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15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN FRANCISCO DIVISION

18 JUSTIN LARKIN, ANTHONY TIJERINO, and
 AHMAD DEANES, on behalf of themselves and
 19 all others similarly situated,
 20 Plaintiffs,
 21 v.
 22 YELP! INC.,
 23 Defendant.

Case No. 3:11-cv-01503-EMC
**NOTICE OF MOTION AND MOTION FOR
 AN ORDER (1) GRANTING FINAL
 APPROVAL OF CLASS AND
 COLLECTIVE ACTION SETTLEMENT;
 (2) APPROVING AWARD OF CLASS
 REPRESENTATIVE SERVICE
 PAYMENTS; (3) APPROVING AWARD OF
 ATTORNEYS' FEES AND COSTS.**

**[DECLARATIONS OF PETER RUKIN
 ROSA GALLENBERG, THOMAS URMY
 AND KRISTA TITTLE FILED
 CONCURRENTLY]**

Date: November 30, 2012
 Time: 2:30 p.m.
 Courtroom: 5 -17th Floor
 Judge: Hon. Edward M. Chen

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25
26
27
28

C. THE ATTORNEYS’ FEES AND COSTS REQUESTED ARE REASONABLE 144

D. THE REQUESTED ADMINISTRATIVE COSTS ARE REASONABLE..... 16

V. CONCLUSION 166

TABLE OF AUTHORITIES

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

CASES

Blum v. Stenson,
465 U.S. 886, 900 n.16, 104 S.Ct. 1541 (1984) 15

Chindarah v. Pick Up Stix, Inc.,
171 Cal. App. 4th 796 (2009)..... 10

Class Plaintiffs v. City of Seattle,
955 F.2d 1268 (9th Cir. 1992)..... 9

Cullen v. Whitman Med. Corp.,
197 F.R.D. 136, (E.D. Pa. 2000) 16

Fleury v. Richemont N. Am., Inc.,
No. C-05-4525, 2008 WL 3287154 (N.D.Cal., Aug. 6, 2008)..... 14

Garner v. State Farm Mut. Auto. Ins.,
No. CV 08 1365 CW (EMC), 2010 WL 1687832 (N.D. Cal. Apr. 22, 2010) 14

Harris v. Vector Marketing Corp.,
No. C-08-5198, 2012 WL 381202 (N.D.Cal., Feb. 6, 2012) 14

In re Crazy Eddie Sec. Litig.,
824 F. Supp. 320 (E.D.N.Y. 1993)..... 16

In re Heritage Bond Litig.,
No. 02-ML-1475-DT(RCX), 2005 WL 1594389 (C.D. Cal. Jun. 10, 2005) 16

In re Mego Financial Corp. Sec. Litig.,
213 F.3d 454, 459 (9th Cir. 2000) 12

In re M.D.C. Holdings Sec. Litig.,
No. CV89-0090 E (M), 1990 WL 454747 (S.D. Cal. Aug. 30, 1990)..... 15

In re Omnivision Tech., Inc.,
No. C-04-2297 SC, 2007 WL 4293467 (N.D. Cal. Dec. 6, 2007)..... 15

Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.,
221 F.R.D. 523 (C.D. Cal. 2004) 10, 13

Officers for Justice v. Civil Serv. Comm’n,
688 F.2d 615 (9th Cir. 1982)..... 9

Paul, Johnson, Alston & Hunt v. Graulty,
886 F.2d 268 (9th Cir. 1989)..... 15

Rodriguez v. W. Publ’g Corp., 563 F.3d 948 (9th Cir. 2009) 13

Six Mex. Workers v. Ariz. Citrus Growers,
904 F.2d 1301 (9th Cir. 1990)..... 15

1	<i>Staton v. Boeing Co.</i> , 327 F.3d 938 (9th Cir. 2003).....	14
2	<i>Torrise v. Tucson Elec. Power Co.</i> , 8 F.3d 1370 (9th Cir. 1993).....	10
3		
4	<i>Van Bronkhorst v. Safeco Corp.</i> , 529 F.2d 943 (9th Cir. 1976).....	9
5	<i>Vizcaino v. Microsoft Co.</i> , 290 F.3d 1043 (9th Cir. 2002).....	15
6		
7	<i>Watkins v. Wachovia Corp.</i> , 172 Cal. App. 4th 1576 (2009).....	10
8		
9	STATUTES	
10	29 U.S.C §216(b)	11
11	California Labor Code’s Private Attorneys General Act, Labor Code § 2698 <i>et. seq.</i>	3
12	California Civil Code § 1542	11
13	OTHER AUTHORITIES	
14	5 Moore’s Federal Practice § 23.85[2][d] (Matthew Bender 3d ed.).....	13
15		
16	RULES	
17	Fed. R. Civ. P. 23(e)(1)(C).....	9
18		
19		
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1 **NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL**

2 **TO DEFENDANT AND ITS COUNSEL OF RECORD:**

3 PLEASE TAKE NOTICE THAT on November 30, 2012, at 2:30 p.m., or as soon thereafter
4 as the matter may be heard in Courtroom 5 of the United States District Court for the Northern
5 District of California, located at 450 Golden Gate, San Francisco, California, Plaintiffs will move
6 for final approval of the class and collective action settlement reached in this case, an award of
7 class representative service payments in the aggregate amount of \$15,000, attorney's fees in the
8 amount of \$205,000, litigation costs in the amount of \$9,461.62, payment of \$7,500 to the
9 California Labor and Workforce Development Agency (LWDA), and settlement administrative
10 expenses of \$16,000.

11 Plaintiffs' motion is based on this Notice of Motion and Motion, the Memorandum of
12 Points and Authorities that appears below, the Declaration of Peter Rukin, the Declaration of Rosa
13 Vigil-Gallenberg, the Declaration of Thomas Army, the Declaration of Krista Tittle of Claims
14 Administrator Simpluris, Inc., the papers and pleadings on file in this action, and such other
15 evidence as may be presented at the motion hearing.

16 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
17 **FINAL APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT**

18 **I. INTRODUCTION**

19 On July 12, 2012, the Court entered an Order granting preliminary approval of the class and
20 collective action settlement reached in this action against Yelp!, Inc. ("Yelp"). Since that time,
21 notice of the settlement has been distributed to the Class. Class Members' reaction to the
22 settlement generally has been positive. 275 out of 488 California Class Members submitted claims
23 (representing approximately 67 percent of the total weeks worked by all California Class
24 Members), and 145 out of 454 National Class Members have submitted claims (representing
25 approximately 33 percent of the total weeks worked by all National Class Members). Two
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27
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1 California Class Members have chosen to opt out of the settlement, and no Class Members have
2 objected to the Settlement.

3 The results of Class Notice provide no ground for questioning the Court's original
4 determination that the Settlement is fair, reasonable and adequate. Pursuant to the Settlement, and
5 should all late and deficient claims be honored, approximately \$455,000 shall be paid to California
6 Participating Claimants and approximately \$152,000 shall be paid to National Participating
7 Claimants.¹ In addition, Class Counsel are requesting an award of attorneys' fees in the amount of
8 \$205,000 and litigation costs of \$9,461.62. After payment of settlement claims, attorneys' fees,
9 litigation costs, administration expenses, enhancement awards, and LWDA payment, it appears
10 that more than \$845,000 of the \$1,250,000 Maximum Settlement Amount will be paid (should all
11 late and deficient claims be honored).²

12 Accordingly, Plaintiffs respectfully request that the Court grant final approval of the
13 Settlement, award Class Counsel attorneys' fees and costs of \$214,461.62, approve the Settlement
14 Administrator's expenses of \$16,000, order payment of \$7,500 to LWDA, and approve incentive
15 awards of \$5,000 each to the three Class Representatives.

16 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

17 Yelp is a San Francisco-based company which operates a social networking and user
18 review website. Yelp generates revenue through the sale of advertising and uses inside sales
19 personnel, called "Account Executives," to secure its advertising business. Account Executives
20 work under different titles, depending on their experience and seniority: account executive trainee,
21 junior account executive, account executive, or senior account executive. Regardless of title, all
22 Account Executives have the same core responsibility to sell Yelp's advertising products.

23
24 ¹ This distribution calculation is based on Class Counsel's request that more than \$100,000 of the initial
attorneys' fee amount of \$312,500 be redistributed to the California and National Classes.

25 ² As of October 19, 2012, the settlement administrator and parties are working to resolve 8 late claims, 3
26 deficient claims, and 3 claims by individuals who were not included on the original class list but who
27 contend they are part of the Settlement Class. As of the filing date of this Motion, Yelp has agreed that the
28 three additional individuals are part of the Class but has not yet provided their workweek data to the
Settlement Administrator. After all late and deficient claims are resolved, and workweek data for the three
additional individuals is obtained, Counsel will submit an updated report to the Court.

1 From the beginning of its operations until approximately March 2011, Yelp classified its
2 Account Executives as exempt from federal and state overtime laws. Yelp paid all Account
3 Executives under a similar compensation plan during the liability period. Although some details
4 varied, all Account Executives received a base salary and had the ability to earn additional
5 compensation or to move to a higher level of compensation based on performance.

6 Each of the Plaintiffs worked for Yelp as an Account Executive. Docket Number (“Dkt.
7 No.”) 4, at ¶ 9-11. Plaintiff Larkin worked in Yelp's San Francisco office from September 2008 to
8 March 2009 and Plaintiff Tijerino worked in the San Francisco office from February 2010 through
9 November 2010. *Id.* at ¶ 9-10. Plaintiff Deanes worked out of Yelp’s Scottsdale, Arizona office
10 from October 2010 to January 2011. *Id.* at ¶ 11.

11 Plaintiffs contend that Yelp misclassified its Account Executives as exempt from overtime,
12 and that, on the basis of this exempt classification, Yelp did not pay Account Executives the
13 overtime wages required under the FLSA or California law.

14 Yelp contends that Plaintiffs’ claims have no merit. Yelp asserts that the majority of class
15 members, including both of the California named Plaintiffs, previously signed releases that prevent
16 them from bringing the claims asserted in this lawsuit. Yelp also claims that many class members
17 have agreed to pursue any claims that they may have in arbitration individually rather than on a
18 class or collective action basis, effectively precluding them from participating in this action.

19 **A. Procedural History**

20 On March 29, 2011, Plaintiff Justin Larkin filed this action in the United States District
21 Court for the Northern District of California, asserting claims under the FLSA for unpaid overtime
22 and under the California Labor Code for unpaid overtime, waiting time penalties, wage statement
23 damages, and restitution. Dkt. No. 1.

24 On April 18, 2011, Plaintiff Justin Larkin provided notice to the California Labor and
25 Workforce Development Agency and Yelp in accordance with the procedures set forth in the
26 California Labor Code’s Private Attorneys General Act, Labor Code § 2698 *et. seq.* (PAGA). The
27 PAGA notice included a file-endorsed copy of the complaint.
28

1 On April 19, 2011, Plaintiffs filed an amended complaint adding two additional plaintiffs,
2 Anthony Tijerino and Ahmad Deanes. Dkt. No. 4.

3 On May 11, 2011, the parties executed an agreement tolling the FLSA statute of limitation
4 for all potential collective action members effective May 11, 2011. Declaration of Peter Rukin In
5 Support of Plaintiffs' Motion for Final Approval of Class and Collective Action Settlement
6 ("Rukin Decl.") ¶ 7. On May 20, 2012, the parties executed a stipulation requesting a stay of the
7 proceedings pending mediation and permitting the filing of a second amended complaint adding a
8 PAGA claim in the event that mediation failed and the Court thereafter lifted the stay. Dkt. No. 8.
9 On May 24, 2011, the Court granted the requested stay. Dkt. No. 11.

10 Plaintiffs engaged in an investigation into their claims and Yelp's potential defenses,
11 including interviewing numerous class members and reviewing and analyzing documents reflecting
12 Yelp's compensation policies, employment agreements, and workweek data. Rukin Decl., ¶ 6.
13 Additionally, Plaintiffs reviewed an analysis produced by Yelp reflecting time worked by a
14 representative sample of Account Executives, using data gathered from phone systems used by
15 Account Executives. *Id.*

16 On September 15, 2011, the parties participated in a mediation with Mark Rudy of Rudy,
17 Exelrod, Zieff & Lowe. Although the parties did not reach a settlement on that date, they
18 continued to engage in extensive and thorough settlement discussions for over six-months. As a
19 result of these discussions, the parties agreed to the terms and conditions set forth in the Settlement
20 Agreement for which Plaintiffs now seek final approval. Rukin Decl., ¶ 8.

21 On July 12, 2012, this Court preliminarily approved the Settlement with modifications,
22 provisionally certified the Settlement Class, directed class notice to be sent and set a final approval
23 and fairness hearing³. (Dkt. No. 42). Class Notice was distributed pursuant to the Notice Plan
24 approved by the Court, and the period for submitting settlement claims and opting out of the
25

26 ³ The hearing was originally scheduled for November 15, 2012 but was later continued to
27 November 30, 2012. Dkt. 45. Notice of the new hearing date was posted on the website made
28 available for purposes of this settlement. The parties have respectfully requested that the court
clerk post notice of the new date on the front door of courtroom on November 15, 2012 alerting
class members of the new hearing date.

1 settlement has now closed. (Dkt. No. 42, 37, 32; Declaration of Krista Tittle (“Tittle Decl.”) at ¶
2 9).

3 **III. TERMS OF SETTLEMENT**

4 The parties’ Settlement Agreement and Release of Claims (the “Settlement”) is attached as
5 Exhibit 1 to the Declaration of Peter Rukin in Support of Final Approval. (hereinafter referred to
6 as “Exh. 1”). This was amended per the parties’ stipulation. (Dkt. 37). The following is a summary
7 of its terms.

8 **A. The Settlement Class**

9 The Settlement Class is composed of the “California Class” and the “National Class.” The
10 California Class consists of all Persons employed by Yelp as an Account Executive in California
11 from March 29, 2007 through December 31, 2011. Exh. 1, ¶ 1.2 & 1.4. The National Class
12 consists of all Persons employed by Yelp as an Account Executive in the United States outside of
13 California between May 11, 2008 and December 31, 2011. *Id.* at ¶ 1.25 & 1.27. Both Classes
14 include the following job titles: Account Executive, Account Executive Trainee, Associate
15 Account Executive Trainee, Associate Account Executive, Junior Account Executive, Sales
16 Associate, Sales Representative, and Senior Account Executive. *Id.* at ¶ 1.1

17 The Settlement provides that Class Members must submit a claim form and thereby become
18 either a “National Participating Claimant” or “California Participating Claimant.” Members of the
19 National Class who do not submit a claim form do not release any claims that they may have for
20 violations of any federal or state wage and hour laws. Members of the California Class who do not
21 submit a claim form and who do not opt out of the Settlement will release their claims under the
22 terms of the Settlement. *Id.* at ¶ 1.8

23 **B. Relief to the Settlement Class**

24 The Settlement provides that Yelp will pay up to \$1,250,000 as the Maximum Settlement
25 Amount. *Id.* at ¶ 1.22. Payment for court-approved attorneys’ fees and costs, court-approved
26 enhancement payments to the Class Representatives, fees and expenses of the Claims
27 Administrator, and payment of a PAGA penalty to the State of California will be deducted from
28

1 the Maximum Settlement Amount. *Id.* The Settlement Agreement provides that the initial
2 maximum settlement portion for payments to California Participating Claimants is \$586,667 and to
3 National Participating Claimants is \$293,333, but that these settlement portions may be increased
4 in the event that any amounts allocated towards Class Counsel’s attorney fees and costs and the
5 Representative Plaintiff enhancement awards are not sought or awarded. *Id.* at ¶ 1.23 & 1.24. The
6 total amount that Yelp is required to pay under the Settlement Agreement depends on the number
7 of Class Members who become Participating Class Members by submitting claim forms and
8 thereby participate in the settlement.

9 Participating Class Members will be paid based on the total number of weeks worked in
10 covered positions during the relevant class period by all eligible Class Members. Each
11 Participating Class Member will receive his or her *pro rata* share of the Settlement pursuant to the
12 following formula: The total number of weeks worked by each participating Class Member will be
13 divided by the total number of weeks worked by all Class Members and the resulting percentage
14 will be multiplied by the maximum settlement portion for the California Claimants and/or the
15 National Claimants.

16 **C. Release of Claims**

17 The Settlement stipulated that in exchange for the payment of the Settlement Amount, the
18 Representative Plaintiffs, all National Class Members who submitted claims, and all California
19 Class Members who did not opt-out of the Settlement would release all claims against Yelp that
20 were alleged in this case or that reasonably arose out of the facts alleged in this case. Exh. 1., ¶ 1.6
21 & 1.30.

22 **D. PAGA Payment, Class Representatives’ Incentive Payments, Attorneys Fees and**
23 **Costs, and Settlement Administration**

24 The Settlement provides for each of the following: (1) payment of \$7,500 to LWDA in
25 connection with Plaintiffs’ PAGA claim; (2) service payments to the named Class Representatives
26 not to exceed \$5,000 each; (3) payment of \$16,000 to the Settlement Administrator; and (3) Class
27 Counsel’s attorneys’ fees and costs, not to exceed \$312,500 for attorneys’ fees and \$10,000 for
28 costs. Exh. 1, ¶ 1.22 & 2.8.1.

1 **E. Payment**

2 Within 30 days after the Court enters Judgment and the time for appeal has expired, Yelp,
3 through Simpluris, will transmit each participating Class Member their share of the settlement.
4 Exh. 1, ¶ 2.6.1. Checks to Class Members will remain negotiable for 90 days. Exh. 1, ¶ 2.6.2. If a
5 check has not been cashed within 60 days of issuance, Simpluris shall send the Class Member a
6 postcard reminder about the upcoming deadline. *Id.* If any funds remain from uncashed checks
7 upon the expiration of the 90 day negotiation period, the funds shall be donated to the Volunteer
8 Legal Services Program of the Bar Association of San Francisco within 30 days and said donation
9 would be identified as proceeds from this settlement. Exh. 1, ¶ 2.6.2, Dkt. 37.

10 **IV. NOTICE PROCESS AND CLAIMS RATE**

11 The Court approved a notice plan which included individual mailed notices that provided
12 Settlement Class members with information about the Settlement and their options under it. Exh.
13 1, ¶ 2.4 & Exh. 2 & Exh. 3. The parties agreed to a California Notice and a National Notice, both
14 of which included a pre-printed change of address form, a Claim (and Opt In for the National
15 Class) form, and a postage pre-paid return envelope. *Id.* The parties also agreed to that the
16 Notices were to spell out the website address of where documents relating to this settlement could
17 be found, including but not limited to an electronic copy (of one generic-non-Class Member
18 specific) of both the National and California Notice with associated forms, including a generic
19 claim form.

20 The Settlement also required Yelp to provide the Settlement Administrator, Simpluris, with
21 each Class Member’s name, last-known address, social security number and number of qualifying
22 work weeks during the Class Period. Simpluris was to obtain updated address information for
23 Class Members using a National Change of Address search, a skip trace search, and other means
24 that Simpluris customarily uses to locate class members, and then within 21 days after preliminary
25 approval, was required to mail to each Class Member the appropriate Notice and Claim form. If a
26 Notice is returned with a forwarding address, Simpluris was required to immediately re-mail the
27 Notice using that address information. If a Notice was returned as undeliverable, Simpluris was to
28

1 perform a search for a more current address and re-mail the documents. Exh. 1, ¶¶ 2.4.3, 2.4.6,
2 2.4.9.

3 Class Members were provided 50 days from the mailing of the Class Notice to object to or
4 request exclusion from the Settlement. Exh. 1, ¶ 1.40.

5 On August 2, 2012, Simpluris mailed 912 Notice Packets to the individuals contained on
6 the Class List via First Class mail. 105 Notice Packets were returned by the post office. Simpluris
7 performed a skip trace for all Notice Packets returned without forwarding addresses, and remailed
8 all returned Notice Packets. In the end, 22 Notice Packets were undeliverable because Simpluris
9 was unable to find a better address. (Tittle Decl. at ¶¶ 9, 11).

10 On September 6, 2012, the Claims Administrator provided Class Counsel with a randomly
11 generated list of the names (and only the names) of one hundred (100) Class Members who have,
12 as of that point, not yet filed a Claim Certification Form. Shortly thereafter, Class Counsel
13 conducted a public records search of each of person listed on the random list, and contacted those
14 whose phone numbers appeared on public records searches to alert them of the deadline to submit
15 the claim form. Vigil-Gallenberg Decl. ¶ 14

16 On September 7, 2012, reminder postcards were mailed to 678 Class Members who had not
17 submitted a Claim Form or a request for exclusion as of that date. The postcard served as a
18 reminder of the postmark deadline of September 21, 2012 for Claim Forms and requests for
19 exclusion, and also provided the physical and e-mail address for the Claims Administrator as well
20 as the link to the website where the Settlement documents and associated forms could be obtained.

21 To date, 420 Settlement Class Members have submitted claims. Eleven of the claims (8
22 late claims and 3 deficient claims) are currently in dispute, and an additional 3 individuals not
23 included on the original class list contend they are entitled to Settlement Payments. On October
24 16, 2012, Counsel for the parties directed the Settlement Administrator to mail a letter to the 11
25 late and deficient claimants to obtain information necessary to resolving the disputed claims. The
26 8 late claimants were sent a letter requesting an explanation of why they were late in submitting
27 their response, and allowing them until October 26, 2012 to provide that explanation. Title Decl. at
28

¶ 17. The 3 Class Members who submitted deficient claim forms were sent new claim forms and directed to submit complete claim forms by October 26, 2012. Counsel will review the responses from these 11 individuals and attempt to resolve the disputed claims. If counsel are unable to resolve any disputes informally, they will bring them to the Court for resolution.

The 275 California Claim Forms submitted to date represent approximately 56% of the total number of California Class Members and approximately 67% of the total California workweeks. The 145 National Claim Forms represent approximately 32% of the total number of National Class Members and workweeks.

Simpluris is also responsible for receipt of all requests for exclusion from the Settlement. As of this date, Simpluris has received two requests for exclusion from the Settlement by members of the California Class. Of the requests for exclusion received, both were received or postmarked by September 21, 2012. (*Id.* ¶ 15).

IV. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE

A. The Criteria for Final Settlement Approval Are Satisfied

The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Final approval of a proposed class action settlement will be granted where it is established that the proposed settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(1)(C). In determining whether to grant final approval, the Court does not “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992) (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982)).

In the Ninth Circuit, the district court determines the fairness, reasonableness and adequacy of the settlement through a balancing test that considers:

several factors which may include, among others, some or all of the following: the strength of plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation;

1 the risk of maintaining class action status throughout the trial; the amount offered in
2 settlement; the extent of discovery completed, and the stage of the proceedings; the
experience and views of counsel; the presence of a governmental participant; and the
reaction of the class members to the proposed settlement.

3 *Id.* The relative importance of any particular factor will depend upon the nature of the claims, the
4 types of relief sought, and the unique facts and circumstances presented by the individual case. *Id.*
5 Furthermore, “[n]ot all of these factors will apply to every class action settlement. Under certain
6 circumstances, one factor alone may prove determinative in finding sufficient grounds for court
7 approval.” *Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525-6 (C.D. Cal.
8 2004) (citing *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993)).

9 As explained below, the relevant factors support granting final approval to this Settlement.

10 **1. The Settlement is Fair Given the Strength of Plaintiffs’ Case and the Risk,
11 Expense, Complexity, and Likely Duration of Further Litigation**

12 Plaintiffs contend that Yelp misclassified its Account Executives as exempt and failed to
13 pay them overtime wages in violation of California law and the FLSA, and that it has not identified
14 any potential defenses to the substance of Plaintiffs’ claims. Plaintiffs, however, recognize that
15 potential procedural hurdles exist in this case, which could present a barrier to recovery for many
16 putative class members.

17 Yelp claims that the majority of Class Members signed overtime claim releases, and that
18 former employees (including two of the named Plaintiffs) have signed severance agreements
19 containing releases which bar their participation in the lawsuit. Yelp also argues a class action
20 prohibition implemented in February 2012 bars Class Members from pursuing their claims in this
litigation on a class or collective action basis.

21 Plaintiffs contend that, with respect to the former employees who signed severance
22 agreements containing general releases, there was no bona fide dispute over unpaid overtime
23 wages at the time the employees executed the agreements and therefore any purported release of
24 such claims is invalid. *See Watkins v. Wachovia Corp.*, 172 Cal. App. 4th 1576, 1587 (2009)
25 (court must consider “whether a bona fide dispute existed when [plaintiff] signed the release” to
26 determine if the release is effective); *Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App. 4th 796, 803
27 (2009) (employee can “release his claim to past overtime wages as part of a settlement of a bona
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1 fide dispute over those wages”). Similarly, Plaintiffs allege that the releases of wage claims signed
2 by current employees are invalid because Yelp did not make adequate disclosures to the employees
3 before obtaining the releases (including, for example, telling them that they may have been
4 misclassified, or that the company anticipated a lawsuit to recover those wages). Plaintiffs contend
5 that this concealment renders void any purported release of such claims. Further, Plaintiffs
6 contend that the releases upon which Yelp relies do not waive the FLSA claims asserted in this
7 action, because under controlling law such claims may only be waived pursuant to a court-
8 supervised release. Plaintiffs also contend that Yelp's newly-instituted class action waiver,
9 instituted after Plaintiffs left their employment with Yelp, does not prevent them from seeking
10 classwide resolution of their claims and those of the putative class.

11 Although Plaintiffs believe that they should prevail if forced to litigate Yelp’s asserted
12 defenses, they recognize the possibility of adverse rulings on each of these issues. This Settlement
13 recognizes that the existence of executed releases and a potential class action prohibition present
14 legal and factual questions that will involve substantial pretrial motion practice and may bar
15 participation of many class members, as well as narrow the scope of the case.

16 Also, while Plaintiffs vigorously contend that the claims in this case are appropriate for
17 class certification, Yelp will contest certification in the absence of this Settlement. This Settlement
18 avoids the risk that Plaintiffs would not prevail on their Rule 23 motion or defeat any
19 decertification motion under 29 U.S.C §216(b).

20 In sum, the presence of the potential procedural hurdles Plaintiffs face, make the outcome
21 of Plaintiffs’ claims uncertain and a lengthy appeal likely. This Settlement avoids that substantial
22 uncertainty, while ensuring that Class Members receive consideration now for a release of their
23 claims. *See* Rukin Decl., ¶ 12.

24 **2. The Settlement is Fair Given the Potential Recovery**

25 The Settlement sum is also fair and reasonable in light of the potential recovery. Yelp’s
26 position in the litigation was that many Class Members worked no overtime hours, and Yelp
27 provided Class Counsel with data which according to Yelp reflects that Class Members worked an
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1 average of between 12 minutes of overtime per week and 2 hours and 20 minutes of overtime per
2 week. If Plaintiffs were ultimately able to prove up the high end of this range—2 hours and 20
3 minutes of overtime per week—the total overtime wages owed to the California Class would be
4 approximately \$1,392,547.⁴ The Maximum Settlement Portion for Payments to California
5 Participating Claimants (\$586,667) represents forty two percent of this overtime calculation, while
6 the actual approximate \$455,000 California Settlement Sum being paid to California Class
7 Members (after attrition of a portion of the initial attorneys’ fee amount) constitutes approximately
8 48 percent of the overtime wages owed to the participating California Class members. Rukin
9 Decl., ¶ 10.⁵

10 Further, this Settlement affords relief to Class Members who likely would never have filed
11 individual claims for unpaid overtime wages, due to a belief that they validly released their claims
12 to unpaid wages, fear retaliation, or are otherwise concerned about the potential adverse
13 consequences of participating in this litigation. Rukin Decl., ¶ 11. Under the circumstances of the
14 case, the amount of the Settlement is fair, adequate, and reasonable. *See In re Mego Financial*
15 *Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (finding a recovery of one sixth (16.67%) of
16 the potential recovery adequate in light of the plaintiff’s risks).

17 **3. The Plan of Allocation is Fair Adequate and Reasonable**

18 The plan of allocation of the Settlement to Class Members is also fair and reasonable.
19 Based on the information and data reviewed investigating these claims, Counsel have no reason to
20 believe that any one Account Executive would have worked materially more overtime hours, on
21 average, than any other Account Executive. For this reason, the Settlement provides that the
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24 ⁴ 21,345 workweeks x \$28 average OT rate of pay x 2.33 OT hours per week. The unpaid
25 overtime owed to non-California FLSA Class Members (using that same 2.33 hour assumption)
26 would be significantly lower on a per capita basis given the fluctuating workweek method of
27 calculating overtime under the FLSA. Under the FLSA, where an employee has been paid on a
28 salary basis, unpaid overtime is calculated by dividing the salary by the *total hours worked*
(including overtime hours) to obtain a regular hourly rate of pay, and then multiplying that regular
rate by .5 (rather than 1.5). The resulting amount is owed for each overtime hour worked.
⁵ .67 x \$1392,547 = \$933,006. Assuming Class Members all worked 2.33 hours of overtime per
week, Participating California Class Members are receiving \$453,000 for claims worth \$933,006.

1 Settlement shall be allocated based on workweeks worked by Class Member (the standard
2 allocation methodology in wage and hour cases).

3 Additionally, the Settlement allocates a larger per week recovery to California Class
4 members than the National Class members (assuming all eligible class members participate in the
5 settlement) because, as noted above, California law provides for greater remedies and a higher
6 overtime rate and different calculation methodology than the FLSA.

7 **4. The Settlement Reflects the Informed Views of Experienced Counsel and Is**
8 **the Product of Serious, Arm’s-Length Negotiations Conducted After**
9 **Extensive Discovery and Investigation**

10 Courts afford “Great weight” to the recommendation of counsel, “who are most closely
11 acquainted with the facts of the underlying litigation.” *Nat’l Rural Telecomm.*, 221 F.R.D. at 528
12 (quotations and citations omitted). Here, experienced Class Counsel investigated the Class claims
13 and Yelp’s potential defenses. This investigation included the interviews of various putative class
14 members, the review of Yelp’s compensation policies and workweek data, and an analysis of the
15 case law relevant to Plaintiffs’ claims and Defendant’s defenses. (Rukin Decl., ¶¶ 6, 15). This
16 process allowed Counsel to assess the strengths and weaknesses of the claims against Defendant
17 and led Counsel to conclude that the risk/reward calculus favored settlement on the terms obtained.

18 **5. The Lack of Opposition by the Class Supports Approval of the Settlement**

19 “The reactions of the members of a class to a proposed settlement is a proper consideration
20 for the trial court.” *Nat’l Rural Telecomm.*, 221 F.R.D. at 528 (quoting 5 Moore’s Federal
21 Practice § 23.85[2][d] (Matthew Bender 3d ed.)). Here, the reaction has been positive. Two thirds
22 of the total California workweeks and one third of the total National workweeks have been
23 claimed. Only two California Class Members have opted out of the Settlement, and to date no
24 Class Member has objected to the Settlement. This reaction demonstrates the fairness,
25 reasonableness, and adequacy of the settlement.

26 **B. The Requested Service Payments Are Reasonable**

27 In the Ninth Circuit, “[i]ncentive awards are fairly typical in class action cases.” *Rodriguez*
28 *v. W. Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). In deciding on the amount of an incentive

1 award, “the court must evaluate each request individually, taking into account the following
2 factors: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to
3 which the class has benefitted from those actions; (3) the duration of the litigation and the amount
4 of time and effort the plaintiff expended in pursuing it; and (4) the risks to the plaintiff in
5 commencing the litigation, including reasonable fears of workplace retaliation, personal
6 difficulties, and financial risks.” *Harris v. Vector Marketing Corp.*, No. C-08-5198 , 2012 WL
7 381202, at *7 (N.D.Cal., Feb. 6, 2012), quoting *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir.
8 2003) (“the court must balance ‘the number of named plaintiffs receiving incentive payments, the
9 proportion of the payments relative to the settlement amount, and the size of each payment.’”). *See*
10 *also Garner v. State Farm Mut. Auto. Ins.*, No. CV 08 1365, 2010 WL 1687832, at *17 n.8 (N.D.
11 Cal. Apr. 22, 2010) (“Numerous courts in the Ninth Circuit and elsewhere have approved incentive
12 awards of \$20,000 or more where . . . the class representative has demonstrated a strong
13 commitment to the class” and collecting cases).

14 Here, the three representative Plaintiffs each seeks a very modest service award of \$5,000.
15 These payments recognize the time and effort that Plaintiffs invested in assisting Class Counsel
16 with the investigation, prosecution, and settlement of the case, and accepting the risk of an adverse
17 result. Rukin Decl., ¶ 12. In addition, the payments recognize the additional obligations that these
18 representative Plaintiffs will incur as a result of the Settlement, including the requirement that they
19 each execute a general release of any and all known and unknown claims that they may have
20 against Yelp. Rukin Decl., ¶ 12, Exh. 1 ¶ 2.8.2. Under the circumstances, these modest \$5,000
21 incentive awards are reasonable. *Fleury v. Richemont N. Am., Inc.*, No. C-05-4525, 2008 WL
22 3287154, at *6 (N.D.Cal., Aug. 6, 2008) (Chen, J.) (despite the fact that “his participation in the
23 case appears limited,” by “expos[ing] himself to the risk of criticism” plaintiff was entitled to a
24 “modest” \$5,000 incentive award).

25 **C. The Attorneys’ Fees and Costs Requested Are Reasonable**

26 Class Counsel’s fee and cost request is fair, reasonable, and appropriate under a common
27 fund analysis. The Ninth Circuit has approved the use of fund percentages as a reasonable manner
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1 to determine attorneys' fees. See *Vizcaino v. Microsoft Co.*, 290 F.3d 1043, 1047 (9th Cir. 2002);
2 *Six Mex. Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (citing *Blum v.*
3 *Stenson*, 465 U.S. 886, 900 n.16, 104 S.Ct. 1541, 1550 n. 16 (1984)); *In re Omnivision Tech., Inc.*,
4 No. C-04-2297 SC, 2007 WL 4293467, at *8 (N.D. Cal. Dec. 6, 2007) (observing that "use of the
5 percentage method in common fund cases appears to be dominant"). In the Ninth Circuit, 25
6 percent of the common fund is the "benchmark" for an attorneys' fees award. *Paul, Johnson,*
7 *Alston & Hunt v. Graulity*, 886 F.2d 268, 272 (9th Cir. 1989).

8 Here, Class Counsel's fee request of \$205,000 amounts to approximately 25 percent of the
9 monies actually being paid out by Yelp under the Settlement.⁶ The requested fee award is
10 therefore reasonable under the common fund approach.

11 The requested fee is also justified by the financial risks undertaken by Class Counsel in this
12 litigation. Counsel accepted and litigated this class action solely on a contingency fee basis.
13 Counsel has received no compensation for attorney time to date, nor for any of the considerable
14 expenses incurred. Moreover, there has never been any guarantee that counsel would be
15 reimbursed for the costs, or paid for their time. (Rukin Decl., ¶ 15)

16 A lodestar cross-check further supports the reasonableness of the requested fee. Class
17 Counsel have incurred in excess of \$300,000 in lodestar litigating and resolving this case. Rukin
18 Decl., ¶¶ 16; Vigil-Gallenberg Decl. ¶ 16; Urmey Decl. ¶ 8. The requested attorneys' fee award
19 will result in a payment to Class Counsel of 2/3 of their lodestar (that is, they will obtain negative
20 multiplier, or divider, on their fees), which suggest that the fee request is reasonable. *Chun-Hoon*
21 *v. McKee Foods Corp.*, 716 F.Supp.2d 848, 854 (N.D.Cal.2010) (in performing lodestar cross-
22 check, court determined that negative multiplier "suggests that the negotiated fee award is a
23 reasonable and fair valuation of the services rendered to the class by class counsel").

24 Finally, Class Counsel are also entitled to reimbursement of their litigation costs in addition
25 to a benchmark fee award, *In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090 E (M), 1990 WL

26 _____
27 ⁶ Under the terms of the Settlement, while Class Counsel may seek an award of attorneys' fees in
28 an amount up to \$312,500, any portion of this amount not sought accretes to the Settlement Sum
paid to Participating Class Members. .

1 454747, at *7 (S.D. Cal. Aug. 30, 1990). In this case, Class Counsel incurred \$9,461.62 in
2 expenses in connection with the litigation and settlement of this action, and request reimbursement
3 of those costs. Rukin Decl., ¶¶ 13, 14; Vigil-Gallenberg Decl. ¶17; Urmey Decl. ¶ 9.

4 A copy of this motion will be made available on the website designated in the Settlement so
5 that Class Members are informed about the request for attorneys' fees and costs. Dkt. No. 37 ¶¶
6 1& 3. Class Members have until ten days following the filing of this Motion to raise any objections
7 to the fee request. Courts have observed that the absence of any objections to the fees and costs
8 requested supports the conclusion that the requested award is fair, adequate, and reasonable. *See In*
9 *re Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at *15 (C.D. Cal. Jun.
10 10, 2005) (citing *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 148-49 (E.D. Pa. 2000); *In re*
11 *Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326-8 (E.D.N.Y. 1993)).

12 **D. The Requested Administrative Costs Are Reasonable**

13 Lastly, the request for reimbursement of expenses requested by the Settlement
14 Administrator is reasonable. As set forth in the Administrator Declaration of Krista Tittle,
15 Simpluris, Inc. prepared the class notices for mailing, mailed over 912 class notices, conducted
16 necessary follow-up with regard to returned notices, mailed approximately 678 postcards
17 reminding Class Members of the deadline to submit a claim form, or opt-out, set up a website
18 containing the settlement documents and associated forms, and has processed the 426 claims
19 received as well as the requests for exclusion, change of address forms, and disputes raised. (Tittle
20 Decl., ¶¶ 4, 7, 14-17). Simpluris has requested reimbursement of expenses in the amount of
21 \$16,000.

22 **V. CONCLUSION**

23 For all the foregoing reasons, Plaintiffs respectfully request that the Court (1) grant final
24 approval of the proposed Settlement, (2) approve the requested service awards of \$5,000 each to
25 named plaintiffs (3) approve Plaintiffs' request for attorneys' fees and costs in the amount of
26 \$214,461.62, (4) approve payment of settlement administrative costs in the amount of \$16,000; and
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1 (5) approve payment to LWDA of \$7,500 to compensate it for the State of California's share of the
2 PAGA penalties claimed in this action.

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Dated: October 19, 2012

Respectfully submitted,

RUKIN HYLAND DORIA & TINDALL LLP

By: /s/ Peter Rukin
Peter Rukin