal production of documents and data in anticipation of settlement/mediation discussions.

26. I also conducted – and continuously refined and updated – substantial legal research on all case-related theories, which included the review and analysis of more than 200 appellate decisions relating to (among others): (a) class certification; (b) meal period violations (Labor Code §§ 226.7, 512; Industrial Welfare Commission ("IWC") Wage Order No. 1-2001/8 C.C.R. § 11010); (c) rest break violations (Labor Code § 226.7; Wage Order No. 1-2001/8 C.C.R. § 11010); (c) failure to properly itemize pay stubs (Labor Code § 226(a)); (d) failure to pay all wages due on termination (Labor Code § 203); (e) Labor Code § 206.5 violations; (f) unfair competition (Business & Professions Code § 17200 *et seq*.); and (g) PAGA violations (Labor Code § 2699 *et seq*.).

27. I also reviewed thousands of pages of court records at the courthouse, mainly related to cases filed against or involving TMaG and/or its key witnesses, including Ms. Faraimo and Ms. Jagoda.

28. For its part, TMaG took an all-day deposition of Plaintiff Vanessa Bulcao. (TMaG also conducted numerous interviews of putative class members, many of which – as referenced

below – resulted in the preparation of declarations that were provided to us.) TMaG also issued written discovery to Plaintiff, including: (a) 3 Special Interrogatories; and (b) 11 Requests for Production of Documents. Plaintiff responded to all of TMaG's written discovery responses, and produced all of the requested documents (almost 200 pages) in her possession, custody and control.

29. As part of its defense efforts and strategy, and also as a precursor to mediation, **TMaG obtained and produced to Plaintiff more than 50 detailed and varying declarations** (from supervisors, co-workers, and employees that Plaintiff was seeking to represent) in support of TMaG's legal and factual defenses, contentions and positions. Generally speaking, the overall gist of the declarations, when taken as a whole, asserted that:

a. Plaintiff had not been denied her meal period and rest break rights, and was never prohibited from taking meal periods or rest breaks;

b. Plaintiff had clocked out for meal periods on several occasions, and had also left her desk for meal breaks and/or eaten meals with co-workers while still clocked in;

c. Plaintiff was free to leave her desk to take, and did take, rest breaks;

d. TMaG had generous meal break and rest period policies that allowed non-exempt employees to take more than adequate meal periods and rest breaks;

e. TMaG had a fun, low-key and easygoing work atmosphere that allowed many of the putative class members significant discretion to engage in non-work activities at TMaG's large campus, including an on-site gym and cafeteria, and numerous golf related events, and that TMaG's relaxed work environment carried over to its timekeeping practices such that numerous employees were still "on the clock" (and being paid) even when engaging in certain non-work activities;

f. TMaG did not deny meal breaks and/or rest periods to the declarants, nor require that they take skip or postpone them, nor discourage or impede them from taking them;

g. Although there were numerous instances in which meal breaks were not *recorded* in TMaG's time records (so that it appeared as though a meal break had not actually been *taken*), such most likely resulted from one or more of the following: (i) the employee's choice to work during their meal periods; (ii) the employee's failure to clock out for a meal period even if taken; and/or (iii) TMaG allowing or tolerating "paid" (i.e., on the clock) meal periods, particularly when employees were traveling on business and/or working at golf tournaments and other events;

h. TMaG frequently allowed certain employees (including those in Plaintiff's position as executive assistant) to remain on the clock while taking meal periods;

i. Most instances of potential non-compliance with meal and/or rest break rules (*e.g.*, employees being scheduled for late meal periods by supervisors, etc.) were promptly identified and remedied, or were isolated events;

j. Employees did not register any complaints with management to the effect that they had been denied the ability to take meal periods or rest breaks;

k. TMaG maintained and enforced compliant meal period and rest break policies, consistent with the requirements of California law; and

l. Plaintiff was not similarly situated with others she sought to represent.

D. <u>SETTLEMENT DISCUSSIONS</u>

30. Following the completion of the initial round of depositions, interrogatory responses, and after substantial formal document productions had been completed, counsel for the parties began discussing the possibility of a potential settlement. Defense counsel, Mr. William Whelan, requested that I provide a letter analyzing and outlining Plaintiff's theories of liability, class certification, and damages issues. On February 18, 2016, I sent Mr. Whelan with a detailed, 20 page letter containing such an analysis, and requesting certain informal discovery for the purpose of discussing a potential settlement. Mr. Whelan and I had a preliminary discussion about

that letter on February 19, 2016, wherein Mr. Whelan acknowledged receiving it and asked me some questions about it.

31. Following my initial letter and our preliminary discussion, Mr. Whelan and I then exchanged numerous detailed letters that outlined and described the parties' positions on various legal and factual issues. It was clear to me that the parties had very conflicting views on the facts and key legal issues. In part, such conflicting views were set forth in numerous detailed follow-up letters discussing in detail the substance of plaintiff's claims and the defendant's responses and related defenses, as referenced below:

Author	**Date**	**Number of Pages**
Mr. Hyslop	February 25, 2016	5
Mr. Whelan	March 21, 2016	5
Mr. Hyslop	March 24, 2016	6
Mr. Whelan	April 1, 2016	6
Mr. Hyslop	April 14, 2016	4
Mr. Hyslop	May 9, 2016	3
Mr. Hyslop	May 10, 2016	5
Mr. Whelan	June 29, 2016	33 (with declarations)

32. In order to advance the ball towards a potential settlement and/or mediation, Mr. Whelan and I also exchanged numerous emails, conducted telephone calls, and met in person on April 19, 2016. We agreed to try and negotiate a potential settlement without having to involve a mediator to save costs if possible. As part of this process, TMaG also provided to me exemplar but voluminous paper time records (due to the unavailability of reasonably usable/obtainable electronic or summary records). I personally reviewed and analyzed them, and it was an arduous and extremely time-consuming process. Following the completion of the timecard review and analysis, I developed a preliminary alleged exposure model.

33. On July 22, 2016, Messrs. Pestotnik, Winslow and I met in-person with Mr. Whelan to further discuss liability and settlement. We provided him with a preliminary alleged

exposure model, and made a settlement demand. Mr. Whelan did not provide a counter-proposal at the meeting.

34. While the parties were hopeful that a potential class action settlement might be possible to achieve without the assistance of a professional mediator, the parties concluded that a professional mediator would be necessary to achieve further progress. Thus, notwithstanding our diligence, Mr. Whelan and I determined and agreed that, in order to explore the viability and/or potential terms of a mutually acceptable class action settlement, we needed conduct mediation with a professional mediator.

E. MEDIATION

35. Ultimately, we were able to schedule a mediation with the Honorable Steven R. Denton (Ret.), who has experience in wage and hour claims, to take place on October 3, 2016.

36. In advance of the mediation, Plaintiff submitted a 23 page mediation brief, plus 16 pages of exhibits. TMaG submitted a mediation binder with a 15 page mediation brief, plus 6 exhibits comprising 218 pages. Among TMaG's exhibits were over 40 declarations from putative class members and 58 releases from class members that were signed after the lawsuit had been filed. The parties exchanged their mediation briefs and exhibits in advance of the mediation.

37. TMaG made it very clear that, if the case did not settle, it would pursue the strategy discussed in *Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal.App.4th 796, 801, wherein the employer solicited and obtained releases directly from putative class members, thereby undermining plaintiff's case. In fact, TMaG represented in connection with mediation/settlement discussions that 182 former employees (of a total of 381 former employees) had *already* signed wage "releases" in connection with terminating their employment, and many more would be sought.

38. The parties met with Judge Denton (Ret.) for an all-day mediation on October 3, 2016. Despite our diligence, we were unable to reach an agreement. At the end the day however, we agreed that Judge Denton would develop a "mediator's proposal," which could be either rejected or accepted by either or both sides. Under its terms, if one or both sides rejected the proposal, neither side would be informed of the other's decision.

39. On October 4, 2016, Judge Denton (Ret.) issued his "mediator's proposal," with an acceptance/rejection deadline of noon on October 7, 2016. Both parties ultimately accepted the mediator's proposal, and then proceeded to formally document the proposed settlement. Mr. Whelan prepared the first drafts of the settlement-related documents that are attached hereto as **Exhibit A** to the declaration I submitted in support of preliminary approval (hereafter, Hyslop PA Dec.). The parties then exchanged a series of proposed redline revisions over the course of several weeks, culminating in the final versions that were signed by both parties and their counsel.

F. PROPOSED (STIPULATED) SETTLEMENT TERMS

40. Subject to final Court approval, and with the significant assistance of the Honorable Steven R. Denton (Ret.), the parties have *provisionally* agreed to the following proposed class action settlement:

a. TMaG will stipulate to certification of the following Class: All persons who are or have been employed by TMaG as non-exempt employees (i.e., salaried non-exempt and/or hourly) in the State of California at any time from August 11, 2011 through December 16, 2016 (the "Class Period").

b. **TMaG will create a "Settlement Fund" with a maximum possible value of $875,000**, *plus* its portion of any payroll taxes in connection with the wage payments to participating class members.

c. Excluding its portion of payroll taxes, the Settlement Fund is the maximum payment that TMaG will be obligated to make under the proposed settlement, and which also includes, without limitation, all attorneys' fees and costs, any incentive payment to the Class Representative, the costs of settlement and claim administration, any post-settlement costs, and pre and post-judgment interest.

d. If fewer than all eligible Settlement Class Members submit claims, any monies unclaimed will be distributed to those eligible Class Members who submit valid and timely claims based on the same formula as the initial payments were determined on a pro rata basis.

e. The Net Settlement Fund shall be the balance of the Settlement Fund remaining after payments from the Settlement Fund for a $5,000 payment to the Labor and Workforce Development Agency ("LWDA"), attorneys' fees, legal costs, administration costs, and the incentive payment to the Class Representative.

41. As noted, **TMaG will pay its share of any employer payroll taxes** associated with the wage payments to participating Class Members.

42. According to TMaG, as of August 25, 2016 **the putative class contains appropriately 685 employees**, consisting of 304 current and 381 former employees. Following preliminary approval, TMaG ultimately identified 693 employees as class members, and gave their contact and related information to the claims administrator for the purpose of issuing class notice.

43. In ¶ 14.H.7 of the Stipulation of Settlement, the parties provisionally agreed to the following breakdown of the $875,000 common fund (all of which was proposed by Judge Denton (Ret.), in his "mediator's proposal"), subject to Court approval:

a. a guaranteed payment of $577,500 – *i.e.*, the Net Settlement Fund – to those members of the Settlement Class who submit valid and timely claim forms;

b. an attorneys' fees award to Class Counsel of up to $262,500 (*i.e.*, 30% of the settlement fund, as proposed in Judge Denton (Ret.)'s "mediator's proposal");

c. litigation costs payable to Class Counsel of up to $15,000;

d. a Class Representative's incentive award payable to Plaintiff Bulcao of up to $5,000;

e. a payment to the LWDA for Plaintiff's PAGA claims under California Labor Code §§ 2699 *et seq.* in an amount not to exceed $5,000; and

f. claims administration expenses of up to $10,000.

Each of these components are discussed in detail below.

Class Notice

44. Each Class Member was sent a Notice (Exhibit 2 to the Stipulation of Settlement) to his/her last known address in a mailing envelope that included the words "TMaG Class Settlement" as part of the return address associated with the Claims Administrator, Phoenix Settlement Administrators ("PSA"), and also included the following language on the envelope: "**IMPORTANT LEGAL DOCUMENT – YOU MAY GET MONEY FROM A CLASS ACTION SETTLEMENT AS EXPLAINED IN THE ENCLOSED NOTICE.**" *See*, Exhibit A to Hyslop PA Dec., ¶ H.14(e).

45. Class Members had Claim Forms mailed to them at their last known address, as updated by PSA through the NCOA database. *See*, Exhibit A to Hyslop PA Dec., ¶ H.14(j).

46. Notices were provided in English only, as TMaG represented that virtually all – if not all – employees are/were fluent in or fully capable of reading an English notice, and that a notice in Spanish was not necessary.

47. For any Notice Packets that were returned to the administrator as undeliverable, PSA performed a skip trace, and then re-mailed the Notice Packet to the new address. *See*, Exhibit A to Hyslop PA Dec., ¶ H.14(j). Ultimately, only one (1) Notice Packet was undeliverable, according to PSA.

Website

48. PSA also created and maintained a website at www.TMaGSettlement.com, at which it posted a complete copy of the Stipulation and Settlement Agreement of Class Action Claims, the Class Notice, a blank Claim Form, Plaintiff's Motion for Preliminary Approval, and the Preliminary Approval Order. Once filed, PSA will then post Plaintiff's Motion for Final Approval and the Final Approval Order/Final Judgment. *See*, Exhibit A to Hyslop PA Dec., ¶ H.14(e). The Notice itself also directed Class Members to the website. *See*, Exhibit 2 as attached to Exhibit A to Hyslop PA Dec., hereto. Thus, Class Members will be able to determine, by going to the website, whether Final Approval was granted.

Plan of Allocation

49. As expressed in the Stipulation of Settlement, the **plan of allocation** among Class Members is as follows (emphasis added):

> All Class Members will be eligible to submit a claim for a 'Settlement Award' (as defined below). If a Class Member submits a timely and properly completed Claim Form ('Claim Form') (attached as Exhibit 3) then the Class Member will be a 'Participating Class Member.' On TMaG's behalf, the Claims Administrator will pay Settlement Awards to Participating Class Members. The gross amounts of these Settlement Awards will be calculated by assigning a dollar value to each week of work with TMaG. **In addition, Settlement Awards will be distributed as follows: Class members who primarily worked in the Assembly, Shipping, and regulated Customer Service departments will receive 25% more than other Class Members. Class Members who previously signed releases with TMaG that specifically identified the *Bulcao v. TMaG* lawsuit (including but not limited to Assembly, Shipping, and regulated Customer Service Representative Employees) will receive 30% of what would otherwise be their participation had no release been executed. Class members who previously signed releases with TMaG that did not specifically identify the *Bulcao v. TMaG* lawsuit (including, but not limited to Assembly, Shipping, and regulated Customer Service representatives employees) will receive 60% of what they would have otherwise been paid had no release been signed.** As used here, the term 'primarily' shall mean fifty-one percent (51%) or more of workweeks worked by Participating Class Members. The award will be based on the actual number of weeks worked and partial workweeks will be counted as a fraction of a workweek. The amount to be paid per week worked will be calculated by dividing the $577,500 maximum value of the Net Settlement Fund by the number of weeks worked by all Class Members during the Class Period. If less than 100% of all Class Members file Claim Forms, those Participating Class Members who do file claim forms will share proportionately in the settlement residual. TMaG shall calculate an estimated amount to be paid per week no later than fourteen (14) days after the date the Parties execute this Agreement and the Claims Administrator shall calculate a final amount to be paid per week fourteen (14) days after the close of the Claims Period.

See, Exhibit A to Hyslop PA Dec., ¶ H.8(c).

50. These different allocations by category of Class Member were agreed upon primarily for the following reasons:

a. First, the decision to allocate 25% more to employees who worked primarily in "Assembly, Shipping, and regulated Customer Service departments" was based on the fact that these employees had work and meal schedules *imposed* on them by supervisors (as opposed to an employee

determining on his/her own, potentially in consultation with his/her supervisor, when/if a meal period would be taken), and were more likely to have been scheduled for late meal periods on occasion.

b. Second, for those employees who signed a release *after* the lawsuit was filed that *specifically mentioned* the *Bulcao v. TMaG* lawsuit, the decision to allocate only 30% of what would otherwise be their participation had no release been executed was based on the probable enforceability of such releases under *Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556, 578; *Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal.App.4th 796, 801; and *Watkins v. Wachovia Corp.* (2009) 172 Cal.App.4th 1576, 1587.

c. Third, for those employees who signed a more "generic" release that did *not* mention the *Bulcao v. TMaG* lawsuit, the decision to allocate to them 60% of what they would have otherwise been paid had no release been signed was based on the *possibility* that such releases *could* be considered valid under the *Aleman, Chindarah,* and *Watkins* cases but *may* not be.

Average Payout

51. **According to PSA, 253 Class Members submitted valid and timely Claims. That means that, for participating Class Members, the average payment will be $2,282.61, due to the "guaranteed payment of $577,500" to the Settlement Class (i.e., $577,500 ÷ 253 = $2,282.61.** However, since the payments will ultimately be calculated based on the number of weeks each employee worked at TMaG within the Class Period (as calculated based on the aggregate total of all weeks worked by all Class Members during the Class Period), those employees with more seniority will – rightfully so – receive a much larger share than those who may have only worked at TMaG for a few months. For example, according to PSA, **30 participating Class Members will receive the maximum payment of $4,047.96**, if final approval is granted. By contrast, **Plaintiff Bulcao's *pro rata* share of the settlement is very small – only $184.59**, as she only worked at TMaG for a few months, from February 11, 2015 to May 19, 2015. As to Ms. Bulcao in particular, the settlement also provides that, in conjunction

with the proposed incentive payment of $5,000, she will settle any residual individual claims against TMaG in exchange for a general release.

52. To put the $2,282.61 number into perspective, the average hourly rate for assembly and shipping workers during the Class Period was, respectively, $11.77 and $12.44.[2] Under the proposed allocation of settlement funds as referenced above, assembly and shipping workers (plus regulated customer service workers) will receive a 25% increase in their pro rata share because – as hourly workers who had rigid schedules imposed on them – they were more likely to have been occasionally scheduled for meal periods *after* completing five hours of work. **Among all Class Members, employees working in assembly and shipping positions with TMaG had the highest average headcounts: 79 for assembly and 76.5 for shipping.**[3] Assembly and shipping also had – by far – the highest number of terminations out of any category: 49 for assembly and 53 for shipping.

53. **With a 25% bump, the average payout per Class Member for assembly and shipping workers would be $2,853.26, which for an assembly worker who earned $11.77/hour equates to 242.41 hours of work.** However, because the final calculation for each individual Class Member will be based on weeks of actual employment with TMaG, an assembly worker who was employed by TMaG during the *entire* Class Period will receive *substantially more* than $2,853.26. On the flip side, this also means that an assembly worker who was only employed by TMaG for two months during the Class Period, for example, will receive a relatively small amount of money.

54. By contrast, for example, other non-exempt TMaG employees covered by the proposed settlement had comparatively small average headcounts – design (4.5), executive admin (8.5), finance (6.5), IT (5.5), marketing (11), operations (18), PGA (14.5), and retail (15).

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[2] Based upon compensation data provided by TMaG to Plaintiff, we calculated that the average hourly rates paid to Class Members during the Class Period ranges from $11.77 to $27.42.

[3] "Average headcount" refers to the number of people employed in a position at any given time; therefore, due to turnover, the actual number of Class Members in such categories will necessarily be higher.

According to TMaG, employees in the vast majority of these categories – design, executive admin, finance, IT, marketing, operations, and PGA, for example – had comparatively flexible schedules (not rigid schedules imposed on them by supervisors) that (according to TMaG and as referenced in many of its declarations) gave them the freedom to choose when and if they would take meal and rest breaks, and for how long. As to these people, TMaG claimed that – even if its meal and rest policies were somehow defective or improper, a contention TMaG hotly disputed – such people had suffered no harm because TMaG did not implement or enforce its meal period and rest break policies in a manner that deprived them of lawful meal periods and/or rest breaks.

Retail Employees

55. According to TMaG and my own independent review of the exemplar records I obtained from TMaG for settlement purposes, retail employees (unlike other employees) were actually on an adidas™ time-keeping and payroll system (not the same TMaG time-keeping and payroll system that applied to the other categories of employees)[4] that *automatically* paid them premium pay when/if they clocked out for a meal after completing five hours of work, or if they clocked back in before 30 minutes had expired.

56. Nevertheless, for retail employees, my examination of exemplar time-keeping and payroll/paystub records did reveal certain instances in which retail employees were not properly paid with premium pay. For example, I noticed instances in which retail employees worked more than 6 hours of work but were not paid a premium payment. Given how the adidas™ premium pay process was explained to me in the deposition of Jennie Jagoda, I expected to see premium payments made in such instances, but that was not the case with the exemplar records I was reviewed.

57. On the flip side, however, the adidas™ automatic payment system may have been *overly* generous to employees in certain respects, because – for example – I noticed that in several instances it resulted in the automatic payment of an extra hour of pay even when an employee clocked out for a 28 or 29 minute meal period, but not for the full 30 minutes. As another

[4] Even so, retail employees were considered employees of TMaG, as indicated on their paystubs.

example, I also saw instances in which an employee received premium pay for clocking out a minute or two beyond the fifth hour of work, whereas *Brinker* held "the statute requires a first meal period no later than the start of an employee's sixth hour of work" (*Brinker*, *supra*, 53 Cal.4th at 1041), meaning that clocking out at the *beginning* of the sixth hour would not be considered a violation under *Brinker*. This type of automatic payment system programming can result in employees "gaming" the system by clocking back in a few minutes too early (*i.e.*, before the expiration of a full 30 minutes) or a few minutes too late (*i.e.*, after completing five hours of work) even though they may never have been truly prevented, discouraged, or impeded from taking a full 30 minute meal break, as *Brinker* would require to establish a violation. *Brinker*, *supra*, 53 Cal.4th at 1040.

58. Further, because TMaG only opened its one or two retail stores in 2015, the number of workweeks associated with retail workers is expected to be comparatively low, particularly considering that the average headcount for such category was also relatively low (15). In any case, we included retail employees in the settlement due to the anomalies I found in their premium payment process.

Fairness of Allocations and Unavailability of Electronic Database

59. The parties have attempted to be as fair as possible in the allocations without the necessity of undertaking an exceptionally detailed, cumbersome and expensive review of each Class Members actual time records, since that type of "forensic accounting" would not only create a logistical nightmare for PSA but – due to the expense involved in such an undertaking – it would also likely consume a substantial portion of the Net Settlement Fund. Moreover, TMaG represented in settlement discussions (as part of Plaintiff's request for informal discovery) that it was *unable* to obtain a complete electronic database of its time records from its timekeeping vendor, ADP. (Consequently, Plaintiff was only able to obtain exemplar time-keeping reports, consisting of thousands and thousands of pages, but was not able to obtain an electronic database of time-records or reliable statistical data-points from TMaG.) Thus, even *if* such a forensic accounting were considered the preferred method for allocating settlement funds, according to

TMaG it would not be possible or feasible given the inability of its vendor, ADP, to provide such data electronically.

Estimated Potential Recovery If Plaintiff Had Prevailed

60. Plaintiff's inability to obtain an entire database of time records for the Class Period also hampered our ability to accurately or precisely provide a reasonable estimate of the amount of recovery that each Class Member *could have obtained* if Plaintiff had prevailed in this case (through appeal).[5] Moreover, TMaG repeatedly asserted – as set forth in many declarations provided to us – that certain Class Members routinely and affirmatively *chose* to take late lunches, or didn't clock out even if they took meal breaks, or were actually given paid (on the clock) meal periods by TMaG, or *voluntarily* returned to work before the expiration of 30 minutes, etc. According to TMaG, this meant that – under *Brinker* – Plaintiff would not be able to demonstrate that TMaG *impaired*, *impeded* or *discouraged* such people from taking their statutory meal periods, even if their policies were facially unlawful. *See*, *e.g.*, *Brinker*, *supra*, 53 Cal.4th at 1040 (employer must give employees a reasonable opportunity to take a timely, uninterrupted 30-minute break, and may not impede or discourage them from doing so). While we disputed this reading of *Brinker* and other cases, we also considered TMaG's arguments as part of our risk analysis when determining to settle.

61. If TMaG's arguments were accepted, that meant that for employees in design, executive admin, finance, IT, marketing, operations, and PGA, for example, a time-record showing no meal period, a late meal period, or a short meal period would not necessarily equate to a violation of applicable meal period rules. Even using our time-keeping sampling methodology, we could not therefore *assume* each such instance would or did equate to a violation, or that each such "violation" would necessarily (or even reasonably) translate into an "extra hour of pay" remedy. In short, we considered the risk that Plaintiff's meal and rest period claims could have been defeated by TMaG's arguments.

[5] By law, employers need only keep records of meal periods, and are not required to keep records of rest breaks. Since TMaG didn't keep time-keeping records of rest breaks, obtaining a database would not have helped us estimate the potential recovery on our rest break claim.

62. For these reasons, the more reliable approach to "estimating" the potential recovery could be considered one based on the exemplar time records of those employees who *were* subjected to meal period schedules imposed on them by supervisors – i.e., shipping, assembly, and regulated customer service workers. Based on my review of exemplar time-keeping records (numbering in the thousands of pages) for these employees, I estimated "violation" rates by category for settlement purposes that *could* reasonably translate into a finding that TMaG would owe meal and rest period premium payments (under Labor Code § 226.7) to such employees in the amount of $1,199,000. However, this number assumes hypothetical "violation" rates of 10% on the rest period claims for these employees, even though there are no records to prove such "violations" and there are also instances in which TMaG did apparently build compliant rest breaks into certain schedules. So for employees who were affirmatively *scheduled* to take timely rest breaks, even if they were scheduled to take late/non-compliant meal periods, assigning a dollar amount to these claims could be considered tenuous.

63. Potential paystub penalties (under Labor Code § 226(e)) – assuming both meal and rest period violations could be proven for all such employees – could *potentially* add another $187,000, which totals $1,386,000. Such is not a given, however, as Section 226(e) limits remedies to those circumstances in which an employee can prove he or she has actually "*suffer[ed] injury* as a result of a *knowing* and *intentional* failure to comply" with the provisions of Labor Code § 226(a). (Emphasis added.) Again, we took this into account as part of our risk assessment.

64. For those shipping, assembly, and regulated customer service workers who were terminated, applying "waiting time penalties" (under Labor Code § 203) to these claims could add roughly $460,000, but as a derivative claim Plaintiff would not only need to prove the underlying violations (and that premium paid was owed but not paid), but would also need to prove the non-payment of the premium pay was "willful." This was part of our risk assessment, too.

65. If the stars aligned for Plaintiff on the claims for these shipping, assembly, and regulated customer service workers, these employees could conceivably recover roughly

$1,846,000 – if Plaintiff prevailed on a class basis and such an award were affirmed on appeal. The assignment of dollar amounts to these claims is admittedly non-scientific and imprecise.

66. Accounting for all these risks, including the risk of a complete loss at trial or on appeal, and for certification risks, and giving due regard for "assumptions" which may ultimately prove untrue, a settlement that *guarantees* TMaG will pay $875,000 now is preferable to "betting the farm," rolling the dice, and coming up empty-handed.

No Reversion

67. **The settlement *does not* provide for any reversion of funds to TMaG.** Rather, the Stipulation of Settlement provides in ¶ H.8(c): "If less than 100% of all Class Members file Claim Forms, those Participating Class Members who do file claim forms will share proportionately in the settlement residual." That means that, if approved according to its terms, TMaG *will not benefit* from a lower participation rate, because any "residual" will be reallocated to those Class Members who submit Claim Forms. Stated differently, if the settlement as proposed receives final approval, *TMaG will pay $875,000* to settle this case and *will not receive any residual, reversion, or refund*, other than interest that accrues.

No Cy Pres Distribution, Unless Settlement Checks Are Not Cashed/Negotiated

68. Except in the event of uncashed checks, the settlement does not provide for any *cy pres* distribution. In this respect, the Stipulation of Settlement says: "Any checks paid to Participating Class Members shall remain valid and negotiable for one hundred eighty (180) days from the date of their issuance and may thereafter automatically be canceled if not cashed by a Participating Class Member within that time, at which time the Settlement Class Member's claim will be deemed void and of no further force and effect. Any balance remaining in any bank account created by the Claims Administrator shall be subject to a cy pres award paid to Class Counsels' and TMaG's choice of recipients." *See*, Stipulation of Settlement, ¶ 15(b).

No Injunctive Relief

69. **The settlement does not contemplate or provide for any injunctive relief.** *See*, Exhibit A to Hyslop PA Dec., ¶ H.13. Given that TMaG has changed several of its policies (likely in response to this lawsuit), the proposed settlement does not mandate more changes.

No General Release – Limited Scope Release Only

70. **The Class *will not* be providing a general release under Civil Code § 1542 or otherwise.** Rather, under the terms of the proposed settlement, the Class will – if approved – only provide a limited release. Indeed, the Stipulation of Settlement states as much, and also gives examples of common wage and hour claims that would *not* be released as a result of the settlement saying (emphasis added):

> **This Release is expressly limited and narrowly tailored to the factual and legal claims asserted in Plaintiff's First Amended Complaint, filed on or about March 7, 2016, and only applies to those persons identified by the Released Parties as being a member of the Settlement Class in connection with the administration of this proposed settlement.** By way of example only, this release is not intended to and shall not release the Released Parties from any claim that TMaG allegedly: (a) failed to properly pay or calculate wages for any of its non-exempt employees for all hours worked (i.e., straight-time, overtime and/or off-the-clock hours); (b) improperly classified any of its employees as exempt from overtime (i.e., allegedly entitling them to overtime pay for any overtime hours alleged worked or allegedly depriving them of other protections to which non-exempt employees would be entitled); (c) improperly classified, designated, or treated any person as an independent contractor rather than an employee. Additionally, this release is not intended to release and shall not release the Released Parties from all potential derivative claims (e.g., unfair competition under Business and Professions Code §§ 17200 *et seq*, PAGA violations under Labor Code §§ 2699 *et seq*., etc.) associated with such allegations; but is intended to release and shall release the Released Parties from those derivative claims specified above (i.e., the alleged failure to pay Class Members all wages in a timely fashion owed on termination of employment and the alleged failure to provide Class Members with compliant paystubs or wage statements).

See, Exhibit A to Hyslop PA Dec., ¶ H.3.

Settlement Does Not Cover Claims Outside of Operative Complaint

71. **The proposed settlement terms would not and does not cover any claims that are *outside* the four corners of the first amended complaint.** *See*, Exhibit A to Hyslop PA Dec., ¶ H.3. Nor does the proposed settlement require that the operative complaint be amended.

Every Class Member Had the Right to Object

72. Under the proposed settlement terms, **every Class Member had the right to object** to the settlement and/or be heard at the final approval hearing, regardless of whether such Class Member filed or submitted a formal written objection. *See*, Exhibit A to Hyslop PA Dec.,

¶ H.14(k)(i). Class Members had 45 days to submit objections, from the date of mailing notice packets. *Id*. **Not one Class Member objected to the proposed settlement, which I interpret as a sign that the proposed settlement has been favorably received by the Class, and enjoys widespread support.**

Every Class Member Had the Right to Opt Out

73. Under the proposed settlement terms, **every Class Member had the right to exclude himself or herself from the settlement** (i.e., opt out), in which case the Class Member would be excluded from the Class, would not be bound by the settlement, and would be permitted to bring her or her own claim. *See*, Exhibit A to Hyslop PA Dec., ¶ H.14(k)(i), (ii). Class Members had 45 days to submit opt-outs/requests for exclusion, from the date of mailing notice packets. *Id*. PSA received one (1) opt-out, but the parties stipulated to the rescission of that opt-out, as it was apparently submitted in error. Therefore, **there were no opt-outs**.

G. REASONS FOR SETTLEMENT

74. From my perspective, there was uncertainty about numerous factual and legal issues, all of which we took into account as part of the assessment of the risk going forward. For example, such risks include:

a. The risk that certifying an entire class of TMaG's non-exempt employees may be denied – in the trial court or after an appeal – particularly given that:

i. TMaG posited that Ms. Bulcao's grievances were based on individualized factual disputes based on her own personal interactions with her supervisors, which could lead to a denial of certification;

ii. TMaG had already compiled more than 50 declarations from class members, which it would use to oppose class certification, on the grounds that common factual and legal issues did not predominate.

b. The risk that we might not establish liability if:

i. our main liability theory on meal periods 8 C.C.R. § 11010(11)(A) and/or Labor Code § 226.7(b) based on TMaG's meal period policy

("non-exempt Employees are entitled to a meal period of not less than thirty (30) minutes for time worked of five (5) hours or more") was considered hyper-technical, and did not actually or directly result in TMaG denying meal periods to employees *during* the first five hours of an employee's shift, as California law requires under *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1048–1049;

ii. the trier of fact accepted TMaG's argument that most non-exempt employees were generally permitted to take their meal periods whenever they wished, and were not required to take them *after* working for five hours or more;

iii. the trier of fact accepted TMaG's argument that, even if it had a non-compliant meal period policy (a premise it denied), the policy was not *implemented* or *enforced* in a way that denied Class Members the meal periods that are mandated by law;

iv. our main liability theory on rest breaks under 8 C.C.R. § 11010(12)(A) and/or Labor Code § 226.7(b) based on the omission from TMaG's meal period policy ("Non-exempt Employees are entitled to a minimum ten (10) minute rest period per every four hours of time worked.") of the phrase "or major fraction thereof" (from the applicable Wage Order, 8 C.C.R. § 11010(12)(A)) was considered hyper-technical, and did not actually or directly result in TMaG denying rest breaks to employees on the schedule required by *Brinker*, *supra*, 53 Cal.4th at 1029 (i.e., "10 minutes rest for shifts from three and one-half to six hours in length, 20 minutes for shifts more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on").

v. the trier of fact accepted TMaG's argument that most non-exempt employees (those not subject to rigorous, supervisor-imposed schedules) were permitted to take rest breaks whenever they wished, for however long they wanted, and however frequently they wanted;

vi. the trier of fact accepted TMaG's argument that, even if it had a non-compliant rest break policy (a premise it denied), the policy was not *implemented* or *enforced* in a way that denied Class Members the rest breaks that are mandated by law; and

vii. the trier of fact (or the Court) concluded the proposed "remedy" for these "violations" (i.e., one hour of pay at the employee's regular rate of compensation for each work day that the meal ore period is not provided, per 8 C.C.R. § 11010(11)(D) and (12)(B)) was overly punitive or confiscatory, thereby substantially reducing or eliminating the Class remedy.

75. We also took into account as part our risk assessment and analysis that several of our liability theories (i.e., paystub violations under Labor Code § 226(a), termination pay violations under Labor Code § 201-202, waiting time penalties under Labor Code § 203, improper wage releases under Labor Code § 206.5, UCL claim, PAGA claim under Labor Code § 2699 *et seq*.) were derivative in nature, in the sense that we would be required to prove "premium pay" was owed but had not been paid. In addition, we also took into account that two of our claims (paystub violations under Labor Code § 226(a) and termination pay/waiting time penalties under Labor Code § 201-203) had elevated standards of proof. Specifically: (a) the remedy for paystub violations under Labor Code § 226(e) is only available where the employee proves he suffered an "injury as a result of a knowing and intentional failure to comply with [Labor Code § 226(a)]"; and (b) waiting time penalties under Labor Code § 203 require proof that the failure to pay at termination was "willful."

76. Further, we also took into account as part our risk assessment and analysis that:

a. the court has substantial discretion under PAGA to assess a penalties far less than that statutory maximum if the penalty would be considered confiscatory or punitive in nature;

b. the releases *already obtained* by TMaG could ultimately be enforceable, such that hundreds of people could be removed from the putative class and/or denied recovery; and

c. TMaG could seek and obtain hundreds of *additional* releases, as happened in *Chindarah*, *supra*, 171 Cal.App.4th at 801, thereby undermining and/or eliminating the vast majority of Plaintiff's claims.

77. Moreover, TMaG vigorously defended this case, and continuously denied each of the claims and contentions asserted. TMaG also repeatedly asserted and denied any wrongdoing or legal liability arising out of any of the facts or conduct alleged in the lawsuit. We took all of TMaG's repeated denials into account as part of our risk assessment. For example, these included TMaG's denials that the Class Members had suffered any damage; that TMaG failed to provide any of the Class Members meal periods and/or rest breaks as required by California law; that TMaG failed to compensate the Class Members for all hours worked; that TMaG failed to pay any earned "premium pay;" that TMaG failed to provide accurate and itemized wage statements; that TMaG failed to fully compensate employees in a timely manner upon termination of employment; that TMaG required Class Members to sign releases in order to be paid wages due; that TMaG engaged in any unlawful, unfair or fraudulent business practices; that TMaG engaged in any wrongful conduct as alleged in the lawsuit; or that the Class Members were harmed by the conduct alleged in the lawsuit.

78. **As evidenced by its ability and willingness to obtain more than 50 declarations and at least 58 releases *after the litigation had been filed*, TMaG was exceptionally resourceful and was determined to fight Plaintiff's allegations at every turn. Indeed, given that TMaG obviously sought to completely deny the Class from ever receiving *any recovery* from this lawsuit, the fact that this settlement – if approved – will provide Class Members**

with a guaranteed payout of $577,500 is very significant. For these reasons and others, I believe it supports final approval.

79. For its part, TMaG was faced with the risks inherent of additional expensive discovery followed by a lengthy and expensive trial against a (probable) certified class represented by Class Counsel experienced in handling employment class actions. As part of their decision-making, both parties concluded that any further litigation would be protracted and expensive for everyone, as well as risky, and that substantial amounts of time, energy and resources had been and would be devoted to the litigation, if a settlement were not reached and approved. The settlement we agreed upon was arrived at through arms' length negotiations, taking into account all relevant factors as discussed herein, including uncertainty, risk, expense, and delay attendant to continuing the case through trial and any appeal. Both the facts and the law were hotly contested and disputed by both sides.

80. Although as Class Counsel we were ultimately confident in the merits of the Class Members' position, we were put in the position of negotiating a settlement or facing the risk that the case might not be certified or that trial might not result favorably for the Class. Employment and class action laws are constantly evolving, and any changes in the law always threaten to eliminate the claims of Plaintiff and the Class. In these rapidly changing areas of law, claims can be created and deleted with the risk of retroactivity. Thus, although Class Counsel believe in the viability of the claims in this action and the ability to succeed at trial, we accounted for the risks that the Court would reach, or future changes in the law would dictate, a different conclusion, which could leave the Class Members with no benefits at all.

81. Lastly, as part of our settlement analysis, we also considered the projected/potential expense associated with taking the case to trial and/or appeal – i.e., the avoided cost of further litigation. Litigating employment class actions through trial is not only rare, but as evidenced by **Exhibits A** and **B** hereto, doing so can also be incredibly expensive from a cost standpoint. Two employment class actions that were heavily litigated in San Diego, through either trial or appeal, illustrate this point.

a. **Exhibit A** (authenticated below) is the December 12, 2014 Final Approval Order from *Hohnbaum et al. v. Brinker Restaurant Corp, et al.* ("*Hohnbaum* Order"), better known as *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. While *Brinker* was not tried, it was filed and heavily litigated in San Diego, ultimately culminating in a landmark opinion from the California Supreme Court. The *Hohnbaum* Order reflects that the *costs alone* were $1,047,145.91 (*see*, 4:10-11), which were necessarily advanced by plaintiffs' counsel without any guarantee that they would be reimbursed.

b. **Exhibit B** (authenticated below) is the August 30, 2012 Final Approval Order from *Puchalski et al. v. Taco Bell Corp.* ("*Puchalski* Order"), an employment class action that went to trial in San Diego before the Honorable Kevin A. Enright. After six years of heavy litigation, *Puchalski* settled during the *fourth month* of trial. *See*, *Puchalski* Order, 1:17-23. The *Puchalski* Order reflects that *costs alone* were $800,000. *Id*. At 7:4-9.

82. Thus, as these two case examples illustrate, litigating class actions through certification, trial, and/or appeal can be extraordinarily expensive simply from a cost standpoint, especially when expert witnesses play a large role in analyzing records, developing opinions, and testifying. In one recent employment class action case I handled (on the defense side), which settled shortly before trial, plaintiffs' counsel incurred $260,000 in costs alone.

83. Here, by settling before certification and/or trial, Plaintiff *avoided* incurring costs which could have been in the hundreds of thousands of dollars.

84. Accordingly, Class Counsel decided that settlement on the terms and conditions as described herein was in the best interests of Class Members.

H. SUITABILITY OF SETTLEMENT CLASS FOR CERTIFICATION

85. All settlement class members were ascertainable from TMaG's records. The settlement class is comprised of approximately 693 people.

86. The proposed settlement class members' claims all stem from a common set of circumstances. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual member in the Class, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Specifically, there are questions of law and fact common to the members of the Class including, without limitation, the following:

a. whether members of the Class were provided with compliant meal periods as specified under California law, or received compensation in lieu thereof;

b. whether TMaG had uniform policies, procedures, and/or practices relative to meal periods;

c. whether members of the Class were authorized and permitted to take compliant rest periods as specified under California law, or received compensation in lieu thereof;

d. whether TMaG had uniform policies, procedures, and/or practices relative to rest breaks;

e. whether, for those Class members who left TMaG's employ or who were terminated, TMaG timely paid any wages due and owing to such Class members;

f. whether TMaG willfully failed to pay, in a timely manner, any wages owing to Class members who left its employ or who were terminated;

g. whether TMaG required Class Members to sign release agreements before paying wages owed on termination of employment;

h. whether TMaG failed to provide Class Members with compliant wage statements or paystubs; and/or

i. whether TMaG violated any provisions of the California Labor Code or California Business and Professions Code, as alleged in Plaintiff's First Amended Complaint.

87. The claims of the Class Representative herein are typical of the claims of the members of the Class. Specifically, Plaintiff Bulcao, the Class Representative, worked at TMaG during the putative class period and was subject to TMaG's aforementioned business practices. Thus, Ms. Bulcao's claims arise from the same course of conduct from which the Class Members' claims arise.

88. The Class Representative and Class Counsel herein have fairly and adequately protected the interests of the members of the Class. As described herein, Plaintiff has also aggressively and competently asserted the Class Members' interests through this litigation. Class Counsel is experienced in wage and hour, employment, and class action litigation, and has litigated this action for the class for 18+ months, plus several months of pre-filing investigation.

89. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct. Namely, if TMaG were required to defend multiple actions by numerous individual Class Members, it could be exonerated in some cases and found liable in others, leaving it future/contingent liability uncertain, and the enforceability of its uniform policies and procedures in question.

I. CLASS REPRESENTATIVE'S ENHANCEMENT AND GENERAL RELEASE PAYMENT

90. It is appropriate to recognize the contributions of the Class Representative in prosecuting this litigation. The enhancement serves as recognition for the extraordinary amount of time and effort Plaintiff Bulcao spent assisting in the prosecution of this case. The settlement provides the Class Representative, Ms. Bulcao, with a reasonable enhancement for the risks, time and effort she expended in coming forward to provide invaluable information in support of the claims alleged in the complaint. As previously noted, the settlement provides that Ms. Bulcao was able to submit a claim as a Class Member, but that she would also settle any residual individual claims against TMaG in exchange for the general release/incentive payment.

91. **According to the final report of PSA, Ms. Bulcao's *pro rata* share of the settlement is only $184.59, which in and of itself would certainly not be considered a**

sufficient incentive for the average person to initiate a class action lawsuit, including acceptance of: (a) the fiduciary duties and responsibilities of a class member, and the personal stress and anxiety often associated with fulfilling them; (b) the time commitment associated with serving as the lead plaintiff; (c) the potential and/or actual impact on future employment prospects (as discussed further in Ms. Bulcao's declaration); and (d) the associated expenses.

92. Ms. Bulcao sat for a full day deposition in this case, and has spent valuable time reviewing drafts of complaints, reviewing and verifying discovery responses, reviewing, analyzing and explaining various TMaG policies and procedures and document productions, assisting me to prepare for depositions and mediation, and reviewing depositions, briefs, and pleadings which I sent to her.

93. She also attended some deposition sessions that I took of TMaG personnel. In addition, I have met with, spoken to, and corresponded with Ms. Bulcao on numerous occasions, and have routinely sent her updates on the progress of the case and have provided her with case-related materials to review. Her declaration, which has been submitted with the moving papers, provides additional detail.

94. Ms. Bulcao was an essential element in the successful prosecution and ultimate settlement of this case and was always available to provide her input on the litigation, gather evidence and other information that proved critical to the prosecution.

95. Accordingly, I believe a $5,000 enhancement/general release payment to Plaintiff Bulcao is fair and reasonable, especially given her invaluable assistance in prosecuting this case.

J. <u>PROPOSED ATTORNEYS' FEES AND COSTS</u>

96. This Court can appreciate that litigating a class action matter against a corporate defendant represented by a skilled law firm in an unsettled area of law is not appealing to most lawyers, particularly when the plaintiff's lawyer will have to finance the litigation. This case was taken on a contingency basis and is not a case undertaken lightly. Even the simple risk of advancing costs in this type of litigation can be high.

97. Out-of-pocket costs incurred by Class Counsel to date are near $15,000. Here is the breakdown of costs we have incurred/identified at this point:

Expense Type	**Expense Total**
Court Reporter Charges	$6,325.67
Court Filing Fees	$1,745.00
Settlement Administrator (Half Share of *Belaire* Notice)	$279.50
Westlaw	$401.67
Photocopies of TMaG documents, etc. at 12 cents per page only	$860.04
Postage	$57.69
Court Service Fee (One Legal)	$79.50
Mediation Fees paid to Judicate West	$4,030.00
Messenger Fees paid to Cal Express	$83.40
File Folders	$5.00
Total	**$14,053.57**

98. From the outset, my firm and I understood that we were embarking on a complex, expensive, and lengthy litigation with no guarantee of ever being compensated for the enormous investment of time and money that the case would require. In undertaking that responsibility, my firm and I were obligated to assure that sufficient resources of attorneys were dedicated to the prosecution of the litigation and that funds would be available to compensate staff and for the considerable out-of-pocket costs that a case such as this entails. Moreover, in committing to fully prosecute this case, my firm – and myself in particular – had to forego work on other potentially profitable matters in order to devote the time necessary to pursue this litigation. However, without the substantial work performed by Plaintiff's counsel, as discussed herein, this case would never have been positioned for settlement on the terms which were ultimately achieved.

99. The settlement provides that, at final approval, class counsel will seek attorneys' fees not to exceed $262,500 and costs not to exceed $15,000, which amount TMaG has agreed it will not oppose.

100. Even with my extensive experience litigating class action cases, prosecuting these cases still carries a considerable amount of risk. There is the significant risk that Plaintiff would not succeed in certifying the class or in proving TMaG's liability at trial. Even a win at trial presents appellate risks that could eliminate any or all trial victories, especially if an appellate court found that certification of the claims on a class basis was not warranted or justified.

101. Through March 15, 2017, **my firm has invested a total of 960.77 hours into this matter**, at hourly rates for attorneys ranging from $450 to $610, for a **total lodestar to date of $573,036, without application of any multiplier**, as referenced in the chart below.

Attorney	CA Bar Admission Year	Hourly Rate	Hours	Lodestar
Timothy R. Pestotnik	1987	$610	56.40	$34,404
Ross H. Hyslop	1990	$600	877.77	$526,662
Russell F. Winslow	2006	$450	26.6	$11,970
		TOTAL:	**960.77**	**$573,036**

102. My reasonable hourly rate for this matter is $600 per hour, and is based on my 26+ years of complex business litigation, employment/consumer and class action experience, including serving as lead or co-lead counsel on numerous class action cases, as referenced below. Although the vast majority of the time spent on this matter is mine alone, Messrs. Pestotnik and Winslow were invaluable in assisting me to prosecute this case. Their hourly rates, ranging from $450 to $610, are reasonable and commensurate with their experience in handling sophisticated business and/or class action litigation.

103. All Pestotnik LLP attorneys keep their time in six minute increments, by matter. Although we all keep detailed time sheets, California case law permits fee awards even in the absence of detailed time sheets. *See*, *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 64. The Court need only be provided with enough detail to assess the reasonableness of the fees claim. *Margolin v. Regional Planning Commission* (1982) 134 Cal.App.3d 999, 1006-1007 (attorney declaration as to number of hours worked by firm members sufficient). While I have summarized my firm's activities herein, we have not submitted detailed time sheets, in order to preserve Plaintiff's attorney-client and work product privileges. However, we would be willing to provide them to the Court upon request, if necessary.

104. The nature of class action work and Class Counsel's expertise justify the requested fees as well. Class Counsel has expertise in employment class action litigation, which requires specialized learning and the willingness to take large risks. Consequently, Class Counsel respectfully requests final approval, including that the Court approve an award of attorneys' fees

to Class Counsel in the amount of $262,500 and costs of $14,053.57, as agreed to by TMaG as part of the settlement (see, Exhibit A to Hyslop PA Dec.). Plaintiff Bulcao has expressly given written approval for this fee award not only in Stipulation of Settlement but also in her concurrently filed declaration in support of preliminary approval.

105. Significantly, if approved, Plaintiff's request for an award of attorneys' fees in the amount of $262,500 (representing 30% of the class recovery) would result in a *downward* adjustment of the lodestar, by approximately 54% (*i.e.*, a *negative* multiplier of .54). If approved this award of attorneys' fees would result (when applied only to the accrued hours to date of 960.77) in **an effective/blended hourly rate of $273.22/hour**.

106. For purposes of further supporting our hourly rates and/or the requested incentive payment to Plaintiff (i.e., in addition to the published cases cited in Plaintiff's memorandum of points and authorities in support of final approval), I have also attached several final approval orders that originated in San Diego courts (state and federal) in the last several years. Such orders are authenticated below, and the significance of each is summarized, with pin-point citations to the relevant portion of each order.

107. Attached hereto as **Exhibit A** is a true and correct copy of a December 12, 2014 Order and Judgment Granting Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Award of Attorneys' Fees, Costs, Class Representative Service Payments, and Claims Administration Expenses, as issued by the court in *Hohnbaum et al. v. Brinker Restaurant Corp, et al.*, Superior Court of the State of California for the County of San Diego, Case No. GIC834348. The attached is Order is the final approval of the settlement for the case *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

As it pertains to Plaintiff Bulcao's request for an award of attorneys' fees, costs, and an incentive payment, this Order is relevant to the community standard for hourly attorney rates on employment class actions, and is also instructive on the issue of incentive awards. In particular, the Order reflects that:

- The case settled for a common fund of $56,500,000, inclusive of fees and costs, among other expenses (*see*, 1:26);

- Counsel for Plaintiffs in *Hohnbaum* reported working 42,620.35 hours, for a total lodestar of $28,947,594 in incurred attorneys' fees, which is an effective blended rate of $697.20/hour ($28,947,594 ÷ 42,620.35 = $697.20/hour) (*see*, 3:17-4:23);
- As part of the approved settlement, Plaintiffs' counsel agreed to cap their potential recovery of attorneys' fees at $22,600,000, which the court awarded and authorized, and which is an effective blended rate of $530/hour ($22,600,000 ÷ 42,620.35 = $530/hour) (*see*, 1:6-10; 3:17-4:23);
- The cap of $22,600,000 of the $56,500,000 settlement fund represented 41.8% (*see*, 1:6-10; 3:17-4:23); and
- The court awarded incentive payments to the class representatives ranging from $20,000 – $25,000 (excepting the plaintiff who was only added as a PAGA representative, who received $2,000) (*see*, 1:6-10, 4:25-5:14).

108. Attached hereto as **Exhibit B** is a true and correct copy of an August 30, 2012 Order and Judgment Granting Final Approval of Class Action Settlement, as issued by the court in *Puchalski et al. v. Taco Bell Corp.*, Superior Court of the State of California for the County of San Diego, Case No. GIC870429.

As it pertains to Plaintiff Bulcao's request for an award of attorneys' fees, costs, and an incentive payment, this Order is relevant to the community standard for hourly attorney rates on employment class actions, and is also instructive on the issue of incentive awards. In particular, the Order reflects that:

- the case settled for a common fund of $20,000,000, inclusive of fees and costs, among other expenses (*see*, 3:21-26);
- Counsel for plaintiffs in *Puchalski* reported working 19,949 hours, but as part of the settlement agreed to cap their potential recovery of attorneys' fees at $10,000,000, for an effective blended rate of $501.27/hour ($10,000,000 ÷ 19,949 = $501.27/hour) (*see*, 5:14-7:2);
- The cap of $10,000,000 of the $20,000,000 settlement fund represented 50% (*see*, 3:6-26; 4:1-11; 5:22-7:2); and

- The court awarded incentive payments to the two class representatives of $50,000 each, plus $2,000 each to 25 class members who testified at trial (*see*, 7:11-21).

109. Attached as **Exhibit C** is a true and correct copy of a July 24, 2013 Order Granting Final Approval of Class Action Settlement, Attorneys' Fees, Costs, and Incentive Award, as issued by the court in *Johansson-Dohrmann v. CBR Systems, Inc.*, United States District Court for the Southern District of California, Case No. 12-cv-1115-MMA (BGS).

As it pertains to Plaintiff Bulcao's request for an award of attorneys' fees, costs, and an incentive payment, this Order is relevant to the community standard for hourly attorney rates on employment class actions, and is also instructive on the issue of incentive awards. In particular, the Order reflects:

- an award of $585,936.33 in attorneys' fees to class counsel in a consumer class action, which included a 2.07 multiplier (*see*, 13:25-26; 17:12-18:22);
- the court cross-checked the 2.07 multiplier by examining the lodestar, and found a blended hourly rate of $540 was reasonable, including an hourly rate of $695 for lead counsel, Patrick Keegan, Esq.[6] (*see*, 17:12-18:22); and
- the court approved of a $5,000 incentive payment to the class representative (*see*, 19:25-20:15).

110. Attached as **Exhibit D** is a true and correct copy of a January 9, 2014 Order [Granting Final Approval of Class Action Settlement, Attorneys' Fees, Costs, and Incentive Award], as issued by the court in *Morey v. Louis Vuitton North America, Inc.*, United States District Court for the Southern District of California, Case No. 11-cv-1517 WQH (BLM).

[6] Mr. Keegan was co-lead counsel for the plaintiffs in *Baskall et al. v. KFC*, San Diego Superior Court, Case No. 37-2007-00084348-CU-OE-CTL, an employment class action case in which I represented defendant KFC (referenced below, in ¶ 114). In an order dated September 9, 2009, Judge Steven Denton approved a class action settlement in which plaintiff's counsel was awarded $1,020,000 in attorneys' fees, where the lodestar was $412,537.50 based on 855.1 hours of work. (Judge Denton also awarded an incentive award to plaintiff Baskall in the amount of $15,420.) Although in his declaration dated July 23, 2009, Mr. Keegan stated his rate was $525/hour, the fee award represented an effective hourly rate – eight years ago – of $1,192.84. In the past, I have been a co-presenter with Mr. Keegan at civil procedure seminars, and consider him a contemporary of mine.

As it pertains to Plaintiff Bulcao's request for an award of attorneys' fees, costs, and an incentive payment, this Order is relevant to the community standard for hourly attorney rates on employment class actions, and is also instructive on the issue of incentive awards. In particular, the Order reflects that:

- In awarding $375,000 in attorneys' fees and costs, which included a mutliplier of 1.51, the court found lodestar rates ranging from $500-$675/hour were reasonable for plaintiffs' counsel litigating a consumer class action (*see*, 16:4-18); and
- the court approved of a $5,000 incentive payment to the class representative (*see*, 17:20-18:23).

111. Attached as **Exhibit E** is a true and correct copy of a March 17, 2014 Order Granting Final Approval of Class Action Settlement; Granting Unopposed Motion for Attorneys' Fees, Costs, and Incentive Award, as issued by the court in *Chaikin v. Lululemon USA, Inc.*, United States District Court for the Southern District of California, Case No. 3:12-CV-02481-GPC-MDD.

As it pertains to Plaintiff Bulcao's request for an award of attorneys' fees, costs, and an incentive payment, this Order is relevant to the community standard for hourly attorney rates on employment class actions. In particular, the Order reflects that, in awarding $154,833.61 in attorneys' fees, the court found lodestar rates ranging from $350-$650/hour were reasonable for plaintiffs' counsel litigating a consumer class action (*see*, 10:8-11:9).

112. Attached as **Exhibit F** is a true and correct copy of a March 3, 2011 Final Order: (1) Approving Class Action Settlement, (2) Awarding Class Counsel Fees and Expenses, (3) Awarding Class Representatives Incentives, (4) Permanently Enjoining Parallel Proceedings, and (5) Dismissing Action with Prejudice, as issued by the court in *Iorio v. Allianz Life Insurance Company of North America, Inc.*, United States District Court for the Southern District of California, Case No. 05-CV-0633-JLS (CAB).

As it pertains to Plaintiff Bulcao's request for an award of attorneys' fees, costs, and an incentive payment, this Order is relevant to the community standard for hourly attorney rates on

employment class actions, and is also instructive on the issue of incentive awards. In particular, the Order reflects that the court approved:

- an award of $18,000,000 in attorneys' fees for 15,200 hours of work, and found lodestar rates ranging from $410-$750/hour were reasonable for plaintiffs' counsel litigating a consumer class action (*see*, 15:6-20:23);
- given a multiplier of 1.70 on the lodestar, the effective hourly rate was $1,184.20/hour ($18,000,000 ÷ 15,200 = $1,184.20/hour); and
- the court approved incentive payments of $25,000 to each of three class representatives (*see*, 20:25-21:15).

K. EXPERIENCE AND ADEQUACY OF CLASS COUNSEL

113. I have been licensed to practice law in the State of California since December 1990, and have maintained my license in good standing as an active California lawyer since admission to the California bar. I am AV rated by my peers through Martindale Hubbell. Before joining Pestotnik LLP (formerly known as Pestotnik + Gold LLP) as a partner in May 2010, I was a partner with the international law firm of McKenna Long & Aldridge LLP (now Dentons US) for more than ten years, from January 2000 through May 2010. From December 1993 through December 1999, I was an associate attorney with McKenna Long & Aldridge LLP. From 1990 through October 1993, I was an associate attorney with Jennings Engstrand & Henrikson, which dissolved as a law firm in October 1993.

114. Over the course of my career to date, I have been directly and personally involved in the litigation of numerous employment, class, collective, and private attorney general actions, including the following examples:

- *Gomez et al. v. Pizza Hut of Southeast Kansas, Inc.* (San Bernardino Superior Court, Case No. CIVVS900679) (employment class action alleging pizza delivery company did not sufficiently reimburse delivery drivers for expenses incurred using their personal vehicles to deliver pizzas).
- *Cotoner v. Viasys International, LLC* (Los Angeles Superior Court, Case No. BC451584) (employment class action alleging cable/internet installation employees were not sufficiently reimbursed their expenses, and were denied meal and rest periods).

- *Harris v. D.S. Waters of America, Inc.* (San Diego Superior Court, Case No. 37-2013-00073724-CU-0E-CTL) (individual action alleging wrongful termination and PAGA claims on behalf of other aggrieved employees)

- *O'Brien et al. v. Pizza Hut of Southeast Kansas, Inc. et al.* (United States District Court for the Central District of California, Eastern Division, Case No. ED CV 13-01602 VAP (OPx)) (employment class action alleging violations of meal and rest period statutes/rules, and derivative claims)

- *Avila et al. v. Pizza Hut of Southeast Kansas, Inc. et al.* (United States District Court for the Central District of California, Eastern Division, Case No. ED 13-CV-01168 JGB SPx (employment class action alleging violations of meal and rest period statutes/rules, and derivative claims)

- *Davis v. D.S. Waters of America, Inc.* (United States District Court of the Southern District of California, Case No. 14-CV-250 BAS (NLS) (employment class action alleging violation of meal and rest period statutes/rules, plus derivative claims)

- *Malone v. DS Waters of America, Inc.* (United States District Court of the Southern District of California, Case No. 14-cv-02776-GPC-BGS) (class action and PAGA action alleging managers were improperly classified as exempt from overtime);

- *Gomez v. Mycles Cycles, Inc. dba San Diego Harley-Davidson et al.* (San Diego Superior Court, Case No. 37-2015-00043311-CU-BT-CTL) (consumer class action alleging non-compliance with Vehicle Code sections, false advertising, unfair competition, and improper imposition of fees/charges);

- *Perry et al. v. Truong Giang Corp. (*Los Angeles Superior Court, Case No. BC539568) (consumer class action alleging false advertising associated with herbal weight-loss teas)

- *Fuentes v. Riverside Motorcycle, Inc. et al.* (Riverside Superior Court, Case No. RIC 1515384) (consumer class action alleging non-compliance with Vehicle Code sections, false advertising, unfair competition, and improper imposition of fees/charges);

- *Baker v. Temecula Motorsports, Inc. et al.* (Riverside Superior Court, Case No. MIC 1500556) (consumer class action alleging non-compliance with Vehicle Code sections, false advertising, unfair competition, and improper imposition of fees/charges);

- *Kotlov v. Fun Bike Center et al.* (San Diego Superior Court, Case No. 37-2010-00102059-CU-BT-CTL) (consumer class action alleging non-compliance with Vehicle Code sections, false advertising, unfair competition, and improper imposition of fees/charges);

- *C.L. Trustees, et al. v. ACS State & Local Solutions, et al.* (San Diego Superior Court, Case No. 4305) (consolidated set of consumer/general public class actions

alleging city red light contractor improperly and unlawfully operated red light intersection cameras).

- *Rice v. Harbor View Medical Center & Tenet HealthCare* (San Diego Superior Court, Case No. 699605) (consumer/patient class action alleging hospital and health care provider paid unlawful kickbacks to physicians for the referral of patients).

- *Fraker v. KFC Corp., et al.* (U.S. District Court for the Southern District of California, Case No. 06CV 1284 (JM) WMc) (consumer class action alleging KFC engaged in false advertising by allegedly failing to disclose the unhealthy nature of trans fat contained in KFC's various restaurant foods).

- *Yabsley v. Cingular Wireless, LLC* (Santa Barbara Superior Court, Case No. 01221332) (consumer class action lawsuit alleging false advertising of cellular phones at prices that did not disclose sales tax would be calculated based on gross retail price, not specially discounted price)

- *Moore, et al. v. T-Mobile et al.* (U.S. District Court for the Central District of California, Case No. CV 08-03108 GW (AGRx)) (consumer class action alleging that T-Mobile, Flycell, and other providers of premium cell phone content engaged in false advertising, "crammed" cell phone bills with allegedly unauthorized charges, and failed to comply with rules and regulations imposed on cell phone providers).

- *Struyk, et al. v. AT&T Mobility* (U.S. District Court for the Southern District of California, Case No. 07CV1314L (CAB)) (consumer class action lawsuit alleging that cellular telephone company falsely advertised rebates associated with cellular telephones).

- *Niblock, et al. v. Skadden Arps Slate Meager & Flom LLP* (San Diego Superior Court, Case No. GIC 775297) (investor class action alleging misrepresentations to prospective shareholders associated with private placement securities offering by law firm's client).

- *Hoffman, et al. v. Cingular Wireless, LLC* (U.S. District Court for the Southern District of California, Case No. 06 CV 1021 W (BLM)) (consumer class action lawsuit alleging false and deceptive advertising associated with sale of cellular telephones).

- *Galloway Pharmacy, et al. v. Health Benefit Services, Inc., et al.* (San Diego Superior Court, Case No. GIC 878182) (class action lawsuit by class of California pharmacies alleging that Defendants breached managed care services contracts and tortiously interfered with pharmacy businesses by processing pharmacy transactions to include members in a drug discount program).

- *Brower, et al. v. Motorola, Inc., et al.* (San Diego Superior Court, Case No. GIC 765987) (consumer class action lawsuit alleging that cellular telephone use caused Plaintiff, and similarly situated people, to develop brain tumors).

- *Karges v. Massachusetts Mutual Life Ins. Co.* (San Diego Superior Court, Case No. 731920) (consumer class action by policyholders alleging marketing of whole life insurance policies was unlawful, deceptive and misleading).

- *Citizen Action Council v. Main Street Direct, LLC* (San Diego Superior Court, Case No. GIC 789677) (private attorney general/consumer class action alleging marketing of products with credit card statements issued by nation's major banks was unlawful, deceptive and misleading).

- *Phanco v. BMG Direct Music, Inc.* (San Diego Superior Court, Case No. GIC 774082) (private attorney general/consumer class action alleging that BMG's marketing of CD's was unlawful and misleading).

- *Harry Powell v. Star Scientific, Inc., et al.* (San Diego Superior Court, Case No. GIC 771483) (private attorney general action alleging manufacturer failed to pay proper escrow amounts into California tobacco settlement fund).

- *Citizen Action Council v. Allied Marketing Group, Inc.* (San Diego Superior Court, Case No. 783870) (private attorney general/consumer class action alleging direct mailing practices were unlawful and misleading).

- *Frank v. MBNA Corp., et al.* (San Diego Superior Court, Case No. GIC734311) (consumer class action alleging that marketing of life insurance policies through credit card company was unlawful and deceptive).

- *Rothschild v. Tyco International, Ltd., et al.* (San Diego Superior Court, Case No. 726930) (private attorney general/class action alleging that water works parts were not manufactured as represented and failed to comply with industry standards and specifications).

- *People v. Allied Marketing Group, Inc., et al.* (San Diego Superior Court, Case No. 702037) (attorney general civil enforcement action alleging direct mailing practices were unlawful and misleading).

- *Diaz et al. v. First American Home Buyers Protection Corporation* (United States District Court for the Southern District of California, Case No. 09-CV0775 H (WMC)) (consumer class action alleging seller of home warranty plans sold/marketed warranty plans in unlawful and misleading manner, and failed to abide by its promises).

- *Goldman, et al. v. RadioShack Corp.* (U.S. District Court for the Eastern District of Pennsylvania, Case No. 03-CV-0032) (employment class action alleging managers were improperly and unlawfully classified as exempt from overtime).

- *Madely, et al. v. RadioShack Corp.* (Wisconsin Circuit Court, County of Milwaukee, Case No. 02-CV-011800) (employment class action alleging managers were improperly and unlawfully classified as exempt from overtime).

- *O'Gorman v. RadioShack Corp.* (San Diego Superior Court, Case No. 37-2007-00067739-CU-OE-CTL) (employment class action alleging employer required employees to improperly forfeit accrued personal paid absence benefits, on the theory that such benefits constitute accrued vacation time not subject to forfeiture)

- *Baskall et al. v. KFC* (San Diego Superior Court, Case No. 37-2007-00084348-CU-OE-CTL) (employment class action alleging that employer required managerial employees to sign allegedly unenforceable on-duty meal period agreements, did not permit such employees to take state-mandated meal and rest periods, and did not pay employees all wages allegedly due).

- *Perez, et al. v. RadioShack Corp.* (U.S. District Court for the Northern District of Illinois, Case No. 02-CV-7884) (FLSA collective action by exempt managers alleging that they were improperly and unlawfully classified as exempt from overtime).

- *Lloredo, et al. v. RadioShack Corp.* (U.S. District Court for the Southern District of Florida, Case No. 04-CV-20991) (FLSA collective action by exempt managers alleging that they were improperly and unlawfully classified as exempt from overtime).

- *Birns, et al. v. RadioShack Corp.* (U.S. District Court for the Southern District of New York, Case No. 06-CV-0900) (FLSA collective action by exempt managers alleging that they were improperly and unlawfully classified as exempt from overtime).

- *Gonzalez, et al. v. RadioShack Corp.* (U.S. District Court for the Southern District of Florida, Case No. 05-CV-22195) (FLSA collective action by exempt manager alleging that he was improperly and unlawfully classified as exempt from overtime).

- *Belazi, et al. v. Tandy Corp.* (Orange County Superior Court, Case No. 00CC03817) (employment class action by exempt managers alleging that they were improperly and unlawfully classified as exempt from overtime).

- *Macario, et al. v. Tandy Corp.* (Los Angeles Superior Court, Case No. BC231950) (employment class action alleging that employer imposed improper and unlawful deductions from earned bonuses).

- *Rivera, et al. v. RadioShack Corp.* (Los Angeles Superior Court, Case No. BC252808) (employment class action alleging that pay plans improperly and unlawfully failed to pay properly calculated overtime wages to non-exempt employees).

- *Garrow et al. v. Tandy Corp.* (San Diego Superior Court, Case No. 690117) (employment class action by exempt managers alleging that they were improperly and unlawfully classified as exempt from overtime).

- *Puchalski, et al. v. Taco Bell Corp.* (San Diego Superior Court, Case No. GIC 328987) (employment class action by exempt managers alleging that they were improperly and unlawfully classified as exempt from overtime).

- *Brookler, et al. v. RadioShack Corp.* (Los Angeles Superior Court, Case No. BC 313383) (employment class action by hourly employees alleging that employees were improperly denied their meal periods).

- *Aguilar, et al. v. Cingular Wireless LLP* (U.S. District Court for the Central District of California, Case No. 06-CV-8197 ER (FFMx)) (employment class action alleging numerous California labor law violations).

115. At any given time over the last ten years, I estimate that between 60% and 80% of my full time work as a lawyer has been devoted to class action litigation. Presently, at least 80% of my full time practice is devoted to consumer and employment class action litigation as either lead or co-lead counsel.

L. CLASS COUNSEL'S EVALUATION OF SETTLEMENT

116. Based on my 26+ years of experience and my own independent investigation and evaluation, and given the circumstances we faced as outlined herein, in my opinion the settlement for the consideration and on the terms set forth in the Stipulation of Settlement (**Exhibit A** to Hyslop PA Dec.) is fair, adequate, and reasonable and is in the best interest of the Class in light of all known facts and circumstances and the expenses and risks inherent in litigation. Although I am and was confident in the merits of the case, there is always risk associated with litigation. TMaG has raised substantial defenses, and there is always a chance that TMaG could defeat certification or obtain a complete defense verdict at trial. Even succeeding at trial is no guarantee, as the court of appeal can always reverse successful judgments, with devastating consequences. All things considered, I believe the settlement is fair, adequate and reasonable and in the best interests of the Class.

117. In my opinion, the settlement that will be made available for each participating Class Member is fair, reasonable, and adequate given the inherent risks of litigation, specifically those relating to trial, class certification, TMaG's threats to obtain additional releases from class

members, the likelihood of TMaG appealing a favorable judgment for the class, and the costs of pursuing that litigation. The settlement is the result of extensive, arms'-length negotiations, without any collusion, and with the assistance of a highly experienced mediator, Judge Steven R. Denton (Ret.).

M. PROJECTED SETTLEMENT ADMINISTRATION SCHEDULE, IF APPROVED

118. If the Court grants final approval to this proposed class action settlement on March 24, 2017, we have projected/estimated that the following schedule will likely apply:

Estimated Dates	**Description**	**References to Settlement Agreement**
March 24, 2017	Effective Date	¶ 1
March 31, 2017	Fees award and litigation costs wired to Class Counsel.	¶ 10b
April 7, 2017	Bulcao's incentive award mailed to Class Counsel.	¶ 10c
April 7, 2017	Participating Class Member settlement award mailing date.	¶ 8, 15b
April 7, 2017	LWDA Payment Mailing Date	
(on or before 210 days after the Effective Date)	Check stale date	¶ 15b
(on or before 210 days after the Effective Date)	Close of administration of settlement	¶ 15b
(on or before 210 days after the Effective Date)	Administrator provides written certification of completion of settlement to court and counsel for all parties.	¶ 15b
(14 days after Close of Administration)	Administrator pays TMaG any interest earned on settlement fund account.	¶ 7

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed this 17th day of March, 2017, at San Diego, California.

Ross H. Hyslop

EXHIBIT A

DEC 15 '14 AM 9:10

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Additional Counsel Listed After Signature Page
Attorneys for Plaintiffs and all others similarly situated

FILED
Clerk of the Superior Court
DEC 15 2014
By: M. SPIESMAN, Deputy

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER, and SANTANA ALVARADO and ROES 1 through 500, Inclusive on behalf of themselves and all others similarly situated, and on behalf of the general public,

Plaintiffs,

v.

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC. and BRINKER INTERNATIONAL PAYROLL COMPANY, LP a Delaware Corporation; and DOES 1 through 500, Inclusive

Defendants.

CASE NO.: GIC834348

CLASS ACTION

NOTICE OF ENTRY OF ORDER AND JUDGMENT GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR AWARD OF ATTORNEYS' FEES, COSTS, CLASS REPRESENTATIVE SERVICE PAYMENTS, AND CLAIMS ADMINISTRATION EXPENSES

Dept.: C-69
Judge: Hon. Katherine A. Bacal

Complaint Filed: August 16, 2004
First Amended Complaint Filed: March 17, 2006
Second Amended Complaint Filed: July 12, 2013
Third Amended Complaint Filed: August 18, 2014

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 12, 2014, the above-entitled court entered the Order and Judgment Granting Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Award of Attorneys' Fees, Costs, Class Representative Service Payments, and Claims Administration Expenses. A true and correct copy of the Court's December 12, 2014 Order and Judgment, is attached hereto as Exhibit 1.

DATED: December 12, 2014

HURST & HURST

By: _____

Julie Corbo Ridley
Attorney for Plaintiffs and all others similarly situated

ADDITIONAL COUNSEL FOR PLAINTIFFS AND THE CERTIFIED CLASS

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Michael D. Singer (Bar No. 115301)
COHELAN KHOURY & SINGER
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EXHIBIT 1

EXHIBIT 1

FILED
Clerk of the Superior Court
DEC 12 2014
By: J. Browder, Deputy

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER, and SANTANA ALVARADO and ROES 1 through 500, Inclusive on behalf of themselves and all others similarly situated, and on behalf of the general public,

Plaintiffs,

v.

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC. and BRINKER INTERNATIONAL PAYROLL COMPANY, LP a Delaware Corporation; and DOES 1 through 500, Inclusive

Defendants.

CASE NO.: GIC834348

CLASS ACTION

~~[PROPOSED]~~ ORDER AND JUDGMENT GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR AWARD OF ATTORNEYS' FEES, COSTS, CLASS REPRESENTATIVE SERVICE PAYMENTS, AND CLAIMS ADMINISTRATION EXPENSES

Plaintiffs' Motion for Final Approval of Class Action Settlement in conjunction with Plaintiffs' Motion for Award of Attorneys' Fees, Costs, Class Representative Service Payments, came before the Court for hearing on December 12, 2014, in Department C-69, before the Honorable Katherine Bacal. Appearances were as noted on the record.

Plaintiffs' requests for judicial notice are granted.

Plaintiffs' motion for final approval of class action settlement is granted. Individual incentive payments of $25,000 to Adam Hohnbaum, $20,000 each to Illya Haase, Romeo Osorio, Amanda Rader, and Santana Alvarado, and $2,000 to PAGA representative Maria Arriaga are approved. Plaintiffs' counsel are awarded attorneys' fees of $22,600,000 and costs not to exceed $1,000,000. Attorneys' fees are allocated as follows: Hurst & Hurst ($4,375,545.13); Cadena Churchill, LLP ($1,081,600.06); The Turley Law Firm, APLC ($6,145,379.84); Lorens and Associates, APLC ($3,883,889.97); Cohelan Khoury & Singer ($5,162,276), and Appellate Counsel ($1,951,309 ($328,309 to Altshuler Berzon LLP; $422,476.65 to The Furth Firm; $634,734.54 Schubert Jonckheer & Kolbe LLP; and $565,788.81 to The Kralowec Law Group)). Rust Consulting Inc.'s claims administrative expenses are approved in an amount not to exceed $500,000. The Court approves the payment of $20,000 to the California Labor & Workforce Development Agency for PAGA penalties. The objection filed by Michael T. Hanson is overruled.

Final Approval

This is an employee compensation class action in which plaintiffs contend they were they were not provided rest and meal periods by defendant Brinker Restaurant Corporation and its related entities. The class – all individuals who worked as a non-exempt employee at a Brinker-owned restaurant between 10/1/2000 to 9/3/14 – consists of 107,119 persons. Roe Decl. ¶ 17.

The Court granted preliminary approval of a $56,500,000 settlement on 9/3/14. ROA # 664. The general terms of the settlement were discussed in that order and will not be repeated here other than to note that each class member who worked a shift in excess of 3.5 hours will

receive a pro rata distribution of the net settlement amount ($32,348,000) based on the number of qualifying shifts. All class members will receive at least $25. Collectively, the class has 23,345,713 qualifying shifts. Roe Decl. ¶ 10.

As of December 4, 2014, of the 107,118 settlement packets mailed to class members, 34,996 were returned as undeliverable. Roe Decl. ¶¶ 12, 13. Settlement packets were re-mailed to 29,268 updated addresses. *Id.* at ¶ 13. 4,948 of those packets were returned a second time. *Ibid.* Reminder postcards were mailed in English and Spanish to 91,222 class members who had not submitted a claim form as of 11/7/14, and 8,801 class members received a reminder phone call. *Id.* at ¶¶ 15, 16.

As of December 4, 2014, of the 28,327 unique claim forms received, 28,008 are complete and timely, representing 26 percent of the total class members. *Id.* at ¶ 18. In the aggregate, their claims amount to $17,596,170.81, which is 54 percent of the net settlement amount. *Ibid.* Five people requested to be excluded from the class and one untimely objection was received. *Id.* at ¶¶ 12, 21.

At the hearing, Class Counsel provided the Court with updated claims information. As of December 10, 2014, 37,473 claim forms were received, 33,155 are unique Class Members, representing 31 percent of the total class members. In the aggregate, their claims amount to $20,161,345.02, which is 62 percent of the net settlement amount. Five people timely requested to be excluded from the class, one person untimely requested to be excluded from the class, and one untimely objection was received.

The Court finds the proposed settlement to be fair, adequate and reasonable. See, e.g., *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800–1801; Cal. Rules of Court, rule 3.769(g). The settlement was reached after more than a decade of hard-fought litigation by determined advocates on both sides. If plaintiffs prevailed on all their claims at trial, they could potentially recover $100 million to $135 million. Hurst Decl. ¶ 9. However, there were numerous uncertainties, including whether plaintiffs' survey evidence would be admissible to establish the number of missed breaks and whether Brinker would prevail on its summary adjudication motion regarding waiting time penalties. *Ibid.* In light of these and other

difficulties, plaintiffs' counsel estimates a 40-60 percent chance of prevailing at trial. *Ibid.* Even if plaintiffs prevailed at trial, they faced a substantial delay in receiving any recovery in the event that Brinker appealed.

The class members will receive significant monetary and other benefits. The average settlement payment is $301.98. Hurst Decl. ¶ 14. Over 23,000 class members will receive between $250 and $1,000, and more than 8,000 class members will receive more than $1,000. *Ibid.* The maximum payment is $5,650. *Ibid.* This lawsuit has provided additional benefits. In 2012, Brinker revised its rest break and meal period policies and instituted a new timekeeping system. Hurst Decl. ¶ 33; Lorens Decl. ¶ 22. As a result of these changes, in the last two years the class received an estimated benefit of more than $3.5 million for rest breaks alone. Hurst Decl. ¶ 34; Hurst Decl. Ex. 8 [Taylor Decl.] ¶ 7; Lorens Decl. ¶¶ 22-23. In light of these benefits, it is not surprising that only six individuals requested to be excluded, and that 31 percent of the class submitted claims forms, compared to an average of 10-15 percent for wage and hour class actions. Lorens Decl. ¶ 24. Under all the circumstances, the $56,500,000 settlement appears reasonable.

Attorneys' Fees

Plaintiffs are requesting $22,600,000 and costs of $1,000,000. The generally accepted method for determining reasonable attorneys' fees in this context is the lodestar-multiplier approach. See *Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254. Plaintiffs were represented by various counsel at trial. Hurst & Hurst expended 11,664.8 hours at hourly rates ranging from $195 to $850, resulting in a lodestar of $7,274,540. Hurst Decl. ¶ 21. They also incurred more than $320,224.88 in costs. *Id.* at ¶ 28. Cadena Churchill spent 2,541.35 hours on the case at rates ranging from $175 to $725 per hour, resulting in a lodestar of $1,208,638.25. Cadena Decl. ¶ 10. That firm also incurred over $83,573.26 in costs. *Ibid.* The Turley Law Firm devoted 13,743 hours to the case at rates ranging from $130 to $750 per hour, resulting in a lodestar of $7,245,439. Turley Decl. ¶ 42, 55. Turley also incurred $198,509 in costs. *Id.* at ¶ 56. Lorens and Associates

spent 10,895.80 hours on the case at hourly rates ranging from $195 to $850, resulting in a lodestar of $8,640,642.50. Lorens Decl. ¶ 29. Cohelan Khoury & Singer worked a total of 3,775.4 hours with hourly rates between $250 and $850, resulting in a lodestar of $2,630,388.50. Singer Decl. ¶¶ 20, 22 & Ex. 2. The firm incurred costs of $221,974.13. *Id.* at ¶ 40.

Plaintiffs were assisted on appeal by Schubert Jonckheer & Kolbe LLP, Altshuler Berzon LLP, The Furth Firm LLP, and the Kralowec Law Group. Collectively, Appellate Counsel claimed fees of $1,947,946 and $39,474.71 in costs, which will be paid exclusively from the fees awarded to class counsel. Hurst Decl. ¶ 27.

All told, class counsel incurred $28,947,594 in fees and more than $1,047,145.91 in costs. Ridley Decl. ¶ 52. They have continued to incur costs post-preliminary approval in connection with the claims process by, among other things, staffing a call center. Hurst Decl. ¶ 28. Plaintiffs have agreed to cap their fees at $22,600,000. This amount is less than the fees actually incurred and effectively constitutes a negative multiplier. If the amount of fees and costs requested is cross-checked as a percentage of the total settlement fund, they would amount to 41.8 percent. See *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 45. This amount is in line with the 20 to 50 percent awarded in similar cases. *Martin v. AmeriPride Services, Inc.* (S.D. Cal., June 9, 2011, 08CV440-MMA JMA) 2011 WL 2313604, at *8. The fees are justified by the unusual amount of time this case has been litigated, the novel issues presented (which resulted in a landmark Supreme Court case, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004), the extraordinary lengths counsel undertook to ensure class members participated in the settlement, and the fact that counsel handled the case on a contingency basis. The Court concludes the requested fees and costs are reasonable.

Incentive Payments to the Class Representatives

Incentive payments to class representatives "must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit." *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1395. The court must also consider the "risk to the class

representative in commencing suit" and any "notoriety and personal difficulties" he or she encounters as a result of the litigation. *Id.* at p. 1394. The declarations of the class representatives relate their extensive personal involvement in assisting counsel with investigation, discovery, sitting for depositions, and attending mediations. This is affirmed by counsel who state that they without the representatives' assistance, they would have incurred additional paralegal fees. The representatives' involvement in this action could adversely affect their prospects for employment elsewhere. Hohnbaum in particular was aware of the significant risks of pursuing this litigation as Brinker's counsel threatened to "take my house" if Brinker prevailed at trial. Hohnbaum Decl. ¶ 8. Thus, it is appropriate that he receive a moderately higher incentive payment of $25,000. Arriaga joined as PAGA representative when the third amended complaint was filed in 2014. Arriaga Decl. ¶ 9. Because her participation in the case less was extensive than the other representatives, a $2,000 payment is warranted. The Court concludes the incentive payments are appropriate to compensate the representatives for their efforts and risks.

Objections

The Court received one objection. The sole objector is Michael T. Hanson, who according to his declaration, was incarcerated in New Hampshire. Although received after the deadline for objections, the Court has considered it on the merits. Hanson states seven bases for his objections: there should not be any incentive payments; the attorneys' fees and administrative expenses are excessive; the California Labor and Workforce Development Agency should not receive more money than most class members; there should not be a floor for the settlement; the Notice was defective; and, the total net settlement amount is inaccurate. Plaintiffs responded to Hanson's objections in the declarations of Jared Zentz and Kyle Van Dyke, as well as in a portion of Julie Ridley's declaration. According to Van Dyke's declaration, Hanson stated that he was withdrawing all but one of his objections. Van Dyke Decl. ¶ 2. Hanson's remaining objection is to the amount of attorneys' fees. Hanson believes class counsel should receive the same pay as the average hourly rate for each class member:

$8.97. *Id.* at ¶ 3. The Court notes that this is below California minimum wage. It hardly needs to be stated that Hanson's position fails to consider the nature of the work being performed by class counsel. For the reasons already stated, the Court finds the amount of fees requested to be reasonable.

Without affecting the finality of this Order in any way, and pursuant to Code of Civil Procedure §664.6 and Cal. Rules of Court 3.769(h), the Court retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation and enforcement of this order and the Settlement. ~~Nothing in this Order shall preclude any action to enforce the Parties' obligations pursuant to the Settlement Agreement or pursuant to this Order, including the requirement that Defendant make~~ payments to participating ~~Class Members in accordance with the Settlement~~.

Having fully considered Plaintiffs' Motion for Final Approval of Class Action Settlement and Plaintiffs' Motion for Award of Attorneys' Fees, Costs, Class Representative Service Payments, and the one objection thereto, and good cause existing therefor, THE COURT HEREBY ADJUDGES AND DECREES THAT JUDGMENT BE ENTERED, PURSUANT TO THE TERMS OF THIS ORDER AND JUDGMENT.

Plaintiffs are directed to serve notice on all parties within 2 court days of this ruling.

IT IS SO ORDERED.

DATED: 12/12/14

KATHERINE A. BACAL

HONORABLE KATHERINE A. BACAL
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

FILED
Clerk of the Superior Court
DEC 15 2014
By: M. SPIESMAN, Deputy

Case Name: Hohnbaum, et al. v. Brinker Restaurant Corp. et al.
Case Number: GIC 834348

I, the undersigned, declare:

I am a citizen of the United States and am employed in the County of San Diego, State of California. I am over the age of eighteen and am not a party to this action. My business address is 701 B Street, Suite 1700, San Diego, California 92101.

On December 15th, 2014, I served the following documents:

- **NOTICE OF ENTRY OF ORDER AND JUDGMENT GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR AWARD OF ATTORNEYS' FEES, COSTS, CLASS REPRESENTATIVE PAYMENTS, AND CLAIMS ADMINISTRATION EXPENSES**

on the interested parties in this action:

Hurst & Hurst
701 B Street
Suite 1700
San Diego, CA 92101

X **BY U.S. MAIL:** by placing true and correct copy(ies) thereof in an envelope addressed to the attorney(s) of record, addressed as stated below:

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Attorneys for Defendants

____ **BY FACSIMILE:** by causing a true copy thereof to be sent via facsimile to the attorney(s) of records at the telecopier number(s) so indicated above and that the transmission was reported as completed and without error.

____ **BY OVERNIGHT MAIL:** by causing a true copy to be delivered via Federal Express Next Day Delivery to the following addressee(s):

____ **By ELECTRONIC MAIL:** by causing a true and correct copy thereof to be transmitted electronically to the following attorneys(s) of record at the e-mail address(es) indicated above.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on December 12th, 2014, San Diego, California.

Beatrice Cadena

Beatrice Cadena

Hurst & Hurst
701 B Street
Suite 1700
San Diego, CA 92101

EXHIBIT B

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

MARINA PUCHALSKI and RAJEEV CHHIBBER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

TACO BELL CORP., a California Corporation, and DOES 1-20, inclusive,

Defendants.

Case No.: GIC 870429

~~[PROPOSED]~~ **ORDER AND JUDGMENT GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

Hon. Kevin A. Enright
Dept: 74

The Motion for Final Approval of the settlement reached between plaintiffs, Marina Puchalski, Rajeev Chhibber and the certified class, and defendant, Taco Bell Corp., and for final approval of Class Counsel's Application for Statutory Attorney's Fees and Costs, Application for Enhancement Awards for the Class Representatives and the Twenty-Five (25) class members who testified at trial, and Application for Costs for the Claims Administrator was heard on August 17, 2012. On June 4, 2012, this Court signed the Order Granting Preliminary Approval of Settlement. The Court Ordered that adequate notice be given to the Class Members in accordance with the Preliminary Approval Order and the parties' Settlement Agreement.

The Court has read and considered all papers filed herein, including the Settlement Agreement and Release of All Claims (hereinafter "Settlement Agreement"), Plaintiffs' Motion for Final Approval of Class Action Settlement and Award of Attorney Fees, Costs and Enhancements ("Motion") and supporting documents, including the Supplemental Declarations of Class Counsel. The Court notes that that the Motion was not opposed and no Class Member filed an objection to any aspect of the settlement. The Court also notes that only one class member opted-out of the proposed settlement. In addition, this Court has had the opportunity to view the efforts of Class Counsel, Charles A. Jones, Jones Law Firm, Edward J. Wynne, Wynne Law Firm, and Peter F. Klett, Dickinson Wright PLLC, during the course of the four month trial in this case and as such comments very favorably on the skill, expertise and professionalism demonstrated by Class Counsel during the course of this complex and protracted trial. This case was heavily litigated and aggressively defended for over six (6) years. Class Counsel successfully guided this case through class certification and defeated ~~several~~ motions to decertify this case prior to the commencement of trial. In view of the diligent efforts in a complex area of the law presenting many novel questions of law, the significant monetary results obtained on behalf of the class members, and having

considered all papers filed and proceedings herein and otherwise being fully informed in the matter, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. This Order and Judgment Granting Final Approval of Settlement ("Final Approval Order and Judgment") incorporates by reference the definitions set forth in the Settlement Agreement, and all terms used herein shall have the same meaning as set forth in the Settlement Agreement.

2. This Court has jurisdiction over the subject matter of this litigation and over all parties to this litigation, including all members of the Classes. This Court will have continuing jurisdiction over this matter until all obligations outlined in the Settlement Agreement have been complied with and thereafter if any issues pertaining to this case and/or settlement arise.

3. The notice given to the Class of the settlement as described in the Settlement Agreement and Preliminary Approval Order constituted the best notice practicable under the circumstances. The notice program provided due and adequate notice of these proceedings and of the matters set forth in the notice, including the settlement set forth in the Settlement Agreement, to all persons and entities entitled to such notice, and the notice program fully satisfied the requirements of due process and applicable law. The Court further finds that the mailing of the Notice of Settlement to the class members was properly administered by CPT Group, Inc., pursuant to Court order and that in connection with the mailing of the notice the response was very favorably received by class members. Only one class members filed a request for exclusion and no class member filed an objection to any aspect of the Settlement.

4. This Court hereby approves the settlement set forth in the Settlement Agreement and finds that the settlement is, in all respects, fair, reasonable, adequate and in the best interest of the Class. In making this determination, the Court has considered the following factors, among others: the strength of the Plaintiffs' case; the risk, expense, and complexity of the litigation; the likely duration of further litigation; the risk of maintaining class status throughout trial; the nature and extent of the discovery exchanged between the parties; the fact that the settlement resulted from multiple arm's-length negotiations; the fact that the settlement confers a substantial economic benefit to a large number of class members; the evidence put before this Court during trial; the experience and views of counsel for both parties; and the lack of any objections by Settlement Class Members. Consummation of the settlement in accordance with the terms and provisions of the Settlement Agreement is therefore approved. The settlement shall be binding upon all members of the Class who did not timely elect to be excluded from the Class when the opportunity was provided by the Court.

5. Pursuant to the Settlement Agreement, the effective date of the settlement shall be thirty-five (35) days after a Notice of Entry of this Order and Judgment granting Final Approval of the Settlement in this case.

6. Defendant, Taco Bell, shall pay the total gross sum of Twenty Million Dollars ($20,000,000) to the Settlement Administrator within thirty-five (35) days of the entry of this Order. The Settlement Administrator is directed to immediately place these funds into a federally insured interest bearing escrow account as provided for in the Settlement Agreement. This sum shall represent the total consideration to be paid by defendant in connection with the settlement.

7. The following payments shall be made from the Settlement Fund: (1) payment of attorney's fees and costs, in the amount of Ten Million, Eight Hundred Thousand Dollars ($10,800,000); (2) the payment of enhancement awards to each of the Class Representatives of Fifty Thousand Dollars ($50,000) and payment to each of the twenty-five (25) class members who testified at trial in the amount of Two Thousand Dollars ($2,000); (3) the payment of costs and administrative fees to the Settlement Administrator, C.P.T. Group. Inc., in the amount of Twenty One Thousand, Three Hundred and Four Dollars ($21,304). Once all of the above payments have been made, all amounts remaining in the Settlement Fund, as discussed herein, shall be distributed to the class members and Bankruptcy Trustees who timely filed valid claim forms pursuant to section IV (M) of the Settlement Agreement.

8. With respect to the eight (8) Bankruptcy Trustees who filed claim forms, settlement checks shall be made payable to the Bankruptcy Trustee for the estate of the corresponding class member for whom the Bankruptcy Trustee filed a claim and not to the class member.

9. The Settlement Administrator, CPT Group, Inc., shall calculate the amount of each class member's settlement check as further described in the Settlement Agreement at section IV (M). All class members who timely submitted valid claims and did not exclude themselves from this settlement will be paid their settlement payments out of the Net Settlement Fund in accordance with the time frame provided in the Settlement Agreement Section I. The Settlement Administrator shall mail the settlement awards to the class members within forty (40) days of the signing of this order.

10. Proof of the payments outlined in paragraphs 7 through 9 of this Final Order and Judgment will be filed with the Court by the Settlement Administrator and provided to Class Counsel and Defense Counsel.

11. Undeliverable or un-cashed checks will be governed by section IV (R) of the Settlement Agreement. After all settlement payments, attorney's fees and costs, claims administration costs, enhancement payments to the class representatives and twenty-five (25) class members who testified at trial, and taxes have been paid and distributed from the Settlement Fund, the Claims Administrator shall inform Class Counsel and Defense Counsel of the total value of the Unclaimed Settlement Funds.

12. Neither the fact of settlement, nor the Settlement Agreement (or any other mediation or settlement-related documents or data), nor any of the negotiations or proceedings connected with the settlement, nor any act performed or document executed pursuant to or in furtherance of the settlement, shall be construed as an admission or evidence of the truth of the allegations in this Action, or of any liability, fault, or wrongdoing of any kind.

13. All valid claims filed by Class Members on or before September 14, 2012 will be honored. With respect to any Class Members who file untimely claims after September 14, 2012, the Court hereby finds that those claims shall not be allowed and that the Claims Administrator may notify them accordingly. Any Class Member who previously excluded him/herself from this action shall not be entitled to receive any settlement proceeds stemming from this settlement.

14. The Court hereby approves Class Counsel's application for the payment of attorney's fees in the amount of $10,000,000. The Settlement Administrator is directed to pay Class Counsel's attorney's fees in the amount of $10,000,000, within thirty-five (35) days of the signing of this Order to the following Class Counsel: Jones Law Firm, Wynne Law Firm, Dickinson Wright PLLC, and Righetti Glugoski P.C.. The total amount of hours spent by the attorneys representing the class is 19,949 hours. Thus, the effective hourly rate for Class Counsel is $501.27 an hour. The Court notes that

this effective hourly rate is far less than the rates at which Class Counsel have been approved by other Courts. The fact that Class Counsel are receiving a lower effective hourly rate than that at which they have been approved in other cases is not a reflection on the quality of the work performed by Class Counsel in this case: rather it is due to the unique aspects of this settlement and the substantial number of hours spent by Class Counsel in prosecuting this case over the last six years. The Court finds that an award of attorney's fees in the amount of $10,000,000 is reasonable and justified based on the following: (1) this was a unique case that involved numerous novel and complex issues of law; (2) this case was heavily litigated and aggressively defended over the course of the last six years; (3) the quality of representation by all counsel involved in this case was extremely high; (4) the effective hourly rate for Class Counsel is far less than the hourly rate of lead defense counsel ($795 per hour); (5) the amount of attorney's fees awarded to Class Counsel are nearly $2,000,000 less than the amount of attorneys fees paid by Taco Bell to defend this action; (6) the firms representing Taco Bell are very well respected in the legal community and proved to be very formidable opponents which required increased attention and work on this case by Class Counsel; (7) this case is one of only a handful of wage and hour class action cases in this State that has actually gone to trial; (8) unlike many settlements in class actions which settle either pre or post-certification or pre-trial, this case settled during its fourth month of trial; (9) Class Counsel has yet to be compensated for the substantial amount of work completed in this case over the course of the last six years; (10) due to the unique demands associated with this case, Class Counsel was precluded from taking on other cases while prosecuting this case; (11) this settlement is a non-reversionary, total payout settlement; (12) not a single class member objected to any aspect of this settlement; (13) this settlement resulted in substantial monetary recovery for a large number of class members; and (14) the monetary recovery for the class members in this case compares very favorably and is much higher than the monetary

recovery obtained for class members in other similar wage and hour class action settlements.

15. The Court hereby approves Class Counsel's application for the reimbursement of litigation costs in the amount of $800,000. The Settlement Administrator is directed to pay Class Counsel's litigation costs in the amount of $800,000 within thirty-five (35) days of the signing of this Order. The Settlement Administrator is directed to pay the $800,000 in litigation costs to the following Class Counsel: Jones Law Firm, Wynne Law Firm, Dickinson Wright PLLC, Righetti Glugoski P.C..

16. The Court hereby approves the application for enhancement awards to Class Representatives Marina Puchalski and Rajeev Chhibber in the amount of $50,000, each. The Court hereby approves the application of enhancement awards to each of the following twenty-five (25) class members who testified at trial in the amount of $2,000: Michelle Kafity, Mallisa Baustian, Nora Markert, Randolph Clark, Sheryl Nix Kaufman, Andrea Ferguson, Jacob Dittburner, James Petersen, Sajjad Amhad, Bijan Amir, Carlos Diaz, Kalif Omar, Chi Hatwood, Rene Rodriguez, Reymundo Santibanes, Berta Hernandez, Brian Cooper, Paul Shouse, Jose Torres, Carmen Santiago, Kwan Tuchinda, Greg Carlos Jr., Adan Santos, Araceli Madrigal and Carrie Landgraf. The Settlement Administrator is directed to pay the above enhancement awards within thirty-five (35) days of the signing of this Order.

17. The Court hereby approves the payment of costs to the Settlement Administrator, CPT Group, Inc., in the amount of $ 21,304.

18. This Final Approval Order and Judgment is entered pursuant to the Stipulation of the parties and is intended to effectuate the settlement more fully described in the Stipulation.

19. The parties are mutually released, as provided in the Settlement Agreement.

Dated: August 30, 2012

Honorable Kevin A. Enright
Judge of the Superior Court

Approved as to form and content:

Class Counsel
JONES LAW FIRM

By: _____
Charles A. Jones

Defense Counsel
CAROTHERS DISANTE & FREUDENBERGER LLP

By: _____
Julie M. Davis

EXHIBIT C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EILEEN JOHANSSON-DOHRMANN, on behalf of herself, all other persons similarly situated and the general public, Plaintiff, vs. CBR SYSTEMS, INC. and DOES 1 through 100, Defendants.	CASE NO. 12-cv-1115-MMA (BGS) **ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD;** [Doc. No. 29] **JUDGMENT AND DISMISSAL**

On July 23, 2013, this matter came before the Court on Plaintiff's Motion for Final Approval of Class Settlement, and Motion for Attorneys' Fees, Reimbursement of Expenses, and Incentive Award [Doc. No. 29]. For the reasons explained below, the Court **GRANTS** Plaintiff's motions in their entirety.

I. BACKGROUND

A. Factual Background and Class Action Allegations

Defendant Cbr Systems, Inc. ("Cbr") is licensed by the state of California to store cord blood and tissues from mothers' umbilical cords. When a customer ("member") enrolls to obtain Cbr's services, the member is required to submit a Medical and Health History Profile ("Profile") form. The Profile forms are then stored and maintained as part of Cbr's business records. Class representative, Eileen

Johansson-Dohrmann, is a Cbr member.

On December 13, 2010, backup tapes and computer equipment containing unencrypted confidential member information were stolen from a Cbr employee's vehicle. This action followed. Plaintiff alleges in her First Amended Complaint ("FAC") that Cbr failed to adequately protect the medical and other private information of its clients; that Cbr's privacy policy misled its customers regarding the security of their confidential information; and that Cbr's notice to its customers was defective because Cbr unreasonably delayed sending the notification letter and because the letter was not sufficiently detailed.

In all, Plaintiff alleges seven causes of action: (1) violation of Confidentiality of Medical Information Act, Cal. Civil Code § 56 *et seq.*; (2) Invasion of Privacy–Constitutional; (3) Invasion of Privacy–Common Law; (4) Failure to Provide Reasonably Security Procedures with Respect to Personal Information about California Residents, Cal. Civil Code § 1798.81.5; (5) Breach of State Security Notification Laws, Cal. Civil Code § 1798.82; (6) Breach of Contract; and (7) Unlawful Business Practices, Cal. Bus. & Prof. Code § 17200, *et seq.*

B. Procedural Background

Plaintiff originally filed suit in California state court on January 5, 2012; Cbr removed to this Court on May 7, 2012. After being granted an extension of time to file a responsive pleading, Cbr filed a motion to dismiss. Thereafter, on June 13, 2012, Plaintiff filed the FAC.

In early June 2012, the parties began settlement discussions. They enlisted the assistance of Justice Howard B. Wiener (Ret.) to mediate settlement discussions. During the first session with Justice Wiener, the parties reached an agreement regarding some terms of a potential settlement, but several issues remained unresolved (i.e., the details of the claims administration, class definition and the payment of attorneys' fees and/or any incentive award). After engaging in additional informal settlement discussions, the parties participated in a second

mediation session with Justice Wiener on August 6, 2012. After this session, the parties came to an agreement and entered into a Memorandum of Understanding embodying the general terms of the settlement. On November 8, 2012, the parties entered into the Settlement Agreement. [*See* Doc. No. 18-3.]

On August 24, 2012, the Court granted a stay of all proceedings to facilitate the parties' completion of settlement efforts. The parties moved for preliminary approval of class settlement on November 16, 2012, which the Court granted. This matter is now before the Court for final approval of the settlement. On July 23, 2013, the Court held a hearing on the pending motions. Attorney Patrick N. Keegan appeared on behalf of the class. Attorneys Joseph R. Tiffany and Connie Jean Wolfe appeared on behalf of Cbr. No objectors appeared at the hearing.

C. The Settlement

1. Settlement Class

The settlement class is comprised of all former and current Cbr clients whose confidential individually identifiable medical information and/or financial information was contained on Cbr's computer equipment and computer backup tapes that were stolen on December 13, 2010.

There are approximately 292,000 class members.

2. Settlement Terms

The settlement agreement provides that all class members may obtain, free of charge, a two-year subscription to a "Credit Monitoring Protection Package"("Credit Package") that provides for the following: (1) daily credit monitoring of three credit bureau reports; (2) provision of a credit report upon enrollment; (3) mobile and/or email credit alerts; (4) customer fraud resolution assistance; and (5) identity theft insurance protection of up to one million dollars for harm caused by identity theft. The Credit Package, provided by Experian, has a retail value of $15.95 per month. Cbr agrees that the total value of the Credit Package to the class is worth $111,751,187.00.

In addition, for class members who have incurred reasonable out-of-pocket expenses, Cbr has agreed to reimburse members for such expenses, subject to a cap of five hundred thousand dollars ($500,000) for all such expenses.[1] Also, for class members who suffered from "Identify Theft,"[2] Cbr has agreed to reimburse such members up to fifty thousand dollars ($50,000) per Identity Theft incident, in the amount of the proven loss, for any loss that: (1) resulted from Identify Theft that is claimed and shown by the Claimant to have occurred more likely than not as a result of the Theft; (2) is an actual, documented and unreimbursed loss; and (3) occurred during the time period from December 13, 2010, through and including December 13, 2016. The total aggregate amount of "Identify Theft" reimbursement is subject to a cap of two million dollars ($2,000,000). The parties agree that, in combining the reimbursement funds with the Credit Package, the total settlement fund equals $114,251,187.

Cbr has also agreed to pay for reasonable costs of dispute resolution through arbitration under the auspices of JAMS for any disputed reimbursement claims that cannot be resolved through good faith discussions between the claimants and Cbr or the Settlement Administrator. In addition, Cbr has agreed that the claimant may choose whether the arbitration is conducted in person in the claimant's hometown, over the telephone, or by ruling on the papers submitted. Cbr will pay for the costs of dispute resolution (excluding attorneys' fees and expenses, if any) even if the claimant's claim is ultimately rejected by the arbitrator. In addition, if the claimant

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[1] Such expenses include: (i) reasonable costs of replacement checks necessitated by the opening of a new checking account or changing accounts; (ii) the cost of obtaining credit monitoring and identity theft insurance, if the purchase of such insurance occurred before the Credit Package becomes available, and provided such insurance is cancelled at the earliest opportunity thereafter, but in no event more than $20.00 per month, subject to reasonable documentation, and up to a total maximum of $200.00 per claimant; and (iii) reasonable costs of telephone calls, postage related to inquiries regarding a class member's bank accounts, financial accounts, mortgage accounts and/or credit reports, lost time (calculated at $10.00 per hour), the cost of placing a security freeze on a credit report, and/or the cost of changing a telephone number.

[2] Identity theft is the use of a class member's name, address, social security number, bank or credit card account number, or other identifying information without the class member's knowledge to commit fraud or any other crime.

is successful, he or she will receive an additional 10% of the face value amount of the award, plus attorneys' fees and costs if an attorney was retained. The costs of dispute resolution will be paid in addition to the amounts designated for out-of-pocket expense or Identity Theft reimbursement. Thus, the settlement terms are designed to ensure that Cbr and the Settlement Administrator will exercise sound discretion in addressing each claim and that claimants will have ample recourse through the most convenient mechanism possible, at no expense to them, if any claim is wrongfully denied.

Finally, Cbr has implemented new security measures providing for the encryption and backup of customer data using a tapeless technology that does not require transport of backup data offsite. Additionally security measures have also been implemented.

The sole class representative, Eileen Johansson-Dohrmann will receive an enhancement award of $5,000. Finally, class counsel (in a motion filed concurrently with the Final Approval motion) requests $585,936.33 in fees and $14,063.67 in costs. Cbr has agreed not to object to this request. These fees and costs will be awarded separately from the settlement funds. Justice Wiener, who acted as the mediator for the class settlement negotiations, also helped negotiate the fee arrangement after the parties concluded their negotiations regarding substantive terms of the settlement.

II. DISCUSSION

A. Motion for Final Approval of Class Settlement

1. Class Certification

A plaintiff seeking a Rule 23(b)(3) class certification must first satisfy the prerequisites of Rule 23(a). Once subsection (a) is satisfied, the purported class must then fulfill the requirements of Rule 23(b)(3). In the present case, the Court previously preliminarily certified the following class:

> All former and current CBR Systems, Inc. clients whose confidential individually identifiable medical information and/or financial

> information was contained on CBR Systems, Inc.'s computer equipment and computer backup tapes that were stolen on December 13, 2010.

At that time, the Court concluded that the proposed class satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). [*See* Doc. No. 23.] The Court also found that the proposed class satisfied the predominance and superiority requirements of Rule 23(b)(3). Based on its previous findings, the Court should certify the class for the purpose of settlement. No party or class member has objected to certification of the settlement class.

2. Final Approval of the Settlement

a. Legal Standard

Voluntary conciliation and settlement are the preferred means of dispute resolution in complex class action litigation. *Officers for Justice v. Civil Service Com'n of City and Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982). And though, "[u]nlike the settlement of most private civil actions, class actions may be settled only with the approval of the district court," "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited." *Id.* at 623, 625; *see also* Fed. R. Civ. P. 23(e). Courts are not "to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute," nor is "[t]he proposed settlement [] to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Id.* Rather, "a district court's only role in reviewing the substance of [a] settlement is to ensure that it is 'fair, adequate, and free from collusion.'" *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

In making this appraisal, courts have "broad discretion" to consider a range of factors such as "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery

completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Id.* (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). "The relative importance to be attached to any factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625.

When (as here) the settlement takes place before formal class certification, settlement approval requires a "higher standard of fairness." *Lane*, 696 F.3d at 819. "The reason for more exacting review of class settlements reached before formal class certification is to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the unnamed plaintiffs who class counsel had a duty to represent." *Id.* (quotations omitted).

b. Analysis

i. Strengths and Risks of the Case

To determine whether the proposed settlement is fair, reasonable, and adequate, the Court must balance against the continuing risks of litigation (including the strengths and weaknesses of the plaintiff's case), the benefits afforded to members of the Class, and the immediacy and certainty of a substantial recovery. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). In other words,

> [t]he Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, "It has been held proper to take the bird in hand instead of a prospective flock in the bush."

Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 526 (C.D. Cal. 2004) (citations omitted).

Here, while Plaintiff was confident that her claims have merit, she acknowledges the uncertainty of prevailing due to the defenses that could have been asserted by Cbr. For example, Cbr was prepared to assert a defense to Plaintiff's

claim for $1,000 in statutory penalties under the Confidentiality of Medical Information Act ("CMIA") by arguing that Cbr did not possess any "medical information" so that there was no required "release" of medical information. If successful, the $1,000 statutory award would have been erased. In light of this, it is unclear what damages would have been available to the class, and if these damages would have would have resulted in a more favorable victory for the class. In his declaration, Justice Wiener observed that, "the settlement is . . . fair and reasonable to all parties and provides significant benefits to the Settlement Class." [Wiener Decl., Doc. No. 29-6, ¶ 3.] In sum, in light of the uncertainty and extended timeframe of litigation, the Court finds this factor weighs in favor approving the settlement.

ii. The Settlement Amount

To assess whether the amount offered is fair, the Court may compare the settlement amount to the parties' estimates of the maximum amount of damages recoverable in a successful litigation. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459. While settlement amounts that are close to the plaintiff's estimate of damages provide strong support for approval of the settlement, settlement offers that constitute only a fraction of the potential recovery do not preclude a court from finding that the settlement offer is fair. *Id.* (finding settlement amount constituting one-sixth of the potential recovery was fair and adequate). Thus, district courts have found that settlements for substantially less than the plaintiff's claimed damages were fair and reasonable, especially when taking into account the uncertainties involved with litigation. *See, e.g.*, *Williams v. Costco Wholesale Corp.*, 2010 U.S. Dist. LEXIS 67731, at *9-*10 (S.D. Cal. July 7, 2010) (finding settlement amount constituting approximately 75.6% of the plaintiffs' claimed losses from unpaid overtime pay to be adequate); *Glass v. UBS Fin. Serv., Inc.*, 2007 U.S. Dist. LEXIS 8476, at *13 (N.D. Cal. Jan. 26, 2007) (finding settlement of wage and hour class action for 25 to 35% of the claimed damages to be reasonable).

Here, Plaintiff alleges that class members were entitled to statutory penalties of $1,000, in addition to their actual damages under the CMIA. When compared to the baseline $1,000 damages award, the Credit Package represents roughly 38% of this value.[3] In addition to the Credit Package, Cbr also agrees to provide class members with a $500,000 fund for reimbursement of out-of-pocket expenses and a $2,000,000 fund for Identity Theft reimbursement. Specifically, class members are able to make claims of up to $50,000 against the $2,000,000 fund for Identity Theft reimbursement up until December 13, 2016, and will be able to submit claims for reimbursement of out-of-pocket expenses up until 90 days after the effective date of the Final Judgment. As of June 10, 2013, 53 class members had submitted reimbursement claims in the total amount of $109,164.89: Out-of-pocket expense claims totaling $29,712.28 and Identity Theft claims totaling $79,452.61.

The Court finds that while class members will not recoup the full $1,000 in alleged statutory damages, the Credit Package coupled with the reimbursement funds provides the class with real and substantial benefits. This factor weighs in favor of settlement.

iii. The Stage of the Proceedings (Investigation, Discovery and Research Completed)

In the context of class action settlements, as long as the parties have sufficient information to make an informed decision about settlement, "formal discovery is not a necessary ticket to the bargaining table." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (quotation omitted). Here, the parties engaged in both formal and informal discovery, including: (1) the deposition of the person who was Cbr's Vice President of Information and Chief Technology Officer at the time of the Theft; (2) the deposition of the Cbr employee whose vehicle was broken into during the Theft; (3) multiple requests for production of documents; (4) the review

[3] The value of two years of the Credit Package to each class member is $15.95 per month for 24 months, for a total of $382.80 ($15.95 x 24).

of thousands of pages of documents; and (5) the evaluation of Cbr's security procedures by an independent security advisor retained by Plaintiff's counsel. [Keegan Decl. ¶¶ 17-18.] Justice Wiener notes, "It was clear from the briefs and the discussions during the mediation that the parties and their counsel had a thorough understanding of the facts and law as well as the risks and uncertainties pertaining to the litigation." [Wiener Decl. ¶ 3.]

iv. Endorsement of Experienced Counsel

Class counsel has significant experience in class action litigation. His support of the settlement should be accorded significant consideration. *See, e.g., Nat'l Rural Telcoms Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation. This is because parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation") (internal quotation marks and citations omitted).

Moreover, Justice Wiener attests that the parties "vigorously negotiated their respective positions," and that the settlement was the "product of arm's-length and good faith negotiations." [Wiener Decl. ¶ 7.]

v. Reaction of the Class

The Ninth Circuit has held that the number of class members who object to a proposed settlement is a factor to be considered. *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832, 837 (9th Cir. 1976). The absence of a large number objectors supports the fairness, reasonableness, and adequacy of the settlement. *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (citations omitted); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (finding "persuasive" the fact that 84% of the class filed no opposition).

The reaction of the class has been almost entirely positive. Of the nearly 287,000 class members noticed, 11,914 submitted claims and only 20 opted out as of June 10, 2013. Moreover, only four class members objected (two of which are identical), which objections the Court overrules as meritless. The small percentage of opt-outs and objectors strongly supports the fairness of the settlement. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004); *see also Ko v. Natura Pet Prods.*, 2012 U.S. Dist. LEXIS 128615, at *15-*16 (N.D. Cal. Sept. 10, 2012); *Collado v. Toyota Motor Sales, U.S.A., Inc.*, 2011 U.S. Dist. LEXIS 133572, at *6-*7 (C.D. Cal. Oct. 17, 2011); *Wren v. RGIS Inventory Specialists*, 2011 U.S. Dist. LEXIS 38667, at *33 (N.D. Cal. Apr. 1, 2011). The Court will now address the concerns of each individual objector.

1. Objections by Alan Gonzalez Cancel & Ivelisse Reyes [Doc. Nos. 25, 27]

Alan Gonzalez Cancel and Ivelisse Reyes submit identical objections. They object to the proposed settlement because the agreement does not include an amount for their personal damages. They state that the behavior of Cbr and the news that their personal information could be used to their detriment has given them emotional concern and anguish. They "understand that [they] should be compensate[d] for [their] damages, as part of the settlement in an [amount not less than] $5,000.00." Cancel and Reyes are unrepresented and did not attend the final approval hearing.

The Court finds that these objections are not well-taken. To begin, objectors' purported emotional distress damages are uncorroborated and entirely speculative; based on the information they provide, it is doubtful they would have been entitled to such damages had they pursued their claim individually. Also, personal injury damages (including emotional distress damages) are not being sought in this lawsuit. [*See* FAC ¶ 18.] Thus, Cancel and Reyes could not recover the damages they seek in this action. Finally, the Ninth Circuit has cautioned that "settlement is the offspring of compromise; the question we address is not whether the final product

could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). If Cancel and Reyes believed that "[their] personal claim[s] w[ere] being sacrificed for the greater good . . . they had the right to opt-out of the class." *Id.* Objections seeking a "better" result, without more, are not sufficient to overturn a settlement agreement.

2. Objection by Marycon De Rama and Gerry De Rama [Doc. No. 28]

Marycon De Rama and Gerry De Rama object because they "don't agree that only two years of credit monitoring and identify theft insurance [should] be offered. It's only fair that it'll (sic) be extended more than that, up to five years and there should be a lifetime guarantee that reimbursement will be given should an identity theft damage be discovered and proven that it (sic) stems from the stealing incident on Dec. 2010." [Doc. No. 28.] The De Rama's aver that "two years of identify protection are not enough compensation for an uncertainty that identify theft and damages may take place anytime in out lifetime to [the Theft]." [*Id.*] They did not appear at the final approval hearing.

While the Court acknowledges that identity theft may occur at any time, the Court finds that this objection also merely seeks a better result without consideration for whether the settlement is fair. As mentioned previously, if objectors believed that "[their] personal claim[s] w[ere] being sacrificed for the greater good . . . they had the right to opt-out of the class." *Hanlon*, 150 F.3d at 1027. But further, this objection fails to take into account the additional provisions of the settlement, namely that class members may submit claims for actual identity theft loss through and including December 16, 2016. Thus, while the Credit Package runs for two years (approximately July 2013 - June 2015), the Identity Theft reimbursement fund will be available for an additional year-and-a-half (approximately June 2015 - December 2016). Finally, the Court finds that a "lifetime guarantee" of

reimbursement is unreasonable. Such an arrangement would place Cbr in perpetual uncertainty with respect to its liability and duty to pay out claims. If objectors wished to pursue such a settlement with Cbr, they were free to do so on their own. However, their proposed settlement is not an option for a class of over 285,000 members. Thus, the court overrules this objection.

vi. No Suggestion of Collusion

Finally, no aspect of the settlement suggests collusion. Rather, it was reached after two days of mediation before the Honorable Howard B. Wiener (Ret.), and neither the requested attorneys' fees, nor the requested incentive award appear unreasonable. Nor do any objectors suggest collusion. In his declaration, Justice Wiener indicates that the parties "vigorously negotiated their respective positions." [Wiener Decl. ¶ 5.] Further, he

> can categorically state the settlement reached between the parties was the product of arm's-length and good faith negotiations. It is [his] opinion, based on [his] experience in participating in class actions, either as a mediator, Special Master or judge and the information [he] reviewed, the settlement is non-collusive, fair and reasonable to all parties and provides significant benefits to the Settlement Class.

[*Id.* ¶ 7.]

3. Conclusion

Under the proposed settlement, the class receives immediate tangible benefits in the form of the Credit Package, and may further seek reimbursement of any actual loss. In light of the uncertainty of litigation, the benefit to the class, and the overwhelming class support, the Court finds this settlement fair, adequate, and free of collusion. Accordingly, the Court **GRANTS** the motion for final approval.

B. Motion for Award of Attorneys' Fees and Costs

Plaintiff seeks an award of attorneys' fees and costs in the amount of $600,000, which represents $585,936.33 in fees and $14,063.67 in costs. After the parties concluded their negotiations regarding substantive terms of the settlement, the parties separately negotiated the fees and costs award with Justice Howard

Wiener's assistance. Defendant agreed to pay these fees and costs in addition to the class settlement. No objector contests the fees and costs amounts.

1. Relevant Law

Rule 23(h) of the Federal Rules of Civil Procedure provides that, "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). This action asserts California claims, and thus the Court applies California law to determine both the right to and method for calculating fees. *See Mangold v. California Public Utilities Com'n*, 67 F.3d 1470, 1478 (9th Cir. 1995). Under California law, the primary method for determining the amount of reasonable attorneys' fees is the lodestar method, which multiplies the number of hours reasonably expended by a reasonable hourly rate with the court increasing or decreasing that amount by applying a positive or negative multiplier based on, among other factors, the quality of representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented. *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556-57 (2009). But in cases such as this, where the class benefit can be monetized with a reasonable degree of certainty, a percentage of the benefit approach may be used. *Id.* at 557-58 (citing *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26-27 (2000)). California courts use this percentage cross-check not only in conventional common fund cases but also in cases in which, as here, the defendant creates a common fund for the benefit of the class members and agrees to pay attorneys' fees separately. *See Lealao*, 82 Cal. App. 4th at 35-37.

Under the percentage method, California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent and has endorsed the federal benchmark of 25 percent. *In re Consumer Privacy Cases*, 175 Cal. App. 4th at 556 n.13. As to the settlement fund amount: "The total fund could be used to measure whether the portion allocated to the class and to attorney fees is

reasonable." *Id.* at 553-54 (citations omitted). Always, "[t]he ultimate goal is to award a reasonable fee." *See Hartless v. Clorox*, 273 F.R.D. 630, 645 (S.D. Cal. 2011). The Ninth Circuit has identified a number of factors that may be relevant in determining if the award is reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the burdens carried by class counsel; and (5) the awards made in similar cases. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002).

2. Analysis

Here, the parties agree that the value of two years of the Credit Package to the class as a whole was worth $111,751,871.00. In addition, Cbr also agreed to provide the class with a $500,000 fund for reimbursement of out-of-pocket expenses and a $2,000,000 fund for identity theft reimbursement. Thus, the gross settlement fund equals $114,251,187.00. Accordingly, the requested award of $585,936.33 in fees amounts to just 0.5% of the total amount of the gross settlement fund available to the class. This is well within the 25% benchmark. Further, consideration of the relevant factors outlined above militates in favor of the reasonableness of the fee.

a. Result Achieved

As discussed above, Cbr agreed to provide each class member with two years of the Credit Package, a $500,000 fund for reimbursement of out-of-pocket expenses, and a $2,000,000 fund for Identity Theft reimbursement. Plaintiff cites a number of privacy class action cases wherein courts have approved settlements giving less or even no direct compensation to class members. [Memorandum in Support of Fee Application ("Fee Application") at 16, Doc. No. 29-3.] In comparison, the result achieved here is considerably more beneficial.

b. Risks of Litigation

Plaintiff asserts that "had this settlement not been achieved[,] Plaintiff and the Settlement Class faced a costly and risky trial against Cbr with ultimate success far from certain." [Fee Application at 18.] While establishing liability may have been

possible, it is unclear what damages would have been available for the class in the end. This, coupled with the omnipresent risks of litigation, weighs in favor of the reasonableness of the fee.

c. The Skill Required, and the Quality and Efficiency of the Work

Plaintiff asserts that the settlement was possible only because class counsel was "able to convince Cbr, early on, that Plaintiff could potentially prevail on the difficult legal issues raised in Cbr's motion to dismiss, achieve class certification, overcome difficulties in proof as to monetary relief, and take the case to trial if need be." [Fee Application at 18.] Plaintiff avers that class counsel's previous expertise in privacy litigation allowed for the successful prosecution of these complex claims.

With respect to the quality of work, Justice Wiener indicated that the parties' briefs submitted prior to mediation "thoughtfully and thoroughly discussed the legal issues and the merits of their respective positions." Further, "[i]t was clear from the briefs and the discussions during the mediation that the parties and their counsel had a thorough understanding of the facts and law as well as the risks and uncertainties pertaining to the litigation." [Wiener Decl. ¶ 3.] Finally, the motions for preliminary and final approval were reasonably thorough and detailed.

d. Contingent Nature of the Case

Class counsel received no compensation during the course of this litigation, having been retained on a contingency fee basis. Given the risks of the litigation, there was a viable chance that class counsel could have received nothing at all for their efforts. Also, counsel argues that the award here (either 0.5% of the total value or 12.5% of the total benefits claimed) is much less than the average contingency fee award of 33%. [Fee Application at 19.] This weighs in favor of the reasonableness of the fee.

3. Cross-Checking Reasonableness of the Fee with the Lodestar Approach

To be complete, the Court cross-checks this award using the lodestar approach. Under this method, the lodestar amount is calculated by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. *Hanlon*, 150 F.3d at 1029. The lodestar may include a risk multiplier to enhance the fees under certain circumstances, in which a court considers "the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id.* at 1026. The customary range for multipliers is between 1.0 and 4.0. *See Vizcaino*, 290 F.3d at 1051 n.6 (describing appendix to opinion, finding a range of multipliers in common fund cases "of 0.6–19.6, with most (20 of 24, or 83%) from 1.0-4.0 and a bare majority (13 of 24, or 54%) in the 1 .5–3.0 range").

Here, counsel provided a declaration evidencing the hourly rate for their services and establishing the number of hours worked on the case. [*See* Keegan Decl. ¶¶ 49-55.] As the following table indicates, Keegan & Baker has spent 524.1 total hours working on the case.

Name	Hours	Avg. Rate	Total Lodestar
Patrick N. Keegan, Esq.	338.75	$695.00	$235,431.25
Jason E. Baker, Esq.	11.00	$375.00	$4,125.00
Brent Jex, Esq.	9.50	$325.00	$3,087,50
Lisa Magorien, Esq.	164.85	$245.00	$40,388.25
Total	**524.1**	**~$540.00**	**$283,031.50**

The Court first considers whether the average hourly rate of approximately $540.00 is reasonable. A reasonable hourly rate is typically based upon the prevailing market rate in the community for "similar work performed by attorneys of comparable skill, experience, and reputation." *Chalmers v. City of L.A.*, 796 F.2d 1205, 1210 (9th Cir. 1986); *see also Davis v. City of S.F.*, 976 F.2d 1536, 1545-46 (9th Cir. 1992) *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993). Counsel declares that this rate is lower than the prevailing market rates in California

for attorneys of comparable experience and skill. Counsel fails to substantiate this assertion, but the Court finds the firms' average hourly rate of $540 to be a reasonable hourly rate for counsel of similar skill and experience in the San Diego legal market.[4]

Additionally, the Court finds that the firms' expenditure of 524.1 hours on the case is reasonable. Although counsel has not provided the Court with detailed time sheets, such detailed time sheets are not necessary. *See Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) ("[T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And appellate courts must give substantial deference to these determinations, in light of the district court's superior understanding of the litigation.") Based on the foregoing, when multiplying the reasonable hourly rate by the number of hours, Plaintiffs' calculation of a $283,031.50 lodestar amount is both appropriate and "presumptively reasonable." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (citing *Cunningham v. Cnty. of L.A.*, 879 F.2d 481, 488 (9th Cir. 1988)).

Next, calculating the lodestar using the time expended in the litigation of this case, the requested attorneys' fee award of $585,936.33 yields a 2.07 multiplier of the lodestar. In light of the factors mentioned previously, and the customary range for multipliers, the Court finds a multiplier of 2.07 reasonable.

Finally, class counsel seek reimbursement of their costs in the amount of $14,063.67. Class counsel are entitled to reimbursement of the out-of-pocket costs they reasonably incurred investigating and prosecuting this case. *See In re Media*

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[4] *See Shames v. Hertz Corp.*, 2012 WL 5392159, at *18 (S.D. Cal. 2012) ("The *National Law Journal* data reveals that rates at six national defense firms with San Diego offices averaged between $550 and $747 per hour for partners and $346 and $508 per hour for associates.").

Vision Tech. Sec. Litig., 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970)); *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003). As with fees, reimbursement of costs here will be paid directly by Cbr and will not reduce the funds available to the Class. The Court finds that class counsel's out-of-pocket costs were reasonably incurred in connection with the prosecution of this litigation, were advanced by class counsel for the benefit of the Class, and should be reimbursed in full in the amount requested.

4. Conclusion

The Court **APPROVES** the award of attorneys' fees and costs in the amount of $600,000.

C. Class Representative Incentive Payment

1. Relevant Law

In assessing the reasonableness of an incentive award, several district courts in the Ninth Circuit have applied the five-factor test set forth in *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995), which analyzes: (1) the risk to the class representative in commencing a class action, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation. *See, e.g.*, *Carter v. Anderson Merchs., LP*, 2010 U.S. Dist. LEXIS 55629 (C.D. Cal. May 11, 2010); *Williams v. Costco Wholesale Corp.*, 2010 U.S. Dist. LEXIS 67731 (S.D. Cal. July 7, 2010).

2. Analysis

The only Class Representative in this case is Plaintiff Eileen Johansson-Dohrmann. No class member has objected to the proposed award of $5,000 to Ms. Johansson-Dohrmann. Class counsel avers that "Ms. Johansson-Dohrman spent significant time and provided invaluable assistance to

counsel and the Settlement Class in this case." [Keegan Decl. ¶ 58.] She "review[ed], for factual accuracy, all major pleadings filed with the Court, provid[ed] the factual background for the complaints filed in this Act, met[] with counsel on matters such as progress of the case and settlement, review[ed] documents," among other things. [*Id.*] The Court finds the $5,000 incentive award is within the acceptable range of approval and does not appear to be the result of collusion. *See, e.g.*, *Villegas v. J.P. Morgan Chase & Co.*, 2012 U.S. Dist. LEXIS 114597, *18 (N.D. Cal. Aug. 8, 2012) ("[T]he Settlement provides for an incentive award to the Plaintiff in the amount of $10,000. In this District, a $5,000 incentive award is presumptively reasonable."); *Williams v. Costco Wholesale Corp.*, 2010 U.S. Dist. LEXIS 67731, *19-*20 (S.D. Cal. July 7, 2010) (approving $5,000 award in an antitrust case settling for $440,000).

3. Conclusion

The Court **APPROVES** the $5,000 incentive award to Plaintiff Eileen Johansson-Dohrmann.

III. CONCLUSION

The Court **OVERRULES** all objections to the class settlement and **GRANTS** Plaintiff's motions in their entirety, finding the proposed settlement of this class action appropriate for final approval pursuant to Federal Rule of Civil Procedure 23(e). In doing so, the Court finds that the proposed settlement appears to be the product of non-collusive negotiations; that the settlement was entered into in good faith; that the settlement is fair, reasonable and adequate; and that Plaintiff has satisfied the standards for final approval of a class action settlement under federal law. Furthermore, as set forth above, the Court finds the negotiated attorneys' fees, costs, and class representative incentive payment reasonable.

JUDGMENT AND ORDER OF DISMISSAL

This Court **APPROVES** the settlement and **ORDERS** the parties to effectuate the settlement agreement according to its terms.

The Court **DISMISSES** this case on the merits and with prejudice, pursuant to the terms of the parties' settlement agreement.

Upon the effective date, the Plaintiff, and each and every class member who have not opted out of the settlement, and anyone claiming through or on behalf of any of them, shall be deemed to have, and by operation of this Judgment shall have, fully, finally, and forever waived, released, relinquished, discharged, and dismissed each and every one of the released claims against each and every one of the Released Parties.

If this Judgment and the settlement do not become final and effective in accord with the terms of the settlement agreement, then this Judgment and all orders entered in connection therewith shall be deemed null and void and shall be vacated.

The Court shall not retain continuing jurisdiction over implementation of the settlement or future disputes over construing, enforcing, or administering the settlement.

The Clerk of Court is instructed to terminate this case.

IT IS SO ORDERED.

DATED: July 24, 2013

Hon. Michael M. Anello
United States District Judge

EXHIBIT D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DEANNA MOREY, an individual, on behalf of herself and all others similarly situated, Plaintiff, vs. LOUIS VUITTON NORTH AMERICA, INC., a Delaware corporation, Defendants.	CASE NO. 11cv1517 WQH (BLM) ORDER

HAYES, Judge:

The matters before the Court are the unopposed Motion in Support of Award of Attorney's Fees, Costs, and Incentive Award (ECF No. 65), and the unopposed Motion for Final Approval of Class Action Settlement (ECF No. 68), filed by Plaintiff Deanna Morey.

BACKGROUND

On May 20, 2011, Plaintiff Deanna Morey, on behalf of herself and all others similarly situated, initiated this action by filing a class action Complaint against Defendant Louis Vuitton North America, Inc. ("LVNA") in the Superior Court of California, County of San Diego. (ECF No. 1-1 at 5-12). Plaintiff alleged that Defendant violated California's Song-Beverly Credit Card Act, Cal. Civ. Code §

1747.08, by requesting and recording personal identification information when shoppers used a credit card for purchases at Louis Vuitton retail stores.[1] On July 8, 2011, Plaintiff removed the action to this Court.

On July 11, 2011, the Honorable M. James Lorenz sua sponte remanded the action to the state court, finding that the amount in controversy did not exceed $5,000,000 – the amount required for original jurisdiction to vest with this Court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. section 1332(d). (ECF No. 3). Defendant filed a Motion for Reconsideration (ECF No. 4), which the Court denied. (ECF No. 7).

On July 21, 2011, Defendant initiated an appeal to the Court of Appeals for the Ninth Circuit from the Court's July 11, 2011 Order. (ECF No. 9). On January 10, 2012, the Ninth Circuit reversed, holding that the Court erred in finding that the amount in controversy requirement under CAFA had not been satisfied. (ECF No. 16).

On February 10, 2012, Defendant filed an Answer to the Complaint. (ECF No. 20). On February 17, 2012, the Magistrate Judge issued a Rule 26 scheduling Order (ECF No. 21), and discovery commenced.

On August 17, 2012, Plaintiff filed the First Amended Class Action Complaint – the operative pleading in this case – in which Plaintiff alleges:

> Defendant operates retail stores throughout the United States, including California. Defendant was, and is, engaged in a pattern of unlawful business practices whereby it utilizes a customer information capture card

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[1]The Song-Beverly Credit Card Act provides:

> [N]o person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business shall do any of the following: ...
>
> Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise....

Cal. Civ. Code § 1747.08.

> which contained preprinted spaces for credit card customers to write their respective: (i) name; (ii) email address; (iii) address (including ZIP code); (iv) birth date; (iv) home telephone number; and (v) mobile telephone number. It was, and is, Defendant's policy and practice to request credit card customers to write their respective personal identification information upon the customer information capture card in the form of their: (i) names; (ii) email addresses; (iii) addresses; (iv) birth dates; (iv) home telephone number; and (v) mobile telephone number, and to subsequently enter such information into its electronic customer database at the point-of-sale. Defendant's acts and practices as herein alleged were at all times intentional.

(First Amended Class Action Complaint ¶ 2, ECF No. 32 at 2). Plaintiff proposed to prosecute this action on behalf of "all persons from whom Defendant collected personal identification information in conjunction with a credit card purchase transaction at a California retail store during the period of time beginning May 23, 2010 and continuing through the date of trial...." *Id.* ¶ 21.

On August 31, 2012, Defendant filed a Motion to Dismiss. (ECF No. 33). On September 28, 2012, Plaintiff filed a Motion for Class Certification. (ECF No. 37). The parties filed opposition and reply briefs to each motion. (ECF Nos. 36, 42, 50, 51).

On October 2, 2012, Judge Lorenz recused himself from this case and Judge Hayes was assigned. (ECF No. 40).

On February 13, 2013, after several settlement and case management conferences, the Magistrate Judge issued an Order indicating that the parties had reached a tentative settlement. (ECF No. 56).

On February 29, 2013, Plaintiff filed an unopposed Motion for Preliminary Approval of Class Action Settlement, accompanied by the declaration of Plaintiff's counsel, Gene J. Stonebarger, and several exhibits. (ECF No. 62). On August 15, 2013, the Court issued an order that (1) preliminarily approved the settlement agreement; (2) provisionally certified the class; (3) conditionally certified Plaintiff as Class Representative; and (4) appointed Stonebarger Law, APC and Patterson Law Group, APC as Class Counsel. The August 15, 2013 Order ordered notice and provided detailed information to class members regarding their rights under the Settlement Agreement. (ECF No. 64).

On October 30, 2013, Plaintiff filed a Motion in Support of Award of Attorney's Fees, Costs, and Incentive Award ("Motion for Attorneys' Fees"). (ECF No. 65).

On December 5, 2013, Plaintiff filed a Motion for Final Approval of Class Action Settlement. (ECF No. 68).

On December 12, 2013, the Court held a fairness hearing. (ECF No. 69). No Class members appeared.

TERMS OF THE PROPOSED SETTLEMENT

The proposed settlement class (the "Class") consists of "all persons who made a credit card purchase at a [Louis Vuitton] store in California during the period from May 20, 2010 to January 28, 2013 and who were requested to and did provide personal identification information, excluding transactions where such personal identification information was collected for shipping, delivery, servicing or repairing of the purchased merchandise or for special orders or paid holds." (ECF No. 62-1 at 24).

I. Class Benefits

"Class members have been presented with the opportunity to submit a claim for a Merchandise Credit. The Settlement Administrator received 23,876 timely claims. Thus, these 23,876 individuals who timely submitted a valid claim will receive Merchandise Certificates in the amount of $41.00.[2]" (Declaration of Matthew J. McDermott - Class Administrator, ECF No. 68-3 ¶ 10).

"The Merchandise Certificates will be good for all purchases at stand-alone Louis Vuitton retail stores in California, may not be combined, are fully transferable, and have a one-year expiration on use. The Merchandise Certificates cannot be redeemed at leased store locations within department stores." (ECF No. 62-1 at 10) (citing Exh. 1, Settlement Agreement, § III(C)).

II. Class Notice

"In compliance with the Court's Preliminary Approval Order dated August 15,

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[2] Under the Settlement, the actual amount of each Merchandise Certificate will be $1 million divided by the total number of qualifying claims rounded down to the nearest whole dollar. $1 million divided by 23,876 is $41.88.

2013 ... LVNA provided notice to the Class in four ways: Direct Email Notice, Direct Mail Notice, Publication Notice and Website Notice. The Class Notice ... described, inter alia, the claims in the lawsuit, the terms of the Settlement, and the procedures for objecting to the Settlement and for electing to be excluded from the Class and the Settlement. The Notice also informed Class members that they are permitted to appear at the Fairness Hearing on December 12, 2013, either with or without counsel. LVNA provided Class members with sufficient notice of the Settlement." (ECF No. 68-1 at 8-9).

A. Direct Email Notice

"On September 13, 2013, the Settlement Administrator emailed the Summary Email Class Notice ... to all Class members for whom LVNA has a valid email address. ... The Settlement Administrator sent the Email Notice to 221,717 Class members.... As of December 3, 2013, 296 email notices were returned as undeliverable." (McDermott Decl. Exh. 2, ECF No. 68-5 ¶¶ 3,7).

B. Direct Mail Notice

"On September 13, 2013, the Settlement Administrator mailed a postcard containing the Summary Postcard Class Notice ... to all class members for whom LVNA has a valid mailing address and who were not sent the Summary Email Class Notice.... The Settlement Administrator sent the Summary Postcard Notice to 106,001 Class members.... As of December 3, 2013, 6,245 postcard notices were returned as undeliverable.... The Settlement Administrator re-mailed 233 postcard notices to forwarding addresses provided by the U.S. Postal Service, of which 14 were returned a second time." (McDermott Decl. Exh. 1, ECF No. 68-4 ¶¶ 3,7).

C. Publication Notice

"On September 24, 2013 and September 30, 2013, LVNA published the Publication Notice ... in the Los Angeles and San Francisco editions of USA Today." (McDermott Decl. Exh. 3, ECF No. 68-6 ¶ 4).

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D. Website Notice

"Prior to September 13, 2013, the Settlement Administrator established a settlement-specific website, located at www.lvnasettlement.com (the 'Settlement Website') for Class members to visit and learn information about the case. The website has an online claim filing and email contact capabilities. Additionally, downloadable copies of the Preliminary Approval Order, Long Notice, Settlement Agreement, and Claim Form are available on the website. The downloadable Claim Form and online filing capability were disabled after the November 13, 2013 filing deadline." (McDermott Decl., ECF No. 68-3 ¶ 5).

III. Objections to and Exclusions From the Settlement

"Pursuant to the Court's Preliminary Approval Order, Class members were required to file and postmark any objections to the proposed settlement on or before November 13, 2013. Similarly, Class members wishing to opt out of the settlement were required to mail a letter electing to exclude themselves from the Class on or before November 13, 2013. There have been no objections and only seven (7) valid requests to be excluded." (McDermott Decl., ECF No. 68-3 ¶¶ 8-9).

IV. Attorney's Fees, Costs and Incentive Fee Award

"The Preliminary Approval Order appointed Plaintiff Deanna Morey as the Class Representative, and the law firms of Stonebarger Law, APC and Patterson Law Group, APC as Class Counsel. Plaintiff filed her Motion for Attorney's Fees[,] Costs and Incentive Award on October 30, 2013, fourteen (14) calendar days prior to the Class members' objection deadline. [The] Class [R]epresentative applied for an incentive award of $5,000, and $375,000 in attorney's fees and costs to Class Counsel." *Id.*

DISCUSSION

I. Class Certification

Plaintiff seeks certification of a settlement class under Federal Rule of Civil Procedure 23(b)(3). "To obtain certification of a class action ... under Rule 23(b)(3), a plaintiff must satisfy Rule 23(a)'s [] prerequisites of numerosity, commonality,

typicality, and adequacy of representation, and must also establish that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, __ U.S. __, 133 S. Ct. 1184, 1191 (2013) (internal citations omitted). In this case, the Court previously preliminarily certified the proposed settlement class. (ECF No. 64 at 9-13). At that time, the Court concluded that the proposed class satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). *Id.* The Court also found that the proposed class satisfied the predominance and superiority requirements of Rule 23(b)(3). No party or class member has objected to certification of the settlement class. The Court reaffirms its prior certification of the class for purposes of settlement.

A list of those putative Class members who have timely elected to opt out of the Settlement and the Class, and who are therefore not bound by the Settlement, the provisions of the Settlement Agreement, this Order and the final Judgment to be entered by the Clerk of the Court hereon, has been submitted to the Court in the Declaration of Matthew J. McDermott, filed in advance of the Final Approval Hearing. All other Class members (as permanently certified below) shall be subject to all of the provisions of the Settlement, the Settlement Agreement, this Order, and final Judgment to be entered by the Clerk of Court.

II. Notice

Notice to the putative Class members was comprised of individual mailed and emailed notice to all known Class members and steps taken to provide notice to unknown Class members. The Court finds that this notice (i) constituted the best notice practicable under the circumstances, (ii) constituted notice that was reasonably calculated, under the circumstances, to apprise the putative Class members of the pendency of the action, and of their right to object and to appear at the Final Approval Hearing or to exclude themselves from the Settlement, (iii) was reasonable and

constituted due, adequate, and sufficient notice to all persons entitled to be provided with notice, and (iv) fully complied with due process principles and Federal Rule of Civil Procedure 23.

III. Fairness of the Settlement

A. Legal Standard

Courts require a higher standard of fairness when a settlement takes place prior to formal class certification to ensure class counsel and Defendant have not colluded in settling the case. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Ultimately, "[t]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). "The question [the Court] address[es] is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027.

Courts consider several factors when determining whether a proposed "settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (*quoting Hanlon*, 150 F.3d at 1027). These factors may include one or more of the following: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members to the proposed settlement. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998); *see also Torrisi v. Tucson Elec. Power Co.*, 8 F. 3d 1370, 1376 (9th Cir. 1993) (holding that

only one factor was necessary to demonstrate that the district court was acting within its discretion in approving the settlement).

B. Analysis

1. The strength of the case and the risk, expense, complexity, and likely duration of further litigation

To determine whether the proposed settlement is fair, reasonable, and adequate, the Court must balance against the risks of continued litigation (including the strengths and weaknesses of Plaintiff's case), the benefits afforded to members of the Class, and the immediacy and certainty of a substantial recovery. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000).

> The court shall consider the vagaries of the litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, 'It has been held proper to take the bird in hand instead of a prospective flock in the bush.'

Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 526 (C.D. Cal. 2004).

Plaintiff asserts that the settlement is fair and reasonable in light of the risk, expense, complexity, and likely duration of further litigation if the case were to proceed to trial. (ECF No. 68-1 at 15-16). Specifically, Plaintiff asserts that "the uncertainty as to whether consumers' voluntariness constitutes an affirmative defense creates substantial risk for both sides." *Id.* at 16 (citing Declaration of Gene J. Stonebarger, ECF No. 68-2 ¶ 5). Plaintiff acknowledges the expense and length of continued proceedings necessary to prosecute the litigation against LVNA through trial and appeals. *Id.* In reaching a settlement, Plaintiff has also taken into account the uncertain outcome and the risk of any litigation, "especially in complex actions such as this Class Action, as well as the difficulties and delays inherent in such litigation. This litigation involves complex class action issues, which would involve protracted risky litigation if not settled." *Id.* Given these risks, the Court agrees that the actual recovery through settlement confers substantial benefits on the class that outweigh potential recovery

through full adjudication.

2. The stage of the proceedings

In the context of class action settlements, as long as the parties have sufficient information to make an informed decision about settlement, "formal discovery is not a necessary ticket to the bargaining table." *Linney*, 151 F.3d at 1239 (quoting *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241 (5th Cir. 1982)) (internal quotations omitted). In this case, the parties have engaged in formal discovery, "allowing Class Counsel and counsel for LVNA to sufficiently evaluate their positions' strengths and weaknesses, and the probable expense of taking this case to trial." (ECF No. 68-1 at 18). In addition to conducting discovery, the parties have engaged in extensive settlement discussions through the course of this case, including a settlement conference with a Magistrate Judge. The case was filed in San Diego Superior Court in May of 2011, and the parties reached a tentative settlement on February 11, 2013. The parties' extensive investigation, discovery, and subsequent settlement discussions during that time weigh heavily in favor of granting final approval.

3. The settlement amount

To assess whether the amount offered is fair, the Court may compare the settlement amount to the parties' estimates of the maximum amount of damages recoverable in a successful litigation. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459. While settlement amounts that are close to the plaintiffs' estimate of damages provide strong support for approval of the settlement, settlement offers that constitute only a fraction of the potential recovery do not preclude a court from finding that the settlement offer is fair. *Id.* (finding settlement amount constituting one-sixth of the potential recovery was fair and adequate). Thus, district courts have found that settlements for substantially less than the plaintiffs' claimed damages may be fair and reasonable, especially when taking into account the uncertainties involved with litigation. *See Shames v. Hertz Corp.*, No. 07-CV-2174-MMA(WMC), 2012 WL 5392159 at *6 (S.D. Cal. Nov. 5, 2012).

The Complaint in this case alleges that each Class member is entitled to a civil penalty for each violation of California Civil Code section1747.08(e) in amounts of up to $1,000 per violation. (ECF No. 1-1 at 11). The proposed settlement provides Class members with Merchandise Certificates valued at approximately $1 million. Divided by the 23,876 Class members, the settlement provides a $41.00 Merchandise Certificate to each Class member. Given the risk, expense, complexity, and duration of further litigation, the Court finds that the amount and terms of the proposed monetary benefits to the Class members are fair and reasonable.

4. Whether the class has been fairly and adequately represented during settlement negotiations

Counsel who represented the class included experienced attorneys at Stonebarger Law, APC and Patterson Law Group, APC. Both firms are "very experienced in consumer class actions" and "have represented millions of consumers in numerous class actions asserting violations of California's consumer-protection statutes, including the Song-Beverly Credit Card Act of 1971." (ECF No. 68-1 at 18; *see also* ECF Nos. 65-3, 65-5). Plaintiff's attorneys are well qualified to conduct this litigation and to assess its settlement value. The Court finds that the Class has been fairly and adequately represented during settlement negotiations.

5. The reaction of the class to the proposed settlement

The Ninth Circuit has held that the number of class members who object to a proposed settlement is a factor the Court may consider in its settlement approval analysis. *Shames*, 2012 WL 5392159 at *8 (citing *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832, 837 (9th Cir. 1976)). The absence of a large number of objectors supports the fairness, reasonableness, and adequacy of the settlement. *Id.*; *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (finding "persuasive" the fact that 84% of the class filed no

opposition).

In this case, Class Notice was given (either by Direct Email Notice or Direct Mail Notice) to approximately 327,718 potential Class members. (ECF No. 68-1 at 9). Notice was also given by publication and by website. *Id.* There have been no objections, and only seven requests to be excluded. *Id*; *see also* McDermott Decl., ECF No. 68-3 ¶¶ 8-9. The lack of objections and the small number of Class members who opted out of the settlement, compared to the large number of Class members who received Notice, favors approval of the settlement.

6. Absence of collusion in the settlement process

In addition to the above considerations, the Court has an obligation to "satisfy itself that the settlement was not the product of collusion." *Browning v. Yahoo! Inc.*, No. 04CV01463(HRL), 2007 WL 4896699, at *38 (N.D. Cal. Nov. 16, 2007). In this case, the proposed settlement is the product of "extensive negotiations conducted at arm's-length among counsel and a well-respected mediator." (ECF No. 68-1 at 19). Participation of a mediator is not dispositive, but is "a factor weighing in favor of a finding of non-collusiveness." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011); *Amunrud v. Sprint Commc'ns Co.*, 2012 WL 443751, at *10 (D. Mont. Feb. 10, 2012) (finding absence of signs of collusion based, in part, on mediator's participation); *In re HP Laser Printer Litig.*, 2011 WL 3861703, at *12-13 (C.D. Cal. Aug. 31, 2011) (same).

The case has been "hotly contested since its inception in May of 2011...." (ECF No. 68-1 at 19). Class counsel for LVNA has demonstrated that they were fully prepared to litigate this case through final judgment. The Court is satisfied that the settlement process did not involve collusion.

7. Class Action Fairness Act Considerations

When applicable, special considerations arise in cases involving coupon settlements. CAFA allows a court to approve a coupon settlement "only after a hearing

to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members." 28 U.S.C. § 1712(e). Although the "fair, reasonable, and adequate" standard is identical to that contained in Rule 23(e)(2), "several courts have interpreted section 1712(e) as imposing a heightened level of scrutiny in reviewing such [coupon] settlements." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010) (citing *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F. 3d 646, 654 (7th Cir. 2006); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1321 (S.D. Fla. 2007)). Likewise, Rule 23 itself may require closer scrutiny of coupon settlements. *See* Fed. R. Civ. P. 23(h), 2003 Advisory Committee Notes ("Settlements involving non-monetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class."). Before granting final approval, the Court "must discern if the value of a specific coupon settlement is reasonable in relation to the value of the claims surrendered." *True*, 749 F. Supp. 2d at 1069.

The Court must determine whether CAFA applies to the settlement in this case. Although CAFA defines other terms, it does not define what constitutes a "coupon." *See* 28 U.S.C. § 1711. Courts have often blurred the distinction between "coupons" and "vouchers." However, they are not equivalent. *See Foos v. Ann, Inc.*, No. 11cv2794 L(MDD), 2013 WL 5352969, at *2 (S.D. Cal. Sept. 24, 2013).

> The distinction between a coupon and a voucher is that a coupon is a *discount* on merchandise or services offered by the defendant and a voucher provides for *free* merchandise or services.... A coupon requires a class member to purchase a product or services and pay the difference between full price and the coupon discount.... In contrast, a voucher is more like a gift card or cash where there is an actual cash value, is freely transferable, and does not require the class members to spend any additional money in order to realize the benefits of the settlement.

Id.

The terms of the proposed settlement agreement provide that the 23,876 individuals who timely submitted a valid claim will receive Merchandise Certificates in the amount of $41.00. (McDermott Decl., ECF No. 68-3 ¶ 10). "The Merchandise

Certificates will be good for all purchases at stand-alone Louis Vuitton retail stores in California, may not be combined, are fully transferable, and have a one-year expiration on use. The Merchandise Certificates cannot be redeemed at leased store locations within department stores." (ECF No. 62-1 at 10) (citing Exh. 1, Settlement Agreement, § III(C)). Plaintiff contends that the Merchandise Certificates are not "coupons" because they provide dollar-for-dollar value and are "properly characterized as akin to cash." (ECF No. 65-1 at 26). At the December 12, 2013 fairness hearing, Class Counsel stated that there are several items for sale at Louis Vuitton retail stores in California that are priced below $41.00. A Class member would be able to use the Merchandise Certificate to acquire *free* merchandise, and would not be required to spend any additional money in order to realize the benefit of the settlement. The Court finds that the Merchandise Certificates are vouchers and not coupons, and CAFA does not apply.

However, even *if* CAFA applied here, the Court has undertaken the "heightened analysis" required by the statute. Specifically, the Court has satisfied CAFA's requirement that a hearing be held and the Court's findings be in writing. *See* 28 U.S.C. § 1712(e). The Court is satisfied that the settlement in this case does not violate Congress's concern that in many cases "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(3).

C. Conclusion

The Court finds that the settlement is fundamentally "fair, adequate and reasonable" under Rule 23(e), and that no evidence of collusion exists. The Court grants the Motion for Final Approval of Class Action Settlement (ECF No. 68).

IV. Motion for Attorney's Fees & Costs

The parties have agreed upon an award of $375,000.00 in attorney's fees and costs, and a $5,000.00 incentive award to the named Plaintiff, Deanna Morey. (ECF

No. 65-1 at 8). "This compromise was reached by the parties to avoid further litigation of these issues and a contested fee motion. Under no circumstances will any of the proposed fees and costs diminish the payout to the Class." (Stonebarger Decl., ECF No. 65-2 ¶ 4).

A. Relevant Law

Rule 23(h) of the Federal Rules of Civil Procedure provides that, "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method." *In re Bluetooth*, 654 F.3d at 942.

"The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Id.* After computing the lodestar figure, the district court may then adjust the figure upward or downward taking into consideration twelve "reasonableness" factors: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Morales v. City of San Rafael*, 96 F. 3d 359, 363 n. 8 (9th Cir. 1996).

The hours expended and the rate should be supported by adequate documentation and other evidence; thus, attorneys working on cases where a lodestar may be employed should keep records and time sheets documenting their work and time spent. *Hensley*

v. Eckerhart, 461 U.S. 424 (1983). But as the Supreme Court has noted, trial courts may use "rough" estimations, so long as they apply the correct standard. *Fox v. Vice*, __ U.S. __, __, 131 S. Ct. 2205, 2216 (2011).

B. Analysis

The Court applies the lodestar method to calculate and evaluate attorneys' fees. Plaintiff provides the Court with declarations from Gene J. Stonebarger and James R. Patterson in support of the Motion for Attorneys' Fees. (*See* ECF Nos. 65-2, 65-3, 65-4, 65-5). Class counsel calculated their lodestar using current billing rates for the five attorneys who worked on this case: $650 per hour for Gene J. Stonebarger; $500 per hour for Richard D. Lambert, an associate of Stonebarger Law, APC; $350 per hour for Elaine W. Yan, an associate of Stonebarger Law, APC; $675 per hour for James R. Patterson of Patterson Law Group, APC; and $675 per hour for Allison Goddard of Patterson Law Group, APC. (ECF No. 65-1 at 15-16). Plaintiff asserts that the requested rates are reasonable because "[d]istrict [c]ourts have, on numerous occasions, 'found reasonable attorneys fees based on rates of $650 for partner services [and] $500 for associate attorney services....'" (ECF No. 65-1 at 16) (citing *Faigman v. AT&T Mobility LLC*, No. C-06-0462 MHP, 2011 WL 672648, at *5 (N.D. Cal. Feb. 16, 2011); *Suzuki v. Hitachi*, No. C 06-7289 MHP, 2010 WL 956896, at *3 (N.D. Cal. Mar. 12, 2010)). The Court finds that the hourly rates charged are reasonable.

Class Counsel contends that they had spent approximately 394.6 hours in prosecuting this action at the time the Motion for Attorneys' Fees was filed. (*See* Stonebarger Decl., ECF No. 65-2 ¶ 6; Patterson Decl., ECF No. 65-4 ¶ 5). Stonebarger Law, APC has expended 214.1 hours and $2,524.05 in costs. (Stonebarger Decl., ECF No. 65-2 ¶ 6). Patterson Law Group, APC has expended approximately 180.5 hours and $3,004.25 in costs. (Patterson Decl., ECF No. 65-4 ¶ 5). Class Counsel has not provided detailed time records, but instead provides general summaries of each firm's billing time. (*See* ECF Nos. 65-2 at 4-5; 65-4 at 3-5). The summaries and declarations

provide a sufficient showing of the hours counsel performed on this case. As of October 30, 2013, when the Motion for Attorneys' Fees was filed, Class Counsel's total fee lodestar in this action was $242,057.50. (Stonebarger Decl., ECF No. 65-2 ¶ 6; Patterson Decl., ECF No. 65-4 ¶ 5). In addition, Class Counsel had expended $5,528.30 in un-reimbursed expenses in the prosecution of this action, which brought the lodestar to $247,585.80. *Id.*

As previously noted, courts may enhance the lodestar figure with a multiplier. Plaintiff requests a multiplier of approximately 1.51 in order to bring the lodestar of $247,585.80 to a total fee award of $375,000.00. Having considered the factors for enhancing the lodestar in this action, the Court finds that counsel has displayed skill in presenting the claims; bore some risks in bringing this action; the Class received benefits because of the action; and the requested fee will not reduce the Class members' recovery. For these reasons, the Court will enhance the lodestar figure with the requested multiplier of 1.51.[3]

C. Conclusion

The Court approves the award of attorneys' fees, as well as Class Counsel's request for litigation costs and expenses, in the total amount of $375,000.

V. Class Representative Award

In assessing the reasonableness of an incentive award, several district courts in the Ninth Circuit have applied the five-factor test set forth in *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995), which analyzes (1) risk to the class representative in commencing a class action, both financial and otherwise; (2) the

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[3] Class Counsel further stated that at the time the Motion for Attorneys' Fees was filed, they anticipated spending a minimum of another 57 hours to complete the case. (Stonebarger Decl., ECF No. 65-2 ¶ 9; Patterson Decl., ECF No. 65-4 ¶ 5). Due to the additional time spent on the case after the filing of the Motion for Attorneys' Fees, including preparation for and participation in the fairness hearing on December 12, 2013, the actual lodestar number in this case is higher than $247,585.80, and therefore the multiplier used to reach the requested fee award of $375,000.00 is actually lower than 1.51.

notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation. *Shames*, 2012 WL 532159 at *21 (citing *Carter v. Anderson Merchs., LP*, No. EDCV 08-0025-VAP(OPx), 2010 WL 1946784 (C.D. Cal. May 11, 2010)).

Class Representative Deanna Morey requests a $5,000 incentive payment to compensate for her services as court appointed Class Representative. (Declaration of Deanna Morey, ECF No. 65-6 ¶ 8). No Class member has objected to the Class Representative's requested incentive payment. Moreover, the parties have agreed that the Class Representative's requested incentive award is reasonable because "she dedicated a significant amount of time and effort in bringing this case forward and litigating this case, actively participating in this lawsuit, undertaking significant risks, and achieving substantial class benefits." *Id.* at 24. The Court finds that the $5,000 incentive award is within the acceptable range of approval, and does not appear to be the result of collusion. *See, e.g., Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA (EMC), 2012 WL 5878390, at *7 (N.D. Cal. Nov. 21, 2012) ("[T]he settlement provides for an incentive award to the Plaintiff in the amount of $10,000. In this District, a $5,000 incentive award is presumptively reasonable."); *Williams v. Costco Wholesale Corp.*, No. 02cv2003 IEG (AJB), 2012 WL 2721452, at *7 (S.D. Cal. Jul. 7, 2010) (approving a $5,000 award to a class representative in an antitrust case settling for $440,000). The Court approves the $5,000 incentive award for Plaintiff Deanna Morey.

CONCLUSION

IT IS HEREBY ORDERED that the Motion for Final Approval of Class Action Settlement (ECF No. 68), and the Motion in Support of Award of Attorneys' Fees, Costs, and Incentive Award (ECF No. 65) are GRANTED as follows:

1. The Settlement and Settlement Agreement are hereby approved as fair, reasonable, adequate, and in the best interests of the Class, and the requirements of due process and Federal Rule of Civil Procedure 23 have been satisfied. The parties are ordered and directed to comply with the terms and provisions of the Settlement Agreement.

2. The Court, having found that each of the elements of Federal Rules of Civil Procedure 23(a) and 23(b)(3) are satisfied, for purposes of settlement only, the Class is permanently certified pursuant to Federal Rule of Civil Procedure 23, on behalf of the following persons:

> All persons who made a credit card purchase at a LVNA store in California during the period of time from May 20, 2010 to January 28, 2013 and who were requested to and did provide personal identification information, excluding transactions where such personal identification information was collected for a special purpose incidental but related to the individual credit card transaction, including information relating to shipping, delivery, servicing or repairing of the purchased merchandise or for special orders or paid holds.

The Class members identified in the Declaration of Matthew J. McDermott (ECF No. 68-3 ¶¶ 8-9) as having timely and properly elected to opt out from the Settlement and the Class are hereby excluded from the Class and shall not be entitled to any of the benefits afforded to the Class members under the Settlement Agreement. The Court adopts and incorporates by reference its preliminary conclusions as to the satisfaction of Rules 23(a) and (b)(3) set forth in the Preliminary Approval Order (ECF No. 64) and notes again that because this certification of the Class is in connection with the Settlement rather than litigation, the Court need not address any issues of manageability that may be presented by certification of the class proposed in the Settlement Agreement.

3. For purposes of Settlement only, the named Plaintiff is certified as Representative of the Class and Class Counsel is appointed to the Class. The Court concludes that Class Counsel and the Class Representative have fairly and adequately represented the Class with respect to the Settlement and the Settlement Agreement.

4. Notwithstanding the certification of the foregoing Class and appointment of the Class Representative, for purposes effecting the Settlement, if this Order is reversed on appeal or the Settlement Agreement is terminated or is not consummated for any reason, the foregoing certification of the Class and appointment of the Class Representative shall be void and of no further effect, and the parties to the proposed Settlement shall be returned to the status each occupied before entry of this Order without prejudice to any legal argument that any of the parties to the Settlement Agreement might have asserted but for the Settlement Agreement.

5. Plaintiff and all Class members who are not excluded shall be deemed to fully and irrevocably release, waive, and discharge Defendant and each of its respective past, present and future owners, stockholders, parent corporations, related or affiliated companies, subsidiaries, officers, directors, shareholders, employees, agents, principals, heirs, representatives, accountants, attorneys, auditors, consultants, insurers and re-insurers, and their respective successors and predecessors in interest, from any and all past, present, and future liabilities, claims, causes of actions (whether in contract, tort, or otherwise, including statutory, common law, property, and equitable claims), damages, costs, attorneys' fees, losses, or demands, whether known or unknown, existing or potential, or suspected or unsuspected, which Plaintiffs and all Class members have or may have arising out of or relating to any act, omission, or other conduct alleged or otherwise referred to in the Action (the "Released Claims").

6. With respect to the Released Claims, Plaintiff and all Class Members who are not excluded shall be deemed to have, and by operation of the Final Judgment shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law that purports to limit the scope of the general release. Section 1542 provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS

FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

7. The Court has reviewed the application for an award of fees, costs, and expenses submitted by Class Counsel and the exhibits, memoranda of law, and other materials submitted in support of that application. The Court recognizes that Defendant has not opposed the application for an incentive award of $5,000.00 to be paid by Defendant and an award of attorneys' fees and costs of $375,000.00 to be paid by Defendant. This agreement is in addition to the other relief to be provided to Class members under the Agreement. On the basis of its review of the foregoing, the Court finds that Class Counsel's request for attorneys' fees and expenses is fair, reasonable, and appropriate and hereby awards fees and expenses to Class Counsel in the aggregate amount of $375,000.00 and an incentive award to Plaintiff in the amount of $5,000.00 to be paid by Defendant in accordance with the terms of the Settlement Agreement.

8. Neither the Settlement Agreement nor any provision therein, nor any negotiations, statements or proceedings in connection therewith shall be construed as, or deemed to be evidence of, an admission or concession on the part of the Plaintiff, any Class Member, Defendant, or any other person of any liability or wrongdoing by them, or that the claims and defenses that have been, or could have been, asserted in the action are or are not meritorious, and this Order, the Settlement Agreement or any such communications shall not be offered or received in evidence in any action or proceedings, or be used in any way as an admission or concession or evidence of liability or wrongdoing of any nature or that Plaintiff, any Class member, or any other person has suffered any damage; *provided, however,* that the Settlement Agreement, this Order, and the final Judgment to be entered thereon may be filed in any action by Defendant or Class members seeking to enforce the Settlement Agreement or the final Judgment by injunctive or other relief, or to assert defenses including, but not limited to, *res judicata*, collateral estoppel, release, good faith settlement, or any theory of

claim preclusion or issue preclusion or similar defense or counterclaim. The Settlement Agreement's terms shall be forever binding on, and shall have *res judicata* and preclusive effect in, all pending and future actions or other proceedings as to Released Claims and other prohibitions set forth in this Order that are maintained by, or on behalf of, the Class members or any other person subject to the provisions of this Order.

9. In the event that the Settlement Agreement does not become effective or is cancelled or terminated in accordance with the terms and provisions of the Settlement Agreement, then this Order and the final Judgment shall be rendered null and void and be vacated and all orders entered in connection therewith by this Court shall be rendered null and void.

10. The action and the claims alleged therein are hereby ordered DISMISSED with prejudice.

11. Without in any way affecting the finality of this Order and the final Judgment, the Court hereby retains jurisdiction as to all matters relating to the interpretation, administration, and consummation of the Settlement Agreement.

DATED: January 9, 2014

William Q. Hayes

WILLIAM Q. HAYES
United States District Judge

EXHIBIT E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LAUREN CHAIKIN, an individual, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

LULULEMON USA INC., a Nevada Corporation, LULULEMON ATHLETICA INC., a Delaware Corporation, and DOES 1 through 50, inclusive,

Defendants.

CASE NO.: 3:12-CV-02481-GPC-MDD

ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT; GRANTING UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD

[DKT. NOS. 28, 29.]

Currently pending before the Court is Plaintiffs' unopposed Motion for Final Approval of Class Action Settlement, (Dkt. No. 29), and Plaintiffs' Motion for Attorneys' Fees and Incentive Award. (Dkt. No. 28.) After consideration of the Parties' briefs and supporting declarations, the Court GRANTS Final Approval of the Settlement and GRANTS Plaintiffs' Motion for Attorney's Fees and an Incentive Award for named Plaintiff Lauren Chaikin.

PROCEDURAL HISTORY

As set forth in the settlement agreement between the parties, Plaintiff Lauren Chaikin filed a County of San Diego Superior Court Complaint against Defendants

lululemon USA, Inc. and lululemon Athletica, Inc. (collectively, "Defendants") on or about August 10, 2012. (Dkt. No. 1 Ex. A; see also Dkt. No. 24-3 at 2.) Plaintiff alleged violations of the Song-Beverly Credit Card Act, Cal. Civil Code § 1747.08, negligence, invasion of privacy, and unlawful intrusion. On October 19, 2012, Defendants filed a motion to dismiss the Complaint. (Dkt. No. 6.) On November 9, 2012, Plaintiff filed an Amended Complaint. (Dkt. No. 8.) Plaintiff alleges Defendants requested and recorded zip codes from their credit card customers in California.

On November 6, 2013, the Court entered an Order preliminarily approving the Parties' class action settlement; certifying the settlement class; appointing class representatives and class counsel; approving the Parties' notice plan; and setting a final approval hearing for Friday, March 14 at 1:30 p.m. (Dkt. No. 25, "Preliminary Approval Order.")

The Court has reviewed and considered: (1) the terms and conditions of the proposed Settlement as set forth in the Settlement Agreement, (Dkt. No. 24-3); (2) the memorandum in support of the motion for an award of attorneys' fees, costs, expenses, as well as a named plaintiff incentive award, (Dkt. No. 28); (3) the points and authorities submitted by Plaintiffs in support of the motion for final approval of the settlement, (Dkt. No. 29); (4) the declarations and exhibits submitted in support of said motions; (5) the entire record of this proceeding, including but not limited to the points and authorities, declarations, and exhibits submitted in support of preliminary approval of the settlement, (Dkt. No. 24); (6) the notice plan providing notice to the Class; (7) the proceedings at the Final Approval Hearing; (8) the absence of any objections or exclusions from the Settlement; (9) this Court's experiences and observations while presiding over this matter, and the Court's file herein; and (10) the relevant law.

Based on these considerations and the Court's findings of fact and conclusions of law as set forth in the Preliminary Approval Order, the Court enters

the following FINDINGS and CONCLUSIONS:

A. The Court has subject-matter jurisdiction over this Action and all acts within this Action, and over all the parties to this Action, including all members of the Class.

B. The Class provisionally certified in the Preliminary Approval Order has been appropriately certified for settlement purposes. Class Counsel and the Class Representative have fairly and adequately represented the Class for purposes of entering into and implementing the Settlement.

C. The notice to putative Class Members was comprised of emailed notice to all Class Members who provided an email address to Defendants and steps taken to provide notice to unknown Class Members. The Court finds that this notice (i) constituted the best notice practicable under the circumstances, (ii) constituted notice that was reasonably calculated, under the circumstances, to apprise the putative Class Members of the pendency of the Action, and of their right to object and to appear at the Final Approval Hearing or to exclude themselves from the Settlement, (iii) was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to be provided with notice, and (iv) fully complied with due process principles and Federal Rule of Civil Procedure 23.

D. The Court has held a Final Approval Hearing to consider the fairness, reasonableness, and adequacy of the Settlement and has been advised that there have been no objections to the Settlement.

E. The Settlement is the product of good faith, arm's-length negotiations between the Class Representative and Class Counsel, on the one hand, and Defendant and its counsel, on the other hand, before the Honorable William C. Pate, a neutral mediator. (See Dkt. No. 29-2 ¶ 3.) The Court has found no evidence of collusion or other conflicts of interest between Plaintiff, Class Counsel, and the Class. In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011).

F. The Settlement, as provided for in the Settlement Agreement, is in all respects fair, reasonable, adequate, and proper, and in the best interest of the Class. In reaching this conclusion, the Court considered a number of factors, including: [1] the strength of Plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class members to the proposed settlement. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

In particular, Plaintiffs and Class Counsel maintain that this action and the claims asserted therein are meritorious and that Plaintiffs and the Class have the evidence to establish a case against Defendants. (Dkt. No. 29-1 at 9.) However, Defendants deny any wrongdoing and argue that the voluntary nature of their customers' provision of information is a valid affirmative defense to Plaintiffs' claims. (Id. at 10.) The Parties acknowledge that protracted litigation over their respective legal positions will entail substantial risk for both sides; expense; uncertainty; and delays. (Id.)

Based on the stage of litigation reached concerning relevant legal issues and the parties' exchange of information through their voluntary discovery process, Plaintiffs and Defendants were fully informed of the legal bases for the claims and defenses herein, and capable of balancing the risks of continued litigation and the benefits of the Settlement. Class Counsel and Defendants' Counsel are highly experienced civil litigation lawyers and are capable of properly assessing the risks, expenses, and duration of continued litigation.

In addition, although the settlement involves credit vouchers rather than a cash distribution, Defendants will provide $25.00 vouchers to 3,509 class members under the Settlement Agreement. (Id. at 2.) Redemption of the credit vouchers will

require no additional purchase, and the credit vouchers will be valid for six months. In addition, the Settlement affords injunctive relief to the Class. Defendants have agreed to comply with the provisions of California Civil Code section 1747.08 in its California retail stores and to refrain from collecting personal identification information except for reasons specifically exempted from section 1747.08. (Id.)

The Court has considered the realistic range of outcomes in this matter, including the amount Plaintiff might receive if she prevailed at trial, the strengths and weaknesses of the case, the novelty and number of the complex legal issues involved, and the risk that Plaintiff and the Class would receive less than the Settlement relief, or nothing, at trial. The relief offered by the Settlement is fair, reasonable, and adequate in view of these factors.

G. No putative Class Members elected to opt out of the Settlement and the Class. As such, all Class Members (as permanently certified below) shall be subject to all of the provisions of the Settlement, the Settlement Agreement, this Order, and final Judgment to be entered by the Clerk of the Court.

On the basis of the foregoing findings and conclusions, as well as the submissions and proceedings referred to above, NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

Certification of Class and Approval of Settlement

1. The Settlement and the Settlement Agreement are hereby approved as fair, reasonable, adequate, and in the best interests of the Class, and the requirements of due process and Federal Rule of Civil Procedure 23 have been satisfied. The parties are ordered and directed to comply with the terms and provisions of the Settlement Agreement.

2. The Court having found that each of the elements of Federal Rules of Civil Procedure 23(a) and 23(b)(3) are satisfied, for purposes of settlement only,

the Class is permanently certified pursuant to Federal Rule of Civil Procedure 23, on behalf of the following persons:

> All persons who used a credit card to purchase merchandise at one of the Affected Locations during the applicable Class Period, and from whom Defendants requested and recorded their ZIP code.

The term "Affected Locations" means the select lululemon showrooms in California where ZIP codes were inadvertently collected by Defendants during the applicable Class Period, specifically, Carmel (now closed), Lake Tahoe, Los Gatos (now closed), San Diego, and Sherman Oaks (now closed).

The "Class Period" is specific to the location of the lululemon showroom at which the credit card transaction occurred, and means the following: (a) August 10, 2011, to August 16, 2012, for credit card transactions at the Carmel, Lake Tahoe, Los Gatos, and Sherman Oaks showrooms; or (b) August 10, 2011, to December 20, 2012, for credit card transactions at the San Diego showroom only.

Excluded from the Settlement Class are all persons who used a debit card, business credit card or a prepaid credit card to purchase merchandise; all persons who only engaged in a transaction that involved shipping, delivery, return or servicing of the purchased merchandise, or for special orders; all persons who opt-out of the settlement in a timely and correct manner; Defendants, its subsidiaries, affiliates, successors, assigns, any entity in which Defendants have a controlling interest and all of their respective officers, directors, and employees; counsel of record and their respective law firms for either of the Parties; and the presiding judge in the Action, his family members and relatives.

3. The Court readopts and incorporates herein by reference its preliminary conclusions as to the satisfaction of Rules 23(a) and (b)(3) set forth in the Preliminary Approval Order and notes again that because this certification of the Class is in connection with the Settlement rather than litigation, the Court need

not address any issues of manageability that may be presented by certification of the class proposed in the Settlement.

4. For purposes of Settlement only, the named Plaintiff is certified as representative of the Class and Class Counsel is appointed counsel to the Class. The Court concludes that Class Counsel and the Class Representative have fairly and adequately represented the Class with respect to the Settlement and the Settlement Agreement.

5. Notwithstanding the certification of the foregoing Class and appointment of the Class Representative for purposes of effecting the Settlement, if this Order is reversed on appeal or the Settlement Agreement is terminated or is not consummated for any reason, the foregoing certification of the Class and appointment of the Class Representative shall be void and of no further effect, and the parties to the proposed Settlement shall be returned to the status each occupied before entry of this Order without prejudice to any legal argument that any of the parties to the Settlement Agreement might have asserted but for the Settlement Agreement.

Release and Injunctions Against Released Claims

6. The Settlement Class, and each Settlement Class Member and Plaintiff, on behalf of themselves, their family members, agents, employees, representatives, attorneys, prior attorneys, insurers, reinsurers, successors, assigns, and heirs, do hereby fully release, relieve, acquit, remise and discharge Defendants, their predecessors, successors, parent companies, subsidiaries, assigns, managing agents, partners, partnership, officers, directors, affiliated and related entities, attorneys, insurance carriers, reinsurance carriers, agents, shareholders, servants, employees, representatives, and all persons, firms, associations, and/or corporations connected with each of them without limitation, from and against the Subject Claims and any claim, demand, obligation, action, cause of action, costs, expenses, losses or liability, for damages and injuries arising out of or related in

any way to the causes of action and/or claims that have been alleged and/or could have been alleged based on the facts alleged in the Action, whether in law or equity, known or unknown, whether real, personal, economic, or otherwise, including claims for attorneys' fees and other damages in connection with the Subject Claims.

The "Subject Claims" include all claims against Defendants, whether known or unknown, relating to the subject matter of this Action, alleged caused by Defendants, including those claims and causes of action set forth in the Complaint or Operative Complaint filed in the Action.

7. The Settlement Class, each Settlement Class Member, and Plaintiff, and each of them, hereby knowingly and voluntarily waive and relinquish all rights and benefits afforded by Section 1542 of the California Civil Code relating to the Subject Claims, and by any comparable state or federal statute, law, right, or rule which may be applicable hereto. Section 1542 provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

Applications for Attorneys' Fees, Costs, and Expenses and Representative Plaintiff Incentive Award

8. The Court has reviewed the application for an award of fees, costs, and expenses submitted by Class Counsel and the exhibits, memoranda of law, and other materials submitted in support of that application. The Court recognizes that Defendants have not opposed the application for an award of attorneys' fees and costs of $155,000.00 to be paid by Defendants. This agreement is in addition to the other relief to be provided to Class Members under the Agreement.

The Court notes that "coupon" settlements generally require increased judicial scrutiny under the Class Action Fairness Act ("CAFA"). In re HP Inkjet Printer Litig., 716 F.3d 1173, 1178 (9th Cir. 2013) (citing CAFA, 28 U.S.C. § 1712(e)). However, CAFA does not define what constitutes a "coupon." See 28 U.S.C. § 1711 (defining various other terms). Although courts have often blurred the distinction between "coupons" and "vouchers," the Court adopts the approach of the line of federal district court cases distinguishing credit vouchers, which require no additional purchase to redeem and therefore operate like cash, from coupons, which provide a discount or subsidy from a larger purchase and thus fall under the restrictions of section 1712(e). See Foos v. Ann, Inc., No. 11cv2794 L(MDD), 2013 WL 5352969 *2 (S.D. Cal. Sept. 24, 2013) (Lorenz, J.) ("The distinction between a coupon and a voucher is that a coupon is a *discount* on merchandise or services offered by the defendant and a voucher provides for *free* merchandise or services.") (emphasis in original); Seebrook v. Children's Place Retail Stores, Inc., No. C 11-837 CW, 2013 WL 6326487 (N.D. Cal. Dec. 4, 2013) (finding a $10.00 certificate was not a coupon because much of the merchandise at defendant's stores was priced for purchase at ten dollars or less and class members did not need to spend money to realize the settlement benefit). Accordingly, the Court does not view this settlement as a "coupon settlement" requiring the application of 28 U.S.C. § 1712.

In addition, the settlement at issue includes injunctive relief, requiring Defendants' continued compliance with California Civil Code section 1747.08. In class actions that provide for injunctive relief, courts frequently use a "lodestar" calculation because there is no way to gauge the net value or any percentage of the settlement. "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." Morales v. City of San Rafael, 96 F.3d 359, 363 (9th Cir. 1996); see also Blum v. Stenson, 465 U.S. 886, 897 (1984) (The lodestar calculation begins with the

multiplication of the number of hours reasonably expended by a reasonable hourly rate.). After computing the "lodestar," the district court may then adjust the figure upward or downward taking into consideration twelve "reasonableness" factors: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Morales, 96 F.3d at 363 n. 8 (quoting Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975)). The hours expended and the rate should be supported by adequate documentation and other evidence; thus, attorneys working on cases where a lodestar may be employed should keep records and time sheets documenting their work and time spent. Hensley v. Eckerhart, 461 U.S. 424 (1983). However, trial courts may use "rough" estimations, so long as they apply the correct standard. Fox v. Vice, 131 S. Ct. 2205, 2216 (2011).

Here, Plaintiff's counsel calculated their lodestar using current billing rates for the five attorneys who worked on this case: $650.00 per hour for 77.4 hours for Gene J. Stonebarger of Stonebarger Law; $500.00 per hour for 1.1 hours for Richard D. Lambert of Stonebarger Law; $350.00 per hour for 47.7 hours for Elaine W. Yan of Stonebarger Law; $650.00 per hour for 31 hours for James R. Patterson from Patterson Law Group, APC; and $500.00 per hour for 124 hours for Brian J. Lawler of Pilot Law, P.C. Plaintiff's counsel asserts the requested rates are reasonable and supports this contention by providing substantial authority that similar hourly rates have been approved by both California state and federal courts. (Dkt. No. 28-2 ¶ 7.) Having reviewed the declarations and legal authorities

provided by Class Counsel, the Court finds that the requested hourly rates charged by counsel are reasonable. Accordingly, Class Counsels' current total lodestar is $154,833.61, plus $5,128.61 in unreimbursed costs. Class Counsel is not seeking a multiplier to increase the fee award in this case. (Dkt. No. 28-1 at 15.)

On the basis of its review of the foregoing, the Court finds that Class Counsel's request for attorneys' fees and expenses is fair, reasonable, and appropriate and hereby awards fees and expenses to Class Counsel in the aggregate amount of $155,000.00, to be paid by Defendants in accordance with the terms of the Settlement Agreement.

9. The Court has reviewed the application for a named plaintiff incentive award submitted by Class Counsel and the exhibits, memoranda of law, and other materials submitted in support of that application. The Court recognizes that Defendants have not opposed the application for an incentive award of $3,000 to be paid by Defendants. This agreement is in addition to the other relief to be provided to Class Members under the Agreement. Given the time and risk expended by Plaintiff to litigate this case on behalf of the class, the Court finds that Plaintiff's request for an incentive award is fair, reasonable, and appropriate and hereby awards an incentive award to Plaintiff in the amount of $3,000.00, to be paid by Defendants in accordance with the terms of the Settlement Agreement.

Other Provisions

10. Neither the Settlement Agreement nor any provision therein, nor any negotiations, statements or proceedings in connection therewith shall be construed as, or be deemed to be evidence of, an admission or concession on the part of the Plaintiff, any Class Member, Defendants, or any other person of any liability or wrongdoing by them, or that the claims and defenses that have been, or could have been, asserted in the Action are or are not meritorious, and this Order, the Settlement Agreement or any such communications shall not be offered or received

in evidence in any action or proceeding, or be used in any way as an admission or concession or evidence of any liability or wrongdoing of any nature or that Plaintiff, any Class Member, or any other person has suffered any damage; *provided, however,* that the Settlement Agreement, this Order, and the final Judgment to be entered thereon may be filed in any action by Defendants or Class Members seeking to enforce the Settlement Agreement or the final Judgment by injunctive or other relief, or to assert defenses including, but not limited to, *res judicata*, collateral estoppel, release, good faith settlement, or any theory of claim preclusion or issue preclusion or similar defense or counterclaim. The Settlement Agreement's terms shall be forever binding on, and shall have *res judicata* and preclusive effect in, all pending and future actions or other proceedings as to Subject Claims and other prohibitions set forth in this Order that are maintained by, or on behalf of, the Class Members or any other person subject to the provisions of this Order.

11. In the event that the Settlement Agreement does not become effective or is canceled or terminated in accordance with the terms and provisions of the Settlement Agreement, then this Order and the final Judgment shall be rendered null and void and be vacated and all orders entered in connection therewith by this Court shall be rendered null and void.

Dismissal; Continuing Jurisdiction

12. The Action and the claims alleged therein are hereby ordered dismissed on the merits and with prejudice, without an award of attorneys' fees or costs to any party except as provided in this Order.

13. Without in any way affecting the finality of this Order and the final Judgment, this Court hereby retains jurisdiction as to all matters relating to the interpretation, administration, and consummation of the Settlement Agreement.

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CONCLUSION AND ORDER

Based on the foregoing, it is hereby ORDERED that:

1) The unopposed motion for attorney's fees, (Dkt. No. 28), is **GRANTED**. The Court awards $155,000.00 to Class Counsel and $3,000.00 to Named Plaintiff Lauren Chaikin;

2) The unopposed motion for final approval of class action, (Dkt. No. 29), is **GRANTED**;

3) This action, including all individual and Class claims resolved in it, is **DISMISSED WITH PREJUDICE**, without an award of attorneys' fees, costs, litigation expenses, or incentive payments to any party except as provided in this Final Approval Order. The Clerk of Court is directed to enter **FINAL JUDGMENT** accordingly.

IT IS SO ORDERED.

Dated: March 14, 2014

HON. GONZALO P. CURIEL
UNITED STATES DISTRICT JUDGE

EXHIBIT F

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY J. IORIO, MAX FREIFIELD, and RUTH SCHEFFER, on behalf of themselves and all others, similarly situated,

Plaintiffs,

v.

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA, INC.,

Defendant.

CASE NO. 05-CV-0633-JLS (CAB)

[CLASS ACTION]

FINAL ORDER: (1) APPROVING CLASS ACTION SETTLEMENT, (2) AWARDING CLASS COUNSEL FEES AND EXPENSES, (3) AWARDING CLASS REPRESENTATIVES INCENTIVES, (4) PERMANENTLY ENJOINING PARALLEL PROCEEDINGS, AND (5) DISMISSING ACTION WITH PREJUDICE

Fairness Hearing
Date: March 3, 2011
Time: 1:30 p.m.
Court: Courtroom 6
Hon. Janis L. Sammartino

Following a hearing on July 1, 2010, ("Preliminary Approval Hearing"), this Court entered its Order (1) Preliminarily Approving Class Action Settlement, (2) Directing Distribution of the Class Action Settlement Notice, (3) Setting a Final Approval Hearing, and (4) Preliminarily Enjoining Parallel Proceedings, (Doc. No. 437) ("Preliminary Approval Order"), preliminarily approving the Settlement entered into by the parties in the above-captioned Action, and scheduling a hearing to determine whether the Settlement is fair, reasonable, adequate, in the best interests of the Class, and free from collusion, whether the Settlement should be finally approved by the Court, and to consider a motion by Class Counsel for an award of attorneys' fees, costs and litigation expenses, and incentives for the Class Representatives ("Fairness Hearing").

The Court has considered: (i) the points and authorities submitted in support of the motion for final approval of the Settlement ("Final Approval Motion"); (ii) the points and authorities submitted in support of the motion for an award of attorneys' fees and costs and litigation expenses, and approval of incentive awards for the Class Representatives ("Fee Motion"); (iii) the declarations and exhibits submitted in support of said motions; (iv) Allianz's separate request for final approval of the Settlement and entry of judgment herein, on the terms and conditions set forth in the Settlement; (v) the *Settlement Stipulation* and *Amendment to Settlement Stipulation*; (vi) the entire record in this proceeding, including but not limited to the points and authorities, declarations, and exhibits submitted in support of preliminary approval of the Settlement, filed June 3, 2010 (Doc. Nos. 424-435); (vii) the full and fair notices provided to the Class of the pendency of this class action, the Settlement, the Fairness Hearing, and Class members' rights with respect to this class action lawsuit and Settlement; (viii) the relatively few members of the class certified by the Court who requested exclusion pursuant to their right to do so at the time of the notices of the pendency of this class action; (ix) the existence of only six objections to the Settlement, out of more than 12,000 Class Members, three of which have been withdrawn by the objector; (x) the absence of any objection or response by any official after the provision of all notices required by the Class Action Fairness Act of 2005, 28 U.S.C. §1715; (xi) the oral presentations of Class Counsel and Counsel for Allianz at the Preliminary Approval Hearing and

Fairness Hearing; (xii) this Court's experiences and observations while presiding over this matter, and the Court's file herein; and (xiii) the relevant law.

Based upon these considerations, the Court's findings of fact and conclusions of law as set forth in the Preliminary Approval Order and in this *Final Order: (1) Approving Class Action Settlement, (2) Awarding Class Counsel Fees and Expenses, (3) Awarding Class Representatives Incentives, (4) Permanently Enjoining Parallel Proceedings, and (5) Dismissing Action with Prejudice* ("Final Approval Order"), and good cause appearing:

IT IS HEREBY ORDERED AND DECREED, as follows:

1. Definitions. The capitalized terms used in this Final Approval Order shall have the meanings and/or definitions given to them in the Settlement, or if not defined therein, the meanings and/or definitions given to them in this Final Approval Order.

2. Incorporation of Documents. This Final Approval Order incorporates and makes a part hereof:

A. the Parties' *Settlement Stipulation*, filed as Exhibit 1 to the Declaration of Robert S. Gianelli in support of final settlement approval, on February 10, 2011, ("Gianelli Declaration"), including all exhibits thereto and the Parties' *Amendment to Settlement Stipulation* filed as Exhibit 2 to the Gianelli Declaration including all exhibits thereto, (collectively, "Settlement Stipulation"), which sets forth the terms and provisions of the proposed settlement ("Settlement");

B. the Court's findings and conclusions contained in its Preliminary Approval Order dated July 1, 2010, 2010, (Doc. No. 437), ("Preliminary Approval Order").

3. Jurisdiction. The Court has personal jurisdiction over the Parties, the Class Members (as defined below at paragraph 4 below), including objectors. The Court has subject matter jurisdiction over this action, including, without limitation, jurisdiction to approve the Settlement, to settle and release all claims alleged in the action and all claims released by the Settlement,

including the Released Transactions (as defined in the Settlement Stipulation), to adjudicate any objections submitted to the proposed Settlement (including objections by Class Members or CAFA officials), and to dismiss this Action with prejudice. All Class Members, by failing to exclude themselves according to the Court's prior orders and the terms of the prior notices of the pendency of the Action, have consented to the jurisdiction of this Court for purposes of this Action and the Settlement of this Action.

4. Definition of the Class and Class Members. The "Class," which is comprised of the "Class Members," is defined by the Court's Order Granting Plaintiffs' Motion for Class Certification, dated July 25, 2006 (the "Class Certification Order"), (Doc. No. 113), and is as follows: All persons who purchased one of the following annuities from Allianz Life Insurance Company of North America or LifeUSA Insurance Company while they were California residents, age 65 years or older, and prior to July 26, 2006: Bonus Maxxx (including Accumulator Bonus Maxxx, Bonus Maxxx 12% and Bonus Maxxx 14%), BonusDex, Bonus Maxxx Elite, BonusDex Elite, 10% Bonus PowerDex Elite and MasterDex 10; subject to the following categories of persons which are specifically excluded from the Class:

A. Officers, directors or employees of Allianz; any entity in which Allianz has a controlling interest; the affiliates, legal representatives, attorneys or assigns of Allianz; any federal, state or local governmental entity; and any judge, justice or judicial official presiding over this matter, and the staff and immediate family of any such judge, justice or judicial officer.

B. Any person who acted as an independent insurance Agent licensed by the State of California and appointed by Allianz in the sale of Annuities that are in the Class.

C. Any person who, under the terms of the previous orders and notices to class members in this Action, timely and properly submitted a written request to be excluded from the Class.

All Class Members are subject to this Final Approval Order and the Final Judgment to be entered by the Clerk of Court in accordance herewith.

5. Findings and Conclusions. The Court finds that the Settlement was not the product of collusion or any other indicia of unfairness, is fair, reasonable, and adequate to the Class in light of the complexity, expense, and likely duration of the litigation (including appellate proceedings), and the risks involved in establishing liability, damages, and in maintaining the Action as a class action, through trial and appeal. The Court finds that the Settlement represents a fair and complete resolution of all claims asserted in a representative capacity on behalf of the Class and should fully and finally resolve all such claims. In support of these findings and conclusions, the Court further finds:

A. There is no evidence of collusion. The proposed settlement, as set forth in the Settlement Stipulation, resulted from extensive arms-length negotiation. The Action was extensively and vigorously litigated, up to the commencement of trial (as further described below), prior to any settlement. Plaintiffs and Allianz engaged in intensive arms-length negotiations, over the course of multiple mediation sessions before a capable and well-respected mediator, Robert J. Kaplan of Judicate West, with extensive experience in mediating complex consumer and insurance cases. Extensive negotiations thereafter resulted in the proposed settlement reflected by the Settlement Stipulation.

B. The Settlement provides for substantial cash payments and/or other monetary benefits to every Class Member, without requiring any Class Member to affirmatively participate in a claims process (although some of the categories of Settlement Relief, by their nature, are dependent upon the Class Member's future policy choices, and require an affirmative election to annuitize, convert an existing annuitization option to a different annuitization option, and/or request partial withdrawal). No portion of the substantial Settlement Relief would be consumed by attorneys' fees, litigation expenses, notice expenses, settlement administration expenses, or the requested incentive awards for the Named Plaintiffs, since such amounts are all separately provided for. The Court has considered the realistic range of outcomes in this matter, including

the amount Plaintiffs might receive if they prevailed at trial, the strength and weaknesses of the case, the novelty and number of the complex legal issues involved, and the risk that Plaintiffs would receive less than the Settlement Relief or take nothing at trial. The amount offered by the Settlement is fair, reasonable, and adequate in view of these factors.

C. Before reaching the proposed settlement, Plaintiffs and Allianz fully and vigorously litigated their claims and defenses in extensive proceedings before this Court and in the appellate courts. A detailed procedural history of this action is set forth in the Court's docket, and is described in the declaration of Robert S. Gianelli and in Plaintiffs' points and authorities submitted in support of preliminary approval. *Inter alia*, Allianz's challenges to the pleadings, class certification, class decertification, summary judgment, motion to "clarify" the Court's orders regarding class certification, motion to modify the class definition, motion to strike various remedies in the prayer for relief, and motion to decertify the Class' punitive damages claim, and the Parties' motions *in limine* and other trial motions, were all heard and decided prior to Settlement. Class certification issues were repeatedly submitted to the Ninth Circuit, through three separate Rule 23(f) petitions filed by Allianz. Trial briefs, witness lists, jury instructions and verdict forms, and deposition testimony designations were all filed and exchanged. All final pre-trial conferences were completed. The Parties reported ready for trial on March 29, 2010, while settlement negotiations involving a mediator were ongoing. Based on the Parties' reported progress made in mediation, a brief continuance to April 1, 2010 was granted. On that morning, with jury selection scheduled to commence, the Parties reported their proposed settlement to the Court.

D. Before reaching the proposed settlement, Plaintiffs and Allianz also conducted extensive discovery, fully completing all fact and expert discovery. More than 40 lay and expert depositions, cumulatively hundreds of hours of testimony, were completed. Plaintiffs took the depositions of 16 key Allianz managerial employees. Plaintiffs defended the depositions of the class representatives (each was deposed twice) and the depositions of 10 absent class members. All seven expert depositions were completed by the parties. Written discovery was no less comprehensive. In addition to extensive requests for production of documents at deposition,

Plaintiffs propounded three sets of inspection demands (cumulatively 56 requests), plus pre-trial interrogatories and requests for admission. Plaintiffs also subpoenaed additional documents from selling agents. Properly authenticated and verified policy data and mailing data was produced for every single individual class member and annuity. Voluminous documentary evidence (including 22 separate batches of records produced by Allianz) was produced, reviewed and analyzed. The class representatives submitted to extensive written discovery from Allianz as well. Plaintiffs responded to three rounds of written discovery, including interrogatories, inspection demands, and requests for admission.

E. Based upon this full litigation of relevant legal issues affecting this litigation, extensive investigation of the underlying facts in discovery, and full preparation by the Parties for the trial in the action, Plaintiffs and Allianz were fully informed of the legal bases for the claims and defenses herein, and capable of balancing the risks of continued litigation (both before this Court and on appeal) and the benefits of the proposed settlement.

F. The Class is and was at all times adequately represented by Named Plaintiffs and Class Counsel, including in entering into and implementing the Settlement, and has satisfied the requirements of *Federal Rules of Civil Procedure,* Rule 23, and applicable law. Class Counsel submit that they have fully and competently prosecuted all causes of action, claims, theories of liability, and remedies reasonably available to the Class Members. Further, both Class Counsel and Allianz's Counsel are highly experienced trial lawyers with specialized knowledge in insurance and annuity litigation, and complex class action litigation generally. Class Counsel and Allianz's Counsel are capable of properly assessing the risks, expenses, and duration of continued litigation, including at trial and on appeal. Class Counsel submit that the Settlement is fair, reasonable and adequate for the Class Members. Allianz denies all allegations of wrongdoing and disclaims any liability with respect to any and all claims alleged by Plaintiffs and the Class, including their claims regarding the propriety of class certification, but agrees that the proposed settlement will provide substantial benefits to Class Members. Allianz considers it desirable to resolve the Action to finally put Plaintiffs' and the Class' claims to rest and avoid, among other

things, the risks of continued litigation, the expenditure of time and resources necessary to proceed through trial and any subsequent appeals, and interference with ongoing business operations.

G. The selection and retention of the Settlement Administrator was reasonable and appropriate.

H. As further addressed below, through the mailing of the Notice of Pendency of Class Action and the Settlement Notice, each in the forms and manners ordered by this Court, the Class has received the best practicable notice of the pendency of this class action, of the Settlement, the Fairness Hearing, and of Class Members' rights and options, including their rights to opt out (at the time of the notices of pendency), to object to the settlement, and/or to appear at the Fairness Hearing in support of a properly submitted objection, and of the binding effect of the Orders and Judgment in this Action, whether favorable or unfavorable, on all Class Members. Said notices have fully satisfied all notice requirements under the law, including the Federal Rules of Civil Procedure and all due process rights under the U.S. Constitution and California Constitution.

I. The response of the Class to this Action, the certification of a class in the Action, and to the Settlement, including Class Counsel's application for an award of attorneys' fees, litigation expenses, and the class representatives' incentives, after full, fair, and effective notice thereof, strongly favors final approval of the Settlement. Out of the 15,626 notices of the pendency of this class action mailed to the members of the class certified by the Court, only 196 valid requests for exclusion (affecting 239 Class Annuities) were received. In response to the more than 16,000 Settlement Notices mailed to the Class, as of February 10, 2011 (five months after the deadline for objecting to the Settlement), just six objections have been received, four of which have been withdrawn by the objectors. These objections have been filed in the Action, considered by the Court, and are fully addressed below.

J. As set forth in the Settlement, Allianz has denied, and continues to deny, any wrongdoing or liability relating to the Action. Allianz does not join in Plaintiffs' Final Approval Motion or Fee Motion or the points and authorities and supporting papers filed in support of said

motions. Notwithstanding, Allianz has separately requested final approval of the Settlement, dismissal of the Action with prejudice, and entry of judgment in the Action, on the terms and conditions set forth in the Settlement.

6. **Prior Notices of Pendency of Class Action and of Right to Opt Out.** The Court hereby finds that the "Notice of Pendency of Class Action" in the Action was mailed to the Class Members, in three stages, on November 13, 2006, December 26, 2006, and October 2, 2007, in the form and manner approved by the Court in its orders of October 11, 2006 (Doc. No.126), December 12, 2006 (Doc. No. 136), and September 21, 2007 (Doc. No. 190). The Court finds that said notices were the best notice practicable, and were reasonably calculated, under the circumstances, to apprise the Class Members of their rights, including their right to opt out of the Class at that juncture, as set forth in the notices, and fully satisfied the requirements of due process and all other applicable provisions of law.

7. **Special Notice of Right to Remain a Class Member or Request Exclusion:** For a small segment of the Class (318 individuals with 353 Class Annuities), identified as potential Class Members only at the settlement stage (and after the foregoing notices of pendency had been mailed), a supplemental notice of their right to opt out was mailed on August 5, 2010. These Class Members were omitted from prior notices due to an administrative error. Said supplemental notice advised these previously omitted Class Members of their right to remain Class Members or to request exclusion from the Class, and the procedures for doing so. Notice was mailed to these previously-omitted Class Members on August 5, 2010, in accordance with the Court's Order dated July 1, 2010, (Doc. No. 438). The Court finds that said notices were the best notice practicable, and were reasonably calculated, under the circumstances, to apprise these previously-omitted Class Members of their right to opt out of the Class at that juncture, as set forth in the notices, and fully satisfied the requirements of due process and all other applicable provisions of law.

8. Requests for Exclusion. After the mailing of the 15,626 notices of the pendency of this class action, and 318 supplemental notices, including specific notice of the Class Members' right (at said times) to exclude themselves from the certified class, timely and valid requests request for exclusion have been received for only 250 Class Annuities (out of more than 16,000). In addition, nine untimely and/or invalid requests for exclusion were received, (six untimely requests and three requests by non-Class Members). A list of those persons and entities who have timely and validly requested exclusion from the Class, according to the terms of the prior notices of the pendency of the class action and the Court's orders regarding said notices, was filed with the Court in support of final settlement approval as Exhibit C to the Settlement Administrator's declaration (**Pl. Ex. 5**, attached to the Gianelli Declaration), and is incorporated herein and made a part hereof. The persons and Annuities on that list are excluded from the class previously-certified by the Court and are therefore not Class Members, shall not be bound by the Settlement or Judgment in the Action, and shall not receive any Settlement Relief.

9. Notice of Settlement. Based upon the declarations of counsel and the Settlement Administrator, the Court finds that the Settlement Notice was mailed on August 5, 2010, in the form and manner agreed to under the Settlement and approved by the Court in the Preliminary Approval Order, (Doc. No. 437). The Settlement Notice provided fair and effective notice to the Class of the Settlement and the terms thereof, including but not limited to those terms related to the Class recovery and the Settlement Relief, the claims and parties released, the binding effect of the Settlement (if approved) on all Class Members, the provisions for attorneys' fees, litigation expenses, administrative expenses, and Named Plaintiffs' incentives, Class Counsel's intention to petition for an award of such fees, expenses, and incentives in the maximum amounts permitted under the Settlement, the date, time, and place of the Final Approval Hearing, and Class members' rights to object to the Settlement and to appear at the Fairness Hearing (on their own or through counsel of their own selection, at their own expense) in support of any timely and validly submitted objection, all as set forth in the Settlement Notice. The Court finds that said form and manner of giving notice, including the steps taken for updating the Class notice mailing database,

researching alternate mailing data, re-mailing any returned notices, and receiving and responding to Class Member inquiries (including the support services to be provided by the Settlement Administrator and Class Counsel), constitute the best notice practicable, and were reasonably calculated, under the circumstances, to apprise the Class Members of the Settlement and Class Members' rights thereunder. The Court further finds that the Class members were afforded a reasonable period of time to exercise such rights.

Based on the foregoing, the prior notices of pendency and the Settlement Notice, in the forms and manners approved by the Court, collectively fully satisfy the requirements of due process, the United States and California Constitutions, the *Federal Rules of Civil Procedure*, and all other applicable provisions of law.

10. Notices Pursuant to 28 U.S.C. § 1715. Based on the requirements of the Settlement Stipulation and the declarations submitted in support of settlement approval, the Court finds that all notices and requirements of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715, have been satisfied. Allianz' provision of CAFA Notices is attested to by the Declaration of Roland C. Goss, (Doc. Nos. 471-1 and 471-2). The proposed settlement was filed on June 3, 2010 (Doc. Nos. 425-1, 425-2). On June 11, 2010, Allianz served the notices required by 28 U.S.C. § 1715(b), (*see* Doc. No. 432), which included a copy of the Stipulation of Settlement and other documents required by CAFA. This Court entered an Order granting the motion for preliminary approval of the proposed settlement on July 1, 2010 (Doc. No. 437). On July 6, 2010, Allianz served a supplemental CAFA Notice of the entry of the Preliminary Approval Order, *see* Declaration of Roland C. Goss, (Doc. Nos. 471-1 and 471-2), including notice of the date, time, and place of the Fairness Hearing set forth therein. Supplemental CAFA Notices were served by Allianz when this Court re-noticed the Fairness Hearing. The final supplemental CAFA Notice was served by Allianz on January 18, 2011, providing a copy of the Amendment to the Stipulation of Settlement and the date, time and place of the Fairness Hearing set for March 3, 2011. More than ninety (90) days have passed since the service of the foregoing June 11, 2010 and July 6, 2010 notices. No objection or response to the Settlement has been filed by any federal or state

official, including any recipient of the foregoing notices. No federal or state official, including any recipient of the foregoing notices, has appeared or requested to appear at the Fairness Hearing.

11. Class Member Objections. As set forth in detail *supra*, full and fair notice of Class Members' right to object to the proposed settlement and to appear at the Fairness Hearing in support of such an objection has been provided in the form and manner required by the Settlement Stipulation, the Court's Preliminary Approval Order, the requirements of due process, and any other applicable law. The deadline for objection expired on September 9, 2010. Six objections have been submitted by the Class Members (all of which have been filed with the Court, (directly by the objector (Doc. Nos. 441, 442, 444-446) and/or by class counsel in support of final settlement approval). Four of these objections (Doc. Nos. 442, 444, 445, 446) have been withdrawn by the objector. The remaining two pending objections are hereby overruled, for the reasons set forth in Plaintiffs' motion for final settlement approval and Allianz' response thereto (Doc. No. 471). No person has requested leave to appear at the Fairness Hearing to object to the Settlement.

12. Final Settlement Approval and Binding Affect. The terms and provisions of the Settlement have been entered into in good faith, and are fair, reasonable and adequate as to, and in the best interests of, the Parties and the Class Members, and in full compliance with all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the California Constitution, and any other applicable law. Therefore, the Settlement is approved. The Settlement, this Final Order and Judgment shall be forever binding on the Plaintiffs and all other Class Members, as well as their heirs, executors and administrators, successors and assigns, and shall have *res judicata* and other preclusive effect in all pending and future claims, lawsuits or other proceedings maintained by or on behalf of any such persons, to the fullest extent allowed by law.

13. Implementation of Settlement. The parties are directed to implement the Settlement according to its terms and conditions. Allianz is authorized, at its sole option and in its sole discretion, in accordance with the terms of the Settlement Stipulation, and without requiring further approval of the Court, to implement the Settlement before the Final Settlement Date (as defined in the Settlement Stipulation).

14. Appeal after Early Implementation. Any Class Member who failed to timely and validly submit his or her objection to the Settlement, in the manner required by the Settlement, the Settlement Notice, and this Court's Preliminary Approval Order, has waived any objection. Any Class Member seeking to appeal from the Court's rulings must first: (a) move to intervene upon a representation of inadequacy of counsel (if they did not object to the proposed settlement under the terms of the Settlement Stipulation); (b) request a stay of implementation of the Settlement; and (c) post an appropriate bond. Absent satisfaction of all three of these requirements, Allianz is authorized, at its sole option and in its sole discretion, to proceed with the implementation of the Settlement, including before the Final Settlement Date, even if such implementation would moot any appeal.

15. Release. The Release set forth in Section VII of the Settlement Stipulation is expressly incorporated herein in all respects, is effective as of the date of the entry of this Final Order, and forever discharges the Releasees from any claims or liabilities released by the Settlement, including the Released Transactions (as those terms are defined in the Settlement Stipulation). This Release covers, without limitation, any and all claims for attorneys' fees and expenses, costs or disbursements incurred by Class Counsel or other counsel representing Plaintiffs or Class Members in this Action, the settlement of this Action, the administration of such Settlement, and the Released Transactions, except to the extent otherwise specified in this Order and the Settlement Stipulation.

16. Permanent Injunction. All Class Members are hereby permanently enjoined from filing, commencing, prosecuting, intervening in, maintaining, participating (as class members or otherwise) in, or receiving any benefits from, any lawsuit (including putative class action lawsuits), arbitration, administrative or regulatory proceeding or order in any jurisdiction asserting any claims released by this Agreement; and from organizing Class Members into a separate class for purposes of pursuing as a purported class action any lawsuit (including by seeking to amend a pending complaint to include class allegations, or seeking class certification in a pending action) asserting any claims released by this Agreement. Nothing in this paragraph, however, shall require any Class Member to take any affirmative action with regard to other pending class action litigation in which they may be absent class members. Allianz has reserved the right to file motions or to take other actions to enforce the release provisions of the Settlement Stipulation and of this injunction, as it may deem appropriate. The Court finds that issuance of this permanent injunction is necessary and appropriate in the aid of the Court's jurisdiction over the Action and its judgments.

17. Enforcement of Settlement. Nothing in this Final Order shall preclude any action to enforce or interpret the terms of the Settlement Stipulation. Any action to enforce or interpret the terms of the Settlement Stipulation shall be brought solely in this Court.

18. Communications with Class Members. Allianz may not be privy to or respond to inquiries from Class Members to Class Counsel regarding the Settlement. However, Allianz has the right to communicate with, and to respond to inquiries directed to it, from Class Members, Annuity Owners, and Annuity Beneficiaries, orally and/or in writing, regarding matters in the normal course of administering the Annuities, including responding to any Complaints received through state agencies, state officials or otherwise, and may do so through any appropriate agents or agencies. If Allianz receives any inquiry relating to the merits of the Settlement or a Class Member's rights or options under the Settlement, from a Class Member or other Person entitled or potentially entitled to Settlement Relief, Allianz shall not respond to the inquiry but shall forward

it to or refer the inquiring party to Class Counsel. However, Allianz may respond to questions from Class Members, Owners and Beneficiaries in the ordinary course of business if such Persons initiate contact with Allianz and ask for information about annuitizations, withdrawals, loans and other Annuity contract terms and benefits.

19. Attorneys' Fees and Litigation Expenses. The Court orders that Class Counsel shall be entitled to an award of reasonable attorneys' fees and litigation expenses incurred in connection with the Action and in reaching this Settlement, to be paid by Allianz at the time and in the manner provided in the Settlement. The Court finds that an award of reasonable attorneys' fees and litigation expenses, as provided for herein, is appropriate based on the contractual agreement to pay such fees and expenses set forth in the Settlement, the private attorney general doctrine and *Code of Civil Procedure* §1021.5, and the Court's equitable powers under California law.

The Court finds to be reasonable, and awards to Class Counsel, attorneys' fees, to be paid as provided in the Settlement, in the total amount of eighteen million dollars and no cents ($18,000,000.00). The Court finds to be reasonable, and awards to Class Counsel, litigation expenses, to be paid as provided in the Settlement, in the total amount of one million three hundred thousand and no cents ($1,300,000.00), subject to any reduction therefrom pursuant to the terms of the *Amendment to Settlement Stipulation.* The Court further orders that in accordance with the Settlement, in addition to the foregoing award of litigation expenses, Allianz shall pay to the Settlement Administrator (and the former administrator, if applicable) all reasonable settlement notice and administration expenses billed thereby in connection with the Settlement, consistent with the contracts that such administrators entered into for the performance of such work and any additional work requested by the Parties jointly.

The award of attorneys' fees and litigation expenses to Class Counsel in this Final Approval Order shall be the sole reimbursement to which Class Counsel is entitled from Allianz or Releasees with respect to the Action, the Settlement, or the administration of the Settlement. Allianz and Releasees shall have no obligation to pay attorneys' fees or costs or litigation expenses

with respect to the Action, the Settlement, or the administration of the Settlement, to any other person, firm, or entity other than as provided in this Final Order. No Named Plaintiff, or any other Class Member, shall have any obligation to pay Class Counsel any further amounts for attorneys' fees, costs, or litigation expenses in the Action. No Named Plaintiff, or any other Class Member, shall be entitled to seek or receive any further payment of attorneys' fees or litigation expenses in connection with the Action from Allianz or any Releasee.

Allianz does not join in Class Counsel's motion for an award of attorneys' fees and litigation expenses. Allianz does not join in requesting and does not necessarily agree with any of the related findings requested by Class Counsel and made by the Court in connection with Class Counsel's motion for an award of attorneys' fees and litigation expenses, including the findings set forth in this paragraph 19 of the Final Order. Notwithstanding, pursuant to the Settlement, Allianz does not oppose an award of attorneys' fees and litigation expenses as provided for by Section VIII of the Settlement.

In support of the foregoing attorneys' fee and litigation expense award, the Court finds as follows:

A. The following hourly billing rates are reasonable in light of the complexity of this litigation, the work performed, Class Counsels' reputation, experience, and competence, and the prevailing billing rates for comparably complex work by comparably qualified counsel in the relevant market:

1. For Robert S. Gianelli, $750 per hour;
2. For Raymond E. Mattison, $750 per hour;
3. For Don A. Ernst, $750 per hour;
4. For Ronald A. Marron, $595 per hour;
5. For Dean Goetz, $595 per hour;
6. For Sherril Nell Babcock, $575 per hour;
7. For Christopher D. Edgington, $575 per hour;
8. For Jully C. Pae, $500 per hour;
9. For Richard R. Fruto, $450 per hour;

10. For Joanne Victor, $450 per hour;

11. For Scott Juretic, $410 per hour;

12. For future attorney time in connection with settlement administration, $410 per hour, as further described below.

The reasonableness of these billing rates is supported by the declarations of these attorneys, the Declaration of Gary Greenfield, by Class Counsel's prior attorneys' fee awards in comparably complex class action insurance litigation in the relevant legal market, by prior attorneys' fee awards in this and other judicial districts for comparably qualified counsel in comparably complex work, and by published industry billing rates, all as set forth in Class Counsel's motion for an award of attorneys' fees, and the supporting declarations and exhibits.

With respect to future attorney time in connection with settlement administration, Class Counsel have provided an estimate in their submitted declarations, based upon administration of past, comparable class action settlements, of the attorney time which will be incurred for this purpose. The Court approves the requested $410 per hour billing rate for such attorney settlement administration work.

B. The $195 hourly billing rate for work performed by certified paralegals is reasonable in light of the experience and qualifications of these non-attorney billers. The reasonableness of this billing rate is supported by a recent fee awards for work performed by these paralegals in the relevant market, in comparable litigation, and the submitted declarations of counsel. Paralegal time, which is normally billed to fee-paying clients, is properly included and reimbursable under a lodestar analysis. *See, e.g., United Steelworkers v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F. 2d 403, 407-08.

C. The time declared to have been expended by Class Counsel and Class Counsel's paralegals, as set forth in Class Counsel's motion for an award of attorneys' fees and supporting declarations, is reasonable in amount in view of the complexity and subject matter of this litigation, and the skill and diligence with which it has been prosecuted and defended, and the quality of the result obtained for the Class.

D. The reasonableness of the fee awarded by this Final Approval Order is supported by a "multiplier" analysis, the second requisite step in a lodestar analysis. A fee multiplier is properly applied if supported by appropriate factors, including the extent of the risks of the litigation and the purely contingent nature of the fee award (factors which are not subsumed in Class Counsel's lodestar amount). Here, Class Counsel consisted of two small firms, Gianelli & Morris and Ernst and Mattison (now Ernst Law Group and Mattison Law Firm), and a sole practitioner, the Law Offices of Ronald A. Marron. Cumulatively, the eleven lawyers working on the file expended in excess of 15,200 hours over a five and one-half year period, plus more than 1,800 paralegal/law clerk hours, and more than $1.49 million in out-of-pocket litigation expenses, a very substantial commitment given the small size of these offices. Class Counsel's ability to recover fees and expenses in this action was purely contingent upon a successful outcome or settlement. The contingency risks presented by this litigation were significant, as analyzed in the preliminary and final approval motions and supporting declarations. *Inter alia,* it is significant that a related nationwide class action (from which the Class here was carved out), asserting certain similar claims and theories, was defeated by Allianz in a jury trial. *Mooney v. Allianz Life Insurance Company of North America*, D. Minn. Case No. 06-545 ADM/FLN. The *Mooney* jury verdict has been reduced to judgment, that judgment has become final, and the *Mooney* class recovered nothing. Risks relating to Class certification are also significant. In various procedural postures, Allianz vigorously challenged class certification throughout this lawsuit, both before this Court (opposing certification, seeking decertification, seeking "clarification" regarding the certified claims, seeking to modify the class definition, and seeking to decertify plaintiffs' punitive damages claims) and in three separate Rule 23(f) petitions for permission to appeal in the Ninth Circuit. Although this Court rejected these challenges to class certification, the Ninth Circuit has not considered any of Allianz' challenges on their merits to date. Despite this risk, plaintiffs litigated this action up to only hours before the commencement of jury selection, when the Settlement was reached.

In view of the foregoing contingency/litigation risk, factors which are not subsumed in Class Counsel's lodestar, the Court finds that application of the requested fee multiplier of 1.70

(which supports an award of attorneys' fees in the full unopposed amount of $18.0 million dollars) is appropriate. Multipliers ranging from 2-4 (and higher) have been approved in comparably complex litigation, under such circumstances. *See, e.g., Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 255 (2001); *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 549 (S.D. Fla. 1988); *Declaration of Geoffrey P. Miller*, 30-35, (*Gianelli Declaration*, **Pl. Ex. 17**). The requested fee multiplier falls on the low end of the reasonable range, based on typical multipliers approved in comparable litigation, as reflected in the foregoing cases and in the *Declaration of Geoffrey P. Miller*, ¶¶30-35, (*Gianelli Declaration*, **Pl. Ex. 17**). The Court approves the requested fee multiplier of 1.70, (thereby limiting the awarded fee to the unopposed amount of $18.0 million).

E. Based upon the valuation of settlement benefits set forth in the *Declaration of Vincent P. Gallagher, Ph.D.*, (*Gianelli Declaration*, **Pl. Ex. 15**), the amount of attorneys' fees approved here by the Court (based on the foregoing lodestar/multiplier), in the amount of $18.0 million, represents 16.48% of the Settlement's "full utilization value" (*i.e.*, the value of the benefits made available to the Class) and 29.95% of the Settlement's "projected utilization value" midpoint, (*i.e.*, the midpoint of the range of the projected value of the benefits which will be received by the Class). The Ninth Circuit has determined that 25% of the recovery is a "benchmark" award for class action cases, and recognized that percentage fees in the range of 20-30% are generally appropriate. *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1029 (9th Cir. 1998); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990). The fee award sought in the present case is reasonable when judged by this standard. The projected utilization value midpoint (29.95%) falls within this generally appropriate range, and the full utilization value (16.48%) falls well below the *Hanlon* benchmark. A fee award at the higher end of the accepted range, under *Hanlon*, is justified here, in part, by the same contingency/litigation risk discussed above. The percentage of recovery here, both with respect to full utilization value and the projected utilization value midpoint, is reasonable in light of prior fee awards (measured as a percentage of recovery) in comparable class action litigation, as set forth in the *Declaration of Geoffrey P. Miller*, ¶¶36-57, (*Gianelli Declaration*, **Pl. Ex. 17**).

F. Out of approximately 12,000 Class members and more than 16,000 Settlement Notices mailed, including explicit notice of the fees and expenses requested here, there is only a single complaint regarding attorneys' fees, (Doc. No. 441). The stated objection ("[a]s usual, the only party benefiting from a class action lawsuit is the attorneys") is refuted by the foregoing percentage of recovery analysis, and the valuation of the direct class relief performed by Dr. Gallagher. Plaintiffs' contend that this complaint is not a valid objection, since there is no stated basis for the objection. Notwithstanding, this isolated objection to the attorneys' fee award is overruled.

G. Based on the declarations of Class Counsel submitted in support of the Fee Motion, the Court finds that Class Counsel have incurred out-of-pocket litigation expenses (paid and un-reimbursed, or currently due) in an amount more than $1.49 million, that said expenses were of a nature typically billed to fee-paying clients, and that said expenses were reasonable and necessary to the prosecution of this action in light of the extent of proceedings both on and off the Court's docket, the complexity of the legal and factual issues in the case, the amount at stake in this litigation, and the vigorous efforts of counsel for all parties herein. The Court finds these expenses are reasonable in this case.

H. The proposed division of awarded attorneys' fees among Class Counsel, as set forth in the *Client Consent for Amendment to Co-Counsel Association and Fee Distribution Agreement*, filed by Class Counsel in support of preliminary settlement approval as Exhibit 12 to the Declaration of Christopher D. Edgington, and as set forth by the declarations of Mr. Mattison and Mr. Ernst in support of final approval, is reasonable and is hereby approved. The attorneys' fees awarded by this Final Approval Order shall be divided among Class Counsel according to said approved division.

20. Named Plaintiffs' Incentives. The hereby Court approves incentives for each of the Named Plaintiffs, Anthony J. Iorio, Ruth Scheffer, and Max Freifield, to be paid by Allianz at the time and in the manner provided in the Settlement. The amount of said incentive shall be the full unopposed amount provided for by the Settlement, *to wit*: twenty-five thousand dollars and no

cents ($25,000.00), for each Named Plaintiff. To the extent that any Named Plaintiff may become deceased prior to payment of these incentives, the Parties shall cooperate to ensure that any sums so awarded are distributed to his or her heirs.

Based on the declarations of Class Counsel and the Named Plaintiffs submitted in support of final settlement approval, Named Plaintiffs have actively participated and assisted Class Counsel in this litigation for the substantial benefit of the Class despite facing significant personal limitations. Each has waived their right to pursue potential individual claims or relief in the Action. Apart from these incentives, the Named Plaintiffs will receive no settlement payments or benefits of any nature other than their share of the Settlement Relief available to the Class generally. These incentives are approved to compensate the Named Plaintiffs for the burdens of their active involvement in this litigation and their commitment and effort on behalf of the Class.

The amount of these incentives shall not affect or reduce the Settlement Relief generally payable to any Class Member, including to Named Plaintiffs, under the Settlement, and shall not affect or reduce the amount of attorneys' fees and litigation expenses payable to Class Counsel under the Settlement and this Final Approval Order.

21. Modification of Settlement Stipulation. The Parties are hereby authorized, without needing further approval from the Court, to agree to and adopt such amendments to, and modifications and expansions of, the Settlement Stipulation, if such changes are consistent with this Order and do not limit the rights of Class Members or any other Person entitled to Settlement Relief under this Agreement.

22. Retention of Jurisdiction. The Court has jurisdiction to enter this Final Order. Without in any way affecting the finality of this Final Order or the Final Judgment, for the benefit of the Class and Allianz, and to protect this Court's jurisdiction, the Court expressly retains continuing jurisdiction as to all matters relating to the Settlement, and the administration, consummation, enforcement, and interpretation of the Settlement Stipulation and of this Final Order, and for any other necessary and appropriate purpose.

Without limiting the foregoing, the Court will retain continuing jurisdiction over all aspects of this case including but not limited to any modification, interpretation, administration, implementation, effectuation, and enforcement of the Settlement, the administration of the Settlement and Settlement Relief, including notices, payments, and benefits thereunder, the Settlement Notice and sufficiency thereof, any objection to the Settlement, any request for exclusion from the certified class, the adequacy of representation by Class Counsel and/or the Class Representatives, the amount of attorneys' fees and litigation expenses to be awarded Class Counsel, the amount of any incentives to be paid to the Class Representatives, any claim by any person or entity relating to the representation of the Class by Class Counsel, to enforce the release and injunction provisions of the Settlement and of this Order, any remand after appeal or denial of any appellate challenge, any collateral challenge made regarding any matter related to this litigation or this Settlement or the conduct of any party or counsel relating to this litigation or this Settlement, and all other issues related to this Action and Settlement.

Further, without limiting the foregoing, the Court retains continuing jurisdiction to:

A. enforce the terms and conditions of the Settlement Stipulation and resolve any disputes, claims or causes of action that, in whole or in part, are related to or arise out of the Settlement Stipulation, this Final Order and Judgment (including, without limitation, determining whether a person is or is not a Class Member, and enforcing the permanent injunction that is a part of this Final Order and Judgment), and determining whether claims or causes of action allegedly related to this case are barred by this Final Order and Judgment;

B. enter such additional orders as may be necessary or appropriate to protect or effectuate this Final Order and Judgment, or to ensure the fair and orderly administration of the Settlement; and

C. enter any other necessary or appropriate orders to protect and effectuate the Court's retention of continuing jurisdiction; provided however, nothing in this paragraph is intended to restrict the ability of the Parties to exercise their rights under the Settlement Stipulation.

23. No Admissions. This Final Order and the Settlement Stipulation, all provisions herein or therein, all other documents referred to herein or therein, any actions taken to carry out this Final

Order and Judgment and the Settlement, and any negotiations, statements, or proceedings relating to them in any shall not be construed as, offered as, received as, used as, or deemed to be evidence of any kind, including in this Action, any other action, or in any other judicial, administrative, regulatory, or other proceeding, except for purposes of obtaining approval of the Settlement and the entry of judgment in the Action, enforcement or implementation of the Settlement, or to support any defense by Allianz based on principles of *res judicata*, collateral estoppel, release, waiver, good-faith settlement, judgment bar or reduction, full faith and credit, setoff, or any other theory of claim preclusion, issue preclusion, release, injunction, or similar defense or counterclaim to the extent allowed by law. Without limiting the foregoing, neither the Settlement Stipulation nor any related negotiations, statements, mediation positions, notes, drafts, outlines, memoranda of understanding, or Court filings or proceedings relating to the Settlement or Settlement approval, shall be construed as, offered as, received as, used as, or deemed to be evidence or an admission or concession by any person, including but not limited to, of any liability or wrongdoing whatsoever on the part of Allianz, to Plaintiffs, or the Class, or as a waiver by Allianz, of any applicable defense, including without limitation any applicable statute of limitation.

24. Dismissal of Action. This action, including all individual and Class claims resolved in it, shall be dismissed on the merits and with prejudice, without an award of attorneys' fees or costs to any party except as provided in this Order.

25. Mattison Law Firm Appointed as Co-Class Counsel. The law firm of Ernst and Mattison, previously appointed by this Court as co-Class Counsel in the Action, has changed names to Ernst Law Group, and one of the class attorneys of record, Mr. Mattison, has formed a new firm, Mattison Law Group. Notice of the prior firm's name change, and association of the Mattison Law Firm in the Action, have been filed with the Court. Based on the Court's prior findings at the time of the certification of the Class, in support of the appointment of Mr. Mattison

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and Ernst and Mattison as co-class counsel, the Court now hereby appoints the Mattison Law Firm as co-class counsel. Allianz has not objected to the appointment of the Mattison Law Firm as co-class counsel.

26. Pursuant to the Settlement, the proposed *Fourth Amended Complaint*, Exhibit A to the Settlement, previously served and filed as Plaintiffs' Exhibit 1 in support of final settlement approval, (Doc. No. 468-2, pp. 106-114), is deemed to be signed by Class Counsel and filed as of the date of this order, superseding any previous complaint in the Action.

IT IS SO ORDERED.

Dated: March 3, 2011

Janis L. Sammartino
Honorable Janis L. Sammartino
United States District Judge