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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14

15 SALOMON CASIQUE, individually, and
on behalf of all others similarly situated;
16 JESUS HERRERA, individually, and on
behalf of all others similarly situated;
17 SABINO NUNGARAY, individually,
and on behalf of all others similarly
18 situated;
JOSE MANUEL CERVANTES,
19 individually, and on behalf of all others
similarly situated;

20 Plaintiffs,

21 vs.

22 VALLEYCREST LANDSCAPE
23 DEVELOPMENT, INC., a California
corporation;
24 and DOES 1 through 10, inclusive,

25 Defendants.
26
27
28

Case No.: CV09-9114 GHK (SSx)

Hon. GEORGE H. KING

CLASS ACTION

**PLAINTIFFS' 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: August 1, 2011
Time: 9:30 a.m.
Place: Courtroom 650

Date Removed: December 11, 2009

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

3 Please take notice that on August 1, 2011, at 9:30 a.m., or as soon thereafter
4 as counsel may be heard, in Courtroom 650 of the United States Courthouse, 255
5 East Temple Street, Los Angeles, California, California, Plaintiffs Jesus Herrera,
6 Jose Manuel Cervantes and Sabino Nungaray ("Plaintiffs") will and hereby do
7 move the Court for an order awarding Class Representative Enhancement,
8 Attorney's Fees, and Costs.

9 Plaintiffs seek an Order including the following relief:

- 10 1. an award of attorneys' fees and costs in the amount of \$62,500 from the
11 common fund settlement;
- 12 2. an award of \$2,000 to each of the Plaintiffs as Class Representative
13 Enhancements from the common fund settlement.

14 Plaintiffs' 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: May 20, 2011

Respectfully submitted,

SPIRO MOSS LLP

20
21
22 By: _____


Ira Spiro
H. Scott Leviant
Linh Hua

23
24
25 LAW OFFICES OF SAHAG
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Sahag Majarian, II

26
27 Attorneys for Plaintiffs

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. BACKGROUND 2

 A. Claims 2

 B. Procedural History 2

 C. Discovery and Investigation 3

III. SUMMARY OF SETTLEMENT TERMS 7

IV. DISCUSSION 9

 A. The Legal Standard for Attorneys’ Fee Awards 9

 B. The Fee Award Is Reasonable and Should Receive Final Approval 10

 1. Excellent Results Were Achieved on Behalf of the Class 10

 2. The Experience, Reputation, and Ability of Class Counsel Weigh
 in Favor of the Fee Award 11

 3. The Time and Labor Required by the Litigation Justifies the
 Requested Fee 12

 4. Class Counsel Was Precluded from Other Employment 12

 5. The Complexity of the Legal and Factual Issues 13

 6. Class Counsel Assumed Significant Risk 13

 7. The Fee Award is Reasonable Under the Common Fund Doctrine. 14

 8. A Lodestar Analysis Confirms The Reasonableness of The Fee
 Award 16

 9. Important Public Policies Are Advanced by Awarding Reasonable
 Fees to Skilled Class Counsel 19

 10. Fees Should Based Upon the Benefit Provided to the Class, Not the
 Benefits Claimed by the Class 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

C. The Enhancement Payments Are Reasonable and Should Receive Final Approval.....21

V. CONCLUSION.....22

TABLE OF AUTHORITIES

FEDERAL DECISIONAL AUTHORITY

American Eagle Ins. Co. v. King Resources Co., 556 F.2d 471 (10th Cir. 1977)... 11

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) 15

Central Railroad & Banking v. Pettus, 113 U.S. 116 (1885) 15

Craft v. County of San Bernardino,
 2008 U.S. Dist. LEXIS 27526 (C.D. Cal. 2008) 14, 16

Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938)..... 9

Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000) 17

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) 15

In re Activision Sec. Litig., 723 F. Supp. 1373 (N.D. Cal. 1989) 15

In re Heritage Bond Litig.,
 2005 U.S Dist. LEXIS 13555 (C.D. Cal. June 10, 2005) 11

In re Mercury Interactive Corp. Securities Litigation,
 618 F.3d 988 (9th Cir. 2010)..... 1

In re Public Serv. Co., 1992 U.S. Dist. LEXIS 16326 (S. D. Cal. July 28, 1992).. 12

In re Rent-Way Sec. Litig., 305 F. Supp. 2d 491 (W.D. Pa. 2003) 11

In re Rite Aid Corp. Sec. Litig., 396 F.3d 294 (3d Cir. 2005) 17

Mangold v. Cal. Public Util. Commission, 67 F.3d 1470 (9th Cir. 1995) 9

Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978)..... 11

Steiner v. American Broadcasting Corp., Inc., 2007 U.S. App. LEXIS 21061 (9th
 Cir. 2007)..... 18

Trustees v. Greenough, 105 U.S. 526 (1881) 15

Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294 (N.D. Cal. 1995)..... 16, 21

Vizcaino v. Microsoft Corp., 290 F.3d 1043 (9th Cir. 2002).....10, 12, 13, 17

Waters v. Int'l Precious Metals Corp., 190 F.3d 1291 (11th Cir.1999)..... 21

Williams v. MGM-Pathé Communications Co., 129 F.3d 1026 (9th Cir. 1997)..... 21

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28

CALIFORNIA DECISIONAL AUTHORITY

7-Eleven Owners for Fair Franchising v. Southland Corp.,
85 Cal. App. 4th 1135 (2000) 11

Armenta v. Osmose, Inc., 135 Cal. App. 4th 314 (2005)..... 19

Bihun v. AT&T Information System, 13 Cal. App. 4th 976 (1993)..... 17

California Grape Etc. League v. Industrial Welfare Com.,
268 Cal. App. 2d 692 (1969)..... 19

Chavez v. Netflix, Inc., 162 Cal. App. 4th 43 (2008)..... 16

Cundiff v. Verizon California, 167 Cal. App. 4th 718 (2008) 17

D’Amico v. Board of Medical Examiners, 11 Cal. 3d 1 (1974)..... 15

Daar v. Yellow Cab Co., 67 Cal. 2d 695 (1967)..... 19

Earley v. Superior Court, 79 Cal. App. 4th 1420 (2000) 19

Flannery v. California Highway Patrol, 61 Cal. App. 4th 629 (1995)..... 11

Gentry v. Superior Court, 42 Cal. 4th 443 (2007)..... 20

Gould v. Maryland Sound Industries, Inc., 31 Cal. App. 4th 1137 (1995)..... 19

Graham v. DaimlerChrysler Corp., 34 Cal. 4th 553 (2004)..... 18

Ketchum v. Moses, 24 Cal. 4th 1122 (2001)..... 14

Lealao v. Beneficial California, Inc., 82 Cal. App. 4th 19 (2000) 15, 16

Linder v. Thrifty Oil Co., 23 Cal. 4th 429 (2000)..... 19

Ramirez v. Yosemite Water, Inc., 20 Cal. 4th 785 (1999)..... 19

Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319 (2004)..... 19

Serrano v. Priest, 20 Cal. 3d 25 (1977)..... passim

Wershba v. Apple Computer, 91 Cal. App. 4th 224 (2001) 13, 18

1
2
3
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TREATISES

7 Witkin, B.E., CALIFORNIA PROCEDURE (2007 Supp.) §§ 255-261	15
Herr, MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.71 (2008).....	10

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a putative wage and hour class action on behalf of current and former Mechanics, or Leadmen and Laborers subject to the Private Recovery Work Agreement Between The Southern California District Council of Laborers and its Affiliated Local Unions and ValleyCrest Landscape Development, Inc. (“Defendant” or “ValleyCrest”) at its Lopez Canyon facility. Plaintiffs Jesus Herrera, Jose Manuel Cervantes and Sabino Nungaray (collectively, “Plaintiffs”) and ValleyCrest reached a proposed class action settlement which will resolve all of the claims asserted against Defendant based on the facts alleged in the Complaint and First Amended Complaint (“FAC”).

On February 25, 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), Plaintiffs made their Motion for an order awarding Class Representative Enhancements, Attorney’s Fees, and Costs available on Plaintiffs’ counsel’s website for class member review well before the time for submitting objections has expired.

Having preliminarily approved the terms of settlement for purposes of providing notice and an opportunity to comment to the class, the \$62,500 fee and cost allocation, and the \$2,000 enhancement awards that were all negotiated in connection with the mediation that settled this case against Defendant are within the “range of reasonableness.” All of the relevant factors weigh in favor of final approval of the terms of that settlement, including those payments. On a percentage or lodestar basis, the fee award sought by this Motion is well within the range of reasonableness and comparable to other approved class action settlements in both California federal and state courts. So, too, are the other components of the

1 settlement reasonable and worthy of final approval, including class member
2 enhancements of \$2,000 for class representatives that initiated the action, provided
3 evidence to support class claims, attended the mediation, and remained in frequent
4 contact with Class Counsel throughout the case.

5
6 **II. BACKGROUND**

7 **A. Claims**

8 Plaintiffs and Salomon Casique filed the present class action on October 14,
9 2009 in Los Angeles County Superior Court against Defendant. The Complaint,
10 the current operative complaint in the Action, alleges that, with respect to
11 Defendant's Mechanics, Foreman, Laborers and Superintendents working for
12 Defendant in California, Defendant, (1) failed to pay them minimum and union
13 wages in alleged violation of Labor Code §§ 1194 and 1198, (2) failed to pay
14 overtime compensation in alleged violation of Labor Code §§ 1194 and 1198, and
15 failed to pay overtime pursuant to applicable collective bargaining agreements, (3)
16 failed to provide meal periods in alleged violation of Labor Code §§ 226.7 and 512,
17 (4) failed to provide rest breaks in alleged violation of Labor Code §§ 226.7 and
18 512; (5) failed to reimburse business expenses in violation of Labor Code § 2802;
19 (6) failed to provide accurate itemized wage statements in alleged violation of
20 Labor Code § 226; (7) failed to pay all wages due and owing at the time of
21 termination in alleged violation of Labor Code § 203; (8) failed to pay vested
22 vacation wages; (9) violated the Unfair Competition Law ("UCL") set forth at
23 California Business and Professions Code § 17200 *et seq.*; and (10) violation of
24 Penalties Pursuant To Cal. Labor Code §2699 ("PAGA"). (Declaration of H. Scott
25 Leviant ["Leviant Decl."], at 6.)

26 **B. Procedural History**

27 Defendant removed the Action to the United States District Court for the
28 Central District of California on December 11, 2009 pursuant to 28 U.S.C. § 1331

1 based upon the existence of federal questions (complete preemption pursuant to the
2 Employment Retirement Security Act and the Labor Management Relations Act).
3 (Leviant Decl., ¶ 7.)

4 On May 5, 2010, the Court approved a Stipulation between the Parties
5 dismissing Salomon Casique from the action, and dismissing without prejudice all
6 allegations asserted on behalf of individuals holding a Superintendent job title.
7 (Leviant Decl., ¶ 9.)

8 On August 9, 2010, counsel for the Parties voluntarily attended mediation
9 before Hon. Edward Infante (Ret.), an independent neutral with extensive
10 experience mediating employment and wage and hour class action cases. (Leviant
11 Decl., ¶ 10.) Through the assistance of Hon. Edward Infante, the Parties were able
12 to reach a Settlement. (Leviant Decl., ¶ 10.)

13 On February 25, 2011, the Court issued an Order conditionally certifying a
14 settlement class, preliminarily approving the proposed settlement, approving notice
15 to the class, and setting the hearing for final approval of the proposed class action
16 settlement. (Leviant Decl., ¶ 11.)

17 **C. Discovery and Investigation**

18 Both prior to and during the mediation on August 9, 2010, the Parties
19 engaged in extensive formal and informal discovery in the Action. The discovery
20 combined with the discussions yielded valuable information to the Parties in terms
21 of class certification issues, ultimate liability and the amount of damages in
22 controversy.

23 The Parties conducted extensive internal and formal investigations regarding
24 the instant matter. The Parties also interviewed Class Members. The Parties also
25 conducted extensive investigations for the preparation of its objections and
26 responses to formal discovery and prosecution and defense of the case, which
27 included reviewing documents relating to Defendant's compensation policies and
28 procedures, employee handbooks, job descriptions and other corporate policies and

1 procedures relevant to the issues herein. Finally, Defendant has produced, and
2 Class Counsel has analyzed, shift data and timesheets of the Class Members
3 (“Mediation Data”). (Leviant Decl., ¶ 15.) Defendant represented at the time it
4 was produced and continues to represent that the Mediation Data was not known by
5 Defendant to be erroneous, and Defendant believes that it is reliable information
6 extracted from the books and records of Defendant. (Leviant Decl., ¶ 15.)

7 Accordingly, the Parties are sufficiently familiar with the facts of this case to
8 warrant settlement now and have agreed to this arms-length Settlement pursuant to
9 the terms set forth herein. (Leviant Decl., ¶ 17, 20.)

10 The Parties recognize that the issues presented in the Action are likely only
11 to be resolved with extensive and costly pretrial proceedings and that further
12 litigation will cause inconvenience, distraction, disruption, delay and expense
13 disproportionate to the potential benefits of litigation and have taken into account
14 the risk and uncertainty of the outcome inherent in any litigation. (Leviant Decl., ¶
15 12.)

16 Based on their own independent investigation and evaluation, Class Counsel
17 is of the opinion that the Settlement documented by this Stipulation is fair,
18 reasonable, and adequate, and in the best interest of the Settlement Class in light of
19 all known facts and circumstances, including the risk of significant delay, the risk
20 the Settlement Class will not be certified by the court or that it will later be
21 decertified, the defenses asserted by Defendant to the merits and the class action
22 status of this action, the numerous potential appellate issues, and the risk posed by
23 current economic conditions. (Leviant Decl., ¶ 24.) Based upon their
24 investigations, Class Counsel determined that the scope of the class originally
25 proposed was overly broad and required revision to conform with discovered facts.
26 The revised class, which focuses on operations at a specific facility impacts a class
27 of approximately 745 individuals. (Leviant Decl., ¶ 24.)
28

1 Rest period claims are notoriously hard to certify, and establishing the
2 requisite wilfulness for the penalty claims reduced the value of those claims
3 substantially for settlement purposes. (Leviant Decl., ¶ 21.) Thus, the claims for
4 missed meal periods and off-the-clock work when collecting equipment at the
5 facility comprise the stronger claims in this action. (Leviant Decl., ¶ 21.) But
6 Plaintiffs' investigations confirmed that, at best, these events did not happen to
7 every settlement class member every day. (Leviant Decl., ¶ 21.) Moreover,
8 because time records appeared to contradict these claims, Plaintiffs faced
9 substantial risk if these claims were forced to a judicial determination. (Leviant
10 Decl., ¶ 21.) Although Plaintiffs believe that they could have prevailed, there was a
11 substantial likelihood that Plaintiffs would not prevail on those arguments.
12 (Leviant Decl., ¶ 21.)

13 Because rest breaks are governed by the "make available" standard, and are
14 inherently more flexible than meal periods, the likelihood of certifying a rest break
15 claim is far less certain than certifying a meal period claim under any of the
16 current, competing standards governing meal period claims. (Leviant Decl., ¶ 21.)
17 The uncertainty in all of plaintiff's claims rendered the "wilfulness" standard under
18 Labor Code § 203 difficult or impossible to establish. (Leviant Decl., ¶ 21.) Thus,
19 the theoretical maximum liability for those claims is suspect. (Leviant Decl., ¶ 21.)
20 Focusing on the strongest claims, the meal period and unpaid wages (overtime/off-
21 the-clock) claims, the settlement represents approximately 57% of the estimated
22 maximum exposure (calculated from data, documents and settlement class member
23 interviews), an eminently fair and reasonable compromise prior to class
24 certification. (Leviant Decl., ¶ 21.) When the risks of prevailing at both
25 certification and trial are factored into the equation, the settlement value is that
26 much more supportable. (Leviant Decl., ¶ 21.) Notably, the assigned certification
27 probabilities above slightly exceed the rate of certification in contested motions in
28 California superior courts over the past 5 years (the only courts for which such

1 granular data is currently available), based upon data available through the
2 California Courts website. (Leviant Decl., ¶ 21.)

3 Based upon their ongoing investigation of this matter, Plaintiffs' counsel
4 have also concluded that certain claims asserted in this matter were likely based
5 upon a misunderstanding of the complex documents embodying the union
6 agreements with Defendant. (Leviant Decl., ¶ 22.) For example, a review of the
7 relevant union agreements led Plaintiffs' counsel to conclude that Defendant was
8 paying the correct union wage scale to Laborers, despite their reasonable but
9 mistaken belief that contracts required the payment of higher hourly wages.
10 (Leviant Decl., ¶ 22.)

11 While Defendant specifically denies any liability in the Action, Defendant
12 agreed to enter into this settlement to avoid the uncertainty, cost and business
13 disruption associated with defending the Action.

14 To the best knowledge of the Parties and their respective counsel, other than
15 this Action, there are no other like claims asserted or filed by Class Members.
16 (Leviant Decl., ¶ 27.) To the best knowledge of the Parties and their respective
17 counsel, no Class Member has refrained from bringing an action with claims
18 similar to those raised in the Action, whether in reliance on the Action or
19 otherwise, and who thus might be prejudiced by dismissal of the Action. (Leviant
20 Decl., ¶ 27.)

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

1 **III. SUMMARY OF SETTLEMENT TERMS**

2 The full terms of the settlement are set forth in the Settlement Agreement.

3 The primary material terms are as follows:

- 4 1. The Settlement Class is: “All employees of Defendant ValleyCrest
5 Landscape Development who were employed out of Defendant’s Lopez
6 Canyon facility in California at any time from October 14, 2005 through
7 the date of preliminary approval of this Stipulation by the United States
8 District Court for the Central District of California, and who worked as a
9 Mechanic, or as a Leadman or Laborer subject to the Private Recovery
10 Work Agreement Between The Southern California District Council of
11 Laborers and its Affiliated Local Unions and ValleyCrest Landscape
12 Development.” (Stipulation, ¶ 3.)
- 13 2. Defendant will pay up to \$250,000 (the Gross Settlement Fund “GSF”).
14 (Stipulation, ¶ 30.)
- 15 3. The Settlement Payment includes charges by the claims administrator, the
16 service award to plaintiff, class counsel’s expenses and fees and class
17 member payments. (Stipulation, ¶ 30.)
- 18 4. Class Counsel will not seek an amount greater than 25% of the Maximum
19 “Settlement Payment” in terms of attorneys’ fees *and* costs. (Stipulation,
20 ¶ 52(a).)
- 21 5. Class members who timely file claim forms will receive their pro-rata
22 shares of the Net Settlement Amount (NSA). The NSA will equal the
23 GSF of \$250,000, less payment to the Labor and Workforce Development
24 Agency (“LWDA”), Class Counsel’s Fees and Expenses, the Class
25 Representative Payments; and costs of administering the Settlement.
26 (Stipulation, ¶¶ 30, 52(e).) A Claimant’s share will be calculated by first
27 determining a per shift recovery factor (“Shift Recovery Factor”): divide
28 an amount equal to the NSA by the total number of shifts worked during

1 the Class Period by Laborers, Leadmen and Mechanics that are members
2 of the Settlement Class, weighted by the average hourly rate of pay for
3 each job classification. Then a Settlement Payment for each Qualified
4 Claimant shall be calculated by multiplying his or her job classification
5 average hourly rate of pay by the number of shifts worked by the
6 Qualified Claimant during the Class Period and multiplying the result by
7 the Shift Recovery Factor. (Stipulation, ¶ 52(f).)

8 6. If less than 30% of the Net Settlement Fund is claimed, Claimant's shares
9 will be increased on a pro rata basis, so that at least 30% of the Net QSF
10 is claimed. (Stipulation, ¶ 52(e).)

11 7. The PAGA Penalty Payment amount of \$5,000 shall be paid to the
12 LWDA.

13 8. Subject to the Court's approval, Defendant is to pay Plaintiff an
14 enhancement/service award payment of \$2,000. (Stipulation, ¶ 52(b).)

15 9. Subject to the Court's approval, the Claims Administrator will be paid out
16 of the fund for administration expenses, which expenses are currently
17 estimated at \$20,000. (Stipulation, ¶ 52(c).)

18 10. Pursuant to the Settlement Agreement, Plaintiffs were to file a First
19 Amended Complaint (FAC), which Plaintiffs would seek to submit
20 concurrently with the filing of their Preliminary Approval Motion. The
21 FAC added claims for penalties payable to the LWDA under PAGA and
22 reforms the class definition. (Stipulation, ¶ 49.) This claim was
23 investigated before the mediation, and was negotiated and settled at the
24 mediation.

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1 **IV. DISCUSSION**

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

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

7 When federal courts sit in diversity and are presented with an issue about
8 which there is uncertainty as to whether it concerns “substantive” or “procedural”
9 law, the Erie Doctrine applies. *See generally, Erie R.R. v. Tompkins*, 304 U.S. 64,
10 58 S. Ct. 817 (1938) (establishing familiar axiom that federal procedural law and
11 state substantive law are to be applied in federal diversity actions). It is well-
12 established that the law concerning the assessment and approval of class action
13 attorneys’ fees is substantive law. *Mangold*, 67 F.3d. at 1479 (“The method of
14 calculating a fee is an inherent part of the substantive right to the fee itself, and a
15 state right to an attorneys’ fee reflects a substantial policy of the state”).
16 Accordingly, because the law concerning attorneys’ fees is substantive law, and
17 because California law provides the underlying rules of decision for the operative
18 allegations, California law governs this fee motion.

19 California and the Ninth Circuit, and all federal courts, for that matter, use
20 similar criteria to assess a fee request attendant to a motion for final approval,
21 including:¹ (i) the results achieved on behalf of the class; (ii) class counsel’s

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23
24 ¹ “Neither in *Serrano*[] nor in any other opinion has our Supreme Court
25 carved the factors used in that case into concrete or barred consideration of other
26 relevant and nonduplicative factors.” *Lealao v. Beneficial California, Inc.*, 82 Cal.
27 App. 4th 19, 39 (2000). “Moreover, two of the factors employed by the trial judge
28 in *Serrano*[] – the fact that the plaintiffs’ attorneys received public and charitable
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

1 experience, reputation and ability; (iii) the time and labor required by the litigation;
 2 (iv) whether class counsel was precluded from other work; (v) the complexity of
 3 the litigation; and (vii) the contingent nature of the litigation. *See Serrano v.*
 4 *Priest*, 20 Cal. 3d 25, 49 (1977); *accord Vizcaino v. Microsoft Corp.*, 290 F.3d
 5 1043, 1048-50 (9th Cir. 2002) (identifying similar criteria); *see also* Herr, MANUAL
 6 FOR COMPLEX LITIGATION, FOURTH, § 21.71 at 524-27 (2008) (survey of federal
 7 criteria for approval substantially similar to California criteria).

8
 9 **B. The Fee Award Is Reasonable and Should Receive Final Approval**

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

11 The benefit achieved on behalf of class members defines a primary yardstick
 12 against which any fee motion is measured. *See Serrano*, 20 Cal. 3d at 49; *accord*
 13 *Vizcaino*, 290 F.3d at 1048. While class actions provide substantial external
 14 benefits beyond the litigants, and are essentially self-financing, it is the benefit to
 15 the class members that is the starting point for evaluating a motion for final
 16 approval of attorneys' fees negotiated as part of a class action settlement.

17 One of the most straightforward measures of a settlement's success from the
 18 Plaintiffs' perspective is the average amount available to each class member from
 19 the settlement fund. For the approximate 745 members of the class, the average
 20 gross recovery is estimated to be \$345 per claiming class member. (Leviant Decl.,
 21 at ¶ 19.)

22 How class members respond to a class action settlement is typically
 23 addressed in concert with courts' assessments of a settlement's overall benefit to
 24 class members. *See generally, Vizcaino, supra*. State and federal courts alike take
 25 the measure of a settlement's "fairness" with reference to the class members'
 26 reaction, and specifically the extent to which class members object, and through

27
 28 *Serrano* factors are applicable here, and tend to be repeated throughout state and
 federal authorities.

1 their objections imply a settlement’s unfairness. *See, e.g., 7-Eleven Owners for*
2 *Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1152-53 (2000) (only
3 nine objectors from a class of 5454 was an “overwhelmingly positive” fact that
4 supported approval of the settlement); *Reynolds v. National Football League*, 584
5 F.2d 280 (8th Cir. 1978) (16 objectors out of 5400 strongest evidence of no
6 dissatisfaction with settlement among class members); *American Eagle Ins. Co. v.*
7 *King Resources Co.*, 556 F.2d 471, 478 (10th Cir. 1977) (only one objector “of
8 striking significance and import”). Here, the Court will receive information about
9 Class Member participation and exclusion rates at the time it determines whether to
10 finally approve the settlement. This factor cannot be fully discussed by Plaintiffs at
11 the time this Motion was prepared.

12
13 **2. The Experience, Reputation, and Ability of Class Counsel**
14 **Weigh in Favor of the Fee Award**

15 California law also recognizes the “skill and experience of attorneys” as
16 appropriate criteria for evaluating a fee motion. *Flannery v. California Highway*
17 *Patrol*, 61 Cal. App. 4th 629, 647 (1995); *accord In re Rent-Way Sec. Litig.*, 305 F.
18 Supp. 2d 491 (W.D. Pa. 2003) (“skill and efficiency of counsel” among fee motion
19 criteria); *In re Heritage Bond Litig.*, 2005 U.S Dist. LEXIS 13555 at *64 (C.D. Cal.
20 June 10, 2005) (Considering “the quality of Class Counsel’s effort, experience and
21 skill”).

22 Class Counsel has had substantial experience with the causes of action here
23 (Leviant Decl., at ¶¶ 31-34) and has regularly litigated employment law class
24 actions. Class Counsel also has experience with the process of certifying and
25 resolving wage & hour class actions like that settled here. (Leviant Decl., at ¶ 31.)
26
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1 **3. The Time and Labor Required by the Litigation Justifies the**
2 **Requested Fee**

3 California and federal law also look to the time and labor required in
4 connection with the litigation and settlement of a class action for which final
5 approval is sought. *See Serrano*, 20 Cal. 3d at 49, *accord Vizcaino*, 290 F.3d at
6 1048-50.

7 Through the filing of this Motion, Class Counsel has devoted over 175 hours
8 of attorney time to this matter. (Leviant Decl. ¶¶ 35-38.) This case required
9 substantial firm resources, including: pre-litigation investigation and research;
10 interviewing Class Members; reading and analyzing documentary evidence
11 (including company records and caselaw); engaging in formal and informal
12 discovery; researching the causes of action, particularly those in flux during this
13 litigation; performing legal and factual analyses in preparation for mediation; and
14 drafting the settlement materials and Class Notice. (Leviant Decl., at ¶ 38.) The
15 “time and labor” criterion weighs in favor of final approval and an award of the
16 requested fees and other payments.

17
18 **4. Class Counsel Was Precluded from Other Employment**

19 Another of the criteria for the evaluation of a preliminarily approved fee
20 request is whether the settled litigation resulted in Class Counsel’s foregoing other
21 employment. *Serrano*, 20 Cal. 3d at 49; *accord In re Public Serv. Co.*, 1992 U.S.
22 Dist. LEXIS 16326 at *9 (S. D. Cal. July 28, 1992) (the opportunity cost of being
23 precluded from representing other clients in other cases “weighs in favor of an
24 award of one-third of the common fund”). Here, Class Counsel was precluded
25 from other employment. (Leviant Decl., at ¶ 35.) Over the course of the case, no
26 fewer than three attorneys at Spiro Moss litigated this matter and four total
27 attorneys worked on this matter. During the month leading up to mediation, Ira
28 Spiro, H. Scott Leviant and Linh Hua, worked on this matter heavily, precluding

1 their ability to work on other cases. (Leviant Decl., at ¶ 35.) Class Counsel’s
2 preclusion from other employment supports the requested fee award.

3 4 **5. The Complexity of the Legal and Factual Issues**

5 California law recognizes that the litigation’s general complexity and
6 “difficulty of the questions involved, and the skill in presenting them” are properly
7 considered. *Serrano*, 30 Cal. 3d at 49, *accord Wershba v. Apple Computer*, 91 Cal.
8 App. 4th 224, 245 (2001).

9 Some complexity was also introduced to this litigation. The size of the class,
10 consisting of well over 700 people, created its own form of complexity. Discovery
11 regarding location-specific practices required adjustment to the definition and
12 scope of the class. (Leviant Decl., ¶¶ 22, 24.) As described above, the “complexity
13 and difficulty” factor also favors final approval of the requested fees, though not as
14 strongly as other factors.

15 16 **6. Class Counsel Assumed Significant Risk**

17 Under California law, the novelty and challenges presented by a class action,
18 as well as the corresponding risk that the class members and class counsel will be
19 paid no recovery or fee, is properly evaluated in connection with a fee motion. *See*
20 *Serrano*, 20 Cal. 3d at 49; *accord Vizcaino*, 290 F.3d at 1050-51 (multiplier applied
21 to lodestar cross-check reflects risk of non-recovery).²

22
23
24 ² Indeed, so pervasive is the risk criterion, comprising as it does a case’s
25 basic demands and challenges, that the cross-check multiplier is referred to as the
26 “risk multiplier.” *Vizcaino* at 1051. “This mirrors the established practice in the
27 private legal market of rewarding attorneys for taking the risk of nonpayment by
28 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.
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 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:

4 A contingent fee must be higher than a fee for the same legal services
5 paid as they are performed. The contingent fee compensates the
6 lawyer not only for the legal services he renders but for the loan of
7 those services. The implicit interest rate on such a loan is higher
8 because the risk of default (the loss of the case, which cancels the debt
9 of the client to the lawyer) is much higher than that of conventional
10 loans. A lawyer who bears both the risk of not being paid and
11 provides legal services is not receiving the fair market value of his
12 work if he is paid only for the second of these functions. If he is paid
13 no more, competent counsel will be reluctant to accept fee award
14 cases.

15 *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001). *And see, e.g., Craft v.*
16 *County of San Bernardino*, 2008 U.S. Dist. LEXIS 27526 at *14 (C.D. Cal. Apr. 1,
17 2008) (“In addition to the risk of establishing liability, class certification carries
18 risks and requires experienced class counsel”).

19 As discussed above, the major causes of action in this matter – off-the-clock
20 labor and meal period violations – presented substantial risk for Class Counsel due
21 to (1) difficulties with proof of liability, and (2) potential clarifying decisions about
22 the meal period standard that would not favor certification or liability. Ultimately,
23 a good result, eliminating risk, was obtained for Class Members.

24
25 **7. The Fee Award is Reasonable Under the Common Fund**
26 **Doctrine**

27 Courts in the Ninth Circuit and California have increasingly embraced the
28 “percentage method” rather than the lodestar approach when awarding attorneys’

1 fees in a common fund settlement. *See* 7 Witkin, B.E., CALIFORNIA PROCEDURE
 2 (2007 Supp.) §§ 255-261 at 236-241 (describing pre-eminence of percentage
 3 method under California law); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
 4 (1980) (“[A] litigant or a lawyer who recovers a common fund for the benefit of
 5 persons other than himself or his client is entitled to a reasonable attorney’s fee
 6 from the fund as a whole”); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78
 7 (N.D. Cal. 1989) (Patel, J.) (endorsing percentage method). *See generally*,
 8 *Serrano*, 20 Cal. 3d at 25; *accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th
 9 Cir. 1998).

10 The California Supreme Court has consistently held that “when a number of
 11 persons are entitled in common to a specific fund, and an action brought by a
 12 plaintiff or plaintiffs for the benefit of all results in the creation or preservation of
 13 that fund, such plaintiff or plaintiffs may be awarded attorneys’ fees out of the
 14 fund.” *Serrano* at 34 (quoting *D’Amico v. Board of Medical Examiners*, 11 Cal. 3d
 15 1 (1974)).³ Common fund fee awards are desirable because they most accurately
 16 align incentives with outcomes. “Courts agree that because the percentage-of-the-
 17 benefit approach ‘is result-oriented rather than process-oriented, it better
 18 approximates the workings of the marketplace’ than the lodestar approach.”
 19 *Lealao*, 82 Cal. App. 4th at 48 (citations omitted).

20 California law has no set fee “benchmark” with respect to its common
 21 benefit percentage analysis.⁴ Although the Ninth Circuit’s 25 percent “benchmark”
 22 analysis is not applicable here as state law controls, the requested fee award is
 23 nevertheless appropriate using this standard. In awarding percentages of the class
 24 fund, courts in the Ninth Circuit frequently take into account the size of the fund.

26 ³ The common fund doctrine has long been a part of North American
 27 jurisprudence. *See, e.g., Trustees v. Greenough*, 105 U.S. 526 (1881); *Central*
Railroad & Banking v. Pettus, 113 U.S. 116 (1885).

28 ⁴ *See generally, Serrano*, 20 Cal. 3d 25; *Lealao*, 82 Cal. App. 4th 19.

1 *Craft v. County of San Bernardino*, 2008 U.S. Dist. LEXIS 27526 (Apr. 1, 2008
2 C.D. Cal.) Often, but not always, fees of less than 25 percent will be awarded in
3 “megafund” cases (cases of \$50 million or more). *Id.* Cases settling for less than
4 \$10 million, as here, will typically result in fees above 25 percent. *Id.*

5 California recognizes that the custom and practice in class actions is to award
6 approximately one-third of a fund as a fee award. *See Chavez v. Netflix, Inc.*, 162
7 Cal. App. 4th 43, 66, n.11 (2008) (“Empirical studies show that, regardless whether
8 the percentage method or the lodestar method is used, fee awards in class actions
9 average around *one-third* of the recovery.”) (emphasis added). However, Plaintiff
10 in this case requests *less than* the customary one-third of the fund that is often
11 awarded in California. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp.
12 294, 297-98 (N.D. Cal. 1995) “[m]ost of the cases Class Counsel have cited in
13 which high percentages such as 30-50 percent of the fund were awarded involved
14 relatively smaller funds of less than \$10 million”). Plaintiff requests that 25% of
15 the fund be award to Class Counsel as fees *and* costs for achieving these results for
16 the Class.

17 In any event, the maximum Settlement Fund obtained through the efforts of
18 Plaintiff's counsel is \$250,000. Adhering to the benchmark established by the
19 Ninth Circuit, Plaintiff's counsel has agreed to accept no more than \$62,500 in fees
20 *and* costs. (Leviant Decl., ¶ 13(d).) But perhaps most importantly, the proposed
21 attorneys' fees were disclosed to the Class Members in the Notice issued to Class
22 Members. (Leviant Decl., at ¶ 11.)

23 24 **8. A Lodestar Analysis Confirms The Reasonableness of The** 25 **Fee Award**

26 Despite the widely recognized limitations of the so-called “lodestar” method,
27 California and federal courts recognize the utility of a lodestar “cross-check.”
28 *Lealao*, 82 Cal. App. 4th at 46. A lodestar “cross-check” analysis typically

1 happens in three steps. *Cundiff v. Verizon California*, 167 Cal. App. 4th 718
 2 (2008), *accord Vizcaino*, 290 F.3d at 1047.⁵ First, a trial court must determine a
 3 baseline guide or “lodestar” figure based on the time spent and reasonable hourly
 4 compensation for each attorney involved in the case. *Serrano* at 48. Second, the
 5 court sets a reasonable hourly fee to apply to the time expended, with reference to
 6 the prevailing rates in the geographical area in which the action is pending. *Bihun*
 7 *v. AT&T Information System*, 13 Cal. App. 4th 976, 997 (1993) (16 years ago,
 8 affirming a \$450 per hour rate for a Southern California litigation attorney).
 9 Finally, a “multiplier” of the base lodestar is set with reference to the factors
 10 described in detail throughout this brief.⁶ Across all jurisdictions, multipliers of up
 11 to four are frequently awarded in common fund cases. NEWBERG, §14.03 at 14.
 12 Often, multipliers of greater than four are warranted.⁷

13 Here, Class Counsel has billed well over 175 hours, at rates commensurate
 14 with experience and the prevailing rates among defense and plaintiffs’ firms that
 15 regularly litigate wage and hour class actions. (Leviant Decl., ¶¶ 31-38.)

Attorney	Hours	Rate	Total
H. Scott Leviant	131.3	\$550	\$72,215.00
H. Scott Leviant (est.)	10	\$550	\$5,500.00

16
 17
 18
 19
 20 ⁵In contrast to the use of the lodestar method as a primary tool for setting a
 21 fee award, the lodestar cross-check can be performed with a less exhaustive
 22 cataloging and review of counsel’s hours. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d
 23 294, 306 (3d Cir. 2005) (“The lodestar cross-check calculation need entail neither
 24 mathematical precision nor bean-counting.”); *Goldberger v. Integrated Resources,*
Inc., 209 F.3d 43, 50 (2d Cir. 2000) (“Of course, where [the lodestar method is]
 used as a mere cross-check, the hours documented by counsel need not be
 exhaustively scrutinized.”).

25 ⁶ Those factors include the novelty and difficulty of issues involved, and thus
 26 the risk factor; the skill displayed in presenting the issues; whether the litigation
 precluded other employment; and the contingent nature of the fee award. *Serrano*
 at 49.

27 ⁷*Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (Table of Percentage-Based
 28 Attorneys’ Fee Awards in Common Fund Cases summarizing survey of lodestar
 multipliers).

Linh Hua	25	\$400	\$10,000.00
Sahag Majarian	25	\$600	\$15,000.00
		Total:	\$102,715.00

Multiplying the attorney hours by the respective hourly rates listed above yields the total lodestar figure of \$102,715.00. 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 (and cost award) of \$62,500, imposing a “negative” multiplier (a multiplier less than 1, but not a negative number in the mathematical sense).

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 of less than 0.6 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 affirms that the fee award that has been preliminarily approved does in fact fall within the range of reasonableness.

1 **9. Important Public Policies Are Advanced by Awarding**
 2 **Reasonable Fees to Skilled Class Counsel**

3 Wage and hours laws “concern not only the health and welfare of the
 4 workers themselves, but also the public health and general welfare.” *California*
 5 *Grape Etc. League v. Industrial Welfare Com.*, 268 Cal. App. 2d 692, 703 (1969).
 6 California’s overtime laws “are to be construed so as to promote employee
 7 protection.” *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 340
 8 (2004) (citing *Ramirez v. Yosemite Water, Inc.*, 20 Cal. 4th 785, 794 (1999)).⁸
 9 Moreover, the Legislature’s decision to criminalize certain employer conduct
 10 reflects a determination that the conduct affects a broad public interest. For
 11 example, under Labor Code section 1199 it is a crime for an employer to fail to pay
 12 overtime wages. *Gould v. Maryland Sound Industries, Inc.*, 31 Cal. App. 4th 1137,
 13 1148 (1995). In short, “California’s labor statutes reflect a strong public policy in
 14 favor of full payment of wages for all hours worked.” *Armenta v. Osmose, Inc.*,
 15 135 Cal. App. 4th 314, 324 (2005); accord, *Earley v. Superior Court*, 79 Cal. App.
 16 4th 1420, 1430 (2000) (enforcement of wage laws reflects broad public interest).

17 Courts have also long acknowledged the importance of class actions as a
 18 means to prevent a failure of justice in our judicial system. *Linder v. Thrifty Oil*
 19 *Co.*, 23 Cal. 4th 429, 434-435 (2000) (citing *Daar v. Yellow Cab Co.*, 67 Cal. 2d
 20 695, 703-704 (1967)). The California Supreme Court has unwaveringly endorsed
 21 private enforcement of California’s wage and hour laws through class actions:

22 Labor Code section 1194 confirms ‘a clear public policy . . . that is
 23 specifically directed at the enforcement of California’s minimum wage
 24 and overtime laws for the benefit of workers.’” [citing *Sav-On*, 34
 25 Cal. 4th at 340] Although overtime and minimum wage laws may at

26 _____
 27 ⁸ 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 times be enforced by the Department of Labor Standards Enforcement
2 (DLSE), it is the clear intent of the Legislature in section 1194 that
3 minimum wage and overtime laws should be enforced in part by
4 private action brought by aggrieved employees. [citation omitted]
5 *Gentry v. Superior Court*, 42 Cal. 4th 443, 455-56 (2007).

6 As a practical matter, therefore, privately initiated class actions are the sole
7 mechanism for enforcement of California's labor code derived worker protections.
8 And, now, over 700 current and former ValleyCrest employees have been given the
9 opportunity to claim cash payments upon the final approval of this settlement.
10 Those who become class members in future actions will also benefit, so long as
11 their case is taken on by able attorneys that, despite the risks, have a reasonable
12 opportunity to receive full compensation for their time expended and risks taken.

13
14 **10. Fees Should Based Upon the Benefit Provided to the Class,**
15 **Not the Benefits Claimed by the Class**

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

19 To claim their logically ascertainable shares of the judgment fund,
20 absentee class members need prove only their membership in the
21 injured class. Their right to share the harvest of the lawsuit upon proof
22 of their identity, whether or not they exercise it, is a benefit in the fund
23 created by the efforts of the class representatives and their counsel.

24 *Boeing*, 444 U.S. at 480. Since *Boeing*, appellate courts have repeatedly applied
25 the *Boeing* formulation and found reversible error where trial courts failed to do so.
26 For example, the Ninth Circuit said:

27 In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81, 100 S.Ct. 745,
28 750-51, 62 L.Ed.2d 676 (1980), the Court concluded that the attorneys

1 for a successful class may recover a fee based on the entire common
2 fund created for the class, even if some class members make no claims
3 against the fund so that money remains in it that otherwise would be
4 returned to the defendants. In *Six (6) Mexican Workers v. Arizona*
5 *Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990), we held likewise,
6 and indicated that our benchmark for an attorneys' fee award in a
7 successful class action is twenty-five percent of the entire common
8 fund.

9 *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997)
10 [attorney fee award should have been based on a total recovery fund of \$4.5
11 million, even though only \$10,000 in claims were submitted]; *see also, Waters v.*
12 *Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295 (11th Cir.1999). Thus, if fewer
13 than all Class Members claim their shares in this matter, the Court should
14 nevertheless apply *Boeing* and evaluate the requested fee against the total amount
15 of funds made available to the Class Members and not the amount claimed by
16 them.

17
18 C. **The Enhancement Payments Are Reasonable and Should Receive**
19 **Final Approval**

20 It is customary and appropriate to provide a payment to the named Plaintiff
21 for services to the class as Class Representative. *Van Vranken v. Atlantic Richfield*
22 *Co.*, 901 F. Supp. 294 (N.D. Cal. 1995). Here, the Named Plaintiff and, upon
23 preliminary approval having been granted, the Class Representatives, spent
24 considerable time and effort in the prosecution of this action, including providing
25 evidence at the outset of the case, attending the mediation session, assisting with
26 preparations for mediation, providing documents, analyzing data, identifying
27 witnesses, and consulting with Class Counsel. (Leviant Decl. ¶ 28.) Plaintiffs have
28 served effectively throughout the duration of their role as Class Representatives.

1 (Leviant Decl. ¶ 28.) As a direct result of Plaintiffs' efforts, over 740 Class
2 Members have been provided a chance to benefit. (Leviant Decl., ¶¶ 28-30.) Class
3 Counsel, therefore, fully supports the negotiated service payment of \$2,000 as
4 being fair, reasonable, and appropriate. (Leviant Decl. ¶ 28-30.)

5 Notably, the requested amount is only slightly more than the baseline amount
6 presumed reasonable by District Courts in California. *Faigman v. AT & T Mobility*
7 *LLC*, C-06-04622-MHP, 2011 WL 672648, at *5 (N.D. Cal. Feb. 16, 2011) ("In
8 this district, incentive payments of \$5,000 are presumptively reasonable."), citing
9 *Hopkins v. Hanesbrands, Inc.*, No 08-0844, 2009 WL 928133, at *10 (N.D.Cal.
10 Apr.3 2009) (LaPorte M.J.). Here, the result supports the smaller and unopposed
11 enhancement award of \$2,000.


12
13 **V. CONCLUSION**

14 For all the reasons set forth, Plaintiffs and Class Counsel respectfully request
15 final approval of the requested attorneys' fees, costs, and class member
16 enhancement awards.

17
18 Dated: May 20, 2011

Respectfully submitted,

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20
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28