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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

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER:
1. CERTIFYING CLASS FOR PURPOSES OF CLASS ACTION SETTLEMENT;
2. GRANTING FINAL APPROVAL TO CLASS ACTION SETTLEMENT;
3. AWARDING ATTORNEYS' FEES AND COSTS TO CLASS COUNSEL;
4. APPROVING CLASS REPRESENTATIVE INCENTIVE AWARD;
5. AUTHORIZING PAYMENT TO CLAIMS ADMINISTRATOR; AND
6. DIRECTING CONSUMMATION OF SETTLEMENT AND DISTRIBUTION OF SETTLEMENT PROCEEDS

[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

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I. INTRODUCTION AND BACKGROUND

Plaintiff Vanessa Bulcao ("Plaintiff") respectfully submits this memorandum of points and authorities in support of her motion for final approval of a proposed class action wage and hour settlement ("Settlement") with Defendant Taylor Made Golf Company, Inc. d/b/a TaylorMade-adidas Golf Company ("TMaG"). The terms of the proposed Settlement were preliminarily approved by the Court, as reflected in the Preliminary Approval Order ("PAO") issued on December 16, 2016. As set forth herein, 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 ($577,500) pursuant to the Stipulation.[1]

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;

[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. *See*, Declaration of Ross H. Hyslop in support of Final Approval ("Hyslop FA Dec."), ¶ 6, fn. 1.

- 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.

No Class Member has objected to the Settlement, and the only opt out received by PSA was later rescinded by agreement, because it had been erroneously submitted. *See*, Meade Dec., ¶¶ 7-8. 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) 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.

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 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.

II. OVERVIEW OF PROPOSED SETTLEMENT

For purposes of settlement, TMaG agreed to 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"). (Hyslop PA Dec., ¶ 38; Exhibit A). According to TMaG, as of August 25, 2016 **the putative class contained appropriately 685 employees**, consisting of 304 current and 381 former employees. (*Id.* at ¶ 40.) After preliminary approval by this Court, TMaG updated these numbers for PSA, ultimately resulting in the identification of 693 Class Members. (Meade Dec., ¶ 4.)

Under the proposed settlement, TMaG agreed to create a "Settlement Fund" with a maximum possible value of $875,000, *plus* TMaG's portion of any payroll taxes in connection with the wage payments to participating class members. (Hyslop PA Dec., ¶¶ 38(b), 41; Exhibit A). The proposed Settlement Fund submitted for final approval includes:

- a **guaranteed payment of $577,500 – *i.e.*, the Net Settlement Fund** – to those members of the Settlement Class who submitted valid and timely claim forms;
- an attorneys' fees award to Class Counsel of up to $262,500 (*i.e.*, 30% of the settlement fund, which was proposed by Judge Denton (Ret.), in his "mediator's proposal");
- litigation costs payable to Class Counsel of $14,053.57;
- a Class Representative's incentive award payable to Plaintiff Bulcao of up to $5,000;
- a payment to the Labor and Workforce Development Agency for Plaintiff's PAGA claims under California Labor Code §§ 2699 *et seq.* in an amount not to exceed $5,000; and
- claims administration expenses of $9,250.

(Hyslop PA Dec., ¶ 41; Meade Dec., ¶ 12; Hyslop FA Dec., ¶¶ 40-43.)

All Settlement Class Members had the right to object and the right to opt out. (Hyslop PA

Dec., ¶¶ 70, 71; Meade Dec., ¶¶ 7-8; Hyslop FA Dec., ¶¶ 72, 73) No class member objected. (Meade Dec., ¶ 8; Hyslop FA Dec., ¶ 72.) Although TMaG had the right to void the settlement entirely if opt-outs exceeded 10% (Hyslop PA Dec., Exhibit A [¶14m]), there was only one opt-out, which was ultimately rescinded because it was erroneously submitted (Meade Dec., ¶ 7). Thus, there were no opt-outs. (Hyslop FA Dec., ¶ 73.) As such, TMaG has no right to void the settlement.

Through this motion, Plaintiff seeks final approval of this proposed settlement, and entry of the concurrently submitted (proposed) Final Approval Order.

III. DISCUSSION

A. Standards Applicable to Review and Consideration of Class Action Settlements

Generally speaking, settlements are favored because they create efficiency, reduce costs, reduce risks, save resources, and minimize court congestion. *Consumer Advocacy Croup, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 60; *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 277-78. Courts should give due regard to what is otherwise a private consensual agreement between the parties. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. While class action settlement agreements must be approved by trial courts, courts are vested with broad discretion to make the determination that a proposed settlement, taken as a whole, is fair, adequate and reasonable. *Microsoft, supra*, 135 Cal.App.4th at 723; CRC 3.769(a). *See also*, *Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1800. The public interest, and the interests of the proposed class, may indeed be served by each side giving ground in the interest of avoiding litigation. *Wershba*, *supra*, 91 Cal.App.4th at 250.

The court's discretion in reviewing a proposed class settlement includes examination of numerous non-exclusive relevant factors, and the court is free to engage in a balancing and weighing of factors depending on the circumstances of the case. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *Wershba*, *supra*, 91 Cal.App.4th at 245. The court may – in its assessment of fairness, adequacy and reasonableness – consider several factors when considering final approval:

- Strength of plaintiffs' case;
- Risk, expense, complexity and likely duration of further litigation as a class action;

- Risk of maintaining class status throughout the trial;
- Gross amount of the settlement;
- Extent of discovery and investigation completed;
- Stage of the proceedings;
- Experience and views of counsel;
- Presence of a governmental participant; and
- Reaction of the class to the proposed settlement.

The trial court operates under a *presumption* of fairness when the settlement is the result of: (a) arm's length negotiations; (b) the investigation and discovery are sufficient to permit counsel and the court to act intelligently; and (c) counsel are experienced in similar litigation. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *Dunk*, *supra*, 48 Cal.App.4th at 1802. Here, all of the "presumption" factors are met, as explained below and in detail in the Hyslop PA and FA Decs. On final approval, the presumption of fairness is further bolstered where the percentage of objectors is small. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *Dunk*, *supra*, 48 Cal.App.4th at 1802. Here, zero Class Members objected to the proposed Settlement.

Ultimately, the trial court's determination requires a reasoned judgment that is an amalgam of delicate balancing, gross approximations, and rough justice. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *Dunk*, *supra*, 48 Cal.App.4th at 1801. On appeal, when assessing the fairness of a settlement, great weight is accorded to the trial judge's views since that judge is on the firing line and can evaluate the action accordingly. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1145.

Here, a settlement has been reached before class certification, but the parties request certification for purposes of final approval; as such, Plaintiff recognizes that this motion needs to explain why the class should be certified. Nevertheless, even the Supreme Court has concluded that stipulated certifications for purpose of settlement are acceptable when certification requirements are met. *Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 619.

B. <u>Certification for Settlement Purposes Is Warranted</u>

Plaintiff's motion for preliminary approval set forth the standards for class certification

and the reasons supporting provisional certification, and the Court's PAO identified and relied on numerous authorities to conclude that provisional certification for purposes of settlement was appropriate. *See*, *e.g.*, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021; *Duran v. U.S. Bank* (2014) 59 Cal.4th 1, 28-30; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470; *Collins v. Rocha* (1972) 7 Cal.3d 232, 238; *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 809, 815. Both the certification standards, and the facts supporting certification, remain unchanged since the Court granted preliminary approval on December 16, 2016. The Hyslop FA Dec. also includes such facts, and explains the suitability for certification. (Hyslop FA Dec., ¶¶ 8-18, 85-89.)

Plaintiff's motion for preliminary approval articulated numerous factual and legal theories of recovery *susceptible* to common resolution, and the Hyslop PA Dec., ¶¶ 8-16, explained those theories. *See*, *e.g.*, *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327; *Williams v. Superior Court* (2013) 221 Cal.App.4th 1353, 1370. (*See also*, Hyslop FA Dec., ¶¶ 8-18, 85-89.)

In sum, Plaintiff's operative complaint alleges seven causes of action:

- meal period violations (Labor Code §§ 226.7, 512; 8 C.C.R. § 11010);
- rest break violations (Labor Code § 226.7; 8 C.C.R. § 11010);
- failure to properly itemize pay stubs (Labor Code § 226(a));
- failure to pay all wages due on termination (Labor Code § 203);
- improperly obtained wage/general releases (Labor Code § 206.5);
- unfair competition (Business & Professions Code § 17200 *et seq*.); and
- PAGA violations (Labor Code § 2699 *et seq*.).

(Hyslop PA Dec., ¶ 8; Hyslop FA Dec., ¶ 10.)

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

- established and maintained non-compliant meal period and rest break policies;
- did not pay meal period/rest break premiums to employees when otherwise due;
- did not include earned meal/rest premiums in its wage statements;

- did not include meal/rest premiums in the final wages paid to departing employees;
- presented employees with wage releases without paying premium pay.

(Hyslop PA Dec., ¶ 9; Hyslop FA Dec., ¶ 11.)

As explained in Plaintiff's preliminary approval motion papers, and which is also supported by the Hyslop FA Dec., Plaintiff contends that the allegedly unlawful nature of TMaG's various policies support *both* certification and liability. *Brinker*, *supra*, 53 Cal.4th at 1040, 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."[2] Thus, as explained in detail in Plaintiff's preliminary approval papers, and the factual basis for which is specified in the Hyslop FA Dec., certification of Plaintiff's lawsuit is warranted for purposes of final approval. (Hyslop FA Dec., ¶¶ 8-18, 85-89.)

C. <u>Proposed Settlement Terms</u>

As proposed, TMaG will create a "Settlement Fund" of $875,000, plus the employer portion of any payroll taxes. The proposed Settlement Fund submitted for final approval includes:

- a *guaranteed* payment of $577,500 to the Settlement Class;
- an attorneys' fees award to Class Counsel up to $262,500;
- litigation costs payable to Class Counsel up to $14,053.57;
- a Class Representative's incentive award payable to Plaintiff of $5,000;
- a PAGA payment to the LWDA up to $5,000; and
- settlement administration expenses of $9,250.

See, Hyslop PA Dec., ¶¶ 38-41 and Exhibit A; Hyslop FA Dec., ¶¶ 40-43.

In addition, as set forth in the Hyslop PA Dec. and Exhibit A, as well as the Meade Dec. and Hyslop FA Dec., the proposed Settlement has the following characteristics:

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[2] California's meal period and rest break rules are contained in wage orders issued by the IWC "on an industry-by-industry basis." *Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1149; *Brinker*, *supra*, 53 Cal.4th at 1026–1027. TMaG is subject to IWC Wage Order No. 1-2001 (8 C.C.R. § 11010).

- TMaG will pay its portion of any payroll taxes owed.
- TMaG is *required* to pay out the entire Net Settlement Fund.
- This is true common fund settlement, and not a claims made settlement (i.e., one in which the defendant only "funds" as much as necessary to satisfy those who submitted claims).
- TMaG's payment of $577,500 is guaranteed in the sense that, since not all Class Members submitted claims, any residue inures to the benefit of those who did. Stated differently, TMaG receives *no advantage* from a lower claim rate.
- TMaG will not receive any reversion, except accrued interest upon close of settlement administration.
- Given that TMaG has changed several of its policies (likely in response to this lawsuit), the proposed settlement does not mandate more changes.
- TMaG cannot revoke the proposed settlement, because the number of opt-outs did not exceed the 10% threshold.
- Under the proposed plan of allocation:
    - Payments will be made to participating Class Members within fourteen (14) days of final approval, if granted, based on weeks of work for TMaG during the Class Period, such that employees with longer tenure during the Class Period will receive comparatively more money than those with shorter tenures.
    - Those Class Members who were comparatively more likely to experience meal and/or rest period violations (i.e., assembly, shipping, and regulated customer service) will receive larger shares (*i.e.*, a 25% bump).
    - Those Class Members who have already executed wage releases will receive smaller shares (*i.e.*, either 30% or 60% of normal, depending on whether the release signed specifically references this case).
    - The average payout per Class Member is calculated at $2,282.61 ($577,500.00 ÷ 253 Class Members who submitted valid and timely Claims

= $2,282.61). However, those with longer tenures and in certain job categories (*i.e.*, assembly, shipping, and regulated customer service) will receive more money whereas those in other job categories (with more flexible schedules) and those who have already signed releases will receive less. For example, according to PSA, **30 participating Class Members will receive the maximum payment of $4,047.96**, if final approval is granted. (Hyslop FA Dec., ¶ 51.)

- The settlement administrator has sent to each Class Member, via First Class regular U.S. mail using the most current mailing address information for Class Members as provided by TMaG to the Claims Administrator from TMaG's payroll data, a Notice of Pendency and Settlement of Class Action; Settlement Hearing; and Claim, Objection, and Exclusion Procedures ("Notice") (Exhibit 2 to Stipulation of Settlement), together with a Claim Form (Exhibit 3 to Stipulation of Settlement).
- The Parties selected and the Court preliminary approved the use of PSA as the settlement administrator, after all counsel reviewed competing bids. TMaG provided PSA with the most current contact information consisting of Class Member names, addresses, phone numbers, and social security numbers according to TMaG payroll records. PSA updated that information through the National Change of Address ("NCOA") database. For any returned Notice Packets, PSA performed a skip trace to locate such Class Member, if possible. Ultimately, only one Notice Packet was returned as undeliverable.
- Every Class Member had the right to object. However, not one Class Member objected.
- Class Members have the right to be heard at the final approval hearing even if s/he does not submit or file a formal objection.
- Every Class Members had the right to opt out. However, the sole opt-out received was rescinded, because it was submitted erroneously.
- Except in the event of uncashed checks, which will likely be nominal, the

settlement does not provide for any *cy pres* distribution.

- Class Members will only provide limited releases (thereby preserving most common wage and hour claims, other than meal, rest and premium pay claims), and will not be providing general releases.
- The proposed settlement does not cover any claims *outside* the four corners of the operative (i.e., first amended) complaint.

(Hyslop PA Dec., ¶¶ 38-47, 65-71 and Exhibit A; Meade Dec., ¶¶ 3-11; Hyslop FA Dec., ¶¶ 40-73).

D. <u>The Presumption of Fairness Applies</u>

As noted, the trial court operates under a *presumption* of fairness when the settlement is the result of: (a) arm's length negotiations; (b) the investigation and discovery are sufficient to permit counsel and the court to act intelligently; and (c) counsel are experienced in similar litigation. *Microsoft*, *supra*, 135 Cal.App.4th at 723; *Dunk*, *supra*, 48 Cal.App.4th at 1802; *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal.App.4th 734, 743.

As explained in Plaintiff's preliminary approval papers, and supported by the Hyslop PA Dec., ¶¶ 17-37, ¶¶ 99-101, and also in the Hyslop FA Dec., ¶¶ 19-39, 113-115: (a) Plaintiff conducted substantial discovery before this proposed settlement was reached; (b) the negotiations between counsel were extensive and arms-length, culminating in a mediation with the Honorable Steven R. Denton (Ret.); and (c) lead counsel for Plaintiff has substantial experience litigating employment and consumer class actions, and complex business litigation, and believes that the proposed settlement is fair, adequate and reasonable.

E. <u>Other Settlement Considerations</u>

While the "presumption" of fairness applies here, the Hyslop PA and FA Decs. also discuss in detail many of the other *Dunk* factors – i.e., strength of plaintiff's case; risk, expense, complexity and likely duration of further litigation as a class action; risk of maintaining class status throughout the trial; likelihood of success at trial and the range of potential recovery; that no major claims or types of relief have been omitted from the settlement; and the reasons for different treatment of segments of the class, among others. *See*, generally, Hyslop PA and FA Decs. These

factors should all be considered in the context, as stated in *Wershba*, *supra*, 91 Cal.App.4th at 250, that "[c]ompromise is inherent and necessary in the settlement process," and that even where the relief obtained is "substantially narrower" than might what have been achieved through trial and appeal, such is "no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Id*. (quotations omitted). *See also*, *7-Eleven*, *supra*, 85 Cal.App.4th at 1151 ("voluntary conciliation and settlement are the preferred means of dispute resolution," especially "in complex class action litigation").

F. Attorneys' Fees and Costs

If the Court approves this settlement, the work by Plaintiff's counsel will create a common fund of $875,000. Of that common fund, $577,500 represents a *guaranteed* payment to participating Settlement Class Members. As set forth in the Stipulation, Class Counsel seeks attorneys' fees of $262,500 (representing 30% of the class recovery, as proposed by Judge Denton (Ret.) in his mediator's proposal) and costs of $14,053.57, which amounts TMaG has agreed it will not oppose. Plaintiff Bulcao has expressly given written approval for this fee and cost award not only in Stipulation of Settlement but also in her concurrently filed declaration in support of final approval. *See* Hyslop PA Dec., ¶ 97 and Exhibit A; Hyslop FA Dec., ¶ 104, Bulcao Preliminary Approval ("PA") Dec., ¶ 5; and Bulcao Final Approval Dec., ¶¶ 4-5.

Through March 15, 2017 Class Counsel has invested a total of 960.77 hours[3] 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. (Hyslop FA Dec., ¶ 101.) Given the experience of counsel, these hourly rates are reasonable, as another Court in San Diego found in *Carr v. Tadin, Inc.*, 51 F.Supp.3d 970, 980 (S.D. Cal. 2014). In *Carr,* for example, District Judge Sammartino found that the rate of $650 per hour (as opposed to the requested rate of $715/hour)

[3] "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." *Kerkeles v. City of San Jose* (2016) 243 Cal.App.4th 88, 104 (citation and quotations omitted.)

was reasonable for attorney Ronald A. Marron, also in a class case. Mr. Marron was admitted to the California Bar in 1995 and practices in consumer class action bar in San Diego. By contrast, lead counsel for Plaintiff here was admitted in 1990, five years earlier, but maintains a similar class action practice and has comparable experience. (Hyslop FA Dec., ¶¶ 113-115.) The Hyslop FA Dec., ¶¶ 106-112, and Exs. A-F, also references, summarizes, and attaches several orders issued by state and federal courts in San Diego in the last few years which support the hourly rates of Plaintiff's counsel.

The Hyslop PA and FA Decs. provide extensive detail on: (a) the substantial amount of work that was done by Class Counsel to achieve the result, which was far from certain; (b) the risks faced by the Class, and the uncertainties of achieving a favorable result for the Class; (c) the efforts that TMaG undertook to deny the Class any recovery, including its aggressive campaign to actively solicit wage/general releases from Class Members; (d) the breakdown of time and costs; and (e) Class Counsel's significant experience and expertise in such litigation.

If approved, Plaintiff's request for an award of attorneys' fees in the amount of $262,500 would result in a *downward* adjustment of the lodestar, by approximately 54% (*i.e.*, a *negative* multiplier of .54). (Hyslop FA Dec., ¶ 105.) If approved this award of attorneys' fees would result (if applied only to the accrued hours through March 15, 2017 of 960.77) in an effective/blended hourly rate of $273.22/hour. *Id*.

Recently, the California Supreme Court issued an important opinion discussing the trial court's consideration and award of attorneys' fees in a wage and hour class action. In *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, the defendant reached a wage and hour class action settlement that created a common fund of $19 million dollars, from which plaintiff and defendant both agreed that class counsel would request attorneys' fees of not more than $6,333,333.33 (representing one-third of the gross settlement amount). Based on between 4,263 and 4,463 attorney hours expended by plaintiff's counsel, the total lodestar (*i.e.*, reasonable hourly rates multiplied by number of hours reasonably expended) as calculated by counsel was between $2,968,620 and $3,118,620. Using such calculations not only equated to *blended* hourly rates of between $696.36 and $698.77, but a multiplier of 2.03 to 2.13 was also needed to be applied in

order to reach the fee request.[4] Overruling the arguments of objectors, the trial court granted the request for a one-third share of the common fund.

The California Supreme Court affirmed the trial court's ruling, saying:

> [W]e clarify today that use of the percentage method to calculate a fee in a common fund case, where the award serves to spread the attorney fee among all the beneficiaries of the fund, does not in itself constitute an abuse of discretion. **We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.** The recognized advantages of the percentage method – including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation – convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, *supra*, 1 Cal.5th at 503 (emphasis added; citations omitted). *See also*, *Serrano v. Priest* (1977) 20 Cal.3d 25, 35 (when one who expends attorneys' fees creates a common fund from which others derive benefits, the passive beneficiaries may be required, on an equitable basis, to bear a fair share of the litigation costs).

A similar situation to that presented here – where a plaintiff was seeking an award of attorneys' fees as a percentage of a common fund, but due to the agreed "cap" represented a significant downward multiplier when compared to the lodestar – was presented in *Roos v. Honeywell Int'l, Inc.* (2015) 241 Cal.App.4th 1472, 1495. The trial granted the request, and overruled certain objections. Finding no abuse of discretion, the court of appeal said:

> **In our view, a trial court acts appropriately – and it certainly does not abuse its discretion – when it accepts in a common-fund case a cap on fees, even a cap that is phrased in terms of a percentage of the**

[4] In *Goglin v. BMW of N. Am., LLC* (2016) 4 Cal.App.5th 462, 473-474, the Fourth District Court of Appeal, Division One, affirmed an attorneys' fee award in a Song-Beverly action – based on a contested motion for an award of fees – with an hourly rate of $575, despite that fact defense counsel were billing their clients at $275-300/hour. Plaintiff in *Goglin* had requested total attorney fees of $195,297.50 based on 313.5 hours of work, and the trial court – using the $575/hour rate – awarded attorney fees of $180,262.50. Although plaintiff had requested a rate of $625/hour, the trial court adopted $575/hour instead, because plaintiff's counsel had previously represented as part of a motion for a protective order that his rate was $575/hour. No multiplier was requested.

> **recovery, when the application of the cap results in a lower award than would be authorized under the lodestar method.** The lodestar method is, after all, the primary means of calculating the reasonableness of attorney fees in California. When a court applies a cap to reduce this presumed reasonable amount, and thereby increases class relief, we cannot see how anyone is harmed, least of all the class members, including any objectors. Applying such a cap is consistent with and furthers the trial court's responsibilities to protect the class from having to pay excessive fees to class counsel.

Roos, *supra*, 241 Cal.App.4th at 1495 (emphasis added; citation omitted).

Thus, under *Laffitte*, *Serrano*, *Roos*, *Kerkeles* and *Goglin*, among other authorities (including as attached as Exhibits A-F of the Hyslop FA Dec.), Plaintiff's request for final approval of $262,500 in attorneys' fees and $14,056.57 in litigation costs is eminently reasonable and appropriate.

G. <u>Authorization of Payment to the Class Settlement Administrator, PSA</u>

On December 16, 2016, as referenced in the PAO, the Court approved PSA for the purpose of issuing class notice and administering the proposed class settlement, and provisionally approved payment to PSA up to $10,000. As referenced in the concurrently submitted Meade Dec., ¶¶ 2-11, PSA has faithfully performed the work required, including but not limited to receiving all Class Member contact and related information from TMaG; performing estimated calculations of settlement payments; issuing Notice Packets; receiving and tracking Claim Forms; and calculating estimated final settlement payment amounts for Class Members. If the settlement receives final approval, PSA will finalize the calculations and issue settlement checks to each of the 253 Class Members who submitted a timely and valid Claim Form.

For performing the above-referenced work, PSA submitted a "will not exceed" quote of $9,250. *See*, Meade Dec., ¶ 11 and Exhibit B thereto. Thus, PSA has performed the agreed work, as preliminarily approved by the Court in the PAO, and will finish its work if the settlement receives final approval. Accordingly, Plaintiff requests that the Court approve and authorize payment to PSA in the amount of $9,250. *See*, Meade Dec., ¶ 11 and Exhibit B thereto.

H. <u>Plaintiff's Proposed $5,000 Incentive/Enhancement Payment</u>

The Court's tentative ruling on the preliminary approval motion expressed some concern with the proposed $5,000 incentive/enhancement payment to Plaintiff. Some detail here may be

useful. As set forth below, California law supports such a payment to Plaintiff under the circumstances applicable here. Although discretionary, "[i]ncentive awards are fairly typical in class action cases." *Rodriguez v. W. Publishing Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009). While Plaintiff recognizes the discretionary nature of the award, appellate authorities generally support enhancement or incentive awards to named plaintiffs in the amount requested here.

For example, *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1394-95, affirmed incentive awards of $10,000 to each of four class representatives in a consumer class action, where no "employability" risks are present. In so holding, *Cellphone* said that trial courts may make such awards and in so doing may consider: (a) the risk to the class representative in commencing suit, both financial and otherwise; (b) the notoriety and personal difficulties encountered by the class representative; (c) the amount of time and effort spent by the class representative; (d) the duration of the litigation and; (e) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Relevant here, Plaintiff Bulcao's declaration in support of final approval addresses in more detail several of these factors, including the risks and personal difficulties she faced as the class representative (*e.g.*, rescission of a job offer in February 2016 after providing her prospective employer with the contact information for TMaG's HR representative, Ms. Jennie Jagoda, and many months of subsequent unemployment), the considerable time commitment associated with assisting in the prosecution of the case (*e.g.*, estimated at 85-110 hours), and the duration of the litigation (*i.e.*, brought in August 2015 and aggressively litigated through to the present, resulting in a proposed class action settlement). *See*, Bulcao FA Dec., ¶¶ 8, 13-15.

Further, since Ms. Bulcao was a TMaG employee for a comparatively short period of time (three months), and was not employed in one of the positions entitling her to an increased payment amount, her pro-rata share of the settlement is actually very small – only $184.59. (Hyslop FA Dec., ¶¶ 51, 91.) Thus, her "personal benefit" from the Settlement is lacking. Such an amount, standing alone, is hardly sufficient to induce Plaintiff to lead a class action lawsuit. (Hyslop FA Dec., ¶ 91.) No other class member had to respond to discovery or undergo a deposition. In comparison, the average payment per participating Class Member will be $2,282.61, and 30 Class

Members will receive the maximum payment of $4,047.96. (Meade Dec., ¶ 10; Hyslop FA Dec., ¶ 51.) Other appellate and district court cases have also affirmed, or awarded, $5,000 incentive awards. *See*, *e.g.*, *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 551; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412; *Cox v. Clarus Mktg. Grp., LLC*, 291 F.R.D. 473, 483 (S.D. Cal. 2013).

By contrast, incentive awards of high dollar amounts (e.g., $30,000-$50,000) have been criticized where they lack sufficient evidence to support the expenses, risks, and/or quantification of time involved in the litigation (*e.g.*, *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 806–07; *Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal.App.4th 1251, 1272), where class representatives spent a comparatively small amount of time on the litigation (*e.g.*, *Golba*, *supra*, 238 Cal.App.4th at 1272), or where awards are *30 to 44 times more* than the average class payment (*e.g.*, *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 975, rejecting $30,000 payments compared with average payouts to unnamed class members of about $1,000; *Clark*, *supra*, 175 Cal.App.4th at 806–07, rejecting as abuse of discretion enhancements of $25,000 each that gave named plaintiffs at least 44 times the average payout to a class member). Here, none of these concerns are present, and the proposed incentive award of $5,000 is a little more than twice what the average payment per participating Class Member will be ($2,282.61). *See*, Meade Dec., ¶ 10. Finally, the incentive award here was part of the mediator's proposal.

Under the circumstances, and particularly since her "personal benefit" from the Settlement is very low, Plaintiff's proposed incentive award is not "disproportionate to the amount of time and energy expended in pursuit of the lawsuit." *Cellphone*, *supra*, 186 Cal.App.4th at 1395. Thus, Plaintiff respectfully requests that this Court exercise its discretion to approve the $5,000 incentive payment.

I. $5,000 LWDA Payment

For PAGA penalties, the parties have agreed to an LWDA payment not to exceed $5,000. But as indicated by *Nordstrom Commission Cases* (2010) 186 Cal.App.4th 576, 589, the Court has considerable discretion here, including the right to approve a settlement with zero dollars allocated

to PAGA penalties. If the Court determines the LWDA payment is not warranted or justified, the settlement agreement permits the Court to adjust the payment, if any, accordingly.

IV. CONCLUSION

In sum, Plaintiff respectfully seeks the following relief by this motion:

1. Certification of the proposed class for purposes of settlement;
2. Final approval of Plaintiff's proposed class action settlement with TMaG;
3. Final approval/award of attorneys' fees and litigation costs to Plaintiff's counsel;
4. Final approval/award of an incentive/enhancement payment to Plaintiff Bulcao;
5. Authorization of payment to the settlement claims administrator, PSA;
6. Directing consummation of settlement and distribution of settlement proceeds; and
7. Entry of the proposed Final Judgment and Order.

March 17, 2017

Respectfully submitted,

PESTOTNIK LLP

By: s/ Ross H. Hyslop
Ross H. Hyslop
Attorneys for Plaintiff Vanessa Bulcao, on behalf of herself, the proposed class(es), all others similarly situated, and on behalf of the general public