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2  
3 UNITED STATES DISTRICT COURT  
4 FOR THE EASTERN DISTRICT OF CALIFORNIA  
5

6 TYRUS COLLINS and JAMES GREER, on  
7 behalf of themselves and others  
8 similarly situated,

9 Plaintiffs,

10 v.

11 CARGILL MEAT SOLUTIONS  
12 CORPORATION, a Kansas corporation;  
and DOES 1 through 50, inclusive,

13 Defendants.

1:10-cv-00500 OWW MJS

MEMORANDUM DECISION RE  
UNOPPOSED MOTION FOR FINAL  
APPROVAL OF CLASS ACTION  
SETTLEMENT (DOC. 46) AND FOR  
ATTORNEYS' FEES AND COSTS  
(DOC. 47)

14 I. INTRODUCTION

15 This is a wage-and-hour class action brought on behalf of  
16 meat workers employed by Cargill Meat Solutions Corp., in Fresno  
17 County, California. Declaration of Anthony J. Orshansky  
18 ("Orshansky Decl."), Doc. 48 ¶ 5; see also Second Amended Class  
19 Action Complaint ("SAC"), Doc. 32, filed Dec. 17, 2010. The  
20 action is brought on behalf of Plaintiffs and approximately 239  
21 current and former employees of Defendants' from August 1, 2008  
22 to March 7, 2011 for alleged violations of state wage-and-hour  
23 laws. Orshansky Decl. at ¶ 16.  
24

25 The parties have entered into a Joint Stipulation of  
26 Settlement Agreement. Orshansky Decl. at ¶ 11. A March 7, 2011  
27 memorandum decision: (1) conditionally certified a Settlement  
28

1 Class; (2) appointed Class Counsel; (3) appointed Class  
2 Representatives; (4) appointed a Settlement Administrator; (5)  
3 preliminarily approved the Class Settlement; (6) approved the  
4 class Notice and related materials for distribution; (7) directed  
5 the mailing, by first-class mail, of the Notice Packet by March  
6 25, 2011; and (8) scheduled a final approval hearing for June 27,  
7 2011. Doc. 41. Plaintiffs have filed a motion for final  
8 approval of the settlement, Doc. 44, along with supporting  
9 declarations, Docs. 48-48-1. Plaintiffs have also moved for  
10 approval of their request for attorneys' fees and costs, Doc. 45,  
11 and filed a supporting declaration, Doc. 48. No objections to  
12 approval have been received. See Declaration of Amanda J. Myette  
13 ("Myette Decl."), Doc. 48-1 ¶ 15.  
14  
15

## 16 II. BACKGROUND

17 Plaintiffs allege Defendants failed to reimburse Employees  
18 for expenses they necessarily incurred in the performance of  
19 their job duties; failed to provide legally required rest  
20 periods; failed to pay premium pay for each day on which  
21 requisite rest periods were not provided or were deficiently  
22 provided; failed to pay out wages twice per calendar month;  
23 failed to provide accurate itemized wage statements; and  
24 willfully failed to pay all wages due upon termination or  
25 separation of employment. Plaintiffs sought to certify a class  
26 composed of themselves and similarly situated individuals, and  
27  
28

1 sought declaratory relief and recovery of unreimbursed business  
2 expenditures, back wages, interest, penalties, attorneys' fees,  
3 and costs. See SAC.

4 Both prior and subsequent to the complaint being filed,  
5 Plaintiffs conducted substantial discovery and non-discovery  
6 investigation regarding class certification and the merits of  
7 their claims. Oshansky Decl. ¶ 7. After suit was filed,  
8 Plaintiffs propounded written discovery requesting documents and  
9 information relating to Defendant's employment policies and  
10 practices; pay and time records; Class Members' wages, paychecks,  
11 wage statements, and termination wages; Defendant's policies and  
12 practices relating to reimbursement for work-related expenses;  
13 Defendant's policies and practices relating to safety equipment  
14 and devices required; and other matters relating to certification  
15 issues. *Id.* at ¶ 9. Prior to mediation, Class Counsel also  
16 devoted substantial time and resources to meeting and conferring  
17 with opposing counsel regarding discovery; negotiating a  
18 protective order; reviewing the documentation provided by  
19 Defendant; doing follow-up research on relevant legal and  
20 procedural questions; preparing damage models; and developing  
21 settlement and negotiation strategies. *Id.* at ¶ 10.

### 22 III. SUMMARY OF THE SETTLEMENT

23 The case was resolved with the aid of a mediator, Michael  
24 Loeb, Esq. The Settlement covers approximately 239 current and  
25

1 former meat workers employed by Defendant in California ("Class  
2 Members") from August 1, 2008 to March 7, 2011 ("Covered  
3 Period"). Settlement Agreement ("Settlement"), Doc. 38-1, §  
4 9(c); see also Oshansky Decl. ¶ 16.

5  
6 A. Settlement Payment.

7 Under the Settlement, Defendant will make payments totaling  
8 approximately \$260,000.00, which will be paid out within 15  
9 business days following the final approval of the settlement.  
10 See Settlement §§ 9, 11. This sum will cover:

- 11 • settlement awards to be paid to Class Members who timely  
12 submit valid claims (paid out of the Net Settlement Fund of  
13 \$150,000.00);
- 14 • a \$2,000 payment to the California Labor and Workforce  
15 Development Agency for the amount in penalties due to it  
16 under Labor Code § 2699, et seq.
- 17 • the Settlement Administrator's reasonable fees and expenses  
18 (no more than \$10,000);
- 19 • (subject to court approval) payments to Plaintiffs, in  
20 addition to their Settlement Awards, of \$4,000 each in  
21 compensation of their services as Class Representatives;
- 22 • (also subject to court approval) payments to Class Counsel  
23 of \$82,500, for their reasonable attorneys' fees, as well as  
24 actual litigation costs, up to \$7,500.

1 See Settlement, §§ 9, 11. There will be no reversion of the Net  
2 Settlement Fund to Defendant. *Id.* at § 9(a).

3  
4 B. Payment of Settlement Awards.

5 The Net Settlement Fund ("NSF") of \$150,000 will be  
6 completely separate from any other payments the Defendant makes.  
7 Oshansky Decl. ¶ 12. It will be distributed to all Class Members  
8 who timely submit valid claims ("Qualified Claimants"), based  
9 upon the following allocation formula:

10 Each Qualified Claimant shall receive a payment based on the  
11 number of weeks that he or she worked during the Covered  
12 Period, which shall be from August 1, 2008 through  
13 preliminary approval. Each Qualified Claimant will be  
14 entitled to a provisional share of the settlement calculated  
15 by (1) taking the Qualified Claimant's number of workweeks,  
16 (2) dividing that number by the total number of workweeks of  
17 all Qualified Claimants, and (3) multiplying the resulting  
18 number by the NSF. For purposes of this calculation, the  
19 number of employee's "Workweeks" shall be calculated by (1)  
20 subtracting the employee's first workday during the Covered  
21 Period from his or her last workday of the Covered Period,  
22 (2) dividing that number of days by 7, and then (3) rounding  
23 to the nearest integer.

24 Settlement, § 9(c). A Claim Form, which was mailed to Class  
25 Members with the "Notice of Pendency of Class Action, Proposed  
26 Settlement, Your Rights, and Options for you to Consider"  
27 ("Notice"), included for each Class Member the number of weeks  
28 worked during the Class Period and the Class Member's estimated  
Settlement Amount. See Claim Form, Doc. 38-3.

For tax purposes, one-quarter (1/4) of each settlement  
amount awarded will be deemed wages, one-half (1/2) will be  
characterized as expense reimbursement, and one-quarter (1/4)

1 will be treated as penalties and interest. Settlement Awards  
2 will be subject to applicable tax withholding and reporting.  
3 Settlement, § 9(e).

4 The formula relies upon objective evidence of the number of  
5 weeks worked during the Class Period, provided by the Defendant.  
6 Settlement, § 17. Class Members could also review and confirm  
7 this information, and the Claim Form permitted Class Members to  
8 challenge the number of weeks worked. See Claim Form, § 2(B).

10 C. Distribution of Unclaimed Funds and Uncashed Checks.

11 The Settlement is structured so as to distribute the  
12 entirety of the NSF, regardless of whether or not every member of  
13 the class files a valid claim form. There will be no unclaimed  
14 funds. See Settlement, § 9(c). Checks that remain uncashed  
15 after one hundred and eighty (180) calendar days shall revert to  
16 the California Uncashed Check Fund in the name of the Qualified  
17 Claimant. Settlement, § 18.

19 D. Scope of the Release.

20 The Settlement provides that all Class Members, other than  
21 those who elect not to participate in the Settlement, shall have  
22 released the "Released Parties" from the "Covered Claims." The  
23 Notice contains the following release:  
24

25 Upon the final approval by the Court of the settlement, each  
26 Class member who does not opt out of the settlement, shall,  
27 for the period of time extending from August 1, 2008 to  
28 [preliminary approval], fully release and forever discharge  
Defendant and its respective present and former officers,

1 directors, employees, shareholders, agents, trustees,  
2 representatives, attorneys, insurers, parent companies,  
3 subsidiaries, divisions, affiliates, predecessors,  
4 successors, assigns, and any individual or entity that could  
5 be jointly liable with Defendant (the foregoing are  
6 collectively referred to hereafter as the "Releasees") from  
7 any and all acclaims, causes of action, damages, wages,  
8 benefits, expenses, penalties, debts, liabilities, demands,  
9 obligations, attorney's fees, costs, and any other form of  
10 relief or remedy at law or in equity, of whatever kind or  
11 nature, asserted by the Covered Claims based on the facts  
12 alleged in the Second Amended Complaint ("Complaint") filed  
13 in the Lawsuit.

14 "Covered Claims" means any and all claims, demands,  
15 rights liabilities, and/or causes of actions arising out of  
16 the facts alleged in the Complaint for: (1) violation of  
17 Labor Code § 2802(a); (2) rest-period violations, Labor Code  
18 § 226.7; (3) violation of Labor Code § 204; (4) violation of  
19 Labor code § 226(a); (5) penalties pursuant to Labor Code §  
20 203; (6) penalties under California Labor Code §2609 et  
21 seq.; (7) any penalties that could have been brought based  
22 on the violations alleged in the Complaint, and (8)  
23 violation of Business & Professions Code §17200, et seq.  
24 based on the foregoing alleged violations.

25 Claim Form, § 4. Furthermore:

26 Representative Plaintiffs additionally expressly waive any  
27 and all rights they have under Section 1542 of the Civil  
28 Code of the State of California, which provides:

"A general release does not extend to claims which the  
creditor does not know or suspect to exist in his or  
her favor at the time of executing the release, which  
if known by him or her must have materially affected  
his or her settlement with the debtor."

Notwithstanding the provision of Section 1542, and for the  
purpose of implementing a complete release and discharge,  
Representative Plaintiffs expressly acknowledge the this  
Settlement Agreement is intended to include in its effect,  
without limitation, claims and causes of action which they  
do not know of or suspect to exist in their favor at the  
time of execution hereof and that his agreement contemplates  
the extinguishment of all such claims and causes of action.

1 Settlement, § 10(c). The § 1542 release does not extend to non-  
2 representative class members.

3  
4 E. Objections and Opt-Out Process.

5 Any Class Member who so wishes may object or elect not to  
6 participate in the Settlement. Settlement, §§ 19, 20. The Notice  
7 fully explains the objection and opt-out procedures. See Notice,  
8 § VI; see also "Exclusion Form", Doc 38-4.

9  
10 F. Class Representative Payments; Class Counsel Attorneys' Fees  
11 Payment and Class Counsel Litigation Expenses Payment.

12 The settlement also permits Plaintiffs and their counsel to  
13 seek by separate motion:

- 14 • payments to Plaintiffs, in addition to their Settlement  
15 Awards, of \$4,000 each in compensation of their  
16 services as Class Representatives; and
- 17 • payments to Class Counsel of \$82,500, for their  
18 reasonable attorneys' fees, as well as litigation  
19 costs, up to \$7,500.

20 See Settlement, §§ 11(a), (b).

21  
22 III. DISCUSSION

23 A. Certification of a Class for Settlement.

24 As the Class has only been conditionally certified, final  
25 certification is required and is governed by Federal Rule of  
26 Civil Procedure Rule 23.

27  
28 1. Rule 23(a) Requirements.



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

5 (1) the class is so numerous that joinder of all members  
6 is impracticable (the "numerosity" requirement); (2)  
7 there are questions of law or fact common to the class  
8 (the "commonality" requirement); (3) the claims or  
9 defenses of representative parties are typical of the  
10 claims or defenses of the class (the "typicality"  
11 requirement); and (4) the representative parties will  
12 fairly and adequately protect the interests of the class  
13 (the "adequacy of representation" requirement).

14 *In re Intel Secs. Litig.*, 89 F.R.D. 104, 112 (N.D. Cal.  
15 1981)(citing Fed. R. Civ. P. 23(a)).

16 a. Numerosity.

17 Here, the proposed class is comprised of all individuals who  
18 have been employed by Defendant in their Fresno Grind Facility  
19 from August 1, 2008 to March 7, 2011. There are approximately  
20 239 Class Members. Courts have routinely found the numerosity  
21 requirement satisfied when the class comprises 40 or more  
22 members. *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y.  
23 1998). Numerosity is also satisfied where joining all Class  
24 members would serve only to impose financial burdens and clog the  
25 court's docket. *In re Intel Secs. Litig.*, 89 F.R.D. at 112.  
26 Here, the joinder of approximately 239 individual current and  
27 former employees would only further clog this court's already  
28 overburdened docket.

1                   b.    Common Questions of Fact and Law.

2                   Commonality exists when there is either a common legal issue  
3 stemming from divergent factual predicates or a common nucleus of  
4 facts resulting in divergent legal theories. *Hanlon v. Chrysler*  
5 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). It does not require  
6 that all questions of law or fact be common to every single  
7 member of the class. To satisfy the commonality requirement,  
8 plaintiffs need only point to a single issue common to the class.  
9 *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 (9th Cir. 2007);  
10 *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 655 (C.D. Cal. 2000).

11                   Here, Class Members share the following legal and factual  
12 questions:  
13

- 14                   • Whether Defendant violated California Labor Code  
15                   ("CLC") § 2802 by failing to reimburse Employees for  
16                   necessary expenditures incurred in the course of their  
17                   employment;
- 18                   • Whether Defendant violated CLC § 226.7 and the  
19                   applicable IWC Wage Orders, by failing to provide  
20                   Employees with rest periods for every four consecutive  
21                   hours of work without paying them one hour of wages at  
22                   their regular rates of pay for each day that requisite  
23                   rest periods were not provided or were deficiently  
24                   provided;
- 25                   • Whether Defendant violated CLC § 204 by failing to pay  
26  
27  
28

1 Employees all wages due at least twice per calendar  
2 month;

- 3 • Whether Defendant violated CLC § 226(a) by not  
4 providing employees accurate itemized wage statements;
- 5 • Whether Defendant violated CLC §§ 201-203 by failing to  
6 pay wages and compensation due and owing at the time of  
7 termination;
- 8 • Whether Defendant violated California Business &  
9 Professions Code § 17200 et seq. based on the above;  
10 and,  
11 • Whether Plaintiffs and members of the proposed class  
12 are entitled to equitable relief pursuant to § 17200.

13 Every Class Member was paid under the same pay practices as  
14 every other class members. The commonality requirement is  
15 satisfied.  
16

17  
18  
19 c. Typicality.

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

1 the other Class Members. The typicality requirement is  
2 satisfied.

3  
4 d. Fair and Adequate Representation.

5 The final Rule 23(a) requirement is that the class  
6 representative fairly and adequately protect the interests of the  
7 class. Fed. R. Civ. P. 23(a)(4). "The proper resolution of this  
8 issue requires that two questions be addressed: (a) do the named  
9 plaintiffs and their counsel have any conflicts of interest with  
10 other class members and (b) will the named plaintiffs and their  
11 counsel prosecute the action vigorously on behalf of the class?"  
12 *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir.  
13 2000).  
14

15 Both requirements are satisfied here. Class counsel,  
16 Anthony J. Orshansky, Esq., of the law firm Orshansky & Yeremian,  
17 LLP, has significant experience litigating class actions, serving  
18 as class counsel, and representing plaintiffs in wage and hour  
19 litigation. See Orshansky Decl. at ¶ 2. Class counsel has no  
20 conflicts with the class, *id.* at ¶ 18, and has devoted a  
21 significant amount of time to the lawsuit, *id.* at ¶ 35.  
22

23 In addition, the Class Representatives' interests are  
24 completely aligned with those of the class. The Class  
25 Representatives' interest is in maximizing their recovery.  
26 Although they will each receive an additional \$4,000, this amount  
27 is reasonable compensation for the time and expense they devoted  
28

1 to pursuing this case, as well as for the inherent risk involved  
2 in their doing so. See *id.* at ¶¶ 42-49.

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

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

16  
17 B. The Terms of the Preliminary Approval Have Been Satisfied.

18 The March 7, 2011 preliminary approval of the Settlement and  
19 conditional certification of the Class ordered that the Class be  
20 sent notice of the Settlement, approved the form of notice  
21 proposed by the parties, approved the forms of claims for  
22 settlement share and election not to participate, and set the  
23 hearing for final approval. Doc. 41. The Settlement  
24 Administrator, Rust Consulting, Inc. ("Rust"), has carried out  
25 this Court's order to the extent possible. See generally  
26 Declaration of Amanda J. Myette, Doc. 40. On March 25, 2011,  
27 Class Notices were mailed to all 239 Class Members. *Id.* at ¶ 9.  
28

1 The U.S. Postal Service returned 23 Class Notices as  
2 undeliverable. *Id.* at ¶ 10. Two of these were returned after  
3 the Claim Form deadline, but Rust performed address traces on the  
4 21 undeliverable Class Notices that were returned before the  
5 deadline. *Id.* The traces yielded 17 updated addresses and Class  
6 Notices were promptly mailed to those Class Members via First-  
7 Class mail. Of these 17 re-mailings, 3 were returned as  
8 undeliverable. *Id.* Nine Class Notices remained undeliverable  
9 because the administrator was unable to find a deliverable  
10 address. *Id.* On April 19, 2011, the Settlement Administrator  
11 mailed a reminder to class members who had not yet submitted a  
12 Claim Form or an Exclusion Form to do so by the May 9, 2011  
13 deadline. *Id.* at ¶ 13.

14  
15  
16 Despite these difficulties, 167 Claim Forms (~70%) were  
17 received and accepted by the Settlement Administrator. *Id.* at ¶  
18 11. These Claim Forms also account for 88.15% of the total  
19 possible claimed work weeks. *Id.* According to Plaintiffs, these  
20 figures represent a strongly positive response for a wage-and-  
21 hour class-action-settlement. Oshansky Decl., at ¶ 17.  
22 Additionally, zero individuals submitted Exclusion Forms, and no  
23 class member has submitted an objection to the Settlement.  
24 Myette Decl., at ¶¶ 14, 15.

25  
26 C. Approval of the Settlement.

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

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

22 In determining whether a settlement agreement is fair,  
23 adequate, and reasonable to all concerned, a district court may  
24 consider some or all of the following factors: (1) the strength  
25  
26  
27  
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1 of the Plaintiff's case (2) the risk, expense, complexity, and  
2 likely duration of further litigation; (3) the risk of  
3 maintaining class action status throughout the trial; (4) the  
4 amount offered in settlement; (5) the extent of discovery  
5 completed; (6) the stage of the proceedings; (7) the views and  
6 experience of counsel; (8) any opposition by class members; (9)  
7 the presence of a governmental participant. *Linney v. Cellular*  
8 *Alaska Pshp.*, 151 F.3d 1234,1242 (9th Cir. 1998). This list of  
9 factors is not exclusive and the court may balance and weigh  
10 different factors depending on the circumstances of each case.  
11 *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir.  
12 1993).

13  
14  
15 1. The Relative Strengths of the Parties' Cases Supports  
16 Approval of the Settlement.

17 Defendants contest liability in this action and disputed  
18 Class Counsel at every step. Oshansky Decl., at ¶ 6. If the  
19 litigation proceeds, Plaintiffs would face significant risks.  
20 For example, one of the primary issues in this case revolves  
21 around the reimbursement for steel-toe footwear. However,  
22 whether or not an employer must reimburse purchases required for  
23 operational safety absent a regulation in the industry is not  
24 settled law. Compare *Appeal of: Kaiser Steel Corp. Steel Mfg.*,  
25 1981 WL 140491 (Mar. 5, 1981), \*3 (California Occupational Health  
26 and Safety Appeals Board held that regulation required employer  
27 to pay for safety shoes); with *In re Newman Flange & Fitting Co.*,



1 Co. 07-R2D4-2581, 2009 CA-OSHA App. Bd. Lexis 101 (Cal-OSHA)  
2 App., Sept. 30, 2009) (holding that employer was not required to  
3 pay for safety shoes).

4 Another major issue in this case involves the provision of  
5 rest breaks. Whether rest break claims result in individual  
6 inquiries predominating, thus frustrating class certification,  
7 under California law is currently before the California Supreme  
8 Court (see *Brinkley v. Public Storage, Inc.*, 198 P.3d 1087, 87  
9 Cal.Rptr 674 (Jan. 14, 2009) (review granted) and *Brinker*  
10 *Restaurant Corp. v. Superior Court*, 196 P.3d 216, 85 Cal. Rptr.  
11 388 (Oct. 22, 2008) (review granted). A defense ruling in  
12 *Brinker* would impair Plaintiff's ability to proceed on these  
13 causes of action. See *Brown v. Federal Express*, 249 FRD 580, 585  
14 (C.D. Cal. 2008) (denying class certification of employees  
15 alleging employers denied them meal breaks and rest breaks, and  
16 failed to pay additional one hour of pay to employees who missed  
17 meal breaks).

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

21  
22  
23  
24 2. The Settlement Amount is Fair and Reasonable.

25  
26 The Settlement provides for a payment of about \$260,000.00  
27 by Defendants. The average payment to Class Members is \$898.20.

1 Myette Decl., at ¶ 11. All Settlement shares will be distributed  
2 to each Claimant on the basis of the number of weeks actively  
3 worked by each Claimant during the Class Period. Settlement, §  
4 9(c).

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

9 Finally, the expected Settlement Administrator's fees and  
10 costs of approximately \$10,000 are reasonable in light of the  
11 amount of work achieved. See Myette Decl., Doc 48-1.  
12

13 3. The Release is Appropriate.

14 As part of the Settlement, Class Members release the  
15 following claims: "any and all Covered Claims [listed in the  
16 Complaint] in addition to any claims relating to or arising from  
17 their employment with Defendant, whether known or unknown, that  
18 could have asserted in the Complaint." Settlement, § 10(c).  
19 These released claims appropriately track the breadth of  
20 Plaintiffs' allegations in the action and the settlement does not  
21 release unrelated claims that class members may have against  
22 defendants.  
23

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

26 The Settlement was reached after informed, arm's length  
27 negotiations between the parties. See Oshansky Decl., at ¶¶ 10,  
28

1 11. Plaintiffs' counsel had access to documents including all of  
2 the Defendant's expenses, equipment, and reimbursement policies  
3 as well as time records for Class Members. *Id.* at ¶ 10.  
4 Plaintiffs' counsel reviewed and analyzed all these materials.  
5 *Id.* Counsel was also informed by lengthy interviews with the  
6 Representative Plaintiffs. *Id.* at ¶ 7. In addition, there is no  
7 evidence of collusion.  
8

9  
10 5. Reaction of the Class Members.

11 "The reactions of the members of a class to a proposed  
12 settlement is a proper consideration for the trial court."  
13 *Vasquez v. Coast Valley Roofing*, 266 F.R.D. 482 (E.D. Cal. 2010)  
14 (citing 5 Moore's Fed. Practice § 23.85[2][d]). Class  
15 Representative's opinion of the settlement are especially  
16 important as "[t]he representatives' views may be important in  
17 shaping the agreement and will usually be presented at the  
18 fairness hearing; they may be entitled to special weight because  
19 the representatives may have a better understanding of the case  
20 than most members of the class." *Manual for Complex Litigation*,  
21 *Third*, § 30.44 (1995).  
22

23 Here, the Class Members strongly support the settlement as  
24 evidenced by the relatively high response rate and the absence of  
25 any Requests for Exclusion. See *Oshansky Decl.*, at ¶¶ 16, 17.  
26 Each of the Class Representatives and their attorneys have  
27 extensive understanding of the merits of this settlement having  
28

1 participated extensively in the strategy, formulation, filing,  
2 litigation and negotiation process. See *id.* at ¶ 44. There have  
3 been no objections to the Settlement by Class Members or any  
4 other members of the public.

5 The settlement is fair and reasonable.

6  
7 D. Class Counsel's Requested Fees and Costs.

8 By separate motion, Plaintiffs' counsel also requests  
9 approval of payments for attorneys' fees and costs in the amount  
10 of \$82,500 and \$7,500, respectively. Courts have long recognized  
11 the "common fund" or "common benefit" doctrine, under which  
12 attorneys who create a common fund or benefit for a group of  
13 persons may be awarded their fees and costs to be paid out of the  
14 fund. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir.  
15 1998). "[A] lawyer who recovers a common fund for the benefit of  
16 persons other than himself or his client is entitled to a  
17 reasonable attorney's fee from the fund as a whole." *Staton v.*  
18 *Boeing Co.*, 327 F.3d 938, 972 (9th Cir. 2003) (quoting *Boeing Co.*  
19 *v. Van Gemert*, 444 U.S. 472, 478 (1980)). Awarding a percentage  
20 of the common fund is particularly appropriate "when each member  
21 of a certified class has an undisputed and mathematically  
22 ascertainable claim to part of a lump-sum judgment recovered on  
23 his behalf.'" *Id.* (quoting *Boeing Co.*, 444 U.S. at 478-79).

24 Here, where the Settlement requires lump sum allocations to  
25 each Settlement Class and applies distribution formulas pursuant  
26  
27  
28

1 to which each Class Member who submits a valid claim will receive  
2 a mathematically ascertainable payment, application of the  
3 percentage of common fund doctrine is appropriate.

4 The typical range of acceptable attorneys' fees in the Ninth  
5 Circuit is 20% to 33 1/3% of the total settlement value, with 25%  
6 considered the benchmark. *Powers v. Eichen*, 229 F.3d 1249, 1256  
7 (9th Cir. 2000); *Hanlon*, 150 F.3d at 1029; *Staton*, 327 F.3d at  
8 952. However, the exact percentage varies depending on the facts  
9 of the case, and in "most common fund cases, the award exceeds  
10 that benchmark." *Knight v. Red Door Salons, Inc.*, 2009 WL 248367  
11 (N.D. Cal. 2009); see also *In re Activision Sec. Litig.*, 723 F.  
12 Supp. 1373, 1377-78 (N.D. Cal. 1989) ("nearly all common fund  
13 awards range around 30%").  
14

15  
16 Class Counsel seeks an attorney's fee award of \$82,500, or  
17 31.7% of the total Settlement amount. When assessing whether the  
18 percentage requested is reasonable, courts look to factors such  
19 as: (a) the results achieved; (b) the risk of litigation; (c) the  
20 skill required, (d) the quality of work; (e) the contingent  
21 nature of the fee and the financial burden; and (f) the awards  
22 made in similar cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d  
23 1043, 1047 (9th Cir.2002); *Six Mexican Workers v. Arizona Citrus*  
24 *Growers*, 904 F.2d 1301 (9th Cir.1990).  
25

26  
27 1. The Results Achieved.

28 The individual claims in this case concerned defendants'

1 failure to reimburse Class Members for required safety footwear;  
2 failure to provide proper rest periods; failure to pay Employees  
3 all wages due at least twice per calendar month; and failure to  
4 pay all wages due upon termination or separation of employment.  
5 Such claims would not ordinarily produce large recoveries per  
6 claimant. Here, the NSF of \$150,000 will provide the 167  
7 Qualified Claimants with an average recovery of approximately  
8 \$898.20 per claimant. Myette Decl., at ¶ 11.

10  
11 2. The Risks Involved.

12 There were significant risks in pursuing this case. One of  
13 the primary issues involved in this case has to do with  
14 reimbursement for safety footwear, an unsettled area of the law.  
15 Another major issue was the timely provision of rest periods - an  
16 issue that is currently before the California Supreme Court in  
17 the *Brinker* and *Brinkley* cases. It is unknown what the outcome  
18 of the Supreme Court's decision will be, but an adverse decision  
19 could be prejudicial to the recovery in this case.

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

24 Plaintiffs' Counsel invested \$76,171.50 in lodestar time and  
25 \$10,000 in costs in litigating this case with no guarantee of  
26 recovery.

27  
28 3. The Skill Required.

1           This case required specialized skills in litigating cutting-  
2 edge legal theories surrounding expense-reimbursement and rest  
3 periods. Oshansky Decl., at ¶ 26. Additionally, the case  
4 required extensive review and analysis of time records and  
5 information regarding Class Members' job duties in order to  
6 determine what violations of rest break and reimbursement law  
7 actually occurred. *Id.* at ¶ 26. Class Counsel has extensive  
8 experience in class action wage and hour litigation of this  
9 nature. *See id.* at ¶ 2.

11  
12           4.    The Contingent Nature of the Fee and the Financial  
13                Burden.

14           This case was conducted on a contingent fee basis against a  
15 well-represented Defendant. Counsel has received no money from  
16 plaintiffs or any other source to litigate this case. *See id.*,  
17 at ¶ 27. The plaintiffs are all low-wage workers who could never  
18 meaningfully contribute to any such expenses. Plaintiffs'  
19 counsel accepted the entire risk of litigation and chose to  
20 forego other meritorious, potentially fee-generating cases in  
21 order to vigorously litigate this cause. *Id.* Class Counsel was  
22 successful in effectuating a \$260,000 settlement.

23  
24           5.    Awards in Similar Cases.

25           The requested fee is comparable to similar wage and hour  
26 cases litigated in the Central Valley. For example, this court  
27 has awarded the following fees:  
28

- 1 • 33.3% in *Vasquez v. Coast Valley Roofing*, 266 F.R.D. 482  
2 (E.D. Cal. 2010), Case No. 1:07-cv-00227 OWW DLB;
- 3 • 30% in *Vasquez v. Aartman*, E.D. Cal. Case No. 1:02-CV05624  
4 AWI LJO;
- 5 • 31.25% in *Baganha v. California Milk Transport*, Case No.  
6 1:01-cv-05729 AWI LJO;
- 7 • 33.3% in *Randall Willis et al. v. Cal Western Transport*, and  
8 *Earl Baron et al. v. Cal Western Transport*, Coordinated Case  
9 No. 1:00-cv-05695 AWI LJO;
- 10 • 33.3% in *Benitez, et al. v. Jeff Wilbur and Lisa Wilbur*,  
11 Case No. 1:08-cv-01122 LJO GSA;
- 12 • 33.3% in *Chavez, at al. v. Petrissans*, Case No. 1:08-cv-  
13 00122 LJO GSA.

14 In light of the overall success, skill employed, the  
15 substantial legal risks associated with Plaintiffs' claims, the  
16 financial risks borne by Plaintiffs' Counsel, and similar awards  
17 made in similar cases, under a percentage-of-fund approach the  
18 requested attorney's fee award of 31.7% of the total amount  
19 created by the settlement (or \$82,500) is reasonable under the  
20 circumstances.  
21

22 6. Lodestar Cross-Check.

23 Calculation of the lodestar amount may be used as a cross-  
24 check to assess the reasonableness of the percentage award.  
25

26 *Fernandez v. Victoria Secret Stores*, 2008 WL 8150856 (C.D. Cal  
27



1 2008); *Vizacaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 (9th  
2 Cir. 2002). First, the court must calculate the lodestar amount  
3 by multiplying the number of hours reasonably expended on the  
4 litigation by a reasonable hourly rate. *Cunningham v. County of*  
5 *Los Angeles*, 879 F.2d 481 (9th Cir. 1988). Next, the court may  
6 increase or reduce the presumptively reasonable lodestar fee.  
7 *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1998) (citing  
8 *City of Riverside v. Rivera*, 477 U.S. 561 (1986)).

10 The billing records of Class Counsel Orshansky & Yeremian  
11 LLP reveal the following hours billed (both completed and to be  
12 completed) by three lawyers:

NAME	HOURS	RATE	TOTAL
<u>Orshansky &amp; Yeremian LLP</u>			
Anthony J. Orshansky	59.2	\$520	\$30,784.00
David H. Yeremian	58.5	\$450	\$26,325.00
Justin Kachadoorian	49.7	\$325	\$16,152.50
Anthony J. Orshansky (future)	3.0	\$520	\$1,560.00
David H. Yeremian (future)	3.0	\$450	\$1,350.00
<u>Total</u>	173.4		\$76,171.50

18 See Orshansky Decl., at ¶ 35.

19  
20 The number of hours billed in this case is reasonable under  
21 the circumstances. In addition to considerable discovery and  
22 preparation for mediation, there were also unique, cutting-edge  
23 issues of law to investigate. Similar cases have reached  
24 settlement with over 200 billed hours of attorney time. See  
25 *Alvarado v. Nederend*, 1:08-cv-01099 OWW DLB (wage and hour class  
26 action involving unsettled issues related to meal and rest breaks  
27 with approximately 150 class members reached settlement after  
28

1 Class Counsel expended over 300 hours).

2 Likewise, the hourly rates presented by counsel are also  
3 reasonable. Though prevailing hourly rates in the Eastern  
4 District of California are in the \$400/hour range, Class  
5 Counsels' rates appear to fall within the reasonable rates of the  
6 Laffey Matrix. The Laffey Matrix is a widely recognized  
7 compilation of attorney and paralegal rate data used in the  
8 District of Columbia, frequently used in fee awards cases. The  
9 Laffey Matrix reflects a paralegal rate of \$161, a 1-3 year  
10 lawyer rate of \$294, a 4-7 year lawyer rate of \$361, an 8-10 year  
11 lawyer rate of \$522, an 11-19 year lawyer rate of \$589, and a 20+  
12 year lawyer rate of \$709. The district court in *Fernandex v.*  
13 *Victoria Secret Stores, LLC*, 2008 WL 8150856, \*15 (C.D. Cal. July  
14 21, 2008), increased the Laffey Matrix amounts by the difference  
15 between the cost of living increase provided to Judicial branch  
16 employees in the Washington D.C. area and that provided to  
17 employees in the Los Angeles area. That difference is 2.94  
18 percent as of the 2011 pay tables. Taking the 11-19 years out  
19 bracket as an example, the adjusted Laffey Rate for a 11-19 year  
20 lawyer is \$606 ( $\$589 * 1.0294$ ). Mr. Orshansky's rate of \$520 is  
21 lower than the adjusted Laffey Matrix for an attorney with equal  
22 years in practice. The \$450 billed by Mr. Yeremian is about 15%  
23 lower than the 8-10 year attorney rate of \$537. Finally, Mr.  
24 Kachedoorian's rate of \$325 is also about 15% lower than the 4-7  
25  
26  
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1 year attorney rate of \$371. The lodestar cross-check shows that  
2 Class Counsels' hourly rate and resulting fees of \$76,171.50 are  
3 reasonable. The Court does not intend this finding to have any  
4 precedential effect, as the fee scale is higher than rates  
5 prevailing in the Central Valley.  
6

7 The amount requested by Class Counsel of \$82,500.00 is  
8 greater than its lodestar amount of \$76,171.50. However,  
9 adjustments to increase or decrease the lodestar amount are  
10 sometimes appropriate to justify use of a "lodestar multiplier."  
11 *Clark v. City of Los Angeles*, 803 F.2d 987, 991 (9th Cir. 1986);  
12 see also *Fischel v. Equitable Life Assur. Society of U.S.*, 307  
13 F.3d 997, 1008 (9th Cir. 2002). "It is an established practice  
14 in the private legal market to reward attorneys for taking the  
15 risk of non-payment by paying them a premium over their normal  
16 hourly rates for winning contingency cases." *Fischel*, 307 F.3d  
17 at 1008 (*citing In re Washington Public Power Supply System*  
18 *Securities Litig. v. Continental Ins. Co.*, 19 F.3d 1291, 1299  
19 (9th Cir. 2002)). Generally, a district court has discretion to  
20 apply a multiplier to the attorney's fees calculation to  
21 compensate for the risk of nonpayment. *Fischel*, 307 F.3d at  
22 1008; see also *In re Coordinated Pretrial Proceedings in*  
23 *Petroleum Products Antitrust Litig. v. Exxon Corp.*, 109 F.3d 602  
24 (9th Cir. 1997).  
25  
26

27 The "lodestar multiplier" is calculated by dividing the  
28

1 percentage fee award by the lodestar calculation. Fischel, 307  
2 F.3d at 1008. Here, the multiplier of 1.08 is calculated by  
3 dividing \$82,500.00 by \$76,171.50. To determine whether the  
4 lodestar multiplier is reasonable the following factors may be  
5 considered: (1) the amount involved and the results obtained, (2)  
6 the novelty and difficulty of the questions involved, (3) the  
7 skill requisite to perform the legal service properly, (4) the  
8 preclusion of other employment by the attorney due to acceptance  
9 of the case, (5) the customary fee, (6) whether the fee is fixed  
10 or contingent, (7) time limitations imposed by the client or the  
11 circumstances, (8) the amount involved and the results obtained  
12 (9) the experience, reputation, and ability of the attorneys,  
13 (10) the 'undesirability' of the case, (11) the nature and length  
14 of the professional relationship with the client, and (12) awards  
15 in similar cases. *Id.* (citing *Kerr v. Screen Extras Guild, Inc.*,  
16 526 F.2d 6 (9th Cir. 1975)).

19 First, Class Counsel achieved a good result and generated a  
20 significant benefit for the class amounting to the Net Settlement  
21 Fund of \$150,000 for the benefit of a class of approximately 239  
22 members. Based on the claims rate, the 167 Class Members who  
23 submitted claims will receive the entirety of the NSF, an average  
24 of \$898.20. See Myette Decl., at ¶ 11.

26 Second, Plaintiff's safety footwear reimbursement claims  
27 presented arguable questions for Class Counsel in light of the  
28

1 competing precedent proffered by both parties. Similarly,  
2 Plaintiff's rest break claims raise doubts as California's rest  
3 break law is currently in flux with *Brinker* currently pending  
4 before the California Supreme Court.

5 Third, Class Counsel competently performed. Class Counsel  
6 avoided protracted litigation by conducting significant  
7 investigation of the class claims, and efficiently communicating  
8 and exchanging information with Defense counsel so that the  
9 parties could successfully mediate the case. In preparation for  
10 this case, Class Counsel investigated the potential claims and  
11 class members; comprehensively reviewed many pages of documents;  
12 interviewed the named Plaintiffs; and conducted substantial  
13 discovery into Defendant's policies regarding rest periods,  
14 expense reimbursement, and safety requirements. Orshansky Decl.,  
15 at ¶ 28.

16 Lastly, Class Counsel undertook considerable financial risks  
17 in this litigation by accepting this case on a contingency basis.  
18 Orshansky Decl., at ¶ 27. There was no guarantee they would  
19 recoup their fees or costs. *Id.* Class Counsel has not received  
20 any payment for their time or their expenses, which they began  
21 incurring over a year ago. *Id.* Additionally, Class Counsel had  
22 to forego other work in order to maintain this case. *Id.*  
23 Finally, the requested amount, 31.7% of the total settlement, was  
24 less than the 40% contingency percentage that Plaintiffs agreed  
25  
26  
27  
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1 Class Counsel could receive. *Id.* at ¶ 30.

2 Based on the overall success, the skill with which the case  
3 was prosecuted, the substantial legal risks associated with  
4 Plaintiffs' claims, and the financial risks borne by Plaintiffs'  
5 Counsel, Plaintiff's request for a multiplier of 1.08 of its  
6 lodestar is reasonable. *See, e.g. Steiner v. Am. Broadcasting*  
7 *Co., Inc.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007)(approving  
8 multiplier of 6.85 and citing cases with comparable or higher  
9 multipliers); *Vizcaino*, 290 F.3d at 1051 (finding no abuse of  
10 discretion in awarding a multiplier of 3.65).

11  
12  
13 E. Class Counsel's Request for Costs.

14 Class Counsel incurred out-of-pocket costs totaling  
15 approximately \$6,737.19. The bulk of the incurred costs included  
16 filing fees, costs related to the service of process, mediation  
17 fees, courier and attorney-service costs for court filings, copy  
18 and printing charges for documents, and parking and postage  
19 charges. Orshansky Decl., at ¶¶ 40, 41. Such costs are  
20 routinely reimbursed in these types of cases. *See, In re United*  
21 *Energy Corp. Sec. Litig.*, 1989 WL 73211, at \*6 (C.D. Cal. 1989)  
22 (quoting Newberg, *Attorney Fee Awards*, § 2.19 (1987)); *see e.g.*  
23 *Vasquez*, 266 F.R.D. at 493 (Class Counsel litigation expenses  
24 payment of approximately \$9,000 was fair and reasonable in  
25 similar case).

26  
27 Here, the actual costs incurred are less than the estimated  
28

1 \$7,500, which was included in the Class Notice and to which no  
2 Class Member objected. Plaintiff's request, which is \$6,737.19,  
3 is reasonable.  
4

5 F. Class Representative Enhancement.

6 Pursuant to the Settlement, Plaintiff seeks an enhancement  
7 in the amount of \$4,000 to the named Plaintiffs Tyrus Collins and  
8 James Greer. Orshansky Decl., at ¶ 47. This payment is intended  
9 to recognize the time and efforts that the named Plaintiffs spent  
10 on behalf of the Class Members. *Id.* at ¶¶ 44-46.  
11

12 "Courts routinely approve incentive awards to compensate  
13 named plaintiffs for the services they provide and the risks they  
14 incurred during the course of the class action litigation."  
15 *Ingram v. The Coca-Cola Company*, 200 F.R.D. 685, 694 (N.D. Ga.  
16 2001) (internal quotations and citations omitted). In *Coca-Cola*,  
17 the Court approved service awards of \$300,000 to each named  
18 plaintiff in recognition of the services they provided to the  
19 class by responding to discovery, participating in the mediation  
20 process, and taking the risk of stepping forward on behalf of the  
21 class. *Coca-Cola*, 200 F.R.D. at 694; see, e.g., *Van Vranken v.*  
22 *Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995)  
23 (approving \$50,000 participation award to plaintiffs); *Glass v.*  
24 *UBS Financial Services, Inc.*, 2007 WL 221862, at \*17 (N.D. Cal.  
25 Jan. 26, 2007) (approving \$25,000 enhancement to each named  
26 plaintiff).  
27  
28

1           In this case, among other things, the named Plaintiffs: (1)  
2 provided significant assistance to Class Counsel; (2) endured  
3 lengthy interviews; (3) provided documents and information; (4)  
4 helped analyze documents produced by defendants; (5) and  
5 participated in the mediation, which was a full day session  
6 requiring very careful consideration, evaluation and approval of  
7 the terms of the Settlement Agreement on behalf of the Class.  
8 See Orshansky Decl., at ¶44. Moreover, as with any plaintiff who  
9 files a civil action, Plaintiffs undertook the financial risk  
10 that, in the event of a judgment in favor of Defendant in this  
11 action, they could have been personally responsible for the costs  
12 awarded in favor of the Defendant. See, e.g., *Whiteway v. Fed Ex*  
13 *Kinkos Office & Print Services, Inc.*, No. C 08-2320 SBA, 2007 WL  
14 4531783, at \*\*2-4 (N.D. Cal. Dec. 17, 2007).

17       G.   Claims Administrator Fee.

18           The Class Notice provided that the Claims Administrator  
19 would receive a fee of up to \$10,000. Plaintiffs request that  
20 the full amount of \$10,000 be approved as Rust's fee. The  
21 Declaration of Amanda J. Myette, a Project Manager at Rust,  
22 explains the tasks undertaken by Rust to accomplish notifying the  
23 Class of the settlement and administering its terms. Ms. Myette  
24 estimates administration costs of \$10,000, taking into  
25 consideration both costs incurred to date and those anticipated  
26 to be incurred in the future. This request is substantially  
27  
28



1 lower than previous administrator fees awarded in this District.  
2 See Vasquez, 266 F.R.D.at 483-84 (\$25,000 administrator fee  
3 awarded in wage and hour case involving 177 potential class  
4 members).

5  
6 IV. CONCLUSION

7 For all the reasons set forth above:

8 (1) The Settlement Class is CERTIFIED;

9 (2) The Class Settlement is APPROVED;

10 (3) The payment of \$82,500 in attorney's fees (31.7% of the  
11 Maximum Settlement Value and \$7,500 in costs is APPROVED;

12 (4) The payment of \$4,000 enhancement to each of the named  
13 Plaintiffs, Tyrus Collins and James Greer, is APPROVED;

14 (5) The payment of \$10,000 to the Settlement Administrator  
15 is APPROVED.  
16

17  
18 IT IS SO ORDERED.

19 Dated: June 28, 2011

20 /s/ Oliver W. Wanger  
21 United States District Judge  
22  
23  
24  
25  
26  
27  
28