Dennis F. Moss (State Bar No. 77512)
dennisfmoss@yahoo.com
H. Scott Leviant (State Bar No. 200834)
scott@spiromoss.com
Linh Hua (State Bar No. 247419)
linh@spiromoss.com
SPIRO MOSS LLP
11377 W. Olympic Blvd., 5th Floor
Los Angeles, California 90064-1683
Telephone: (310) 235-2468
Facsimile: (310) 235-2456

Sahag Majarian, II (State Bar No. 146621)
sahagii@aol.com
LAW OFFICES OF SAHAG MAJARIAN, II
18250 Ventura Boulevard
Tarzana, California 91356
Telephone: (818) 609-0807
Facsimile: (818) 609-0892

Attorneys for Plaintiff Rosa Lopez

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

vs.

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

Defendants.

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

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

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

Plaintiff seeks an Order including the following relief:

1. an award of attorneys' fees in the amount of $25,913.00 from the common fund settlement;
2. an award of actual costs;[1]
3. an award of $1,750 to Plaintiff as a Class Representative Enhancement from the common fund settlement.

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

Dated: July 15, 2011

Respectfully submitted,

SPIRO MOSS LLP

By: _____

Dennis F. Moss
H. Scott Leviant
Linh Hua

LAW OFFICES OF SAHAG MAJARIAN II
Sahag Majarian II

Attorneys for Plaintiff

[1] Total actual costs can't be stated with certainty at this time.

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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

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 $25,913.00 fee, reasonable actual costs, and the $1,750 enhancement award 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 unquestionably within the range of reasonableness. So, too, are the other components of the settlement reasonable and worthy of final approval, including the class representative enhancements of $1,750 for a class representatives that initiated the action, provided evidence to support class claims, submitted to a deposition, attended the mediation, and remained in frequent contact with Class Counsel throughout the case.

II. BACKGROUND

A. Claims

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

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

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

B. Procedural History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On May 31, 2011, this 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.

III. SUMMARY OF SETTLEMENT TERMS

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

(a) The Settlement Class includes all persons who (1) were employed by 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."

(b) Defendant will pay up to $103,655.00 (the "Maximum Settlement Fund") on a claims-made basis.

(c) The Settlement Fund will be allocated and disbursed to the Settlement Administrator, to Plaintiff as an enhancement award, to Class Counsel for fees and costs, and to Settlement Class Members as individual payments.

(d) Class Counsel will not seek an amount greater than 25% of the Maximum Settlement Fund for attorneys' fees.

(e) Class Members who submit valid Claim Forms will be eligible to receive Individual Settlement Payments on a pro-rata basis based on their Personal Day Exposure Estimate from Defendant's records.

(f) Subject to Court approval, Defendant will pay Plaintiff an enhancement award of $1,750.00.

(g) Subject to the Court's approval, the Claims Administrator will be paid expenses currently estimated at $14,000.

(h) Subject to the Court's approval, Defendant will pay Class Counsel's attorneys' fees equal to 25% of the Settlement Fund ($25,913.00) and actual costs in litigating this action.

IV. DISCUSSION

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

A. The Legal Standard for Attorneys' Fee Awards

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

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

established that the law concerning the assessment and approval of class action attorneys' fees is substantive law. *Mangold*, 67 F.3d. at 1479 ("The method of calculating a fee is an inherent part of the substantive right to the fee itself, and a state right to an attorneys' fee reflects a substantial policy of the state"). Accordingly, because the law concerning attorneys' fees is substantive law, and because California law provides the underlying rules of decision for the operative allegations, California law governs this fee motion.

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

[2] "Neither in *Serrano*[] nor in any other opinion has our Supreme Court carved the factors used in that case into concrete or barred consideration of other relevant and nonduplicative factors." *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 39 (2000). "Moreover, two of the factors employed by the trial judge 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 *Serrano* factors are applicable here, and tend to be repeated throughout state and federal authorities.

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

1. Excellent Results Were Achieved on Behalf of the Class

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

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

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

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

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

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

4. Class Counsel Was Precluded from Other Employment

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

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

5. The Complexity of the Legal and Factual Issues

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

6. Class Counsel Assumed Risk

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

[3] Indeed, so pervasive is the risk criterion, comprising as it does a case's basic demands and challenges, that the cross-check multiplier is referred to as the "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.

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

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

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

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

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

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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).

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

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

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

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

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

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

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

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

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

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

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

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

> of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.

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

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

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

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

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

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

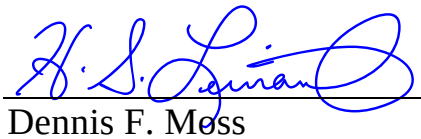
V. CONCLUSION

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

LAW OFFICES OF SAHAG MAJARIAN II
Sahag Majarian II

Attorneys for Plaintiff