MATTHEW RIGHETTI, ESQ. SBN 121012
JOHN GLUGOSKI, ESQ. SBN 191551
RIGHETTI LAW FIRM, P.C.
456 Montgomery St., Suite 1400
San Francisco, CA 94104
Telephone (415) 983-0900
Fax: (415) 397-9005

GEOFFREY GEGA. ESQ, SBN 91980
REGINA SILVA. ESQ, SBN 173573
Cook Brown, LLP
1851 East First Street, Suite 1440
Santa Ana, Ca 92705-4044
Tel: (714) 542-1883
Fax: (714) 542-1009

MICHAEL L. CARVER, ESQ., SBN 173633
LAW OFFICES OF MICHAEL L. CARVER
1600 Humboldt Road, Suite 3
Chico, CA 95928
Telephone: (530) 891-8503
Fax: (530) 891-8512

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FAITH D. MARTIN, et al,

Plaintiff,

v.

FEDEX GROUND PACKAGE SYSTEM INC.,
et al,

Defendants.

Case No. 06-CV-06883-VRW

PLAINTIFFS' FURTHER SUBMISSION IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Honorable Vaughn R. Walker
Location: Courtroom 6
Date: December 18, 2008
Time: 2:30 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

TABLE OF AUTHORITIES

FEDERAL CASES

TABLE OF AUTHORITIES

FEDERAL CASES

TABLE OF AUTHORITIES

FEDERAL CASES

I. INTRODUCTION

On July 23, 2008, a status conference came on for hearing before the court, at which point the court requested further briefing on the proposed settlement presented to the court on June 19, 2008. Accordingly, Plaintiffs submit the following further briefing for consideration along with the briefing previously filed to date regarding the Motion for Preliminary Approval of Class Action Settlement.

This action involves claims that Defendant FEDEX GROUND PACKAGE SYSTEM INC. ("FEDEX" or "Defendant" herein) failed to provide meal and rest periods to its hourly employees. Plaintiff FAITH MARTIN filed this action on behalf of "all hourly employees" against Defendant FEDEX on September 20, 2006 in San Francisco Superior Court ("the MARTIN action") and the action was subsequently removed to federal court. At the time of filing, and unknown to Plaintiff MARTIN, another action was pending in Orange County Superior Court entitled OLGUIN, et al. v. FEDEX GROUND PACKAGE SYSTEM INC. ("the OLGUIN action"). The OLGUIN action had substantially the same allegations and was filed on behalf of all "Package Handlers." The OLGUIN case had been vigorously litigated for four years before the filing of MARTIN in 2006.

Plaintiffs in the pending OLGUIN and MARTIN actions worked with the Defendants to resolve both cases collectively. The parties engaged in mediation on July 20, 2007 with the Hon. Justice Richard C. Neal (ret) and after extensive and time consuming settlement negotiations reached a settlement subject to court approval. The parties believe the settlement is fair and provides an equitable method to distribute the settlement proceeds.

The proposed settlement provides that the MARTIN and OLGUIN actions will be resolved through this court as a combined action. The proposed settlement process includes the filing of a proposed Amended Complaint —and the filing of same was approved by the Court on July 8, 2008.

A. Legal Standard

The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). "There is an overriding public interest in settling and quieting litigation" that is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Nevertheless, where "parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staten v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

With respect to the propriety of certification, Plaintiffs submitted extensive briefing and evidence on the issue in the *Olguin v. FedEx* matter. When this case was resolved, class certification was fully briefed before the Honorable Steven Sundvold in the Orange County Superior Court. Since this Court did not have the benefit of seeing this submission -- and since this Court has asked for further briefing and evidence supporting certification -- Plaintiffs submit along with this brief a compendium of briefs and evidence showing the extensive and detailed class certification briefing that transpired in the *Olguin* matter when it was pending in the Orange County Superior Court. The submitted compendium consists of the following:

- Motion For Class Certification and documents in support of said motion;
- Reply Re: Motion for Class Certification and supporting documents.

In determining whether the terms of the parties' settlement are fair, adequate, and reasonable, the court must balance several factors, including:

> The strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in 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.

Hanlon v. *Chrysler Corporation,* 150 F.3d 1011, 1026 (9th Cir.1998). But see *Molski v. Gleich,* 318 F.3d 937,953-54 (9th Cir. 2003) (noting that a district court need only consider some of these factors--namely those designed to protect absentees).

B. Temporary Settlement Class Should Be Certified As The Elements For Certification Are Present Here.

Certification of a settlement class is a regular feature of class action litigation, and an approved procedure, which should be followed in this case. (See *Newberg on Class Actions* (3d ed. 1991) §11.27, pp. 11-40 to 11-56; and *Manual for Complex Litigation*, Second (1993) §30.45.) The potential members of the class share a community of interest in having this Court determine whether the proposed Settlement is fair, reasonable, and in their best interests.

Based on the proposed Settlement, which we believe is advantageous to the potential members of the class, the Court should conclude that Plaintiffs and members of the class meet the prerequisites for class certification pursuant to Rule 23 of the *Federal Rules of Civil Procedure.* If the Court determines at the final settlement approval that the Settlement should not be finally approved, the temporary Settlement Class will be dissolved by that determination without the need for further motion or order and the OLGUIN matter will remain in state court.

1. Plaintiffs Meet the Prerequisites to a Class Action Under Federal Rule of Civil Procedure 23.

Federal Rule of Civil Procedure 23 provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

a. The Class is So Numerous That Joinder of All Members is Impracticable.

The class must be so numerous that joinder of all members individually is "impracticable." *Federal Rule of Civil Procedure 23(a)(1).* It need not be shown that the number is so large that it would be impossible to join every class member; "impracticability" does not mean "impossibility." *Harris v. Palm Springs Alpine Estates, Inc.* 329 F.2d 909, 913-914 (9th Cir. 1964). "Generally speaking, courts will find that the 'numerosity' requirement has been satisfied when the class comprises 40 or more members." See *Ansari v. New York Univ.* 179 F.R.D. 112, 114 (S.D.N.Y 1998) (emphasis added). See also, *Consolidated Rail Corp. v. Town of Hyde Park* 47 F.3d 473, 483 (2nd Cir. 1995) [numerosity presumed at level of 40 members].

Here, there has never been any dispute but that this element is satisfied in this case. The evidence indicates there are over 42,000 hourly employees during the class period. A potential class of this size is so numerous that joinder of all members is clearly impracticable.

Additionally, because Defendant is obligated pursuant to the Settlement Agreement to provide the Claims Administrator with data showing each Plaintiff's name, address, social security number, and dates of employment in an eligible position, and because *Labor Code §226(b)* requires employers to maintain records of current and former employees, not only is the proposed class numerous, it is also ascertainable.

b. There are Questions of Law and Fact Common to the Class

There must be "questions of law or fact common to the class." *Federal Rule of Civil Procedure 23(a)(2).* The "common question" requirement can be satisfied either by a shared legal issue with divergent factual predicates or by a common core of salient facts with disparate legal remedies. Id. In other words, "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient

facts coupled with disparate legal remedies within the class." *Staton v. Boeing Co.* 327 F.3d 938, 957 (9th Cir. 2003).

As stated by the United States Supreme Court, "Class relief is 'particularly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class." *General Tel. Co. v. Falcon* 457 U.S. 147, 155 (1982).

Here, there are factual and legal questions common to the class and that predominate over questions affecting individual members. For example, relevant and common legal questions include: (1) whether the hourly employees of Defendant are entitled to wages for missed rest and meal periods under California law; (2) whether Defendants' failure to stop the conveyor belts during the day for package handlers to accommodate rest and meal breaks constituted under the *Brinker* Court of Appeal standard (e.g. a *Cicairos* case) an employer preventing and/or denying meal and rest breaks to the hourly employees; and (3) whether Defendant's conduct regarding the foregoing issues constitutes an unlawful, unfair, or fraudulent business practice. Plaintiffs established this element of certification as set forth in Sections IV and D. & I. of the attached Motion For Class Certification and Reply papers, respectively (and the evidence cited in those sections). See Plaintiff's Compendium of Documents Filed in the Olguin matter submitted along with this brief (Ex. 1, Motion for Class Certification and Ex. 6 Reply).

At the last hearing this Court pondered whether any meal/rest case could be certified based on the legal standards set down by *Brinker v. Superior Court*, California Court of Appeal Case No. D049331 (4th App.Dist, 2008). Of course, the pendency of *Brinker* and interpretations of the law by federal district courts created uncertainty over how California courts would interpret the meal/rest statutes, which was a significant factor in evaluating the litigation risk in this case. Since the last hearing on this matter, the California Supreme Court has granted review of the *Brinker* decision (See

California Supreme Court October 22, 2008 Order, Case No. S166350 granting petition for review). If the *Brinker* decision is overturned, then we expect the decision will further strength Plaintiffs' position in this case; however, should the case be upheld, then it should not preclude certification of all meal/rest claims in California. This is so because Plaintiffs allege that a scheme was in place whereby Defendants prevented employees from taking meal and rest breaks. The facts of this case are most similar to the *Cicairos v. Summit Logistics, Inc.* 133 Cal.App.4th 949 (2005) case. As such, the facts presented by this case fit precisely the situation carved out by the *Brinker* court as actionable.

Pertinent and common factual questions include whether potential class members were prevented or impeded from taking duty-free meal and rest periods. Class members worked on conveyor belts under stressful conditions. At the time Plaintiffs filed this action, Defendant was not turning off the conveyor belts to allow class members the opportunity to leave their stations. Instead, there was an endless string of packages requiring attention along with great pressure to clear all packages on the conveyor belt. After Plaintiffs filed this action then Defendant began taking steps to periodically stop the conveyor belts in order to accommodate legally mandated breaks. Specifically, the FedEx operation operates in an assembly line fashion wherein conveyor belts move packages throughout enormous warehouses for scanning, sorting, loading and unloading. Absent a conveyor belt stoppage, packages continue to travel down the belts requiring that employees "man their stations" or suffer the consequences of falling behind and allowing packages to back up. For instance, a package holder who is assigned to load certain trucks will find packages assigned to his truck whisk by and travel to other areas in the facility, making it virtually impossible to complete the loading of the vehicle in time to get the vehicle out for delivery.

Here, Plaintiffs satisfy Rule 23(a)'s commonality requirement because the common factual and legal questions are applicable in the same manner to each member

of the class as set forth in Sections IV and D of the Motion and Reply briefs, respectively.

c. The Claims of the Plaintiffs are Typical of the Claims of the Class

Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent. *Lightbourn v. County of El Paso, Tex.* 118 F.3d 421, 426 (5th Cir. 1998). Here, typicality is established because Plaintiffs are all members of the Class which they seek to represent and their claims -- that they were not provided duty-free meal and rest periods in accordance with California law -- apply equally to absent class members.[1] Each of the Plaintiffs is qualified to act as a class representative, in that the Plaintiffs and the members of the class are similarly situated as the current and former FEDEX employees. The Plaintiffs each worked as hourly employees of FEDEX during the class periods and suffered through the same policies and procedures claimed to be illegal under the law.

d. Plaintiff and Class Counsel will Fairly and Adequately Protect the Interests of the Class

The requirement of adequate representation has two components. *Lerwill v. Inflight Motion Pictures, Inc.* 582 F.2d 507, 512 (9th Cir. 1978). First, the court must determine whether the representative plaintiffs and their counsel have any conflicts of interest with other class members. Id. Second, the court must satisfy itself that the representative plaintiffs and their counsel will prosecute the action fairly, vigorously and competently on behalf of the class. Id. As detailed in the attached Declarations of prospective class counsel, Plaintiffs' counsel are not aware of any conflicts of interest with other class members, and Plaintiffs' counsel have served as lead or co-counsel in

[1] See Declarations of Putative Class Members attached to the Compendium of Documents Filed In Olguin v. FedEx as Exhibit 3.

numerous other class actions in the state and federal courts. See Decl. Of Righetti Decl. of Carver, and Decl of Gega previously filed along with the original motion.

2. The Form and Method of Service of Class Notice Should be Approved

If preliminary approval is granted, notice of the proposed dismissal or compromise must be given to all class members in such a manner as the Court directs. See, *Federal Rule of Civil Procedure* 23(e). Accordingly, Plaintiffs request Court approval of the proposed Class Notice to be provided to the potential members of the class, as well as approving the Claim Form.

"When the parties reach a settlement agreement before a class determination and seek to stipulate that the settlement will have class wide scope, a class notice must be sent to provide absent class members with certain basic information so that they have an opportunity to consider the terms of the settlement." *Newberg on Class Actions* §11.30, pp. 11-62 to 11-63 (3d Ed. 1992).

The class notice should fairly apprise class members of the gist of the claims raised in the action, the basic terms of the proposed settlement, the options available to class members (*e.g.*, submitting a claim form, opting-out and/or objecting), explain the procedures for allocating and distributing settlement funds, indicate a time and place of the hearing to object to the settlement, indicate the time and place for the court to consider approval of the settlement and prominently display the address and phone number of class counsel and the procedures for making inquires. *Manual for Complex Litigation*, Third, §30.212; *Marshall v. Holiday Magic* 550 F2d 1173, 1178 (9th Cir. 1977).

As seen in the proposed Class Notice, these standards are more than met. In fact, the proposed Notice exceeds those standards. The proposed Notice, which combines both notice of class certification and settlement, has been routinely approved by courts. See, *Weinberger vs. Kendrick* 698 F2d. 61, 72 (2nd Cir. 1983).

In addition, California authority generally requires service of class notice by mail or similar reliable means. *Chance v. Superior Court* 58 Cal.2d 275, 290 (1962); *Cartt v. Superior Court* 50 Cal. App.3d 960, 972 (1975). Due process does not require that a class member actually receive a notice but, rather, requires a procedure reasonably certain to reach class members. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 391(1950). *Fontana v. Elrod* (7th Cir. 1987) 26 F.2d 729, 732, provides that if appropriate notice is given, class members will be bound by the judgment even if they never actually receive the notice.

In this case, the parties have agreed to use a neutral third party Claims Administrator to administer the settlement. The administrator will mail individual notices to potential members of the class at the last known address of each employee. If any notices are returned, a social security number search will be performed to attempt to ascertain the class member's correct address. Thereafter, the Claims Administrator will re-mail the notice to any new addresses obtained for any returned notices. This method of service is reasonably calculated to reach the members of the class by the best means practicable under the circumstances, and should, therefore, be approved. This process will provide sufficient opportunity for class members to decide whether or not they wish to participate in the class action and the settlement.

II. THE PROPOSED SETTLEMENT SHOULD BE GIVEN PRELIMINARY APPROVAL AND THE APPROPRIATE PROCEDURES SHOULD BE IMPLEMENTED LEADING TO FINAL APPROVAL OF THE SETTLEMENT.

A. The Settlement Is Within The Range of Possible Approval

At this time, the Court should concern itself with intermediate questions, including (1) whether the proposed Settlement was fairly reached between the defendant and the representative plaintiffs; (2) whether the proposed settlement is sufficiently fair and reasonable for submission to members of the prospective class for acceptance or rejection; and (3) whether proper procedures were adopted for giving

notice to members of the proposed class. *Philadelphia Housing v. American Radiator & Standard Sanitary Corp.* 323 F.Supp. 364, 372 (E.D. Pa 1970).

In this case, the terms of the Settlement Agreement were fairly reached as the result of the arm's-length negotiations between the parties and facilitated by a well-respected mediator. See Declaration of Matthew Righetti filed along with Plaintiff's original motion. Plaintiffs in the pending OLGUIN and MARTIN actions worked with the Defendants to resolve both cases collectively. The parties engaged in mediation on July 20, 2007 with the Hon. Justice Richard C. Neal (ret) and after extensive and time consuming settlement negotiations reached a settlement subject to court approval.

The settlement is in the range of possible approval insofar as it provides a substantial benefit to the members of the class and should be preliminarily approved because the Settlement is fair on its face and worthy of submission to the class members. *In re Corrugated Container Antitrust Litig.* 643 F2d 195, 212 (5th Cir. 1981).

Numerous courts have certified settlement classes. For example, *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), cert. dismissed, 506 U.S. 1088, 122 L. Ed. 497, 113 S. Ct 1070 (1993) the parties entered into a tentative settlement before a class was certified. After a hearing, the "district court issued an order certifying the class and approving the settlement agreement." *Id.* at 289. The Second Circuit affirmed. Similarly, in *Mars Steel Corp. v. Continental Ill Nat Bank & Trust Co.*, 834 F.2d 677, 680 (7th Cir. 1987), the District Court gave preliminary approval to a settlement and "at the same time certified the suit as a class action for settlement purposes." The Seventh Circuit affirmed the settlement and class certification. *See also, In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 178 (5th Cir. 1979) (holding that "a tentative or temporary settlement class was proper"), cert. denied, 452 U.S. 905 (1981); and *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 278 (N.D.Cal. 1976) ("the use of the tentative settlement class procedure was

appropriate in this case"), affd, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978). Likewise, under the circumstances presented herein, certification of a temporary class for settlement purposes is warranted.

B. The Inherent Risks Involved Favor Approval of The Proposed Certified Class and The Settlement

In its order dated July 7, 2008, the court found:

> "FRCP 23 (a) requirements of numerosity, typicality and adequacy are met. The court further finds, pursuant to FCRP 23(b)(3), that common questions of law and fact predominate over individual questions and that the class treatment is superior to any other available means of adjudication.
>
> Accordingly, the court is prepared to certify pursuant to FRCP 23 a settlement class under the above definition when the problems with the settlement and proposed notice are resolved.

See Court's July 7, 2008 Order p. 22)

Upon returning to court to address the issues raised by the court in its July 7, 2008 order, the California Court of Appeal for the Second District handed down its decision in the *Brinker* case. At the hearing, the court inquired as to whether in light of *Brinker*, meal and rest break cases can be certified. Since that time, the California Supreme Court has taken up review of the *Brinker* Court of Appeal decision. Thus, *Brinker* is no longer good law; however, even if *Brinker* is upheld this does not sound the *death-knell* for certification of this action. The issue is "ensure" versus "provide." Plaintiffs have never alleged an "ensure" standard. As *Brinker* made clear, certification is proper in certain circumstances like that presented in the *Cicairos v. Summit Logistics, Inc.* case. As *Cicairos* confirmed and *Brinker* acknowledged, Defendant may not "prevent" or "impede" meal and rest breaks. Where such a policy exists to prevent meal and rest breaks, certification is warranted. Plaintiffs are confident that the facts at issue here resemble the *Cicairos* case (i.e., a conveyor belt that ran continuously

preventing breaks).

That being said, Plaintiff cannot deny that there is an appreciable risk this Court could ultimately find that certification is improper and/or the claims lack merit. This risk is made more significant by the fact that the case is filed against a large and well-funded corporation and is being defended by an able defense team that specializes in handling precisely this kind of litigation on behalf of management. At the same time, we have repeatedly stressed throughout – and we believe Defendant appreciates -- that this case is not a mirror of the *Brinker* or *Starbucks* situations, but rather resembles more closely the circumstances of *Cicairos*.

Although Plaintiffs are confident that certification is proper in this case and also that Plaintiff and the class' claims are meritorious, Plaintiffs have been doing this work long enough to appreciate the certification risks (where certification is largely discretionary decision) and the merits risks as well. Obviously, this court's holding in the *White v. Starbucks* case cannot be overlooked. In addition, the *Brinker v. Superior Court* decision (despite the California Supreme Court granting review) and the subsequent 2nd DCA decision in *Brinkley v. Public Storage, Inc.*, (Cal. Ct. of App. Case No. B200513, Oct. 28, 2008) cannot be taken lightly.

In light of these risks, approval of this class action settlement is in the best interest of the class members.

C. The Value of the Settlement is Favorable When Compared to Full Value and the Litigation Risks.

As part of its Order, and pursuant to discussions with the Court at the preliminary approval and case management hearings, Plaintiffs were asked to substantiate with evidence the assumptions, which underlie the proposed aggregate settlement amount and allocation. Thus, Plaintiffs set forth the following information:

Meal/Rest Periods

During the discovery process, Plaintiffs were given access to FEDEX time

records and other documents pertaining to hours worked by the class. Since the records produced by FEDEX were so voluminous, for purposes of certification on the issue of missed meal and rest breaks, Plaintiffs conducted a sampling. In connection with settlement negotiations and for purposes of settlement, Plaintiffs conducted a further and more detailed evaluation of the time records. Declaration of John Glugoski.

Based on Plaintiffs' sampling of the records, Plaintiff was able to determine approximately how many shifts of 3.5 or more hours were worked, and hence would have been entitled to a rest period. Similarly, Plaintiffs could determine how many shifts exceeding 6 hours were worked, and hence would have been entitled to a meal period.

Plaintiffs' analysis revealed that approximately 77% of the total shifts worked 3.5 hours or more, and were entitled to rest periods; and 5% of the total shifts worked over 6 hours, and were entitled to meal periods. Declaration of John Glugoski.

Rest Period Calculations

Because there was no record-keeping requirement for rest periods, and an employee is paid for rest periods regardless of whether an employee did or did not take a rest period, there is no basis to estimate the actual compliance rate by FEDEX. Similarly, based on statements by class members, the evidence was clear that some efforts were made at some facilities to comply with rest breaks during the first part of the class period, but there was noncompliance for the most part. FEDEX has asserted that there was more compliance on its part during the first part of the class period then Plaintiffs have given it credit for. This is confirmed from the testimony of putative class members; however, noncompliance was still significant. After Plaintiffs filed this class action in 2002, it is agreed that FEDEX made more definitive attempts to correct its compliance.

Based on our review of time records, conveyor belt stoppage and package flow charts, FEDEX's quality survey team's efforts to address meal and rest break issues at

the Anaheim location in 2002, as well as interviews with numerous putative class members, Plaintiffs concluded that during the first two (2) years of the class period, there was a 50% compliance rate. This 50% compliance rate neither afforded Plaintiffs or Defendant the benefit of the doubt. Then, for the subsequent years starting with 2002, based on evidence from putative class members the violation rate appeared to drop based on evidence of compliance. Specifically, putative class members confirmed increased compliance but not absolute compliance. Moreover, there was evidence of a company-wide directive in June 2003 regarding rest breaks and testimony by putative class members that by 2004 there was significant to virtually total compliance. The explanation for the increased compliance stems from a policy to turn off conveyor belts at the locations to accommodate rest breaks. The putative class members confirmed this. See for example Declaration of Justin Bailey, Ex. 3 to Compendium of Documents Filed In Olguin v. FedEx. The compliance rate at that point was estimated to be at about 95% based on the new policy and confirmation from class members confirming the new practice. See Declaration of John Glugoski. Therefore, the following table illustrates the apparent violation rate for the class period based on the discovery conducted:

2000	50%
2001	50%
2002	33%
2003	10%
2004	5%
2005	5%
2006	5%
2007	5%

Plaintiffs then took the above compliance rates and meal/rest period shifts, and applied those variables to the number of estimated shifts worked during the class period. The estimated shifts worked was evidence which was provided by FEDEX, and there

was two (2) separate tables provided by FEDEX as to the estimate shifts worked by the Olguin class, and Martin class.

With respect to the Olguin class, Plaintiffs took the estimate of shifts worked and applied that number to the compliance rates and meal/rest period shifts, and came up with the following estimate of the total shifts of potential violations for missed rest periods.

Year	Shifts	x77%	%violations	Total
2000	99,240	76,414	50	38,207
2001	388,440	299,098	50	149,549
2002	490,729	377,861	33	125,953
2003	568,328	437,612	10	43,761
2004	652,979	502,793	5	25,139
2005	687,126	529,087	5	26,454
2006	780,370	600,884	5	30,044
2007	840,000	646,800	5	32,340

471,447=Total Shifts of Potential violations for rest periods

Plaintiffs then took the average hourly compensation for package handlers over the class period, and came up with a weighted average hourly compensation of $9.78.Hence, the liability for rest periods under the Olguin class was 471,447 x 9.78/hourly = $4,610,751.

Plaintiffs did the same analysis with respect to the Martin class, and came up with a total of 22,204 total shifts. This number was a lot lower than the total shifts for the Olguin class because the class period did not start until 2002, and there were lesser shifts being worked by this class. Plaintiffs took the number of total shifts and multiplied it by the weighted hourly compensation of $13.95. The liability for rest periods under the Martin class was calculated to be $309,745.

Hence, the combined rest period liability for both classes was **$4,920,496**.

Meal Period Calculations

With respect to meal periods, since these breaks were recorded, FEDEX was able to provide Plaintiffs with hard data regarding missed meal breaks. Based on the evidence produced by FEDEX, Plaintiffs were able to calculate that approximately 55% of the shifts, which exceeded 6 hours (i.e. 5%), were working without a recorded meal during the class period. Taking the two calculations together (55% of 5%), the percentage of total shifts worked without a recorded meal was 2.75%.

In order to determine the total shifts with potential violations, Plaintiffs applied the 2.75% to the estimated total shifts worked (3,942,077). The resulting number was 108,407 total shifts of potential meal period violations. Multiplying 108,407 by the weighted hourly compensation of $9.78, the liability for meal periods under the Olguin class was $1,060,220.

Plaintiffs did the same analysis with respect to the Martin Class. Based on the evidence produced by Fed Ex Ground to Plaintiffs, it was deduced that 52% of the shifts exceeded 6 hours. Moreover, 1% of those working over 6 hours did not a recorded meal period. Taking these two calculations together (52% of 1%), the percentage of total shifts worked without a recorded meal was .5%. Applying .5% to the estimated total shifts worked (374,781), Plaintiffs calculated that there were 1873 total shifts of estimated meal breaks.

Multiplying 1873 by the weighted hourly compensation of $13.95, Plaintiffs determined that the liability for missed meal periods in the Martin class was $26,128.

Hence, the combined meal period liability for both classes was **$1,086,348**.

The combined liability for both meal and rest periods was **$6,006,844**.

Plaintiffs also calculated that they could possibly recover over 2.2 million dollars in simple interest for the missed meal/rest periods.

As previously provided in Plaintiffs' papers, the maximum payout fund under the terms of the Settlement is $5,148,750. As demonstrated above, this payout fund is fairly

close to the potential calculated liability for the missed meal and rest breaks and interest. Further, as stated in Plaintiffs' preliminary approval papers, Plaintiffs thought it was fair and reasonable to not continue to litigate this case, where there class certification was still undecided, and even the state of the law regarding an employer's obligation to provide meal/rest periods was unclear.

D. The Court Should Schedule A Hearing On Final Settlement Approval

Following adequate notice to the class members, a hearing is held on the proposed settlement. *Manual for Complex Litigation*, Third, §30.41. Accordingly, it is requested that the Court enter an Order of Preliminary Approval which includes scheduling a hearing on final approval of the settlement, and setting a cut-off date for Class Members to opt-out, object, and submit a Claim Form. The hearing on final settlement approval should be scheduled now so that the date can be disclosed in the Class Notice. Cut-off dates for submission of opt-out requests, objections, and Claim Forms must be established so that the parties can determine, at some specified date, the members of the class and which members are entitled to share in the settlement.

The Claims Administrator is prepared to mail the Class Notice and Claim Form to the potential members of the class within forty (40) days of entry of the Preliminary Approval order of this Settlement as provided in the Settlement Agreement. Plaintiffs recommend that the hearing on final approval of the settlement be set for about April 27, 2009 at 10:00 a.m. Further, because the Motion will be unopposed, the Plaintiffs request the Plaintiffs' Motion for Final Approval of the settlement be submitted ten (10) Court days before the Final Approval hearing

III. ATTORNEY FEES

The Court has requested further discussion about the requested attorney fees. The overriding standard that must be applied to any fee award or allocation is that ***the fee must mimic the market.*** Courts have repeatedly held that district court judges must "'do their best to award counsel the market price for legal services, in light of the risk

of nonpayment and the normal rate of compensation in the market at the time.'" *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) (quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). In order to determine the market rate, the court must consider two factors – the risk of nonpayment and the normal rate of compensation. *Sutton*, 504 F.3d at 694; *Cont'l Ill.*, 962 F.2d at 569-70; *Harmon*, 945 F.2d 976. There is no question that Plaintiffs' Counsel have been and continue to be at serious risk with respect to payment for their efforts in this case. The *Olguin* case has been prosecuted on behalf of class members for the past 6 years.

Alternatively, under the percentage method, the Court must "award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Marketing Litigation*, 264 F.3d 712, 718. The district court must "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." *Id.* In assessing the market rate under the percentage method, the Court may consider "awards made by courts in other class actions;" the "quality of legal services rendered;" and the "contingent nature of the case." *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 600 (7th Cir. 2005).

Under the percentage of recovery method, a fee of 33% of the value of the settlement is fair and reasonable under the circumstances of this case. As case authority makes it clear, a district court has discretion to either apply the lodestar method or the percentage of the fund method in common fund cases. (*In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997).

This Court has already tentatively decided that the lodestar cross check is reasonable. What this Court appears to question is whether 33% figure is reasonable where it is above the 25% benchmark which has been utilized by the Ninth Circuit. While the Ninth Circuit has approved a 25% benchmark, it has also found that a fee

award about the 25% benchmark may also be reasonable where there are relevant circumstances and the district court articulates those circumstances in its decision. (See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) [upheld award of 28% of settlement fund]; see also *Morris v. Lifescan, Inc.*, 54 Fed.Appx. 663 (9th Cir. 2003 unpublished opinion) [Court upheld award of 33% of cash settlement].)

Criteria that a district court takes into account in determining whether an award above 25% is warranted include the following: class counsel achieve exceptional results for the class; the case has been extremely risky for class counsel; class counsel's performance generated benefits beyond the cash settlement fund; the requested rate is at or below the market rate; and class counsel's burden in litigating the case on a contingency basis. (*Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002).

In this case, the majority of the criteria discussed in *Vizcaino* is also present here. For one, despite the pending issues concerning class certification and recent rest/meal break decisions which were less stringent on an employer, Plaintiffs' counsel were able to settle this matter at an amount pretty close to the estimated liability. Second, this case has been extremely risky for class counsel because of the constantly evolving changes in the law, which has been more favorable to the employer (as opposed to the class). Third, after the filing of this case, Fed Ex Ground took the active measure of making changes to its rest period policy to allow employees to take their rest periods (i.e., stopping of conveyor belts). The injunctive effect was significant as evidenced by the fact that this modification was not introduced until after the filing of the lawsuit and provided another economic benefit to the class which does not show up in the monetary calculations but from which the class received significant benefit. The benefit is illustrated as follows

///

///

Year	Shifts	x77%	%violations	% Diff.	Add. Breaks Given Post Filing
2001	388,440	299,098	50	N/A	N/A
2002	490,729	377,861	33	17	62,977
2003	568,328	437,612	10	40	175,045
2004	652,979	502,793	5	45	226,257.5
2005	687,126	529,087	5	45	238,089.5
2006	780,370	600,884	5	45	270,398
2007	840,000	646,800	5	45	291,060
					1,263,827=Total Shifts of additional compliance for rest periods

Plaintiffs have estimated that as a result of these policy changes, the class has been saved from an additional 12.3 million dollars in liability (1,263,827 shifts x $9.78). This is a pretty significant injunctive effect. Fourth, the requested rate is at or below the market rate.

As emphasized by the 7th Circuit in *In re Continental Illinois Sec. Litig.*, 962 F.2d 566 (7th cir. 1992):

> The object in awarding a reasonable attorneys fee ... is to stimulate the market .... The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client. (Id. at. 572.) (See also Kirchoff v. Flynn, 786 F.2d 320, 324 (7th cir. 1986) (when the "prevailing method of compensating lawyers for similar services is the contingent fee, than the contingent fee is the market rate." (emphasis in original); In re Prudential-Bache Energy Income Partnerships Sec. Litig., 1995 WL 700216 (E.D. La. 1995) ("Were this not a class action, attorneys fees would range between 30% and 40%, the percentages commonly contracted for in contingency cases."); Phemister v. Harcourt Brace Jovanovich, Inc., 1984 WL 21891 (N.D. Ill. 1984) ("The percentages agreed on [in non-class action damage lawsuits] vary, with one-third being particularized common."); McKenzie Constr., Inc. v. Maynard, 823 F.2d 43, 48 n.5 (3rd Cir. 1987) (33% contingent fee held reasonable).

The request is also consistent with that which private counsel ordinarily would charge a contingent fee contract in the State of California. California courts have recognized the appropriateness of looking to the private contingent fee marketplace in determining reasonable attorneys' fees. In *Glendora Community Redevelopment Agency v. Demeter* 155 Cal.App.3d 465, 477-479 (1984), the court affirmed an award of reasonable attorneys' fees pursuant to relevant California statutes in partial reliance on a non-binding contingent fee contract providing for a fee of percentage of the recovery, stating:

> The Court is aware that the use of contingency fee arrangements is widespread in the general field of civil law. Many such contracts provide for percentage fees greater than 25% of the total recovery. Such contracts do not limit fees to a proportionate share of the excess recovery over offer. The Court here is not called upon to condemn or condone such practice but is a fact which cannot escape notice. Occasionally, the result is considerable fee. Occasionally, there is no fee at all and no recovery by the client. Sharing the benefits to the client produced by attorneys' service is a recognized method of pricing legal fees. It is no less a logical method in the instant case. (Id. at 480.)

The fee requested here is consistent with the practice in the private marketplace in which contingent fee attorneys and their clients routinely negotiate fees between 331/3% and 45%. In their concurring opinion in *Blum v. Stenson*, 465 U.S. 886 (1984), Justices Brennan and Marshall observed favorably that: "In tort suits, an attorney might receive one-third of whatever the amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." (Id. at. 903.)

Further, class counsel has incurred a significant burden in litigating this matter for 6+ years without receiving payment for its substantial hours worked and expenses fronted for the classes. As provided in class counsel's declarations, class counsel has spent thousands of hours litigating this case. Moreover, class counsel has forgone time on other matters and other work in order for it to focus on various complicated issues

that presented themselves during this lengthy time period.

"In [district court], a fee award of thirty-three and one third (33 1/3%) in a class action [is] not uncommon. The utilization of the market percentage method, as one district court has observed, results in attorneys' fees equal to approximately one-third or more of the recovery." *Teamsters Local Union No. 604 v. Inter-Rail Transport, Inc.*, No. 02-CV-1109-DRH, 2004 WL 768658, *1 (March 19, 2004 S.D. Ill.) (quotations omitted). *See also Retsky Family Limited Partnership v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856 (Dec. 10, 2001 N.D. Ill.) ("A customary fee would range from 33 1/3% to 40% of the amount recovered"); *Meyenburg v. Exxon Mobil Corp.*, No. 3:05-cv-15-DGW, 2006 WL 2191422, *2 (July 31, 2006 S.D. Ill.) ("The Court [is] independently aware that 33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentage in this legal marketplace for comparable commercial litigation"); *Stoner v. CBA Information Services*, 352 F. Supp. 2d 549, 553 (E.D. Pa. 2005) (FCRA case approving a 33 percent fee as "reasonable and well within the norm"); *Razilov v. Nationwide Mutual Insur. Co.*, No. 01-CV-1466-BR, 2006 WL 3312024, *3 (Nov. 13, 2006 D. Or.) (FCRA case noting that "the customary fee arrangement would be contingent and based on an average percentage rate of approximately one-third of the recovery"); *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, No. 00-584-DRH, 2004 WL 287902 *2 (Jan. 22, 2004 S.D. Ill) (holding in ERISA case that "the market for legal services for this litigation is a contingency fee contract" and agreeing that the market supported a 29% fee).

Indeed, if this case were an individual litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 33 1/3% to 40%. *See Kirchoff v. Flynn*, 786 F.2d 320, 328 (7th Cir. 1986) (observing that "40% is the customary fee in tort litigation and noting, with approval, contract providing for one-third contingent fee if litigation settled before trial); *Phemister v. Harcourt Brace Jovanovich, Inc.*, No. 77 C 39, 1984 WL 21981 *15 (Sept. 14, 1984 N.D.Ill.)

("Contingent fee arrangements in non-class action damage lawsuits use the simple method of paying the attorney a percentage of what is recovered for the client. The percentages agreed on vary, with one-third being particularly common."). In light of the foregoing authorities, there is no doubt that a one-third contingency fee is a standard, market-based contingency fee in common fund class action cases such as this.

Moreover, the total value of the settlement here is more than $8.125 Million given the important changes to workplace rules and practices that were implemented as a direct result of this litigation. In light of all of the above, such a request is very reasonable – particularly given their lodestar in the case, the 6+ years of work devoted to it, and the obstacles overcome in order to secure the settlement.

Further, a request of 33% is consistent with the results from numerous studies conducted on fee awards in class action litigation such as the Dunbar study done by the National Economic Research Associates. See Misko On Class Action (2001) p. 43.

IV. CONCLUSION

For the reasons stated above, the Court should: (1) preliminarily approve a settlement of the action only; (2) certify the class; (3) approve the Form and method of service of notice; (4) establish a procedure for Class Members to opt-out, object and submit a "Claim Form"; and (5) schedule a hearing on final approval of the settlement for April 27, 2008 at 10:00 a.m. or at a time designated by the Court.

The Proposed timetable for settlement approval process is as follows:

Event	*Timing*
Defendant provides list of Class Members to the Claims Administrator. *Stip Section 10. E*	20 days after Preliminary Approval
Claims Administrator Mails Class Notice and Claim Form to Class Members. *Stip Section 13(c)(2)*	30 days after Preliminary Approval
Deadline to file claims when Notice	45 days after mailing by Claims

Packets are not returned by Post Office, Opt-Out or Object. *Stip Section 13(d)(1 & (2) and 13(i)*	Administrator
Plaintiffs file Motion for Final Approval. *Stip Section 13(g)*	Requested for 10 Court days before Final Approval Hearing
Claims Administrator provides checks to Claimants. *Stip. Section 10. C, 13(i)*	Within 25 days of the Effective Date
Defendant files certification of completing settlement *Stip Section 13(i)*	Before 180 days after the Effective Date

Respectfully Submitted:

Date: November 20, 2008

RIGHETTI LAW FIRM, P.C.

John Glugoski
Attorney for Plaintiff