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11 *Attorneys for Plaintiff Rosa Lopez*

12 UNITED STATES DISTRICT COURT
 13 CENTRAL DISTRICT OF CALIFORNIA
 14

15 ROSA L. LOPEZ, individually, and on
 16 behalf of other members of the general
 public similarly situated,

17 Plaintiff,

18 vs.

19 KMART CORPORATION, a Delaware
 20 Corporation; and,
 DOES 1 through 10, inclusive,

21 Defendants.
 22

Case No.: CV 09-1334 CJC (RNBx)

CLASS ACTION

**PLAINTIFF'S NOTICE OF
 MOTION AND MOTION FOR
 AWARD OF CLASS
 REPRESENTATIVE
 ENHANCEMENTS, ATTORNEY'S
 FEES, AND COSTS;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

Date: October 3, 2011
 Time: 1:30 p.m.
 Place: Courtroom 9B

Date Action Filed: January 23, 2009
 Date Removed: February 25, 2009

1 **TO THE COURT, TO ALL PARTIES AND TO THEIR COUNSEL OF**
2 **RECORD:**

3 Please take notice that on October 3, 2011, at 1:30 p.m., or as soon thereafter
4 as counsel may be heard, in Courtroom 9B of the United States Courthouse, located
5 at 411 West Fourth Street, Santa Ana, CA 92701, Plaintiff Rose L. Lopez
6 (“Plaintiff”) will and hereby does move the Court for an order awarding Class
7 Representative Enhancement, Attorney’s Fees, and Costs.

8 Plaintiff seeks an Order including the following relief:


- 9 1. an award of attorneys’ fees in the amount of \$25,913.00 from the common
10 fund settlement;
- 11 2. an award of actual costs;¹
- 12 3. an award of \$1,750 to Plaintiff as a Class Representative Enhancement
13 from the common fund settlement.

14 Plaintiff’s motion is based on this Notice, the attached Memorandum of
15 Points and Authorities, the Declaration of H. Scott Leviant submitted herewith, all
16 other pleadings and papers on file in this action, and any oral argument or other
17 matter that may be considered by the Court.

18
19 Dated: July 15, 2011

Respectfully submitted,

SPIRO MOSS LLP

21
22 By: 
23 Dennis F. Moss
24 H. Scott Leviant
25 Linh Hua

LAW OFFICES OF SAHAG MAJARIAN II
Sahag Majarian II

Attorneys for Plaintiff

26
27
28 ¹ Total actual costs can’t be stated with certainty at this time.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As a result of extensive formal discovery, a full-day mediation and months of lengthy settlement negotiations after the mediation, this proposed wage and hour class action settlement is on behalf of all persons who (1) were employed by Defendant Kmart Corporation (“Defendant”) in the state of California on or after January 23, 2005 to September 30, 2010; and (2) were paid an hourly wage as all or part of their compensation; and (3) are no longer employed by Defendant; and (4) were employed by Defendant for at least one year prior to the end of their employment by Defendant; and (5) were classified by Defendant as “Part Time Associates;” and (6) worked in excess of 29 hours per week for 16 or more consecutive weeks and were not re-classified by Defendant as “Full Time Associates.”

Plaintiff Rosa L. Lopez (“Plaintiff”) and Defendant (Plaintiff and Defendant collectively referred to herein as the “Parties”) reached a proposed class action settlement with a \$103,655.00 claims-made common fund. Claims for unpaid vested vacation wages, inaccurate wage statements, failure to pay all wages upon termination of employment and violation of California’s unfair competition laws are released on a class-wide basis. Both Parties believe the Settlement to be fair and reasonable, resulting from factual and legal analyses and arms-length negotiations with the assistance of an experienced mediator.

On May 31, 2011, the Court issued an Order conditionally certifying a settlement class, preliminarily approving the proposed settlement, approving notice to the class, and setting the hearing for final approval of the proposed class action settlement. Pursuant to *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988 (9th Cir. 2010), Plaintiff made the Motion for an order awarding Class Representative Enhancements, Attorney’s Fees, and Costs available on Plaintiff’s

1 counsel's website for class member review well before the time for submitting
2 objections has expired.

3 Having preliminarily approved the terms of settlement for purposes of
4 providing notice and an opportunity to comment to the class, the \$25,913.00 fee,
5 reasonable actual costs, and the \$1,750 enhancement award that were all negotiated
6 in connection with the mediation that settled this case against Defendant are within
7 the "range of reasonableness." All of the relevant factors weigh in favor of final
8 approval of the terms of that settlement, including those payments. On a
9 percentage or lodestar basis, the fee award sought by this Motion is unquestionably
10 within the range of reasonableness. So, too, are the other components of the
11 settlement reasonable and worthy of final approval, including the class
12 representative enhancements of \$1,750 for a class representatives that initiated the
13 action, provided evidence to support class claims, submitted to a deposition,
14 attended the mediation, and remained in frequent contact with Class Counsel
15 throughout the case.

17 **II. BACKGROUND**

18 **A. Claims**

19 Plaintiff filed the putative class action on January 23, 2009 in Los Angeles
20 County Superior Court against Defendant. (Declaration of H. Scott Leviant
21 ["Leviant Decl"], at ¶ 4.) Defendant removed the action to the United States
22 District Court for the Central District of California on February 26, 2009. (Leviant
23 Decl., ¶ 6.) The Complaint alleges, on behalf of Plaintiff and all individuals
24 employed in non-exempt hourly-paid positions for Defendant in California, that
25 Defendant (1) failed to pay wages for vested vacation time in violation of Labor
26 Code § 227.3; (2) failed to provide accurate itemized wage statements in violation
27 of Labor Code § 226; (3) failed to pay wages due and owing at the time of
28 termination in alleged violation of Labor Code § 203; and (4) violated the Unfair

1 Competition Law (“UCL”) set forth at California Business and Professions Code
2 §§ 17200 *et seq.* (Leviant Decl., ¶ 5.)

3 On September 23, 2010, the Court issued an Order for leave to amend the
4 complaint to narrow the class definition so that the action was focused on
5 individuals classified as Part Time Associates while working for some significant
6 span at a Full Time Associate rate of 30 hours or more per week. (Leviant Decl.,
7 ¶¶ 12-13.) The First Amended Complaint focused exclusively on the failure to pay
8 accrued leave time to this narrowed group of individuals.

9
10 **B. Procedural History**

11 Defendant removed the action to the United States District Court for the
12 Central District of California on February 26, 2009. (Leviant Decl., ¶ 6.)

13 On November 12, 2009, the Court issued a Scheduling Order, setting a Trial
14 for June 8, 2010. (Leviant Decl., ¶ 7.) On November 30, 2009, by way of the
15 Settlement Procedure Selection: Request and Notice, the Parties advised the Court
16 that they would participate in a private mediation. (*Id.*)

17 The Parties diligently exchanged formal discovery. (Leviant Decl., ¶ 8.)
18 Plaintiff propounded four sets of Requests for Production of Documents, three sets
19 of Interrogatories, deposed two of Defendant’s corporate representatives, analyzed
20 documents and responses, and communicated with thousands of putative class
21 members by letter and/or telephone. (*Id.*) Defendant also propounded several sets
22 of discovery and deposed Plaintiff. (*Id.*)

23 On March 1, 2010, good cause appearing, the Court ordered the Trial
24 continued to November 9, 2010 and all trial-related dates were also continued.
25 (Leviant Decl., ¶ 9.) On June 14, 2010, Defendant filed a Motion to Deny Class
26 Certification with a continued hearing date of October 18, 2010. (*Id.*) On June 16,
27 2010, Plaintiff filed a Joint Stipulation to compel Defendant’s responses to
28 Requests for Production, Set Three. (*Id.*) By Court Order, the Parties filed

1 supplemental briefing, the Parties appeared for hearing on July 20, 2010, and
2 Plaintiff's motion was denied. (*Id.*)

3 On September 23, 2010, the Court issued an Order for leave to amend the
4 complaint to narrow the class definition, set a class certification briefing schedule
5 with a hearing date of February 7, 2011, and the Trial was continued to May 10,
6 2011. (Leviant Decl., ¶ 13.) On September 28, 2010, Plaintiff filed a First
7 Amended Complaint. (*Id.*) Prior to participation in the mediation, Defendant
8 provided Plaintiff with preliminary mediation data regarding class size, average
9 wage information, and vacation accrual calculation policies. (*Id.*)

10 On September 29, 2010, the Parties participated in a private mediation with
11 the Honorable Diane Wayne (Ret.), a mediator experienced with wage and hour
12 class/representative mediations. (Leviant Decl., ¶ 14.) The Parties were not able to
13 resolve the case at the conclusion of that mediation; however, they continued
14 months of lengthy settlement negotiations after the mediation session concluded.
15 (*Id.*)

16 By November 17, 2010, the Parties agreed to all material terms of a proposed
17 settlement of Plaintiff's class allegations, and Plaintiff filed a Notice of Proposed
18 Class Action Settlement. (Leviant Decl., ¶ 15.) The Parties continued to negotiate
19 settlement terms through April 2011. (*Id.*)

20 The mediation data, combined with discussions between the Parties' counsel,
21 yielded valuable information to the Parties in terms of class certification issues,
22 ultimate liability and the amount of damages in controversy. (Leviant Decl., ¶ 16.)
23 Accordingly, the Parties are sufficiently familiar with the facts of this case to
24 warrant settlement now and have agreed to this arms-length Settlement pursuant to
25 the terms set forth herein. (*Id.*)

26 The Parties recognize that the issues presented in the Action are likely only
27 to be resolved with extensive and costly pretrial proceedings and that further
28 litigation will cause inconvenience, distraction, disruption, delay and expense

1 disproportionate to the potential benefits of litigation and have taken into account
2 the risk and uncertainty of the outcome inherent in any litigation. (Leviant Decl., ¶
3 17.)

4 Based on their own independent investigation and evaluation, Class Counsel
5 is of the opinion that the Settlement documented by this Stipulation is fair,
6 reasonable, and adequate, and in the best interest of the Settlement Class in light of
7 all known facts and circumstances, including the risk of significant delay, the risk
8 that the Settlement Class will not be certified by the Court or that it will be
9 decertified, the defenses asserted by Defendant to the merits and the class action
10 status of this action, the numerous potential appellate issues, and the risk posed by
11 current economic conditions. (Leviant Decl., ¶¶ 20-28.) Based upon their
12 investigations, Class Counsel determined that the scope of the class originally
13 proposed was overly broad and required revision to conform with discovered facts.
14 The revised class impacts a class of approximately 909 individuals. (*Id.*)

15 While Defendant specifically denies any liability in the Action, Defendant
16 agreed to enter into this settlement to avoid the uncertainty, cost and business
17 disruption associated with defending the Action. To the best knowledge of the
18 Parties and their respective counsel, other than this Action, there are no other like
19 claims asserted or filed by Class Members. (Leviant Decl., ¶ 41.)

20 Defendant denies that it engaged in any violations of the law in connection
21 with its wage-and-hour practices, and further denies that it has any liability or
22 engaged in wrongdoing of any kind associated with the claims alleged in the Action
23 by Plaintiff or any Class Member. (Leviant Decl., ¶ 24.) Defendant contends that
24 it at all times complied with all California wage-and-hour laws in connection with
25 the employment of Plaintiff and the Class Members. (*Id.*)

26 On May 31, 2011, this Court issued an Order conditionally certifying a
27 settlement class, preliminarily approving the proposed settlement, approving notice
28

1 to the class, and setting the hearing for final approval of the proposed class action
2 settlement.

3
4 **III. SUMMARY OF SETTLEMENT TERMS**

5 The full terms of the settlement are set forth in the Settlement Agreement.
6 The primary material terms are as follows:

- 7 (a) The Settlement Class includes all persons who (1) were
8 employed by Defendant in the state of California on or after
9 January 23, 2005 to September 30, 2010; and (2) were paid an
10 hourly wage as all or part of their compensation; and (3) are no
11 longer employed by Defendant; and (4) were employed by
12 Defendant for at least one year prior to the end of their
13 employment by Defendant; and (5) were classified by Defendant
14 as “Part Time Associates;” and (6) worked in excess of 29 hours
15 per week for 16 or more consecutive weeks and were not re-
16 classified by Defendant as “Full Time Associates.”
- 17 (b) Defendant will pay up to \$103,655.00 (the “Maximum
18 Settlement Fund”) on a claims-made basis.
- 19 (c) The Settlement Fund will be allocated and disbursed to the
20 Settlement Administrator, to Plaintiff as an enhancement award,
21 to Class Counsel for fees and costs, and to Settlement Class
22 Members as individual payments.
- 23 (d) Class Counsel will not seek an amount greater than 25% of the
24 Maximum Settlement Fund for attorneys’ fees.
- 25 (e) Class Members who submit valid Claim Forms will be eligible
26 to receive Individual Settlement Payments on a pro-rata basis
27 based on their Personal Day Exposure Estimate from
28 Defendant’s records.

- 1 (f) Subject to Court approval, Defendant will pay Plaintiff an
2 enhancement award of \$1,750.00.
- 3 (g) Subject to the Court's approval, the Claims Administrator will
4 be paid expenses currently estimated at \$14,000.
- 5 (h) Subject to the Court's approval, Defendant will pay Class
6 Counsel's attorneys' fees equal to 25% of the Settlement Fund
7 (\$25,913.00) and actual costs in litigating this action.
8

9 **IV. DISCUSSION**

10 While Plaintiff will identify the core authority supporting fee awards, the
11 extensive discussion that usually accompanies such motions is unnecessary here.
12 That is because the result, while excellent given the risks, is simply too small to
13 reimburse the lodestar of Plaintiff's counsel. In fact, the lodestar attributable just to
14 Mr. Leviant, the attorney primarily responsible for this matter and settlement,
15 exceeds \$100,000 (which is the approximate size of the settlement fund). Other
16 attorneys also performed work on this matter. Thus, the request for 25% of the
17 fund to reimburse fees, or \$25,913.00, is so far within the range of reasonableness
18 that expansive discussion is not essential.

19 **A. The Legal Standard for Attorneys' Fee Awards**

20 As a threshold matter, it must be determined "whether state or federal law
21 controls the method of calculating an attorneys' fee awarded" *Mangold v. Cal.*
22 *Public Util. Commission*, 67 F.3d 1470, 1478 (9th Cir. 1995). In deciding the
23 present motion, California law controls.

24 When federal courts sit in diversity and are presented with an issue about
25 which there is uncertainty as to whether it concerns "substantive" or "procedural"
26 law, the Erie Doctrine applies. *See generally, Erie R.R. v. Tompkins*, 304 U.S. 64,
27 58 S. Ct. 817 (1938) (establishing familiar axiom that federal procedural law and
28 state substantive law are to be applied in federal diversity actions). It is well-

1 established that the law concerning the assessment and approval of class action
2 attorneys' fees is substantive law. *Mangold*, 67 F.3d. at 1479 (“The method of
3 calculating a fee is an inherent part of the substantive right to the fee itself, and a
4 state right to an attorneys' fee reflects a substantial policy of the state”).

5 Accordingly, because the law concerning attorneys' fees is substantive law, and
6 because California law provides the underlying rules of decision for the operative
7 allegations, California law governs this fee motion.

8 California and the Ninth Circuit, and all federal courts, for that matter, use
9 similar criteria to assess a fee request attendant to a motion for final approval,
10 including:² (i) the results achieved on behalf of the class; (ii) class counsel's
11 experience, reputation and ability; (iii) the time and labor required by the litigation;
12 (iv) whether class counsel was precluded from other work; (v) the complexity of
13 the litigation; and (vii) the contingent nature of the litigation. *See Serrano v.*
14 *Priest*, 20 Cal. 3d 25, 49 (1977); *accord Vizcaino v. Microsoft Corp.*, 290 F.3d
15 1043, 1048-50 (9th Cir. 2002) (identifying similar criteria); *see also* Herr, MANUAL
16 FOR COMPLEX LITIGATION, FOURTH, § 21.71 at 524-27 (2008) (survey of federal
17 criteria for approval substantially similar to California criteria).

22
23 ² “Neither in *Serrano*[] nor in any other opinion has our Supreme Court
24 carved the factors used in that case into concrete or barred consideration of other
25 relevant and nonduplicative factors.” *Lealao v. Beneficial California, Inc.*, 82 Cal.
26 App. 4th 19, 39 (2000). “Moreover, two of the factors employed by the trial judge
27 in *Serrano*[] – the fact that the plaintiffs' attorneys received public and charitable
28 funding for the purpose of bringing such lawsuits, and the fact that the monies
awarded would not inure to the benefit of individual attorneys but to the
organizations that employed them [citation omitted] – would be *inapplicable* in
most cases.” *Id.* at n.9. The instant case is among that majority of cases to which
those two exceptionally case-specific criteria don't apply. However, the remaining
Serrano factors are applicable here, and tend to be repeated throughout state and
federal authorities.

1 **B. The Fee Award Is Reasonable and Should Receive Final Approval**

2 **1. Excellent Results Were Achieved on Behalf of the Class**

3 The benefit achieved on behalf of class members defines a primary yardstick
4 against which any fee motion is measured. *See Serrano*, 20 Cal. 3d at 49; *accord*
5 *Vizcaino*, 290 F.3d at 1048. One of the most straightforward measures of a
6 settlement's success from the Plaintiff's perspective is the average amount
7 available to each class member from the settlement fund. For the members of the
8 class, each person is receiving, in gross amount, about 75% of the leave pay that
9 they would have accrued were they classified as full-time, rather than part-time
10 employees. (Leviant Decl., at ¶ 25.) Since it is far from certain that they would be
11 entitled to any such benefit accrual, the result is excellent.

12 How class members respond to a class action settlement is typically
13 addressed in concert with courts' assessments of a settlement's overall benefit to
14 class members. *See generally, Vizcaino, supra*. State and federal courts alike take
15 the measure of a settlement's "fairness" with reference to the class members'
16 reaction, and specifically the extent to which class members object, and through
17 their objections imply a settlement's unfairness. *See, e.g., 7-Eleven Owners for*
18 *Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1152-53 (2000) (only
19 nine objectors from a class of 5454 was an "overwhelmingly positive" fact that
20 supported approval of the settlement); *Reynolds v. National Football League*, 584
21 F.2d 280 (8th Cir. 1978) (16 objectors out of 5400 strongest evidence of no
22 dissatisfaction with settlement among class members); *American Eagle Ins. Co. v.*
23 *King Resources Co.*, 556 F.2d 471, 478 (10th Cir. 1977) (only one objector "of
24 striking significance and import"). Here, the Court will receive information about
25 Class Member exclusion rates at the time it determines whether to finally approve
26 the settlement. This factor cannot be fully discussed by Plaintiff at the time this
27 Motion was prepared.
28

1 **2. The Experience, Reputation, and Ability of Class Counsel**
2 **Weigh in Favor of the Fee Award**

3 California law also recognizes the “skill and experience of attorneys” as
4 appropriate criteria for evaluating a fee motion. *Flannery v. California Highway*
5 *Patrol*, 61 Cal. App. 4th 629, 647 (1995); accord *In re Rent-Way Sec. Litig.*, 305 F.
6 Supp. 2d 491 (W.D. Pa. 2003) (“skill and efficiency of counsel” among fee motion
7 criteria); *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555 at *64 (C.D. Cal.
8 June 10, 2005) (Considering “the quality of Class Counsel’s effort, experience and
9 skill”). Class Counsel has had substantial experience with the causes of action here
10 (Leviant Decl., at ¶¶ 30-33) and has regularly litigated employment law class
11 actions. Class Counsel has specific experience with the process of certifying and
12 resolving vacation pay calculation class actions. (Leviant Decl., at ¶ 30.)

13
14 **3. The Time and Labor Required by the Litigation Justifies the**
15 **Requested Fee**

16 California and federal law also look to the time and labor required in
17 connection with the litigation and settlement of a class action for which final
18 approval is sought. See *Serrano*, 20 Cal. 3d at 49, accord *Vizcaino*, 290 F.3d at
19 1048-50. Through the filing of this Motion, Class Counsel devoted well over 200
20 hours of attorney time to this matter. (Leviant Decl. ¶ 37.) The “time and labor”
21 criterion weighs in favor of an award of the requested fees.

22
23 **4. Class Counsel Was Precluded from Other Employment**

24 Another of the criteria for the evaluation of a preliminarily approved fee
25 request is whether the settled litigation resulted in Class Counsel’s foregoing other
26 employment. *Serrano*, 20 Cal. 3d at 49; accord *In re Public Serv. Co.*, 1992 U.S.
27 Dist. LEXIS 16326 at *9 (S. D. Cal. July 28, 1992) (the opportunity cost of being
28 precluded from representing other clients in other cases “weighs in favor of an

1 award of one-third of the common fund”). Here, Class Counsel was precluded
2 from other employment. (Leviant Decl., at ¶ 34.) Over the course of the case, no
3 fewer than three attorneys at Spiro Moss litigated this matter and four total
4 attorneys worked on this matter. Dennis Moss, Gregory Karasik, H. Scott Leviant
5 and Linh Hua, worked on this matter extensively during different periods of time,
6 precluding their ability to work on other cases. (Leviant Decl., at ¶ 37.) Class
7 Counsel’s preclusion from other employment supports the requested fee award.
8

9 5. The Complexity of the Legal and Factual Issues

10 California law recognizes that the litigation’s general complexity and
11 “difficulty of the questions involved, and the skill in presenting them” are properly
12 considered. *Serrano*, 30 Cal. 3d at 49, *accord Wershba v. Apple Computer*, 91 Cal.
13 App. 4th 224, 245 (2001). Discovery produced information requiring substantial
14 adjustments to the definition and scope of the class. (Leviant Decl., ¶¶ 10-11.)
15 Otherwise, complexity was fairly low here, though the fee is so reasonable that the
16 absence of this factor is irrelevant.
17

18 6. Class Counsel Assumed Risk

19 The novelty and challenges presented by a class action, as well as the
20 corresponding risk that the class members and class counsel will be paid no
21 recovery or fee, is properly evaluated in connection with a fee motion. *See*
22 *Serrano*, 20 Cal. 3d at 49; *accord Vizcaino*, 290 F.3d at 1050-51 (multiplier applied
23 to lodestar cross-check reflects risk of non-recovery).³
24

25 _____
26 ³ Indeed, so pervasive is the risk criterion, comprising as it does a case’s
27 basic demands and challenges, that the cross-check multiplier is referred to as the
28 “risk multiplier.” *Vizcaino* at 1051. “This mirrors the established practice in the
private legal market of rewarding attorneys for taking the risk of nonpayment by
paying them a premium over their normal hourly rates for winning contingency
cases.” *Id.* (quoting *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291,
1299 (9th Cir. 1994)). *And see In re Chiron Corp. Sec. Litig.*, 2007 U.S Dist.

1 Ninth Circuit and California state courts regard circumstances in which class
2 counsel's work is wholly contingent as a factor weighing in favor of approving a
3 negotiated fee award that approximates market rates. *Ketchum v. Moses*, 24 Cal.
4 4th 1122, 1132-33 (2001).

5 As discussed above, the major cause of action in this matter – a factual and
6 legal issue regarding the classification of class members as part-time rather than
7 full-time employees – presented substantial risk for Class Counsel due to the binary
8 nature of the outcome following analysis of the ambiguous handbook language
9 Ultimately, a good result, eliminating risk, was obtained for Class Members.

11 7. The Fee Award is Reasonable Under the Common Fund 12 Doctrine

13 Courts in the Ninth Circuit and California generally use the “percentage
14 method” rather than the lodestar approach when awarding attorneys’ fees in a
15 common fund settlement. *See* 7 Witkin, B.E., CALIFORNIA PROCEDURE (2007
16 Supp.) §§ 255-261 at 236-241 (describing prevalence of percentage method under
17 California law); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“[A] litigant
18 or a lawyer who recovers a common fund for the benefit of persons other than
19 himself or his client is entitled to a reasonable attorney’s fee from the fund as a
20 whole”); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989)
21 (Patel, J.) (endorsing percentage method). *See generally*, *Serrano*, 20 Cal. 3d at 25;
22 *accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

23 The fee award requested here is based upon the Ninth Circuit’s 25 percent
24 “benchmark” analysis. The Settlement Fund obtained through the efforts of
25 Plaintiffs’ counsel is \$103,655.00. Adhering to the benchmark established by the
26 Ninth Circuit, Plaintiff's counsel has agreed to accept no more than \$25,913.00 in

27 _____
28 LEXIS 91140 at *24 (N.D. Cal. 2007) (C.D. Cal. April 1, 2008) (noting instability
in relevant law as valid consideration in percentage fee award analysis).

1 fees. (Leviant Decl., ¶ 19(h).) But perhaps most importantly, the proposed
2 attorneys' fees were disclosed to the Class Members in the Notice issued to Class
3 Members. (Leviant Decl., at ¶ 18.)
4

5 **8. A Lodestar Analysis Confirms The Reasonableness of The**
6 **Requested Fee Award**

7 Despite the widely recognized limitations of the so-called "lodestar" method,
8 California and federal courts recognize the utility of a lodestar "cross-check."
9 *Lealao*, 82 Cal. App. 4th at 46. A lodestar "cross-check" analysis typically
10 happens in three steps. *Cundiff v. Verizon California*, 167 Cal. App. 4th 718
11 (2008), *accord Vizcaino*, 290 F.3d at 1047. First, a trial court must determine a
12 baseline guide or "lodestar" figure based on the time spent and reasonable hourly
13 compensation for each attorney involved in the case. *Serrano* at 48. Second, the
14 court sets a reasonable hourly fee to apply to the time expended, with reference to
15 the prevailing rates in the geographical area in which the action is pending. *Bihun*
16 *v. AT&T Information System*, 13 Cal. App. 4th 976, 997 (1993) (16 years ago,
17 affirming a \$450 per hour rate for a Southern California litigation attorney).
18 Finally, a "multiplier" of the base lodestar is set with reference to the factors
19 described in detail throughout this brief. Across all jurisdictions, multipliers of up
20 to four are frequently awarded in common fund cases. NEWBERG, §14.03 at 14.
21 Often, multipliers of greater than four are warranted.

22 Here, Class Counsel has billed well in excess of 200 hours, at rates
23 commensurate with experience and the prevailing rates among defense and
24 plaintiffs' firms that regularly litigate wage and hour class actions. (Leviant Decl.,
25 ¶¶ 30-37.) Looking only at Mr. Leviant's work in this matter, the lodestar
26 calculation is as follows:
27
28

| Attorney | Hours | Rate | Total |
|-------------------------|-------|---------------|---------------------|
| H. Scott Leviant | 198.4 | \$550 | \$109,120.00 |
| H. Scott Leviant (est.) | 15 | \$550 | \$8,250.00 |
| | | Total: | \$117,370.00 |

The figures for estimated (“est.”) time above reflect the best estimates of Class Counsel, based on their experience and the settlement class size, for the time that will be expended by Class Counsel between the filing of this motion and the hearing of Plaintiff’s Motion for Final Approval. This lodestar figure exceeds the requested fee, imposing a massive “negative” multiplier (a multiplier less than 1, but not a negative number in the mathematical sense). Here, the negative multiplier needed to align the negotiated fee award with the attorney hours expended is far below the multipliers of three or more routinely approved in class actions.

Accordingly, the lodestar cross-check affirms that the fee award that has been preliminarily approved does in fact fall easily within the range of reasonableness.

California and Federal courts alike commonly adjust basic lodestar rates to reflect the fair market value of the attorney’s services. *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 579 (2004); *and see Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) (under California law, multipliers typically range from 2 to 4); *accord Vizcaino* (3.65 multiplier), *but see, e.g., Steiner v. American Broadcasting Corp., Inc.*, 2007 U.S. App. LEXIS 21061 (9th Cir. 2007) (affirming 6.85 multiplier); *Wilson v. Bank of Am Natl. Trust & Savs. Assn.*, No. 643872 (Cal. Sup. Ct. Aug. 16, 1982) (multiplier of 10); *Glendora Comm. Redev. Agency v. Demeter*, 155 Cal. App. 3d 456, 465 (1984) (affirming multiplier of 12, and expressly rejecting argument that fee was either exorbitant or unconscionable).

Here, the negative multiplier needed to align the negotiated fee award with the attorney hours expended is considerably less than those higher multipliers that have been approved under California law. Accordingly, the lodestar cross-check

1 affirms that the fee award that has been preliminarily approved does in fact fall
2 within the range of reasonableness.

3
4 **9. Important Public Policies Are Advanced by Awarding**
5 **Reasonable Fees to Skilled Class Counsel**

6 Wage and hours laws “concern not only the health and welfare of the
7 workers themselves, but also the public health and general welfare.” *California*
8 *Grape Etc. League v. Industrial Welfare Com.*, 268 Cal. App. 2d 692, 703 (1969).
9 California’s overtime laws “are to be construed so as to promote employee
10 protection.” *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 340
11 (2004) (citing *Ramirez v. Yosemite Water, Inc.*, 20 Cal. 4th 785, 794 (1999)).⁴
12 Courts have also long acknowledged the importance of class actions as a means to
13 prevent a failure of justice in our judicial system. *Linder v. Thrifty Oil Co.*, 23 Cal.
14 4th 429, 434-435 (2000) (citing *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 703-704
15 (1967)). As a practical matter, therefore, privately initiated class actions are the
16 primary mechanism for enforcement of California’s labor code protections.

17
18 **10. Fees Should Based Upon the Benefit Provided to the Class,**
19 **Not the Benefits Claimed by the Class**

20 In 1980, the United States Supreme Court declared that the availability of a
21 benefit, whether or not claimed, is still a benefit created through the efforts of class
22 counsel and the class representatives:

23 To claim their logically ascertainable shares of the judgment fund,
24 absentee class members need prove only their membership in the
25 injured class. Their right to share the harvest of the lawsuit upon proof

26
27 ⁴ Mr. Dennis Moss, a partner at Spiro Moss LLP, was responsible for the
28 exceptional result in *Ramirez*. Mr. Moss and Mr. Spiro contributed amicus briefing
in the *Sav-on* matter.

1 of their identity, whether or not they exercise it, is a benefit in the fund
2 created by the efforts of the class representatives and their counsel.
3 *Boeing*, 444 U.S. at 480. Since *Boeing*, appellate courts have repeatedly applied
4 the *Boeing* formulation and found reversible error where trial courts failed to do so.
5 For example, the Ninth Circuit said:

6 In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81, 100 S.Ct. 745,
7 750-51, 62 L.Ed.2d 676 (1980), the Court concluded that the attorneys
8 for a successful class may recover a fee based on the entire common
9 fund created for the class, even if some class members make no claims
10 against the fund so that money remains in it that otherwise would be
11 returned to the defendants. In *Six (6) Mexican Workers v. Arizona*
12 *Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990), we held likewise,
13 and indicated that our benchmark for an attorneys' fee award in a
14 successful class action is twenty-five percent of the entire common
15 fund.

16 *Williams v. MGM-Pathé Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997)
17 [attorney fee award should have been based on a total recovery fund of \$4.5
18 million, even though only \$10,000 in claims were submitted]; *see also*, *Waters v.*
19 *Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295 (11th Cir.1999). Thus, if fewer
20 than all Class Members claim their shares in this matter, the Court should
21 nevertheless apply *Boeing* and evaluate the requested fee against the total amount
22 of funds made available to the Class Members and not the amount claimed by
23 them. Because much of the settlement class is comprised of workers that are fairly
24 transient, there is a reasonable likelihood that a significant portion of the class will
25 not participate for a variety of reasons.

1 C. **The Enhancement Payments Are Reasonable and Should Receive**
2 **Final Approval**

3 It is customary and appropriate to provide a payment to the named Plaintiff
4 for services to the class as Class Representative. *Van Vranken v. Atlantic Richfield*
5 *Co.*, 901 F. Supp. 294 (N.D. Cal. 1995). Here, the Named Plaintiff and Class
6 Representative spent considerable time and effort in the prosecution of this action,
7 including providing evidence at the outset of the case, submitting to written
8 discovery and her deposition, attending the mediation session, assisting with
9 preparations for mediation, providing documents, identifying witnesses, and
10 consulting with Class Counsel. (Leviant Decl. ¶ 29.) Plaintiff has served
11 effectively throughout the duration of her role as Class Representative. (Leviant
12 Decl. ¶ 29.) As a direct result of Plaintiff's efforts, roughly 900 Class Members
13 have been provided a chance to benefit. Class Counsel, therefore, fully supports
14 the negotiated service payment of \$1,750 as being fair, reasonable, and appropriate.
15 (Leviant Decl. ¶ 29.)

16 Notably, the requested amount is far less than the baseline amount presumed
17 reasonable by District Courts in California. *Faigman v. AT & T Mobility LLC*, C-
18 06-04622-MHP, 2011 WL 672648, at *5 (N.D. Cal. Feb. 16, 2011) ("In this
19 district, incentive payments of \$5,000 are presumptively reasonable."), citing
20 *Hopkins v. Hanesbrands, Inc.*, No 08-0844, 2009 WL 928133, at *10 (N.D. Cal.
21 Apr. 3 2009) (LaPorte M.J.). Here, the result supports the smaller and unopposed
22 enhancement award of \$1,750.

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V. **CONCLUSION**

For all the reasons set forth, Plaintiff and Class Counsel respectfully request final approval of the requested attorneys’ fees, costs, and class member enhancement awards. Final costs will be provided in a supplemental Declaration of H. Scott Leviant.

Dated: July 15, 2011

Respectfully submitted,

SPIRO MOSS LLP

By:  _____

Dennis F. Moss
H. Scott Leviant
Linh Hua

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