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4 UNITED STATES DISTRICT COURT  
5 FOR THE EASTERN DISTRICT OF CALIFORNIA  
6

7 OCTAVIO ALVARADO, PABLO  
8 MARTINEZ, OMAR GOMEZ, DANIEL  
9 GOMEZ, JOSE DE JESUS GARCIA,  
10 on behalf of themselves and  
11 all other similarly situated  
12 individuals,

11 Plaintiffs,

12 v.

13 REX NEDEREND AND SHERI  
14 NEDEREND (dba "Northstar  
15 Dairy," "Wildwood Farms,"  
16 "Freeway Associates"),

17 Defendants.

1:08-cv-01099 OWW DLB

MEMORANDUM DECISION RE  
UNOPPOSED MOTION FOR FINAL  
APPROVAL OF CLASS ACTION  
SETTLEMENT (DOC. 59)

18 I. INTRODUCTION

19 This is a wage-and-hour class action brought on  
20 behalf of Dairy workers employed by Rex and Sheri  
21 Nederend in, or around, Tulare and/or Kern County,  
22 California. Declaration of Stan S. Mallison, Doc. 60, ¶  
23 2; see also Second Amended Class Action Complaint  
24 ("SAC"), Doc. 27, filed Jan. 19, 2010. The action is  
25 brought on behalf of Plaintiffs and approximately 150  
26 current and former non-exempt employees of Defendants for  
27 alleged violations of federal and state wage-and-hour  
28

1 laws. *Id.*

2 The parties have entered into a Joint Stipulation of  
3 Settlement. A January 11, 2011 memorandum decision: (1)  
4 conditionally certified a Settlement Class; (2)  
5 preliminarily approved the Class Settlement; (3)  
6 appointed Class Representatives and Class Counsel; (4)  
7 approved class notice and related materials; (5)  
8 appointed a settlement administrator; and (6) scheduled a  
9 final approval hearing for April 4, 2011. Doc. 51. By  
10 stipulation, the final approval hearing was continued to  
11 May 2, 2011, Doc. 55, and again to May 16, 2011, Doc. 58.  
12 Supplemental notice of the revised hearing date was  
13 mailed to all class members. Declaration of Michael Bui,  
14 Doc. 66 at ¶ 9. Plaintiffs have filed a motion for final  
15 approval of the settlement, Doc. 56, along with numerous  
16 supporting declarations, Docs. 60-66. No objections to  
17 approval have been received.  
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## 21 II. BACKGROUND

22 Plaintiffs allege that Defendants failed to pay  
23 overtime and minimum wages; failed to pay wages due at  
24 termination of employment; failed to provide all legally  
25 required meal periods and rest breaks; and failed to  
26 provide accurate, itemized employee wage statements.  
27 Plaintiffs sought to certify a class composed of  
28

1 themselves and similarly situated individuals and to  
2 recover back wages, interest, penalties, and attorneys'  
3 fees and costs from Defendants. See SAC.

4 After the complaint was filed, Plaintiffs conducted  
5 substantial discovery and non-discovery investigation  
6 regarding class certification and the merits of their  
7 claims. Mallison Decl. at ¶ 34. Among other discovery,  
8 Plaintiffs served an extensive set of document requests,  
9 demanding all of the critical payroll and timekeeping  
10 information at issue in this case, as well as the names  
11 and contact information for Defendants' former and  
12 current employees. After meeting and conferring  
13 regarding these issues, Defendants produced the core  
14 payroll and timekeeping information. *Id.* at ¶ 34.  
15 Defendants' timekeeping system is both computer and  
16 "paper-based," consisting of paper time records for the  
17 earlier part of the time period and a database for the  
18 later part of the time period. *Id.* at ¶ 35. This  
19 required Plaintiffs' counsel to employ both database  
20 experts to analyze the data as well as to copy and review  
21 tens of thousands of pages of documents. *Id.* Much of  
22 the document and data review took place with Plaintiffs  
23 and other witnesses, who guided counsel through time and  
24 payroll records. *Id.*



- 1 • (subject to court approval) payments to Plaintiffs,  
2 in addition to their Settlement Shares, of \$7,500  
3 each in compensation of their services as Class  
4 Representatives; and  
5  
6 • (also subject to court approval) payments to Class  
7 Counsel of no more than 33.33% of the gross  
8 settlement amount for their reasonable attorneys'  
9 fees, as well as \$10,000 in expenses incurred in  
10 investigating and prosecuting the case, preparing for  
11 and negotiating at the mediation, documenting the  
12 Settlement, securing approval of the Settlement, and  
13 related tasks.  
14

15 Settlement, § III.A - C. There will be no reversion of  
16 the Gross Settlement Payment to Defendants. Mallison  
17 Decl. at ¶ 39.

18  
19 B. Payment of Settlement Shares.

20 After the other amounts are deducted, the Gross  
21 Settlement Amount (then called the "Net Settlement  
22 Amount") will be distributed as Settlement Shares to all  
23 Class Members who submit valid claims, see Settlement §  
24 III, based upon the following allocation formula:

25 The Settlement Share for each Claimant will be  
26 based on (a) that Claimant's total number of  
27 Months of Employment during the Class Period (b)  
28 divided by the aggregate number of Months of  
Employment of all Participating Class Members

1           during the Class Period (with the division rounded  
2           to four decimal places) (c) multiplied by the  
3           value of the Net Settlement Amount.

4           Settlement § III.D.1. This formula relies upon objective  
5           evidence of the term of employment, which Class Members  
6           can easily review and confirm. Mallison Decl. at ¶ 40.  
7           In addition, this information is readily available from  
8           Defendants' records, and the Settlement Administrator can  
9           apply the formula in a fair and transparent manner. *Id.*<sup>1</sup>  
10          The parties estimate that, if all amounts sought under  
11          the Settlement are awarded, a Class Member's average  
12          Settlement Share will average approximately \$2,000 per  
13          employee. *Id.*

14  
15          C.    Distribution of Unclaimed Funds and Uncashed Checks.

16                In the event that not all Class Members submit  
17          claims, the residue will be redistributed to those Class  
18          Members who do submit valid claims. Settlement, §  
19          III.D.3. The settlement agreement provides that in the

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21                <sup>1</sup> Plaintiffs' counsel considered other, more complicated  
22          methods, but determined that although these methods have some merit,  
23          they were not without controversy and would likely lead to a myriad  
24          of objections. Mallison Decl. at ¶ 41. Plaintiffs' counsel  
25          represents that the formula employed in the Settlement is commonly  
26          used in wage-and-hour cases, and is appropriate in this case, where  
27          most workers experience the same working conditions and have similar  
28          claims that roughly correlate with the number of hours that they  
                have worked. *Id.* Further, Plaintiffs' counsel maintains that,  
                although their might be marginally better theoretical methods for  
                calculating allocations amongst class members, the costs of  
                obtaining and processing the information necessary and to make such  
                calculations (especially given Defendants' reliance upon a paper  
                based payroll system for part of the class period) would likely  
                outweigh any benefits of using a more complex calculation method.  
                *Id.*

1 event that checks issued to Class Members are not cashed,  
2 these monies will be donated to California Rural Legal  
3 Assistance, *Id.*, § III.F.10, a public interest  
4 organizations that serves low-income workers in the same  
5 geographical area as the class.  
6

7 D. Scope of the Release.

8 The scope of the release by all Participating Class  
9 Members (all Class Members other than those who elect not  
10 to participate in the Settlement) tracks the scope of  
11 Plaintiffs' allegations:  
12

13 As of the date of the Judgment, all  
14 Participating Class Members hereby fully and  
15 finally release Defendants, and its parents,  
16 predecessors, successors, subsidiaries,  
17 affiliates, and trusts, and all of its  
18 employees, officers, agents, attorneys,  
19 stockholders, fiduciaries, other service  
20 providers, and assigns, from any and all claims,  
21 known and unknown, for or related to all claims  
22 based on or arising from the allegations that  
23 they were or are improperly compensated under  
24 federal, California, or local law (the "Class's  
25 Released Claims"). The Class's Released Claims  
include all such claims for alleged unpaid  
wages, including overtime compensation, missed  
meal-period and rest-break wages or penalties,  
and interest; related penalties, including, but  
not limited to, recordkeeping penalties, pay-  
stub penalties, minimum-wage penalties, missed  
meal-period and rest-break penalties, and  
waiting-time penalties; and costs and attorneys'  
fees and expenses.

26 Settlement, § III.G.2.  
27  
28

1 **E. Objections and Opt-Out Process**

2 Any Class Member who so wishes may object to or  
3 comment on the Settlement; or may elect not to  
4 participate in the Settlement. The Class Notice fully  
5 explains the objection/comment and opt-in procedures.  
6 Settlement, § III.F.4, Exh. C. The Class Notice, as with  
7 all forms, has been provided to the Class Members in  
8 English and Spanish. A small number of notices have been  
9 returned based upon contact information that is no longer  
10 correct, and the Settlement Administrator is attempting  
11 to locate those individuals. Doc. 56.

12  
13  
14 **F. Class Representative Payments; Class Counsel**  
15 **Attorneys' Fees Payment and Class Counsel Litigation**  
16 **Expenses Payment.**

17 By a motion to be filed prior to the Final Approval  
18 Hearing, Plaintiffs and their counsel will seek (and  
19 Defendants have agreed not to oppose):

- 20 • awards to Plaintiffs of Class Representative  
21 Payments of \$7,500 each, in addition to their  
22 Settlement Shares, in compensation for their  
23 services as Class Representatives; and
- 24 • awards to Class Counsel of a Class Counsel  
25 Attorneys' Fees Payment of not more than 33.33% of  
26 the Gross Settlement Amount and a Class Counsel  
27 Litigation Expenses Payment of not more than  
28

1           \$10,000.

2 Settlement, § III.B.1-2.

3  
4                                   IV. DISCUSSION

5       A. Certification of a Class for Settlement.

6           As the Class has only been conditionally certified,  
7 final certification is required and is governed by  
8 Federal Rule of Civil Procedure Rule 23.

9  
10       1. Rule 23(a) Requirements.

11           Federal Rule of Civil Procedure 23(a) states in  
12 pertinent part that "[o]ne or more members of a class may  
13 sue or be sued as representative parties on behalf of  
14 all." As a threshold matter, in order to certify a  
15 class, a court must be satisfied that

16                   (1) the class is so numerous that joinder of all  
17 members is impracticable (the "numerosity"  
18 requirement); (2) there are questions of law or  
19 fact common to the class (the "commonality"  
20 requirement); (3) the claims or defenses of  
21 representative parties are typical of the claims  
22 or defenses of the class (the "typicality"  
23 requirement); and (4) the representative parties  
24 will fairly and adequately protect the interests  
25 of the class (the "adequacy of representation"  
26 requirement).

27           *In re Intel Secs. Litig.*, 89 F.R.D. 104, 112 (N.D. Cal.  
28 1981) (citing Fed. R. Civ. P. 23(a)).

29       a. Numerosity.

30           Here, the proposed class is comprised of all  
31 individuals who have been employed by defendants in

1 California as non-exempt Dairy workers during the period  
2 July 30, 2004 through September 7, 2010. There are  
3 approximately 150 Class Members. Courts have routinely  
4 found the numerosity requirement satisfied when the class  
5 comprises 40 or more members. *Ansari v. New York Univ.*,  
6 179 F.R.D. 112, 114 (S.D.N.Y. 1998). Numerosity is also  
7 satisfied where joining all Class members would serve  
8 only to impose financial burdens and clog the court's  
9 docket. *In re Intel Secs. Litig.*, 89 F.R.D. at 112.  
10 Here, the joinder of approximately 150 individual former  
11 employees would only further clog this court's already  
12 overburdened docket.  
13  
14

15 b. Common Questions of Fact and Law.

16 Commonality exists when there is either a common  
17 legal issue stemming from divergent factual predicates or  
18 a common nucleus of facts resulting in divergent legal  
19 theories. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019  
20 (9th Cir. 1998). Here, the parties agree that potential  
21 Class Members advance claims that raise common questions  
22 of both law and fact, including:  
23

- 24 • Whether Northstar authorized and permitted the Dairy  
25 workers to take required rest periods;
- 26 • Whether Northstar failed to pay Dairy workers an  
27 additional hour of wages for missed meal periods and  
28

1 rest breaks;

2 • Whether Northstar failed to pay all legally required  
3 minimum wages and overtime compensation to hourly  
4 production workers;

5 • Whether hourly production workers are owed waiting  
6 time penalties because Northstar allegedly willfully  
7 failed to pay them additional wages for missed meal  
8 periods and rest breaks, and for meal periods taken  
9 during which they remained on duty, upon the  
10 termination of their employment; and

11 • Whether Northstar's business practices violated  
12 Business and Professions Code section 17200 et seq.  
13 Every class member was paid under the same pay  
14 practices as every other class member. The Commonality  
15 requirement is satisfied.  
16  
17

18  
19 c. Typicality.

20 Typicality is satisfied if the representatives'  
21 claims arise from the same course of conduct as the class  
22 claims and are based on the same legal theory. See e.g.,  
23 *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1463 (9th Cir.  
24 1995) (claims are typical where named plaintiffs have the  
25 same claims as other members of the class and are not  
26 subject to unique defenses). Because every class member  
27 was paid under the same pay practices as every other  
28

1 class member, the representatives' claims are typical of  
2 those of the other class members.

3  
4 d. Fair & Adequate Representation.

5 The final Rule 23(a) requirement is that the class  
6 representative fairly and adequately protect the  
7 interests of the class. This requirement has two parts.  
8 First, the representative's attorney must be "qualified,  
9 experienced, and able to conduct the litigation." *In re*  
10 *United Energy Corp. Solar Power Modules Tax Shelter Inv.*  
11 *Secs. Litig.*, 122 F.R.D. 251, 257 (C.D. Cal. 1998).  
12 Second, the suit must not be "collusive" and the named  
13 Plaintiff's interests must not be "antagonistic to the  
14 class." *Id.*

15  
16 All requirements are satisfied here. Proposed class  
17 counsel, Stan S. Mallison, Esq., of the law firm Mallison  
18 & Martinez, is highly experienced in labor class action  
19 litigation for more than 15 years. Mallison Decl. at ¶¶  
20 5-6. He is highly qualified.

21  
22 In addition, the Class Representatives' interests are  
23 completely aligned with those of the class. Each  
24 Representatives' interest is in maximizing their  
25 recovery. Although they will receive an additional  
26 \$7,500, this appears to be reasonable to compensate them  
27 for the time and expense he devoted to pursuing this  
28

1 case. See Declarations of Class Representatives, Docs.  
2 41-45.

3  
4 2. Certification of a Class under Rule 23(b)(3).

5 Once the threshold requirements of Rule 23(a) are  
6 satisfied, a class may be certified only if the class  
7 action satisfies the requirements of Rule 23(b)(1),  
8 (b)(2), and/or (b)(3). Here, the parties agree for  
9 purposes of the Settlement only that certification of the  
10 Class is appropriate under Rule 23(b)(3) because  
11 "questions of law or fact common to the members of the  
12 class predominate over any questions affecting only  
13 individual members, and ... a class action is superior to  
14 other available methods for the fair adjudication of the  
15 controversy." Fed. R. Civ. P. 23(b)(3).  
16

17  
18 B. The Terms of the Preliminary Approval Have Been  
19 Satisfied.

20 The January 27, 2011 preliminary approval of the  
21 Settlement and conditional certification of the Class  
22 ordered that the Class be sent notice of the Settlement,  
23 approved the form of notice proposed by the parties,  
24 approved the forms of claims for settlement share and  
25 election not to participate, and set the hearing for  
26 final approval. Doc. 53. The claims administrator,  
27 Simpluris, has carried out this Court's order to the  
28

1 extent possible. See generally Bui Declaration, Doc. 66.  
2 On March 1, 2011 class Notice Packets were mailed to all  
3 125 class members with a known address. *Id.* at ¶7. The  
4 U.S. Postal Service returned 51 Notice Packets to the  
5 Settlement Administrator. *Id.* ¶ 10. Best efforts to  
6 trace these individuals and/or find their updated  
7 addresses were conducted by use of "Accurint" a reputable  
8 research tool owned by Lexis-Nexis and remailed 53 class  
9 notice packets. *Id.* However, despite best efforts,  
10 Simpluris did not obtain any claims from these 53  
11 mailings. *Id.* On March 23, 2011, Simpluris also mailed  
12 out 111 reminder notices to class members who had not yet  
13 responding to the initial notice. *Id.* at ¶ 8.

14  
15  
16 Despite these difficulties, 56 claims (40.57%) were  
17 received and accepted by the Claims Administrator. *Id.* ¶  
18 11. According to Plaintiffs, this figure is extremely  
19 high for the type of workforce at issue in this case.  
20 Doc. 70 at 8. No claims have been rejected. Bui Decl.,  
21 Doc. 66, at ¶ 11. Zero individuals submitted elections  
22 not to participate. *Id.* at ¶ 12. As of May 5, 2011, no  
23 class member has submitted an objection to the  
24 Settlement. *Id.* at ¶ 13.

25  
26 C. Approval of the Settlement.

27 "The court must approve any settlement ... of the  
28

1 claims ... of a certified class." Fed. R. Civ. P.  
2 23(e)(1)(A). A settlement may be approved only after a  
3 hearing and on finding that it is fair, reasonable, and  
4 adequate. Fed. R. Civ. P. 23(e)(1)(C). Such approval is  
5 required to make sure that any settlement reached is  
6 consistent with plaintiffs' fiduciary obligations to the  
7 class. See *Ficalora v. Lockheed Cal. Co.*, 751 F.2d 995,  
8 996 (9th Cir. 1985). The court also serves as guardian  
9 for the absent class members who will be bound by the  
10 settlement, and therefore must independently determine  
11 the fairness of any settlement. *Id.* However, the  
12 district court's role in intruding upon what is otherwise  
13 a private consensual agreement is limited to the extent  
14 necessary to reach a reasoned judgment that the agreement  
15 is not the product of fraud or collusion between the  
16 negotiating parties, and that the settlement, taken as a  
17 whole, is fair, reasonable, and adequate to all  
18 concerned. *FDIC v. Alshuler*, 92 F.3d 1503, 1506 (9th  
19 Cir. 1996). Therefore, the settlement hearing is not to  
20 be turned into a trial or rehearsal for trial on the  
21 merits. *Officers for Justice v. Civil Service Com.*, 688  
22 F.2d 615, 625 (9th Cir. 1982). Ultimately, the district  
23 court's determination is nothing more than an amalgam of  
24 delicate balancing, gross approximations, and rough  
25  
26  
27  
28

1 justice. *Id.*

2 In determining whether a settlement agreement is  
3 fair, adequate, and reasonable to all concerned, a  
4 district court may consider some or all of the following  
5 factors: (1) the strength of the Plaintiff's case (2) the  
6 risk, expense, complexity, and likely duration of further  
7 litigation; (3) the risk of maintaining class action  
8 status throughout the trial; (4) the amount offered in  
9 settlement; (5) the extent of discovery completed; (6)  
10 the stage of the proceedings; (7) the views and  
11 experience of counsel; (8) any opposition by class  
12 members; (9) the presence of a governmental participant.  
13 *Linney v. Cellular Alaska Pshp.*, 151 F.3d 1234,1242 (9th  
14 Cir. 1998). This list of factors is not exclusive and  
15 the court may balance and weigh different factors  
16 depending on the circumstances of each case. *Torrison v.*  
17 *Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir.  
18 1993).

19  
20  
21  
22 1. The Relative Strengths of the Parties' Cases  
23 Supports Approval of the Settlement.

24 Defendants contest liability in this action and are  
25 prepared to vigorously defend against these claims if the  
26 action is not settled. *Mallison Decl.* at ¶ 48. If the  
27 litigation proceeds, Plaintiffs would face significant  
28 risks. *Id.* For example, the primary cause of action in

1 this case revolves around the provision of meal periods.  
2 However, the meaning of an employer's obligation to  
3 provide meal periods under California law is currently  
4 before the California Supreme Court (see *Brinker*  
5 *Restaurant Corp. v. Superior Court (Hohnbaum)*, 165 Cal.  
6 App. 4th 25 (2008) (review granted)). A defense ruling  
7 in *Brinker* could impair Plaintiffs' ability to proceed on  
8 these causes of action.  
9

10 Even if Plaintiffs were to prevail, they would be  
11 required to expend considerable additional time and  
12 resources potentially outweighing any additional recovery  
13 obtained through successful litigation. In addition,  
14 continued litigation would clearly delay payment to the  
15 Class. See Mallison Decl. at ¶ 48.  
16

17 In light of these risks, the significant recovery is  
18 fair, reasonable, and adequate and is in the best  
19 interest of the Settlement Class in light of all known  
20 facts and circumstances.  
21

22 2. The Settlement Amount is Fair and Reasonable.

23 The Settlement provides for a payment of almost  
24 \$500,000.00 by Defendants, which is substantial given the  
25 relatively small size of the class (approximately 150  
26 members, with approximately 40 full time employees at any  
27 given time) and the limited nature of the alleged  
28

1 violations at issue. The average settlement share is  
2 nearly \$4,000 per employee. Mallison Decl. at ¶ 40. All  
3 Settlement Shares to be paid under the Settlement are  
4 determined by the number of months each Class Member  
5 worked in a Covered Position. *Id.*

6  
7 The Class Representative Payments and the Class  
8 Counsel Attorneys' Fees Payment are appropriate, and are  
9 separately approved below.

10 Finally, the expected Settlement Administrator's fees  
11 and costs of approximately \$15,000 are less than similar  
12 wage-and-hour settlements of this type and size.  
13 Mallison Decl. at ¶ 39.

14  
15 3. The Release Is Appropriate.

16 As part of the Settlement, Class Members will be  
17 deemed to have released all claims "based on or arising  
18 from the allegations that they were or are improperly  
19 compensated under federal, California, or local law."  
20 Settlement, § III. These released claims appropriately  
21 track the breadth of Plaintiffs' allegations in the  
22 action and the settlement does not release unrelated  
23 claims that class members may have against defendants.

24  
25  
26 4. The Settlement Was the Project of Informed,  
Arm's Length Negotiations.

27 The Settlement was reached after informed, arm's  
28

1 length negotiations between the parties. Both parties  
2 conducted extensive investigation and discovery allowing  
3 them to assess the strengths and weaknesses of the case.  
4 As such, the Settlement is the product of non-collusive  
5 negotiations. See Mallison Decl. at ¶¶ 35-54.  
6 Plaintiffs' counsel had access to thousands of pages of  
7 documents and the full database of timekeeping entries  
8 for the relevant time period, which Plaintiffs' expert  
9 and Plaintiffs' counsel reviewed prior to and during the  
10 negotiations. Counsel was also informed by numerous  
11 interviews with witnesses to the allegations. Mallison  
12 Decl. at ¶ 36. In addition, there is no evidence of  
13 collusion.  
14  
15

16 5. Reaction of the Class Members.

17 "The reactions of the members of a class to a  
18 proposed settlement is a proper consideration for the  
19 trial court." *Vasquez v. Coast Valley Roofing*, 266  
20 F.R.D. 482 (E.D. Cal. 2010) (citing 5 Moore's Fed.  
21 Practice § 23.85[2][d]). Class Representative's opinion  
22 of the settlement are especially important as "[t]he  
23 representatives' views may be important in shaping the  
24 agreement and will usually be presented at the fairness  
25 hearing; they may be entitled to special weight because  
26 the representatives may have a better understanding of  
27  
28

1 the case than most members of the class." Manual for  
2 Complex Litigation, Third, § 30.44 (1995).

3 Here, the Class Representatives strongly support the  
4 settlement. See Declaration of Octavio Alvarado, Doc.  
5 65, at ¶ 5; Declaration of Daniel Gomez, Doc. 63, at ¶ 5;  
6 Declaration of Pablo Martinez, Doc. 61, at ¶ 5;  
7 Declaration of Omar Gomez, Doc. 62, at ¶ 5; Declaration  
8 of Jesus Garcia, Doc. 64, at ¶ 5. Each of these Class  
9 Representatives and their attorneys have extensive  
10 understanding of the merits of this settlement having  
11 participated extensively in the strategy, formulation,  
12 filing, litigation and negotiation process. See Alvarado  
13 Decl. at ¶¶ 3-4; Martinez Decl. at ¶¶ 3-4; O. Gomez Decl.  
14 at ¶¶ 3-4; D. Gomez Decl. at ¶¶ 3-4; Garcia Decl. at ¶¶  
15 3-4. There have been no objections to the settlement by  
16 Class Members or any other members of the public.

17 The settlement is fair and reasonable.

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21 D. Class Counsel's Requested Fees and Costs.

22 Courts have long recognized the "common fund" or  
23 "common benefit" doctrine, under which attorneys who  
24 create a common fund or benefit for a group of persons  
25 may be awarded their fees and costs to be paid out of the  
26 fund. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th  
27 Cir. 1998). "[A] lawyer who recovers a common fund for  
28

1 the benefit of persons other than himself or his client  
2 is entitled to a reasonable attorney's fee from the fund  
3 as a whole." *Staton v. Boeing Co.*, 327 F.3d 938, 972  
4 (9th Cir. 2003) (quoting *Boeing Co. v. Van Gemert*, 444  
5 U.S. 472, 478 (1980)). Awarding a percentage of the  
6 common fund is particularly appropriate "when each  
7 member of a certified class has an undisputed and  
8 mathematically ascertainable claim to part of a lump-sum  
9 judgment recovered on his behalf.'" *Id.* (quoting *Boeing*  
10 *Co.*, 444 U.S. at 478-79).

12 Here, where the Settlement requires lump sum  
13 allocations to each Settlement Class and applies  
14 distribution formulas pursuant to which each Class Member  
15 who submits a valid claim will receive a mathematically  
16 ascertainable payment, application of the percentage of  
17 common fund doctrine appropriate. The typical range of  
18 acceptable attorneys' fees in the Ninth Circuit is 20% to  
19 33 1/3% of the total settlement value, with 25%  
20 considered the benchmark. *Powers v. Eichen*, 229 F.3d  
21 1249, 1256 (9th Cir. 2000); *Hanlon*, 150 F.3d at 1029;  
22 *Staton*, 327 F.3d at 952. However, the exact percentage  
23 varies depending on the facts of the case, and in "most  
24 common fund cases, the award exceeds that benchmark."  
25 *Knight v. Red Door Salons, Inc.*, 2009 WL 248367 (N.D.  
26  
27  
28

1 Cal. 2009); see also *In re Activision Sec. Litig.*, 723 F.  
2 Supp. 1373, 1377-78 (N.D. Cal. 1989) ("nearly all common  
3 fund awards range around 30%").

4 Class Counsel seeks an attorney's fee award of  
5 \$165,523, or 33 1/3% of the Settlement amount. This is  
6 significantly less than Class Counsel's asserted lodestar  
7 of \$198,593.75.<sup>2</sup> When assessing whether the percentage  
8 requested is reasonable, courts look to factors such as:  
9 (a) the results achieved; (b) the risk of litigation; (c)  
10 the skill required, (d) the quality of work; (e) the  
11 contingent nature of the fee and the financial burden;  
12 and (f) the awards made in similar cases. *Vizcaino v.*  
13 *Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.2002); *Six*  
14 *Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301  
15 (9th Cir.1990).

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19 1. The Results Achieved.

20 <sup>2</sup> The district court has reviewed the billing records of Plaintiffs'  
21 counsel, submitted as attachments to the Declaration of Stan  
22 Mallison. Doc. 60. These records reveal that Stan Mallison, a  
23 partner who bills at \$595 per hour spent approximately 176 hours on  
24 this case; Hector Martinez, a partner who also bills at \$595 per  
25 hour spent approximately 85 hours on this case; Marco Palau, an  
26 associate who bills at \$450 per hour spent approximately 7 hours on  
27 the case; Jessica Juarez, an associate who bills at \$325 per hour,  
28 spent approximately 37.5 hours on the case, and Joseph Sutton,  
another associate who bills at \$325 per hour, spent approximately  
2.5 hours on the case. See *id.* at ¶ 57. The billed lodestar is  
reasonable, given that this case involved considerable  
investigation, the filing of a fairly complex, thirty-six page  
complaint, the litigation of a motion to dismiss followed by the  
filing of an amended complaint, and the subsequent settlement of a  
putative class action, requiring preliminary approval, notice, and  
final approval. Moreover, the settlement only provides for partial  
recovery of the total lodestar.

1           The individual claims in the case concerned  
2 defendants' failure to pay class members for portions of  
3 days on an intermittent basis and failure to provide  
4 proper rest and meal periods. Such claims would not  
5 ordinarily produce large recoveries per claimant. Here,  
6 the recovery of nearly \$500,000 will provide the 56  
7 claimant employees with a net recovery of over \$4,000 per  
8 employee. Mallison Decl ¶ 40. This is substantial.

10           2.    The Risks Involved.

11           There were significant risks in pursuing this case.  
12 One of the primary issues involved in this case has to do  
13 with the timely provision of rest and meal periods - an  
14 issue that is currently before the California Supreme  
15 Court in the *Brinker* and *Brinkley* cases. It is unknown  
16 what the outcome of the Supreme Court's decision will be,  
17 but it is possible that decision could seriously damage  
18 the recovery in this case.  
19

20           The Defendants also posed serious defenses to the  
21 claims. And defense counsel demonstrated that they were  
22 very able in defense of their client.  
23

24           Plaintiffs' Counsel invested \$198,593.75 in lodestar  
25 and \$10,827.70 in costs in litigating this case with no  
26 guarantee or recovery.  
27

1           3.    The Skill Required.

2           This case required specialized skills in finding and  
3           contacting largely Spanish speaking workers, and in  
4           litigating cutting-edge legal theories surrounding rest  
5           and meal periods and issues of proof in light of the  
6           limited recording keeping by Defendant. In addition to  
7           the large number of witness interviews, the case also  
8           involved an intensive use and extrapolation from the  
9           existing records. Class Counsel has extensive  
10          experienced in class action wage and hour litigation of  
11          this nature. See Mallison Decl. at ¶¶3-17.  
12

13  
14          4.    Quality of the Work.

15          Counsel thoroughly investigated the case, researching  
16          numerous potential claims to find those that could be  
17          developed and litigated. Eventually, several  
18          sophisticated legal claims were advanced, based on, among  
19          other things, clock-rounding and on-duty meal period  
20          theories, despite the lack of clear caselaw on point.  
21

22          5.    The Contingent Nature of the Fee and the  
23                Financial Burden

24          This case was conducted on a contingent fee basis  
25          against a well-represented Defendant. Counsel has  
26          received no money from plaintiffs or any other source to  
27          litigate this case. The plaintiffs are all low-wage  
28

1 workers who could never meaningfully contribute to any  
2 such expenses. Plaintiffs' counsel accepted the entire  
3 risk of litigation. Despite such challenges, Class  
4 Counsel were able to persuade Defendant that it faced  
5 significant liability exposure such that it was willing  
6 to pay nearly \$500,000 to settle Plaintiff's claims.  
7

8           6. Awards in Similar Cases.

9           The requested fee is in line with similar wage and  
10 hour cases litigated in the Central Valley. For example,  
11 this court has awarded the following fees:  
12

- 13           • 33.3% in *Vasquez v. Coast Valley Roofing*, 266 F.R.D.  
14           482 (E.D. Cal. 2010), Case No. 1:07-cv-00227 OWW DLB;
- 15           • 30% in *Vasquez v. Aartman*, E.D. Cal. Case No. 1:02-  
16           CV05624 AWI LJO;
- 17           • 31.25% in *Baganha v. California Milk Transport*, Case  
18           No. 1:01-cv-05729 AWI LJO;
- 19           • 33.3% in *Randall Willis et al. v. Cal Western*  
20           *Transport*, and *Earl Baron et al. v. Cal Western*  
21           *Transport*, Coordinated Case No. 1:00-cv-05695 AWI  
22           LJO;
- 23           • 33.3% in *Benitez, et al. v. Jeff Wilbur and Lisa*  
24           *Wilbur*, Case No. 1:08-cv-01122 LJO GSA;
- 25           • 33.3% in *Chavez, at al. v. Petrissans*, Case No. 1:08-  
26           cv-00122 LJO GSA;
- 27           • 33.3% in *Chavez, at al. v. Petrissans*, Case No. 1:08-  
28           cv-00122 LJO GSA;

1  
2 In light of the overall success, the skill with which the  
3 case was prosecuted, the substantial legal risks  
4 associated with Plaintiffs' claims, the financial risks  
5 borne by Plaintiffs' Counsel, and similar awards made in  
6 similar cases, the requested attorney's fee award of 33  
7 1/3% of the total recovery (or \$165,523) is reasonable  
8 under the circumstances.  
9

10 E. Class Counsel's Request for Costs.

11 Class Counsel incurred out-of-pocket costs totaling  
12 \$10,827.70, and expect to incur modest additional in  
13 costs related to the final approval of the Settlement.  
14 See Settlement Agreement III.B.1. The bulk of the  
15 incurred costs included filing fees, mediator fees (of  
16 \$5,367.50), ground transportation, copy charges, computer  
17 research, and database expert fees. *Id.*; see also  
18 Mallison Decl. ¶ 58. Such costs are routinely reimbursed  
19 in these types of cases. See, *In re United Energy Corp.*  
20 *Sec. Litig.*, 1989 WL 73211, at \*6 (C.D. Cal. 1989)  
21 (quoting Newberg, *Attorney Fee Awards*, § 2.19 (1987));  
22 see e.g. *Vasquez*, 266 F.R.D. at 493 (Class Counsel  
23 litigation expenses payment of approximately \$9,000 was  
24 fair and reasonable in similar case).  
25  
26

27 Here, the actual costs incurred are greater than the  
28

1 estimated \$10,000, which was included in the Class Notice  
2 and to which no Class Member objected. Plaintiffs  
3 request, which is capped at \$10,000 is reasonable.  
4

5 F. Class Representative Enhancement.

6 Pursuant to the Settlement, Plaintiff seeks an  
7 enhancement in the amount of \$7,500 to the named  
8 Plaintiffs Octavio Alvarado, Pablo Martinez, Omar Gomez,  
9 Daniel Gomez, and Jose de Jesus Garcia. Mallison Decl. ¶  
10 45. This payment is intended to recognize the time and  
11 efforts that the named Plaintiffs spent on behalf of the  
12 Class Members. *Id.*; see also Declarations of Octavio  
13 Alvarado, Pablo Martinez, Omar Gomez, Daniel Gomez, and  
14 Jose de Jesus Garcia, Docs. 61-65.  
15

16 "Courts routinely approve incentive awards to  
17 compensate named plaintiffs for the services they provide  
18 and the risks they incurred during the course of the  
19 class action litigation." *Ingram v. The Coca-Cola*  
20 *Company*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (internal  
21 quotations and citations omitted). In *Coca-Cola*, the  
22 Court approved service awards of \$300,000 to each named  
23 plaintiff in recognition of the services they provided to  
24 the class by responding to discovery, participating in  
25 the mediation process, and taking the risk of stepping  
26 forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at  
27  
28

1 694; see, e.g., *Van Vranken v. Atl. Richfield Co.*, 901 F.  
2 Supp. 294, 299 (N.D. Cal. 1995) (approving \$50,000  
3 participation award to plaintiffs); *Glass v. UBS*  
4 *Financial Services, Inc.*, 2007 WL 221862, at \*17 (N.D.  
5 Cal. Jan. 26, 2007) (approving \$25,000 enhancement to  
6 each named plaintiff).  
7

8 In this case, among other things, the named  
9 Plaintiff: (1) travelled from Bakersfield to Sacramento  
10 for mediation sessions (2) assisted Counsel in  
11 investigating and substantiating the claims alleged in  
12 this action; (3) assisted in the preparation of the  
13 complaint in this action; (4) produced evidentiary  
14 documents to Counsel; and (5) assisted in the settlement  
15 of this litigation. See Mallison Decl.; Declarations of  
16 Octavio Alvarado, Pablo Martinez, Omar Gomez,  
17 Daniel Gomez, and Jose de Jesus Garcia, Docs. 61-65.  
18 Moreover, as with any plaintiff who files a civil action,  
19 Plaintiffs undertook the financial risk that, in the  
20 event of a judgment in favor of Defendant in this action,  
21 they could have been personally responsible for the costs  
22 awarded in favor of the Defendant. See, e.g., *Whiteway*  
23 *v. Fed Ex Kinkos Office & Print Services, Inc.*, No. C 08-  
24 2320 SBA, 2007 WL 4531783, at \*\*2-4 (N.D. Cal. Dec. 17,  
25 2007).  
26  
27  
28

1       **G. Claims Administrator Fee.**

2               The Class Notice provided that the Claims  
3 Administrator would receive a fee of up to \$15,000.  
4 Plaintiffs request that the full amount of \$15,000 be  
5 approved as Simpluris' fee. Doc. 70 at 25-26. The  
6 Declaration of Michael Bui, a Case Manager at Simpluris,  
7 explains the tasks undertaken by Simpluris to accomplish  
8 notify the Class of the settlement and administer its  
9 terms. Mr. Bui estimates administration costs of  
10 \$15,000, taking into consideration both costs incurred to  
11 date and those anticipated to be incurred in the future.  
12 This request is substantially lower than previous  
13 administrator fees awarded in this District. See  
14 Vasquez, 266 F.R.D. at 483-84 (\$25,000 administrator fee  
15 awarded in wage and hour case involving 177 potential  
16 class members).  
17  
18

19  
20                               **V. CONCLUSION**

21               For all the reasons set forth above:

22               (1) The Settlement Class is CERTIFIED;

23               (2) The Class Settlement is APPROVED;

24               (3) The payment of \$165,523 in attorney's fees and  
25 \$10,827.70 in costs is APPROVED;

26               (4) The payment of a \$7,500 enhancement to the named  
27 Plaintiffs Octavio Alvarado, Pablo Martinez, Omar Gomez,  
28

1 Daniel Gomez, and Jose de Jesus Garcia is APPROVED;

2 (5) The payment of \$15,000 to the Settlement

3 Administrator is APPROVED.

4 Plaintiffs shall submit a form of order consistent  
5 with this decision within five (5) days following  
6 electronic service.  
7

8 SO ORDERED  
9 Dated: May 17, 2011

/s/ Oliver W. Wanger  
United States District Judge

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