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Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ROBERT MENDEZ, an individual, RANDY J. MARTINEZ, an individual, ANTHONY A. HARANG, an individual, KEVIN JOHNSON, SR., an individual on behalf of all others similarly situated and the general public,

Plaintiffs,

vs.

R+L CARRIERS, Inc., a Corporation, R&L CARRIERS SHARED SERVICES, LLC, a Corporation, and DOES 1-10,

Defendants.

Case No. CV 11-02478 CW

Assigned to the Hon. Claudia Wilken

Filed: May 20, 2011

UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, CLAIMS ADMINISTRATION EXPENSES, AND INCENTIVE/SERVICE AWARDS TO THE CLASS REPRESENTATIVES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 6, 2014
Time: 2:00 pm
Courtroom: 2

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TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 6, 2014, at 2:00 pm, or as soon thereafter as the matter may be heard in the United States District Court, Northern District of California, Oakland Division, Courtroom 2, Plaintiffs Robert Mendez and Randy Martinez, on behalf of themselves, the general public, and all others similarly situated ("Representative Plaintiffs" or "Class Representatives"), as proposed representatives of the class, seek an order approving their application for attorneys' fees, costs, claims administration expenses, and incentive/service awards for the Representative Plaintiffs.

This Motion is made pursuant to Federal Rules of Civil Procedure R. 23(e). The motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, Declarations and Exhibits filed herewith, the pleading and papers filed in this action, as well as any further documentation submitted to the Court and oral argument of counsel.

DATED: January 10, 2014

LAW OFFICES OF THOMAS W. FALVEY

ALEXANDER KRAKOW + GLICK LLP

S/ Michael S. Morrison
Michael Morrison
Thomas W. Falvey
J.D. Henderson
Class Counsel

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After more than 2.5 years of litigation, Class Representatives Robert Mendez and Randy Martinez have reached a settlement of the class action case they brought against R+L Carriers, Inc., and R&L Shared Services, LLC (collectively "R+L" or "Defendants"). Defendants have agreed to pay **$9,500,000** (no reversion) to resolve the claims of the 519 Class Members, pay the Class Representatives' attorneys' fees and costs, including the costs of settlement administration, pay the Labor Workforce and Development Agency, and provide service payments to the Class Representatives.

In this motion, the Class Representatives seek an award of attorney fees in the amount of $2,850,000, or 30% of the settlement fund. They further seek their litigation costs in the amount of $70,453.30 and settlement administration costs in the amount of $12,000. Plaintiffs also seek service payments for the Class Representatives totaling $10,000, each.

With respect to the request for 30% of the settlement fund for attorneys' fees, this should be granted for the following reasons:

Degree of Success: Class Representatives were successful in obtaining a settlement fund that will pay Class Members an average of **$18,304.43** before deductions for attorneys' fees, costs, etc., and **$12,576.11** after all deductions. For Class Members who worked the entire class period, the payout will be **$36,591.08**. Based on a review of decisions reported on Westlaw, this settlement is amongst the highest for similar wage and hour class actions litigated in the Northern District during the pendency of the case. Plaintiffs also made positive law by defeating Defendants' motion for summary judgment on the issue of whether California's meal and rest breaks laws were preempted by federal law and were successful in obtaining class certification of their claims.

Risks of Continued Litigation: The majority of damages suffered by Class Members were for missed meal and rest periods. The issue of whether federal law preempts enforcement of California's meal and rest break laws with respect to truck drivers engaged in interstate commerce is currently before the Ninth Circuit. An adverse ruling on this issue will wipe out the majority of

damages and a number of district courts have reached the opposite conclusion of this Court.

Fees Awarded by Other Courts: The percentage sought by the Class Representatives is within the historical range of fees awarded by other courts in similar class actions. In fact, this Court has awarded 30% of the settlement fund as attorneys' fees in cases like this one which involved heavy litigation and similar success.

Time Expended and Lodestar Cross-Check: Class Representatives engaged in extensive law and motion practice and discovery over the past 2.5 years to achieve this result. This includes successfully obtaining class certification, successfully opposing Defendants' motion for summary judgment, and obtaining a temporary restraining order with respect to certain declarations Defendants' obtained from Class Members. This was in addition to interviewing and meeting with scores of Class Members, reviewing thousands of pages of documents, taking numerous depositions, and extensively working with an expert statistician to establish the damages and penalties owed. Class Representatives ' lodestar to date is $1,295,325.00. This lodestar could increase by more than $70,000 by the end of the litigation. The modest multiplier of 2.2 [potentially 2.09 by the end of the litigation] they seek is well within the range of multipliers awarded by courts in the Ninth Circuit and this District.

Contingent Nature of Litigation: This case has been pending since May 20, 2011. During this time, Class Counsel has not received any money for this case and has expended over $70,000 in costs.

With respect to the Class Representative service awards, this should be granted based on: (1) the degree of success achieved in this case; (2) the time and effort expended by the Representatives; (3) the significant threat of retaliation the Representatives face from subsequent employers by lending their names to the lawsuit; and (4) the fact that the service award is less than the average payout to Class Members even after deductions.

Accordingly, Class Representatives ' motion should be granted in its entirety.

II. PROCEDURAL HISTORY

A. The Litigation

Class Representative Robert Mendez filed a proposed class action complaint on May 20,

2011 in the United States District Court for the Northern District of California alleging violations of the California Labor Code. Mendez alleged that Defendants failed to provide meal and rest periods or premium compensation in lieu thereof and did not compensate for all hours worked, among other claims. Defendants filed an Answer on June 21, 2011. Declaration of Michael Morrison ("Morrison Decl."), ¶ 8.

On November 16, 2011, the parties engaged in a good faith mediation with the respected mediator, Steven J. Serratore, Esq. Prior to this mediation, Class Representatives sent surveys to Class Members, interviewed in person or over the phone scores of Class Members, and retained an expert statistician to determine damages. Despite their best efforts to settle early in the litigation process, the parties were unable to reach agreement. Morrison Decl., ¶ 9.

On December 16, 2011, Mendez filed a First Amended Complaint ("FAC") pursuant to a stipulation with Defendants, which added three additional plaintiffs, Randy J. Martinez, Anthony A. Harang, and Kevin Johnson, Sr. These Plaintiffs were added to ensure that there was an adequate representative as to each of the claims Plaintiffs were asserting in the lawsuit. The Court granted the stipulation and the FAC was deemed filed on December 20, 2011. Defendants filed an answer to the FAC on January 4, 2012. Morrison Decl., ¶ 10.

The parties engaged in intensive discovery. Mendez and Martinez were each deposed by Defendants, while Plaintiffs took multiple depositions, including of R+L (via a F.R.C.P. Rule 30(b)(6) witness [Defendants' Vice President of Human Resources]) as well as various terminal and assistant terminal managers. The parties exchanged written discovery and each reviewed thousands of documents. Morrison Decl., ¶ 11.

Defendants filed a Motion to Compel further questioning of Martinez and for Sanctions in March of 2012, while Plaintiffs Mendez and Martinez filed for a temporary restraining order concerning the way declarations were obtained by R+L from current employees at the workplace. Defendant's Motion to Compel was denied on April 30, 2012, while Plaintiffs' restraining order was granted, resulting in a May 16, 2012 order for a curative letter to proposed Class Members and restrictions on R+L's use of the declarations signed by Class Members. Morrison Decl., ¶ 12.

On July 17, 2012, Defendants moved for Summary Judgment while Mendez and Martinez

filed their Motion for Class Certification.[1] The pleadings for both parties were voluminous, with each side providing massive amounts of data and declarations to support their position. Morrison Decl., ¶ 13.

The Court granted class certification on November 19, 2012. The Court denied certification of line-haul drivers' meal/rest break claims, but certified meal/rest break claims for city and combo drivers, and certified all other claims for all drivers. The Court also denied R+L's motion for summary judgment. Morrison Decl., ¶ 14.

Defendants next sought leave for an interlocutory appeal, which the Class Representatives opposed. After leave was denied, the parties began discussions which resulted in another attempt at mediation. This effort to agree to a second mediation included an in-person meeting between all counsel at defense counsel's office to discuss pre-mediation terms. Morrison Decl., ¶ 15.

B. The Second Mediation

Both parties did everything they could to ensure a successful mediation. Class Counsel and defense counsel discussed what information was needed and when it should be provided. Class Counsel requested and reviewed voluminous data and documents regarding job titles, work weeks, termination dates, and payroll data for each class member. Based on these documents and interviews, Class Counsel compiled a detailed database of information concerning the job duties and work hours of the Class Members. Morrison Decl., ¶ 16.

There was an enormous amount of data which took a great deal of time and effort to analyze and understand. Class Counsel performed multiple detailed analyses of payroll and timekeeping data. Class Counsel interviewed many Class Members, traveling throughout the state to meet with many of them personally. As an example of the effort which this case required, Class Counsel analyzed over five years' worth of individual Driver Daily Logs (line-haul drivers completed a log each workday), analyzed GPS data from Defendants, as well as analyzed payroll records and other documents. Thousands more documents were provided to Class Counsel by Class Members and the Class Representatives. Morrison Decl., ¶ 17.

[1/] Plaintiffs did not seek to make Aaron Harang and Kevin Johnson class representatives. They remain Class Members.

Class Counsel retained an expert forensic accountant and worked closely with him to analyze the data. The forensic accountant produced a detailed analysis which was utilized extensively to prepare for mediation. Morrison Decl., ¶ 18.

Prior to the mediation session, Class Counsel prepared a massive and detailed mediation brief which contained extensive and detailed analyses of liability and damages issues. There were multiple damage models to account for each category of damages. Also of significance were Class Counsels' review and analysis of recent California state court developments which came after this Court certified the Class, most importantly *Bluford v. Safeway Stores, Inc.*, 216 Cal.App.4th 864 (2013), and *Gonzalez v. Downtown LA Motors, LP*, 215 Cal.App.4th 36 (2013). Morrison Decl., ¶ 19.

The Court denied class certification of meal and rest period claims for line-haul drivers, but this denial was prior to the California Appellate Court's recent opinion (only a few months ago) in *Bluford v. Safeway Stores, Inc.*, 216 Cal.App.4th 864 (2013). In *Bluford* the California Court of Appeal held that truck drivers paid under a piece-rate system (like R+L's compensation system for line-haul drivers) must be separately compensated for rest periods. *Id.* at 871-872. In light of *Bluford*, meal and rest period claims for line-haul drivers were included in the negotiations. As a result, all Class Members will be compensated for all claims, a truly excellent result. Morrison Decl., ¶ 20.

The parties were far apart when negotiations began. Defendants denied – and continue to deny – any liability or wrongdoing of any kind. R+L insists it complied with the Labor Code, the Business and Professions Code, the Industrial Welfare Commission Wage Orders, and similar federal laws, including but not limited to the federal Fair Labor Standards Act. Morrison Decl., ¶ 21.

Defendants also contended – and continue to contend – that case law supports their position that California's meal and rest period laws are preempted by the Federal Aviation Administration Authorization Act as well as the law creating the Federal Motor Carrier Safety Administration. Defendants expect the FAAAA cases (*Campbell v. Vitran Express, Inc.*, 9th Cir. Appeal No. 12-5620; and *Dilts v. Penske Logistics*, 9th Cir. Appeal No. 12-55705) currently on appeal will be

decided in the employer's favor, thus eliminating California's meal and rest period laws for truckers engaged in interstate commerce. Class Counsel, naturally, disagreed with that position, but had to admit it was entirely possible. Morrison Decl., ¶ 22.

R+L also insists its challenged payroll system of "rounding" was and is neutral and legal, and that the "flat-rate" pay system compensated drivers for all time worked. Class Counsel disagreed, citing *Gonzalez v. Downtown Los Angeles Motors*, 215 Cal.App.4th 36 (2013) in support of Plaintiffs' positions. Accordingly, the parties were far apart when it came to their views on liability and damages. Nevertheless, after class certification was granted and the interlocutory appeal was denied, R+L agreed to negotiate. Morrison Decl., ¶ 23.

On August 27, 2013, the parties participated in their second attempt to settle this action – an all-day mediation at the Los Angeles offices of the respected class action mediator, Steve Serratore (who had conducted the initial mediation effort back in November of 2011). Despite their best efforts, the parties remained at an impasse. Mr. Serratore then proposed a mediator's compromise to resolve this case, giving each side time to consider the proposal. This worked. The parties finally had an agreement acceptable to both sides. Morrison Decl., ¶ 24.

C. Preliminary Approval

On December 19, 2013, Class Representatives ' Motion for Preliminary Approval was heard. The Court granted the motion, but asked the parties to submit a new notice to Class Members. On December 20, 2013, the parties submitted the new proposed notice. Morrison Decl., ¶ 25.

On December 23, 2013, the Court issued an order granting preliminary approval. The Court further ordered that the Class Representatives' motion for attorney fees be filed no later than January 10, 2014, and the motion for final approval be filed no later than February 6, 2014. Finally, the Court set the final approval hearing for March 6, 2014 at 2:00 pm. Morrison Decl., ¶ 26; Exhibit "2" to Morrison Decl.

III. SUMMARY OF THE SETTLEMENT AGREEMENT

This is a non-reversionary settlement without a claims process. Instead, the entire amount of $9,500,000 will be paid out if final approval is granted.

Through this class action settlement, the parties are resolving all of the claims in the operative complaint, and in so doing are benefitting the Class Members, as well as benefitting Defendants and the judicial system by avoiding multiple actions and further contested litigation.

As discussed above, due to recent favorable developments in the California Appellate Court (mainly *Bluford*), the proposed class action settlement includes claims that Defendants failed to provide meal and rest periods to all drivers, including line-haul drivers. The Class for settlement purposes is defined as:

All city, combo and line-haul drivers employed by Defendants in California between May 2007 and the date of preliminary approval (December 23, 2013).

Defendants have agreed to pay $9,500,000 plus the employer's share of payroll taxes, to the Class Members, Class Representatives, Class Counsel, the Third Party Administrator, and the LWDA, in full satisfaction of the alleged claims as more specifically described in the Joint Stipulation.

The settlement was reached after an in-depth investigation, an attempted motion for summary judgment by the Defendants, a vigorously-disputed motion for class certification, an attempted interlocutory appeal by the Defendants, a temporary restraining order sought by the Plaintiffs which resulted in a curative letter to the Class at Defendants' expense, various discovery motions, including a motion to compel by the Defendants which was denied, extensive formal and informal discovery, analysis by retained experts, and multiple arms-length, non-collusive negotiations. When negotiations appeared to reach an impasse, the Settlement Agreement was the result of a mediator's proposal. The final version was arrived at only after multiple versions were exchanged between the parties.

The basic terms of the settlement are as follows:

The Settlement Amount is $9,500,000: Under the settlement, all Class Members will be issued a check (unless they exclude themselves). R+L will pay $9,500,000 (the "Settlement Payment") plus the employer's share of payroll taxes in full settlement of all claims alleged in the operative complaint.

The Settlement Payment will be paid in full. There is no reversion. After deductions for costs and fees as approved by the Court, all remaining funds are to be distributed to the Class. Class Counsel requests that any unclaimed funds (e.g., uncashed checks) are to be placed in the California Department of Industrial Relations Unclaimed Wages Fund so Class Members can later claim their wages.

R+L Carriers Shared Services, LLC's share of payroll taxes and other required withholdings from Individual Settlement Payments, including but not limited to R+L Carriers Shared Services, LLC's FICA and FUTA contributions, shall be paid separate from and in addition to the Settlement Amount.

Individual Settlement Payments will be allocated as follows: forty percent (40%) as wages; forty percent (40%) as interest; and twenty percent (20%) as penalties.

Pro Rata Increase In The Event of Additional Class Members: At the time of the mediation, Defendants represented that there were approximately 505 Class Members. Class Counsel relied upon that representation. However, if there are 15% more Class Members than that (581 Class Members is 15% more), Defendants will contribute additional money on a pro rata basis. For example, if there are 582 Class Members, the Settlement Amount of $9,500,000 will be divided by 505 to determine the pro-rata amount per class member ($18,811.88). That amount will then be multiplied by the actual number of Class Members (in this hypothetical, 582) to determine a new Settlement Amount of $10,948,514.85.

Deductions: As more fully described below, and upon approval by the Court, there will be deductions from the Settlement Payment. The deductions are:

a. Attorneys' Fees: the Class Representatives request, and Defendants do not oppose, an award of attorneys' fees of thirty percent (30%) of the Settlement Payment (or $2,850,000) to Class Counsel for all of the work already performed in this case and all work remaining to be performed. While the settlement agreement allows Plaintiffs to seek 33 1/3% of the settlement, they only seek 30%.

b. Costs: the Class Representatives request, and Defendants do not oppose, payment to Class Counsel of their reasonable litigation costs of $70,000 from the Settlement

Payment for costs and expenses incurred by Class Counsel in prosecuting the case and implementing the terms of the Settlement Agreement (including all future costs as well as those already incurred).

c. Service Payments to Class Representatives: the Class Representatives request, and Defendants do not oppose, service payments to the Class Representatives, in the amount of $10,000, each, from the Settlement Payment as an enhancement for their excellent service as Class Representatives, in addition to any payment they may otherwise receive as Class Members.

d. Third Party Administrator Costs: Rust Consulting, Inc., an experienced Third Party Administrator of class action lawsuits, will administer the Settlement, at a cost estimated at $12,000.

e. LWDA: The Class Representatives request a payment of up to $20,000 from the Settlement Payment to the State of California Labor Workforce and Development Agency ("LWDA"). The sum of $26,666.67 from the Settlement Payment will be allocated to penalties under the Private Attorneys General Act of 2005 ("PAGA"). Pursuant to PAGA, the sum will be split between the Class and the LWDA, with 75% of that allocation ($20,000) to be paid to the LWDA and 25% ($6,666.67) to remain for payment to Class Members.

After all deductions approved by the Court have been made from the Settlement Payment, the entire remaining amount is to be distributed to the Class Members based on the number of workweeks the Class Member worked during the class period.

The total for deductions, assuming the Court grants all requested amounts, is $2,974,000 - less than 1/3rd of the Settlement Payment. The entire remainder, estimated to be $6,527,000, is to be distributed to Class Members.

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IV. THE REQUESTED ATTORNEYS' FEES ARE FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED BY THIS COURT.

A. Class Counsel's Fee Is Properly Calculated as a Percentage of the Total Class Settlement.

When a litigant's efforts create or preserve a fund from which others derive benefits, the court may spread litigation costs proportionately among all the beneficiaries to compensate those who created the fund. *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980) ("[A] lawyer who recovers a common fund for the benefit of persons other than ... his client is entitled to a reasonable attorneys' fee from the fund as a whole."); *Mills v. Electric Auto-Lite Co.* 396 U.S. 375, 393-394 (1970) (discussing the acceptance of awarding attorneys' fees and expenses from a settlement where "litigation has conferred a substantial benefit on the members of an ascertainable class."). The common fund doctrine allows a court to award attorneys' fees based upon a percentage of the available fund that is created for the satisfaction of Class Members' claims when a class action reaches settlement or judgment. A. Conte & H. Newberg, *Newberg on Class Actions*, § 14:6 (4th ed. 2002).

Indeed, it is an accepted practice in wage and hour class action settlements to award attorney's fees to Class Counsel based on a total settlement value agreed upon by the parties. *See e.g. Staton v. Boeing Co.*, 327 F.3d 938, 967-972 (9th Cir. 2003).[2] In fact, the Ninth Circuit "has made the percentage-of-the-benefit approach the preferred method for determining fees" in cases

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[2/] California case law also recognizes the percentage of recovery method for awarding attorneys fees in class action cases where a fund is established. In *Serrano v. Priest,* 20 Cal.3d 25 (1977), the California Supreme Court held that:

> [W]here a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorneys' fees out of the fund.

Id. at 34*; see also Bell v. Farmers Insurance Exchange*, 115 Cal.App.4th 715, 726 (2004) (25% fee awarded from $90 million dollar fund); *Wershba v. Apple Computer* 91 Cal.App.4th 224, 254 (2001) (recognizing that one method for calculating attorneys' fees in class actions is the percentage of recovery); *Sanders v. City of Los Angeles*, 3 Cal.3d 252, 261, 263 (1970) (affirming award of attorneys' fee based on percentage of recovery).

like this one. See *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 31 (2000) (citing *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379 (9th Cir. 1995)); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989). This is because the lodestar approach encourages inefficiency and wasteful attorney hours. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050, fn. 5 (9th Cir. 2002) ("it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee").

Other courts have declared a preference for the percentage method because deficiencies of the lodestar method "has stimulated greater judicial willingness to evaluate a fee award as a percentage of the recovery." *In re Thirteen Appeals Arising Out of San Juan*, 56 F.3d 295, 305-306 (1st Cir. 1995); *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 517 (6th Cir. 1993); *Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992); *Chun v. Bd. of Trustees of E.R.S.*, 92 Haw. 432, 439-440 (2000); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1266-68 & fn.3, 1271 (D.C. Cir.1993) (noting that the lodestar approach "encourages significant elements of inefficiency," by giving attorneys an "incentive to spend as many hours as possible" and "a strong incentive against early settlement"; the percentage of the fund approach "more accurately reflects the economics of litigation practice", and "the monetary amount of the victory is often the true measure of success, and therefore it is most efficient that it influence the fee award"; accordingly, "we join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees....").[3]

The percentage of the fund method also more accurately reflects the fees counsel deserves and the benefit conferred upon the class. *See Glass v. UBS Financial Services, Inc.*, 2007 WL 221862, *16 (N.D. Cal. 2007) (25% of the $45,000,000 fund awarded; "Class counsel's prompt

[3/] *Mashburn v. National Healthcare, Inc.*, 684 F.Supp. 679, 695 (M.D. Ala.1988) ("[o]ne of the reasons for supporting a percentage fee award is to encourage early settlement of cases," *citing* H. Newberg, *Attorney Fee Awards*, § 2.07 at 48-51).

action in negotiating a settlement … *should be fully rewarded*"; *no lodestar cross check conducted or needed*) (emphasis added); *Kirchoff v. Flynn*, 786 F.2d 320, 325-26 (7th Cir.1986) ("The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains.... The unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with a payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants....At the same time as it automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure, the contingent fee automatically handles compensation for the uncertainty of litigation."); *In re M.D.C. Holdings Securities Litigation*, 1990 WL 454747, *8 (S.D. Cal.1990) ("[T]he results reached here were accomplished in a remarkably short period of time. It is my strong belief that in general the actual amount of recovery, if any, which ultimately goes to plaintiffs in the majority of cases is inversely proportional to the time spent in litigation.... And finally, concluding litigation quickly and with a fair result is beneficial to the general public in that it frees the resources of the courts to deal with other matters.") (quoting another court); *In re Quantum Health Resources, Inc.*, 962 F.Supp. 1254, 1257 (C.D. Cal.1997)("As critics have noted, the lodestar method needlessly increases judicial workload, creates disincentive for early settlement, and causes unpredictable results. *Court Awarded Attorney Fees*, 108 F.R.D. 237, 246-49 (3rd Cir. 1986). The court agrees with these criticisms.").[4]

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[4/] Furthermore, courts have long recognized that a percentage of recovery for attorneys' fees is properly awarded on the basis of the total value <u>*rather*</u> than the claims payments made. *Boeing*, 444 U.S. at 478, 480-481 (fees of approximately $2,000,000 approved on settlement value of $7,000,000 where only 47% of the eligible claimants made claims); *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (attorney fee award should be based on 33.3% as agreed by the parties based on total recovery value of $4.5 million; "court abused its discretion by basing the fee on the class members' claims against the fund rather than on the percentage of the entire fund or on the lodestar"); *Vizcaino*, 290 F.3d at 1049-1050 (no abuse of discretion in awarding percentage of the common fund).

B. Class Counsel's Request for Thirty Percent (30%) of the Common Fund Is Reasonable.

Historically, attorney's fee awards in common fund cases range from 20% to 50% of the fund, depending on the circumstances of the case. A Conte & H. Newberg, *Newberg on Class Actions*, § 14.03 (3rd ed.1992); *c.f. In Re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 736 (3rd Cir. 2001) (finding that "most fee awards range 'from nineteen percent to forty-five percent of the settlement fund.'"). According to Newberg:

> No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.

3 *Newberg*, § 14.03.

Numerous federal courts within the Ninth Circuit have awarded attorneys' fees equal to or higher than 33 1/3 percent of the settlement both before and after class certification: *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379 (9th Cir. 1995) (upholding award of 33 1/3% of $12 million settlement); *Stuart v. Radioshack Corp.*, No. C-07-4499-EMC, 2010 WL 3155645, *5 (N.D. Cal. Aug. 9, 2010) (1/3 of $4.5 million); *Singer v. Becton Dickinson and* Co., No. 08-CV-821-IEG, 2010 WL 2196104, *8 (S.D. Cal. June 01, 2010) (33 1/3% of $1 million in a wage and hour class action); *Romero v. Producers Dairy Foods, Inc.*, No. 05-0484-DLB, 2007 WL 3492841,*2-4 (E.D. Cal. Nov. 14, 2007) (33 1/3% of $240,000 in a wage and hour class action); *In re Heritage Bond Litigation*, No. 02-ML-1475-DT, 2005 WL 1594403, *19 (C.D. Cal. June 10, 2005) (33 1/3% of $27.83 million); *Antonopulos v. North American Thoroughbreds, Inc.*, No. 87-0979G, 1991 WL 427893, *1 (S.D. Cal. May 6, 1991) (33 1/3 of $3.1 million); *In re Activision Securities Litigation*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (awarding 32.8% of $42 million and holding that "[a]doption of a policy of awarding approximately 30% of the fund as attorneys' fees in the ordinary case is well-justified in light of the lengthy line of cases which find such an award appropriate and reasonable."); *In re Businessland Sec. Litig.*, No.

C-90-20476-RFP, 1991 WL 427887, *1 (N.D. Cal. 1991) (awarding 30% of $6 million, noting that recent trends indicated that thirty percent of the settlement amount is about average) (internal citations omitted).[5]

Ninth Circuit cases discuss the benchmark rate of 25% as the *starting point* for common fund fee analysis. *See Six(6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990). The district court may adjust this rate when circumstances warrant a higher or lower percentage. *Id.* Assessing an appropriate fee based on a percentage of the fund involves in part, the following factors: results obtained for the class, risks of litigation, including the risk of loss and, in the event of success, delay in payment to the class.

1. Excellent Results Achieved on Behalf of the Class.

"Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of relief offered in the settlement . . . They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14, (1981) (internal citation omitted).

Here, Plaintiffs were successful in obtaining a $9.5 million settlement fund for Class Members. The $9.5 million represents anywhere from than 2/3 to 3/4 of the total amount of wages owed to Class Members at the time of settlement. Morrison Decl., ¶ 27. The average payout before deductions is $18,304.43. The average payout to Class Members after deductions [assuming the Court approves the other payments including the requested attorneys fees and costs]

[5] Courts outside of the Ninth circuit have also routinely awarded attorneys' fees equal to or higher than 33 1/3 percent in class action settlements. *See, e.g., Rotuna v. West Customer Management Group, LLC*, No. 09-CV-1608, 2010 WL 2490989,*7 (N.D. Ohio June 15, 2010) (1/3 of settlement fund in wage and hour class action); *Dillworth v. Case Farms Processing, Inc.*, No. C-07-4499-EMC , 2010 WL 776933,*7 (N.D. Ohio Mar. 8, 2010) (1/3 of settlement fund in wage and hour class action); *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 146-47 (E.D. Pa. 2000) (1/3 of $5.97 million); *In re Crazy Eddie Securities Litigation*, 824 F. Supp. 320, 323, 326-327 (E.D.N.Y. 1993) (33.8% of $42 million with unclaimed funds reverting to defendants); *Will v. General Dynamics Corp.*, No. 06-698-GPM, 2010 WL 4818174 at * 3 (S.D. Ill. 2010) (33 1/3 % of $15.5 million); *In re Safety Components International, Inc.*, 166 F.Supp.2d 72, 109 (D.N.J. 2001) (1/3 of net $4.31 million); *In re Ampicillian Antitrust Litigation*, 526 F.Supp. 494, 499 (D.D.C. 1981) (awarding 45% of $7.3 million settlement fund); *Van Gemert v. Boeing Co.*, 516 F.Supp. 412, 420 (S.D.N.Y. 1981) (awarding 36% of the settlement fund).

is **$12,576.11**. The payout for Class Members who worked the full class period is **$36,591.08**. The per week value is $106.28. Declaration of Chris Pinkus ("Pinkus Decl."), ¶ 7.

Class Counsel performed a search of wage and hour class action decisions in the Northern District which were reported on Westlaw where final approval of the settlement was granted between May 20, 2011 and December 31, 2013 (this case was filed on May 20, 2011). Class Counsel were unable to locate any class actions where the primary claims were for missed meal and rest periods which exceeded both the aggregate settlement amount obtained in this case and the average take home amount per class member. Indeed, the only meal and rest break cases Class Counsel could locate which exceeded the aggregate amount of this settlement had substantially more class members. Morrison Decl., ¶ 28; *see, e.g., Minor v. Fedex Office and Print Services, Inc.*, 2013 WL 503268, *1-2 (N.D. Cal. Feb. 8, 2013) (11,775 class members dividing an aggregate settlement of $9,625,000); *Lemus v. H&R Block Enterprises, LLC*, 2012 WL 3638550, *2-3 (N.D. Cal. Aug. 22, 2012) ($35 million settlement with a class size of 18,705 persons).

Plaintiffs are also only aware of a handful of wage and hour class action cases of any type in the Northern District during the May 2011 to December 31, 2013 time period which approximate or exceed the settlement amount in this case. Morrison Decl., ¶ 29. Of these decisions, several allowed for reversion of unclaimed amounts and contained far more class members than 519 class members in this case. *See, e.g., In re Wells Fargo Loan Processor Overtime Pay Litigation*, 2011 WL 3352460, *2-3 (N.D. Cal. Aug. 2, 2012) ($7,218,512 settlement for 3,544 loan officers; partial reversion); *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, *2 (N.D. Cal. Nov. 21, 2012) ($9,225,000 settlement on behalf of a class of 23,500 employees; avg. payout $255; reversion); *Lemus*, 2012 WL 3638550 at *2-3 (reversion; claims made settlement; 18,705 class members).

In addition to obtaining a large settlement amount, Plaintiffs helped establish positive law. In particular, this Court's ruling on the Defendants' motion for summary judgment that California's meal and rest break laws were not preempted by the Federal Aviation Administration Authorization Act is an important counter to the previous district court decisions which held the

opposite. Indeed, at the time of the decision, the majority of district courts in this state had concluded that California's meal and rest break laws were preempted by the FAAAA. *See, e.g., Dilts v. Penske Logistics, LLC, et al.*, 819 F.Supp.2d 1109 (S.D. Cal. 2011); *Esquivel v . Vistar Corp., d/b/a/ Roma Food, et al.*, 2012 U.S. Dist. LEXIS 26686 (C.D. Cal. Feb. 8, 2012); *Campbell v. Vitran Express, Inc.*, 2012 WL 2317233 (C.D. Cal. June 8, 2012). Class Counsel is aware of other plaintiffs' attorneys who had abandoned their meal and rest break claims against trucking companies engaged in interstate commerce in the face of this authority. Morrison Decl., ¶ 30. Since the decision came out, at least one other court has agreed with this Court's reasoning that California's meal and rest period claims are not preempted by the FAAAA. *See, e.g., Brown v. Wal-Mart Stores, Inc.*, 2013 WL 1701581, *4 (N.D. Cal. 2013) ("Plaintiffs rely on a decision from this district, *Mendez v. R + L Carriers, Inc.*, 2012 WL 5868973 (N.D. Cal., Nov.19, 2012), to support their contention that California's meal and rest break laws are not preempted. This Court finds Chief Judge Wilken's decision in *Mendez* persuasive, and will follow it.").

Plaintiffs also obtained class certification of their meal and rest break claims post-*Brinker Restaurant Corporation v. Superior Court*, 53 Cal.4th 1004 (2012). In *Brinker*, the California Supreme Court held that employers need only make meal and rest periods available to employees and did not have to ensure that they were actually taken. *Id.* at 1040-41. While *Brinker* has not resulted in the death knell of meal and rest break class actions as some employers and employer-side labor attorneys had predicted, it has been beneficial to employers overall in terms of reducing the number of certified meal and rest break class actions. *See* M. Michael Cole and Walter M. Stella; *Brinker: The Death Knell for Meal and Rest Break Class Actions*?; Bender's Labor and Employment Law Bulletin, Vol. No. 1, 2013. The decision in this case reaffirms that certification of meal and rest break claims is proper where Plaintiffs produce substantial evidence of centralized policies that preclude class members from taking meal and rest breaks. This case can be cited by future cases seeking to certify meal and rest break claims, especially cases involving truck drivers.

/ / /

2. Risks of Litigation

While Plaintiffs are confident in their case, they are also mindful of the substantial risks of continued litigation. Although this Court found in favor of Plaintiffs on the FAAAA preemption issue, it is very possible that Plaintiffs could have lost on this issue before the conclusion of the case. As stated above, both the *Dilts v. Penske Logistics LLC* and *Campbell v. Vitran Express, Inc.*, cases are currently pending in the Ninth Circuit. The Ninth Circuit could find that California's meal and rest break claims are preempted, which would in turn dramatically lower the value of this case. Indeed, most of the damages in this case are related to Plaintiffs' meal and rest break claims. Morrison Decl., ¶ 31.

There is also no guarantee Plaintiffs would have prevailed on their meal and rest break claims at trial even if the *Dilts* and *Campbell* decisions go their way. Defendants deny that they failed to provide meal and rest periods to drivers and produced dozens of declarations from drivers attesting to this fact. It is possible a jury could have concluded that Defendants complied with the law or that only some terminals violated the law when others did not. Morrison Decl., ¶ 32.

With respect to class certification, it is not improbable that Plaintiffs' favorable class certification order could be undermined by future decisions by the United States Supreme Court. For example, Class Counsel is aware that employers are trying to expand the United States Supreme Court's holding in *Comcast v. Behrend*, 133 S.Ct. 1426 (2013) to preclude class certification in all cases where damages are inherently individualized. Morrison Decl., ¶ 33. While the Ninth Circuit has rejected this position, it is possible the Supreme Court could decide otherwise in the not too distant future.

Overall, as demonstrated above, Defendants vigorously contested liability, the scope and amount of the claimed damages, and the propriety of class certification. Resolution of these issues at trial and/or on appeal would not only delay payment to the Class but also present a risk at each juncture that the class might not receive any recovery at all. These risks must be considered in assessing the fairness of the settlement, which guarantees a prompt and substantial recovery from Defendants. The settlement agreement in this case is therefore consistent with the

"overriding public interest in settling and quieting litigation" that is particularly true in class action suits. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also* 4 *Newberg*: § 11.41 (citing cases).

Furthermore, Class Counsel risked not only a great deal of time but also a great deal of expense to ensure the successful litigation of this action on behalf of the entire Class. There was the prospect of the enormous cost inherent in class action litigation, as well as a long battle with a corporate defendant that had retained a premier defense firm. That prospect has become a reality, in both trial court and courts of appeal in other wage and hour class litigation. The expense of protracted litigation is formidable and Class Counsel and Plaintiffs can incur hundreds of thousands of dollars in costs and face a substantial risk that this time and financial investment can be lost and no monetary recovery obtained for their hard work and financial investment. Therefore, the risks of litigation undertaken by Class Counsel support the fee requested. Indeed, the perception that Plaintiffs' counsel is prepared to litigate and well-qualified to litigate often results in settlement discussions; hence the strength and reputation of counsel is critical and an important component of the outstanding result in this matter.

The public policy in favor of settlement of class actions and other complex cases applies with particular force in this case. Certainty of recovery is enhanced by an equitable and timely consummated settlement such as that under consideration in this case. Tensions created in the employment relationship during the litigation process are alleviated by such settlements as opposed to a trial of the matter, and all parties are in a better position to move forward with their roles in the economy. Accordingly, consideration of the expense, time and risk associated with continued prosecution of this matter weigh in favor of settlement.

3. <u>The Attorneys' Fees Requested by Class Counsel Are Well Within the Range of Fees Approved in Comparable Cases</u>.

As set forth above (*see* Section II(B)), numerous federal courts in wage and hour class actions have awarded attorneys' fees equal to or higher than the 30% of the Maximum Payment

that Plaintiffs seek.[6] This includes decisions from this Court. *See Brailsford v. Jackson Hewitt, Inc.*, 2007 WL 1302978 (N.D. Cal. May 3, 2007) (30% fee award); *Garner v. State Farm Mutual Automobile Insurance Company*, 2010 WL 1687832, *18 (N.D. Cal. April 22, 2010) (granting 30% fee award from $15,000,000 settlement fund).

Accordingly, Class Counsel's request for thirty percent (30%) of the Maximum Payment is in the mid-range of the historical range of fee awards and is justified under the facts of this case for undertaking complex, risky, expensive, and time consuming litigation on a contingent basis under the common fund doctrine.

4. Contingent Nature of Recovery.

This class action was filed more than 30 months ago, and for Class Counsel, the fees were wholly contingent in nature, and Class Counsel's attention to this difficult case was undertaken in lieu of work on other cases. Morrison Decl., ¶ 44; Declaration of Thomas W. Falvey ("Falvey Decl."), ¶¶ 23; Declaration of J.D. Henderson ("Henderson Decl."), ¶ 11. The risks in taking on a class action case are enormous. Litigating a wage and hour class action through certification, and then trial, takes years and requires the investment of tens, and sometimes hundreds, of thousands of dollars. Morrison Decl., ¶ 44.

Also, wage and hours laws are still developing and a change in the law always threatens to wipe out Plaintiffs' recovery. Morrison Decl., ¶ 45; Henderson Decl, ¶ 12. Based on these

[6] *See also Barrera v. GameStop Corp.*, No. CV 09-1399-ODW (C.D. Cal. Nov. 29, 2010) (33 1/3% attorneys' fee award of $3.25 million settlement); *Huang v. SBC Services, Inc., et al.*, No. 06CV2238 DMS (S.D. Cal. Mar. 14, 2008) (30% attorneys fee award of $11,200,000 maximum settlement); *Shoff, et al. v. AT&T et. al.*, Case No. CV 07-3289 DSF (AGRx) (C.D. Cal. Nov. 28, 2008) (30% attorneys' fee award of $16,000,000 maximum settlement); *Doyle et. al. v. AT&T et. al.*, No. CV 08-1275 (JAH) (S.D. Cal. Mar. 1, 2010) (30% attorneys' fee award of $10,500,000 maximum settlement); *Ingalls v. Hallmark Mktg. Corp.*, No. 08cv4342-VBF (C.D. Cal. Oct. 16, 2009) (33.33% attorneys' fee award of $5.6 million settlement); *Benitez et. al. v. Wilbur*, No. 08-1122-LJO (E.D. Cal. Dec. 14, 2009) (33.33% attorneys' fee award of $400,000 settlement); *Chavez et. al. v. Petrissans et. al.*, No. 08-00122-LJO (E.D. Cal. Dec. 15, 2009) (33% attorneys' fee award of $250,000 settlement); *Rippee v. Boston Mkt. Corp.*, No. 05-1359-BTM (S.D. Cal. Oct. 10, 2006) (40% attorneys' fee award of $3.75 million settlement).

considerations, Class Counsel respectfully submit that an award of 30% of the maximum settlement should be awarded for their attorneys' fees – i.e. $2,850,000.

5. Class Counsel Has Expended Significant Time and Effort Pursuing this Litigation Which Supports the Requested Award of Attorneys' Fees.

Class Counsel has performed a substantial amount of work in order to investigate the claims, defeat summary judgment, obtain class certification, establish a reasonable settlement value, and prepare the case for two separate mediation sessions. The work performed by Class Counsel includes:

(1) Preparing and serving written discovery, including requests for production of documents, special interrogatories, and requests for admission; responding to multiple sets of written discovery from Defendants;

(2) Reviewing thousands of pages of documents provided by Defendants and Class Members;

(3) Interviewing both in person and over the phone scores of Class Members about issues relevant to class certification, merits, and damages issues;

(4) Sending out surveys to Class Members asking them to provide pertinent information about the case, including: (1) whether they were provided with meal and rest periods; and (2) the amount of hours they worked for which they were uncompensated;

(5) Reviewing payroll information of Class Members;

(6) Hiring a statistician to review the surveys provided by Class Members and the payroll information provided by Defendants in order to calculate the total wages and penalties owed to Class Members (twice – once for each mediation session);

(7) Doing extensive research on the applicable law with respect to class certification, merits and damages issues as well as Defendants' defenses;

(8) Taking depositions of the corporate defendants (FRCP 30(b)(6)) and various terminal and assistant terminal managers throughout the state;

(9) Defending the Class Representatives depositions;

(10) Preparing a successful ex parte application for a temporary restraining order with respect to Defendants' efforts to obtain declarations from Class Members;

(11) Obtaining numerous declarations from Class Members;

(12) Preparing successful class certification moving papers;

(13) Successfully opposing Defendants' motion for summary judgment;

(14) Preparing two extremely detailed and lengthy mediation briefs;

(15) Participating in two, separate, full day mediations.

Morrison Decl., ¶¶ 8-26, 34-37; Falvey Decl., ¶¶ 7-19, 21-22; Henderson Decl., ¶ 6; Declaration of Michael Boyamian ("Boyamian Decl."), ¶ 6.

6. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award.

At the time of filing this motion, Plaintiffs' lodestar is **$1,295,325.00.** [Morrison: 713.5 hrs.* $665 = 474,477.50.]; [Krakow: 20 hrs * $775= $15,500]; [Wu: 104.3 hrs * $390 = $40,560]; [Falvey: 495 hrs * $775 = $383,625]; [Henderson: 692.5 hrs * $525= $363,562.50]; [Boyamian: 40 hrs * $440 = $17,600.00]. Morrison Decl., ¶¶ 38-43; Falvey Decl., ¶¶ 20-21; Henderson Decl., ¶ 7-10; Boyamian Decl., ¶¶ 6-7 .[7]

This number does not include the time Plaintiffs' counsel will spend: (1) on the final approval motion and supporting papers; (2) dealing with Class Members' inquiries; and (3) preparing for and travel to the final approval hearing. Class Counsel estimates another 70-110 hours collectively on these tasks, which could push the lodestar to above **$1,366,175.00** ($70,850 additional in fees potentially). Morrison Decl., ¶ 41 (20-40 additional hours); Falvey Decl., ¶ 25 (30 additional hours); Henderson Decl., ¶ 10 (20-40 additional hours).

While the lodestar is less than the amount Plaintiff is seeking in this motion, this is clearly a case where a multiplier of just over two (2) [2.2 to date; potentially 2.09 by the conclusion of the case] would be justified. Class Members here are receiving substantial benefits, with some

[7]For evidence supporting the propriety of counsel's hourly rates, *see* Morrison Decl., ¶¶ 2-6, 38-43; Declaration of Carol Sobel, ¶¶ 5-21 and exhibits; Declaration of Wilmer Harris, ¶¶ 11-20; Falvey Decl., ¶¶ 2-6; Henderson Decl., ¶¶ 2-5, 7-9; Boyamian Decl., ¶¶ 2-7;

payments exceeding $36,000 and average payments exceeding $12,000 after deductions. Plaintiffs achieved these results despite the difficulty of certifying wage and hour class actions, especially actions where the class members work in different geographic regions throughout California and in different terminals with different managers and supervisors. Plaintiffs also settled this action before trial, meaning Class Members will be able to obtain the benefits of the settlement sooner rather than later. Indeed, the resolution of this action before trial means that Class Members will not have to testify against their current employer, thereby potentially exacerbating tensions between the employees and their corporate employer.

The Ninth Circuit and courts in this district have approved multiplier ranges which are much higher than the modest multiplier Plaintiffs are seeking here. *See, e.g. Vizcaino*, 290 F.3d at 1050-51 (upholding 28% fee award that constituted a 3.65 multiplier); *id* at 1052-54 (noting district court cases in the Ninth Circuit approving multipliers as high as 6.2, and citing only 3 of 24 decisions with approved multipliers below 1.4). Thus, the multiplier sought is justified and should be awarded.

V. THE PAYMENT TO THE CLASS REPRESENTATIVES FOR THEIR SERVICES TO THE CLASS IS REASONABLE AND ROUTINELY AWARDED BY COURTS.

The Class Representatives seek a service award of $10,000, each. Class Counsel is of the opinion that the service award is reasonable and proper and supported by the particular circumstances of this case and the applicable case law. Defendants do not oppose this request.

Courts have long acknowledged that active litigants are entitled to be compensated for bearing the risk and time to represent others. *Lo Re v. Chase Manhattan Corp.,* 19 F.E.P. Cas. (BNA) 1366 (S.D.N.Y. 1979). Where class representatives are provided with special compensation as part of a class settlement, the Court should ensure that it is fair and reasonable. However, "[i]t is the complete package, taken as a whole, rather than the individual component parts, that must be examined." *Officers for Justice v. Civil Service Commission of San Francisco,* 688 F.2d 615, 628 (9th Cir. 1982).

Indeed, service awards "are not uncommon and can serve an important function in promoting class action settlements." *Sheppard v. Consol. Edison Co. of N.Y., Inc*. U.S.D.C. Case

No. 94-CV-0403 (JG), 2002 U.S. Dist. LEXIS 16314, *16 (S.D.N.Y. Aug. 1, 2002); *In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272-273, fn. 3 (S.D. Ohio 1997) ("[c]ourts routinely approve service awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation"), *and cases cited therein*.

The modest service payments to the Class Representatives are intended to recognize their time and efforts on behalf of the Class. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001); *see also Complex Manual* § 30.42, n.763 (noting that such awards "may sometimes be warranted for time spent meeting with class members or responding to discovery"). In the *Coca-Cola* case, the Court approved service awards of $300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process and taking the risk of stepping forward on behalf of the class. *Ingram*, 200 F.R.D. at 694; *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 300 (1995) (approving $50,000 participation award).

The service awards being sought here are justified. Even prior to the initiation of this lawsuit, Plaintiff Mendez was in constant communication with his counsel about issues related to the case. Plaintiff Mendez was invaluable in providing information about Defendants' payroll practices, Defendants' meal and rest break policies, and the nature of Defendants' business operations. In short, Plaintiff Mendez is the reason why this class action case was initiated. Declaration of Robert Mendez ("Mendez Decl."), ¶ 3; Morrison Decl., ¶ 46; Henderson Decl., ¶ 13.

After the commencement of the litigation, Plaintiffs' counsel determined it would necessary to locate additional class representatives to prosecute this action. Specifically, Plaintiffs' counsel learned that drivers who performed primarily linehaul work were being paid improperly based on a piece-rate formula R+L used to compensate them. Linehaul driving involves the repositioning of trailers between R+L facilities and does not involve making local

deliveries to customers of R+L. Morrison Decl., ¶ 47. Plaintiff Mendez, while performing some linehaul work, was primarily a city or combo driver with local routes. Randy Martinez was a "pure" linehaul driver and agreed to become a class representative to represent linehaul drivers after the case had commenced. Morrison Decl., ¶ 47; Henderson Decl., ¶ 14.

Both Representative Plaintiffs devoted a substantial amount of time to this litigation which supports the modest service awards being sought. The Representative Plaintiffs sat for deposition, responded to multiple sets of written discovery, and met with Class Counsel in person on multiple occasions. Mednez Decl., ¶¶ 3-13; Declaration of Randy Martinez ("Martinez Decl.), ¶¶ 3, 7-13; Morrison Decl., ¶ 48; Henderson Decl., ¶ 15. In total, Plaintiff Mendez spent 60 hours on this case (Mendez Decl., ¶ 13), while Plaintiff Martinez spent 47 hours (Martinez Decl., ¶¶ 13).

It should be noted that the Representative Plaintiffs came forward in order to vindicate the rights of other Class Members despite personal fears of retaliation from subsequent employers. Mendez Decl., ¶ 14; Martinez Decl., ¶ 14. In this age, it is not uncommon for employers to conduct background investigations of prospective employees to determine if they have ever been involved in lawsuits with previous employers. Class Counsel has observed from the obtaining the personnel file of plaintiffs in other cases that employers investigate whether the employee has been involved in previous litigation against their employers and pay for reports detailing this information. Morrison Decl., ¶ 49. Thus, by stepping forward and lending their names to this lawsuit, the Representative Plaintiffs have risked future employment opportunities and have bore risks that absent class members have not.

Finally, the service award is similar to the amount many Class Members will receive from the settlement. Morrison Decl., ¶ 50; Henderson Decl., ¶ 17. Each of the above factors support the conclusion that the enhancement should be approved.

VI. PLAINTIFFS' REQUEST FOR REIMBURSEMENT OF COSTS IS REASONABLE AND PROPER.

In total, as set forth in the declarations of counsel to this Court, Class Counsel have incurred an aggregate of **$70,453.30** in unreimbursed costs and expenses in prosecuting this case ($47,657.15 for AKG Firm and $28,796.15 for Falvey Firm). Morrison Decl., ¶ 51; Exhibit "3" to

Morrison Decl.; Falvey Decl., ¶ 24; Exhibit "A" to Falvey Declaration. Over the past 2.5 years, Class Counsel have incurred expert costs, mediation costs, travel costs, filing fees, discovery and computer research costs, photocopies, faxes, telephone charges, and postage. All of these costs and expenses were reasonable and necessary to bring this case to closure. Morrison Decl., ¶ 51.

As one commentator noted, "the prevailing view is that expenses are awarded in addition to the fee percentage." Conte, Alba; Attorney Fee Awards, § 2.08 at pp. 50-51 (2d Ed. 1977). Courts routinely reimburse plaintiff's counsel for the costs incurred in prosecuting cases on a contingent fee basis. *See In re Businessland Sec. Litig*., Case No. 90-20476 RFP, slip. op. at p. 4 and cases cited therein (N.D. Cal. 1991); *In re GNC Shareholder Litig*. 668 F.Supp. 450, 452 (W.D. Pa. 1987). The recovery of costs is to include all out of pocket costs not part of overhead which are typically billed to a client. *Bussey v. Affleck*, 225 Cal.App.3d 1162, 1166 (1990), *overruled on other grounds*. All of the categories of costs sought here by the Class Representatives are typically billed to a client. Morrison Decl., ¶ 52.

Class Representatives also seek reimbursement of the claims administration expenses in the amount of $12,000. Pinkus Decl., ¶ 8; Morrison Decl., ¶ 52.

VII. CONCLUSION

Based on the foregoing, and in light of the excellent result achieved and the hard work performed by the Class Representatives and their counsel, the Class Representatives' Motion should be approved in its entirety.

DATED: January 10, 2014

ALEXANDER KRAKOW + GLICK LLP

LAW OFFICES OF THOMAS W. FALVEY

By: /s/Michael Morrison
Michael S. Morrison
Thomas W. Falvey
J.D. Henderson
Class Counsel

CERTIFICATE OF SERVICE

I, Michael S. Morrison, an employee of the City of Santa Monica, certify that on January 10, 2014, caused a true and correct copy of the foregoing to be filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel who has registered for receipt of documents filed in this matter:

1. UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, CLAIMS ADMINISTRATION EXPENSES, AND INCENTIVE/SERVICE AWARDS TO THE CLASS REPRESENTATIVES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Counsel for Defendants	***Co-Counsel for Plaintiffs***
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DATED: January 10, 2014 ALEXANDER KRAKOW + GLICK LLP

/s/
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