THE HONORABLE JOHN McHALE
Department 43
Noted for Consideration: December 10, 2018, 9:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

JOSEPH LOWRY, JAMES PHILP, MARK SANDERS, AARON TAYLOR, individually and as representatives for the class of similarly situated employees,

Plaintiffs,

v.

RALPH'S CONCRETE PUMPING, INC., a Washington corporation,

Defendant.

NO. 12-2-40087-3 KNT

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR AWARD OF ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

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I. INTRODUCTION

Plaintiffs Joseph Lowry, James Philp, Mark Sanders, and Aaron Taylor respectfully request the Court grant final approval of the class action settlement they reached with Defendant Ralph's Concrete Pumping, Inc. Plaintiffs believe the settlement—which requires Ralph's to pay a total of $2,550,000 in settlement of all claims in this case for the benefit of the Settlement Classes—is fair, adequate, reasonable, and in the best interests of the Settlement Classes. Indeed, the Settlement is an excellent result, with members of the Settlement Classes receiving approximately 120 percent of their estimated actual damages.

Settlement Administrator Simpluris has successfully implemented the notice program, providing direct notice to 100 percent of members of the Settlement Classes. Simpluris has also established a toll-free number for members of the Settlement Classes to call with questions about the Settlement and a settlement website through which members of the Settlement Classes can access case documents and stay apprised of deadlines. The notice program is the best notice practicable under the circumstances and satisfies due process.

For the reasons set forth in this memorandum and in the papers previously submitted in support of settlement approval, the Settlement is fair, adequate, reasonable and in the best interest of the Settlement Classes. Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement by: (1) finding the Settlement to be fair, adequate, and reasonable; (2) determining that adequate notice was provided to members of the Settlement Classes; and (3) approving the requested awards for class representative service, settlement administration expenses, and attorneys' fees and costs.

II. STATEMENT OF FACTS

This wage and hour class action has been litigated for nearly six years. Plaintiff Joseph Lowry originally filed the lawsuit on December 19, 2012 on behalf of a class of current and former pump truck operators, alleging that Ralph's violated various provisions of Washington employment law. *See* Complaint, Dkt. No. 1. Mr. Lowry brought claims for rest and meal break

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violations, failure to pay for all hours worked, and failure to pay prevailing wages for certain travel time. *See generally id.*; Amended Complaint, Dkt. No. 23. On January 17, 2013, Ralph's removed the case to federal court. *See* Dkt. No. 9. Plaintiff Lowry successfully sought remand. *See* Dkt. No. 10.

Following remand, Mr. Lowry moved to add Mr. Philp, Mr. Sanders, and Mr. Taylor as named Plaintiffs, which the Court granted. *See* Dkt. Nos. 15 & 22. The parties also engaged in substantial discovery. Plaintiffs propounded multiple sets of interrogatories and requests for production, to which Ralph's responded. Declaration of William Houck in support of Plaintiffs' Motion for Final Approval of Class Action Settlement and for Award of Attorneys' Fees, Costs, and Service Awards ("Houck Decl.") ¶ 10. Plaintiff Lowry responded to Ralph's first set of discovery requests to him. *Id.* All four Plaintiffs had their depositions taken. *Id.* Ralph's also deposed Jeromy Frietas, an absent member of the Classes. Id. Plaintiffs deposed Brenda McGinnis, Ralph's controller. *Id.*

Following this extensive discovery and investigation, Plaintiffs moved for class certification. See Dkt. No. 27. The Court heard oral argument and granted Plaintiffs' motion. *See* Dkt. Nos. 62, 69, & 244 Ex. Q. Ralph's filed a motion for reconsideration of the Court's decision. Dkt. No. 65. After a lengthy delay during which discovery was stayed, the Court held a hearing and denied the motion. *See* Dkt. No. 105. Ralph's then sought an interlocutory appeal of the class certification decision; the Court of Appeals denied discretionary review. *See* Dkt. No. 111. Following class certification, in September 2016 notice was mailed to the Classes. Houck Decl. ¶ 11. Seven of the individuals who received that notice opted out. *Id.*

With the Classes certified, the parties resumed litigating the case vigorously, including robust motion practice, additional written discovery, and depositions. Ralph's filed a motion seeking summary judgment on the named Plaintiffs' prevailing wage claims. *See* Dkt. No. 113. The Court denied that motion. *See* Dkt. No. 129. Both sides filed discovery motions during 2017 and early 2018. *See, e.g.*, Dkt. Nos. 149B, 158, 184, 199, & 203. Ralph's deposed 11

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absent members of the Classes. Houck Decl. ¶ 12. Ralph's also deposed Jim Christensen from the Department of Labor and Industries, Plaintiffs' expert Neal Beaton, and Michael Locquiao, a CR 30(b)(6) designee for Frontier Pumping. *Id.* Plaintiffs conducted a CR 30(b)(6) deposition of Ralph's as well as depositions of Timothy Henson and Travis Henson. *Id.* Both sides propounded and responded to additional written discovery requests. *Id.*

In April 2018, Ralph's filed another motion for partial summary judgment, this time on the Class's prevailing wage claims. Dkt. No. 218. In the motion, Ralph's asked the Court to find that, as a matter of law, it was not required to pay prevailing wages for travel time to prevailing wage job sites, at least for a portion of the Class period. *See id.* The Court denied the motion, finding WAC 296-127-018(2)(f) applied to the work of concrete pump truck operators and holding related travel time must be paid under WAC 296-127-018(3). *See* Marshall Decl., Ex. E. Ralph's asked the Court to certify its decision for interlocutory appellate review. Dkt. No. 231. The Court denied that request. Dkt. No. 236.

Each side filed an additional motion on June 29, 2018: Plaintiffs moved for partial summary judgment on the prevailing wage issue, and Ralph's moved for dismissal of certain claims, decertification of the class, and for partial summary judgment on claims during the period of December 19, 2009 to December 11, 2012. *See* Dkt. Nos. 239 & 242. On August 13, 2018, the Court granted Plaintiffs' motion in part, granted the portion of Ralph's motion that Plaintiffs did not oppose, and denied the remainder of Ralph's motion. *See* Dkt. Nos. 259 & 260.

The parties attended mediation on August 7, 2018 with the Honorable Terrence Carroll (Ret.) in an effort to resolve the case without the burden and expense of trial, which was set to begin only six weeks later. Declaration of Toby J. Marshall in support of Plaintiffs' Motion for Final Approval of Class Action Settlement and for Award of Attorneys' Fees, Costs, and Service Awards ("Marshall Decl.") ¶ 2. The parties made progress at mediation but did not reach a resolution that day. *Id.* The parties continued to exchange settlement offers following

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mediation. *Id.* After the Court's August 13, 2018 ruling on the pending motions, the parties were able to reach a settlement. *Id.* The parties executed a CR 2A terms sheet on August 15, 2018 and entered into a final settlement agreement on September 10, 2018. *Id.*

On October 2, 2018, the Court granted Plaintiffs' motion for preliminary approval of the Settlement. *See* Dkt. No. 280. The Settlement requires Ralph's to pay a total of $2,550,000. Marshall Decl., Ex. 1, § II.B. $1,150,000 of this amount will be used to satisfy (1) the settlement awards to members of the Settlement Classes, (2) service awards to the named Plaintiffs, and (3) settlement administration expenses. *Id.* Of this, Plaintiffs will request awards of $7,500 to each of the four named Plaintiffs and an award of settlement administration expenses not to exceed $7,000. *Id.* $1,400,000 will be used to pay attorneys' fees and costs in accordance with statutory fee-shifting and cost-shifting principles. *Id.*

The Class Fund, consisting of no less than $1,113,000, will be allocated so that 45.7 percent of the fund is paid to members of the Breaks and Standby Time Class and 54.3 percent of the fund is paid to members of the Prevailing Wage Class. *Id.* § II.C.2. Each portion of the Class Fund will be distributed pro rata to members of the respective Settlement Classes based on the number of weeks each member worked during the respective class periods, divided by the total number of weeks worked by all members of the respective Classes. *Id.* The average payment for members of the Settlement Classes is more than $5,500 before taxes, and the highest gross payment will be more than $20,250. Marshall Decl. ¶ 5; Declaration of Jeremiah Kincannon Regarding Notice and Settlement Administration ("Kincannon Decl.") ¶ 12.

After the Court granted preliminary approval of the Settlement, the Settlement Administrator, Simpluris, commenced the notice program. Simpluris mailed 200 court-approved notices to members of the Settlement Classes. Kincannon Decl. ¶¶ 6-8. As of the time of filing, just one notice has been returned as undeliverable. *Id.* ¶ 9. Simpluris successfully located an updated address for that individual and remailed the notice. *Id.* At this time, no notices remain undeliverable. *Id.*

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Simpluris established a toll-free telephone number dedicated to answering calls from members of the Settlement Classes. *Id.* ¶ 4. Simpluris also established a link on their case information website dedicated to the Settlement. *Id.* The website provides access to settlement documents and key pleadings. *Id.*

The deadline for opting out of or objecting to the Settlement is November 15, 2018. To date, no members of the Settlement Classes have objected or opted out. *Id.* ¶¶ 9-10.

III. STATEMENT OF ISSUES

1. Whether the Court should find the Settlement to be fair, adequate, reasonable, and in the best interests of members of the Settlement Classes?

2. Whether the notice program was constitutionally sound?

3. Whether the Court should approve awards of $7,500 to each of the named Plaintiffs?

4. Whether the Court should approve an award of no more than $7,000 in settlement administration expenses?

5. Whether the Court should approve an award of $1.4 million in attorneys' fees and costs to Class Counsel?

IV. EVIDENCE RELIED UPON

Plaintiffs rely on the declarations of Toby J. Marshall, William Houck, David C. Burkett, Robert B. Kornfeld, and Jeremiah Kincannon; the Settlement Agreement and related documents attached thereto as exhibits; and all pleadings and papers filed in this action.

V. AUTHORITY AND ARGUMENT

The *Manual for Complex Litigation* describes a three-step procedure for approval of class action settlements: (1) preliminary approval of the proposed settlement; (2) dissemination of notice of the settlement to all affected class members; and (3) a "fairness hearing" or final approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and

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reasonableness of the settlement may be presented. *Manual for Complex Litigation* (Fourth) ("*MCL 4th*") §§ 21.632-.634 (2016). This procedure, which is used by Washington state courts and endorsed by class action commentator Professor Newberg, safeguards class members' due process rights and enables the Court to fulfill its role as the guardian of class interests. *See Newberg on Class Actions* (5th ed.) §§ 13:10, 13:39 (2018).

Here, the first two steps in this procedure have already occurred. The Court granted preliminary approval of the Settlement on October 2, 2018. *See* Dkt. No. 280. On October 16, 2018, Simpluris sent out notice by direct mail to members of the Settlement Classes. Kincannon Decl. ¶ 8. By this motion, Plaintiffs ask the Court to take the final step in this process.

When considering final approval of a class action settlement, a court determines whether the settlement is "fair, adequate, and reasonable." *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001) (quoting *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). This is a "largely unintrusive inquiry." *Id.* at 189. Although the Court possesses some discretion in deciding whether to approve a settlement,

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Id. (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)). Moreover, "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution." *Id*. at 190 (quoting *Officers for Justice*, 688 F.2d at 625).

A. The settlement is fair, adequate, and reasonable.

To decide whether a class action settlement is fair, adequate, and reasonable such that final approval is appropriate, courts consider several factors, including the strength of the

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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 state of the proceedings; the experience and views of counsel; the presence of a governmental participant; the reaction of the class members to the proposed settlement; and the absence of collusion. *Churchill Vill., L.L.C. v. Gen. Elec*., 361 F.3d 566, 575 (9th Cir. 2004); *see also Pickett*, 145 Wn.2d at 188-89. This list is "not exhaustive, nor will each factor be relevant in every case." *Pickett*, 145 Wn.2d at 189 (*quoting Officers for Justice*, 688 F.2d at 625). An analysis of these factors supports final approval of the Settlement reached in this case.

1. The strength of Plaintiffs' case.

Plaintiffs and their counsel continue to believe they have a strong case but are also pragmatic in their awareness of the risks inherent in litigation and the various defenses available to Ralph's. The reality that members of the Settlement Classes could end up recovering only a fraction of their claimed damages or losing some claims at trial was significant enough to convince Plaintiffs and their counsel that the Settlement reached with Ralph's outweighs the gamble and expense of further litigation.

Aside from a complete defense verdict, the primary risk Plaintiffs faced was that a jury would award only a small fraction of the damages Plaintiffs' expert calculated as being owed. Because Ralph's did not keep records of rest and meal breaks taken or missed or of unpaid standby time, Plaintiffs relied on their expert and on deposition testimony to determine damages on those claims. Marshall Decl. ¶¶ 6-8. Plaintiffs had hoped to prove at trial that members of the Break and Standby Time Class missed approximately 50 percent of the rest and meal breaks to which they were entitled and worked off the clock approximately 50 percent of the "standby time" identified on their time cards. *See id.* ¶¶ 7-13. But a jury could have found that a smaller fraction of rest and meal breaks were missed, thus reducing the amount recoverable in damages. Similarly, Plaintiffs hoped to prove that Prevailing Wage

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Class members were entitled to approximately 75 percent of the total damages calculated by their expert, but this amount could have been reduced if the jury found that a lower prevailing wage rate applied or that more of the work included in the expert's calculations was not required to be paid at the prevailing wage rate. *Id.* ¶¶ 14-16.

Further, even if Plaintiffs were to obtain a jury award commensurate with or exceeding the amount recovered in this Settlement, any recovery at trial could be delayed for years by an appeal. The Settlement obtained provides substantial monetary benefits to members of the Settlement Classes without further expense and delay.

2. The risk, expense, complexity, and likely duration of further litigation.

Additional litigation would be lengthy and expensive if this action were to proceed. Although trial was imminent at the time the parties reached the Settlement, the case was far from over. There were multiple claims for a jury to resolve, including both liability and damages issues. Trial of this matter would have been lengthy, expensive, and uncertain. Ralph's almost certainly would have appealed any judgment in Plaintiffs' favor, and members of the Settlement Classes likely would not have received relief for years. This Settlement avoids these risks and provides the Settlement Classes with immediate and certain benefits.

3. The risk of maintaining class action status through trial.

Despite the Court's 2013 decision to certify two classes, Ralph's has repeatedly denied that class certification is appropriate, not only opposing Plaintiffs' initial motion for class certification but also moving for reconsideration of that decision, seeking interlocutory appellate review and, most recently, moving to decertify the meal break, rest break, and overtime claims. *See* Dkt. Nos. 49, 65, 108, & 242. While Ralph's efforts have been unsuccessful, Plaintiffs continued to face a risk that Ralph's would again move to decertify once the evidence was in at trial or that Ralph's would appeal the class certification decision after trial. Plaintiffs therefore faced the continued risk that individual members of the

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Settlement Classes would have to file their own lawsuits or that payouts on any recovery for the Classes would be substantially delayed by appeals.

4. The amount offered in settlement.

The amount offered in settlement supports granting final approval of the Settlement. If Plaintiffs were able to prove (1) that they missed 50 percent of their rest and meal breaks, (2) that they worked 50 percent of the "standby time" shown in gaps on timecards, and (3) that they are entitled to 75 percent of what their expert calculated for prevailing wage travel time violations, the resulting total damages would be $927,500. Marshall Decl. ¶ 17. The payment of $1,113,000 to the Settlement Classes equals 120 percent of these estimated actual damages. *Id.* The total Settlement payment of $2,550,000 thus provides more than Class Counsel's best estimate of the actual damages sustained by the Settlement Classes and also compensates Class Counsel for the almost six years of hard-fought litigation necessary to obtain this excellent settlement. Even assuming Plaintiffs missed 100 percent of their meal and rest breaks, worked 100 percent of the gaps on their time cards as standby time, and are entitled to all of the damages their expert calculated on the prevailing wage claim, members of the Settlement Classes will recover more than 73 percent of these maximum actual damages. Marshall Decl. ¶ 18. Thus, the amount offered in settlement strongly supports settlement approval. *See, e.g., Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964–66 (9th Cir. 2009) (approving settlement amounting to thirty percent of estimated damages); *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving settlement amounting to nine percent of maximum potential recovery).

5. The extent of discovery completed and the state of the proceedings.

"A key inquiry is whether the parties had enough information to make an informed decision about the strength of their cases and the wisdom of settlement." *Rinky Dink, Inc. v. World Business Lenders*, Case No. C14-0268-JCC, 2016 WL 3087073, at *3 (W.D. Wash. May 31, 2016). Here, Class Counsel thoroughly analyzed the factual and legal issues involved in this

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case. Class Counsel propounded written discovery and reviewed thousands of documents. Houck Decl. ¶¶ 10, 12. Class Counsel deposed Defendant's designated agents and learned essential information about Defendant's policies and practices. Houck Decl. ¶¶ 2, 4. After obtaining Defendant's available payroll and hours data, Counsel worked with an expert to analyze that data and calculate damages. Marshall Decl. ¶¶ 6-18. At the time this case settled, Plaintiffs had obtained class certification and partial summary judgment on their prevailing wage claim. *See* Dkt. Nos. 69, 260. Only trial remained. Class Counsel were thus well-informed about the strengths and weaknesses of Plaintiffs' case at the time the parties reached the Settlement.

6. The experience and views of counsel.

Where class counsel is qualified and well informed, their opinion that a settlement is fair, reasonable, and adequate is entitled to significant weight. *See Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 543 (W.D. Wash. 2009). Here, Class Counsel are particularly experienced in litigating wage and hour class actions and have a keen understanding of the legal and factual issues involved in this case. *See* Marshall Decl. ¶¶ 19-21, 24; Declaration of David C. Burkett in support of Plaintiffs' Motion for Final Approval of Class Action Settlement and for Award of Attorneys' Fees, Costs, and Service Awards ("Burkett Decl.") ¶¶ 5-7; Houck Decl. ¶ 2; Declaration of Robert B. Kornfeld in support of Plaintiffs' Motion for Final Approval of Class Action Settlement and for Award of Attorneys' Fees, Costs, and Service Awards ("Kornfeld Decl.") ¶¶ 2-7. Class Counsel believe the Settlement is fair, reasonable, adequate, and in the best interest of the Settlement Classes as a whole. Marshall Decl. ¶ 2; Burkett Decl. ¶ 16; Houck Decl. ¶ 13; Kornfeld Decl. ¶ 16.

7. The reaction of members of the Settlement Classes to the Settlement.

A positive response to a settlement by the class—as evidenced by a small percentage of opt-outs and objections—will further support final approval. *See Pelletz*, 255 F.R.D. at 543; *Tadepalli v. Uber Techs., Inc.*, No. 15-CV-04348-MEJ, 2016 WL 1622881, at *8 (N.D. Cal. Apr.

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25, 2016) (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1043) (observing "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members"). Since notice was sent to members of the Settlement Classes on October 16, 2018, no members of the Settlement Classes have objected to the Settlement or opted out of the Settlement.[1] Kincannon Decl. ¶¶ 10-11. The deadline for objecting or opting out of the Settlement is November 15, 2018. If necessary, Plaintiffs will submit a supplemental memorandum analyzing this factor further after the deadline has passed.

B. Members of the Settlement Classes received the best notice practicable.

This Court has determined that the notice program meets the requirements of due process and applicable law, provides the best notice practicable under the circumstances, and constitutes due and sufficient notice to all individuals entitled thereto. Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Dkt. No. 280, ¶ 6. The settlement administrator, Simpluris, has implemented the program with the help of Class Counsel. *See* Kincannon Decl. ¶¶ 5-9.

Specifically, on October 16, 2018, Simpluris mailed a notice form to each of the 200 members of the Settlement Classes, which included the member's initial estimated award. *Id.* ¶¶ 5-8. Simpluris also established a toll-free telephone number that members of the Settlement Classes can call with questions and a link on the Simpluris website dedicated to this case that includes key documents and information relating to the settlement. *Id*. ¶ 4. Among the key documents made available on the website will be this motion for final approval of the settlement agreement, including Class Counsel's request for attorneys' fees and costs, settlement administration expenses, and service awards for the named Plaintiffs.

[1] Seven individuals who would otherwise be members of the Settlement Classes chose to opt out of this action when notice was sent to all members of the certified classes as of August 2016. These individuals are not part of the Settlement Classes. Their decision to opt out before the parties resolved this case has no bearing on the fairness of the Settlement, as their decision does not reflect a reaction to the Settlement's terms.

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Id. Members of the Settlement Classes will have more than two weeks to review and respond to these requests before the objection deadline. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (class members should receive opportunity to examine final motion for attorneys' fees and costs before deadline for objections to class action settlement).

To date, the notice program has been successful. Only one notice to a member of the Settlement Classes was returned, and that notice was remailed to an updated address such that no notices currently remain undeliverable. *Id.* ¶ 9. For these reasons, the Court should find that Simpluris has provided adequate notice to the Settlement Classes.

C. The award of attorneys' fees and costs is fair and reasonable.

The Settlement Agreement provides separately negotiated amounts for the Class Fund and for the payment of attorneys' fees and costs. After working on this case for nearly six years, with no remuneration of any kind, Class Counsel seek an award of $1,400,000 in attorneys' fees and costs. For the reasons set forth below, the requested award is fair and reasonable.

1. Class Counsel are entitled to recover reasonable litigation costs.

Class Counsel have incurred $127,132.75[2] in litigation costs through October 31, 2018. *See* Marshall Decl. ¶ 31; Burkett Decl. ¶ 15; Houck Decl. ¶ 9; Kornfeld Decl. ¶ 15. These costs include filing fees, service of process and courier expenses, expert fees, computer research expenses, deposition expenses, mediation expenses, copying expenses, and travel expenses. Marshall Decl. ¶ 31; Burkett Decl. ¶ 15; Houck Decl. ¶ 9; Kornfeld Decl. ¶ 14. The expenses were reasonable and necessary to secure the successful resolution of this litigation. *See In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177–1178 (S.D. Cal. 2007) (finding costs such as filing fees, messenger fees, photocopy costs, class action notices, expert fees, travel expenses, postage, online legal research fees, and mediation expenses are relevant and

[2] At preliminary approval, Class Counsel represented that they had incurred $129,897.29 in costs. Class Counsel's costs total at final approval is slightly lower due to overpayment of an expert fee invoice. That overpayment has since been refunded to Class Counsel, resulting in a slightly lowered costs total.

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necessary expenses in class action litigation). Class Counsel thus request reimbursement of these costs.

2. Class Counsel's lodestar fee request is reasonable.

After costs are deducted from the $1,400,000 total request covering both fees and costs, Class Counsel's request for attorneys' fees is $1,272,867.25. Where a prevailing plaintiff is entitled to statutory fee shifting under the relevant statute, it is appropriate to use a lodestar calculation to determine an attorney fee award. *See Morgan v. Kingen*, 141 Wn. App. 143, 162, 169 P.3d 487 (2007); *see also Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 541, 151 P.3d 976 (2007). Here, Class Counsel are entitled to attorneys' fees and costs under RCW 49.46.090, 49.48.030, and 49.52.070. Thus, a lodestar method of calculation is appropriate for determining whether the requested award is fair and reasonable.

"When calculating attorney fees, the court first begins with the lodestar figure, which is the total number of hours reasonably expended multiplied by the reasonable hourly rate of compensation." *Morgan*, 141 Wn. App. at 162; *see also Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-98, 675 P.2d 193 (1983). After the lodestar is calculated, the court may consider adjusting it to reflect "the contingent nature of success, and the quality of work performed." *Id.* at 598.

Class Counsel litigated this case for almost six years, finally settling on the eve of trial and recovering more than $1.1 million in unpaid wages for the benefit of approximately 200 current and former Ralph's employees. The amount recovered represents approximately 120 percent of Class Counsel's best estimate of the actual damages of the Settlement Classes. *See* Marshall Decl. ¶ 17. In the course of obtaining this excellent result, Class Counsel have already incurred more than $1,238,466 in attorneys' fees on a lodestar basis. *See* Marshall Decl. ¶ 27; Burkett Decl. ¶ 13; Houck Decl. ¶¶ 6-7; Kornfeld Decl. ¶¶ 9-10.[3] And Class Counsel anticipate

[3] In conjunction with this motion, Class Counsel have submitted in their declarations summaries of the tasks performed by each attorney and staff member whose work went into the calculation of Class Counsel's lodestar.

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incurring an additional $15,000 in fees and costs to see this case through final approval and check distribution.

The lodestar calculations of Class Counsel are reasonable. First, Class Counsel made efforts to reduce duplication of work and promote efficiency. *See* Marshall Decl. ¶¶ 23, 30; Kornfeld Decl. ¶ 13; Burkett Decl. ¶ 14. Because there was no guarantee of payment in this contingency case, Class Counsel were incentivized to work efficiently and with minimal duplication of effort to avoid performing work for which they would never be paid. Thus, the hours of work devoted to this litigation were reasonable and necessary to secure an excellent outcome for the Settlement Classes.

Class Counsel's requested rates are also reasonable. Class Counsel set their rates for attorneys and staff members based on a variety of factors, including among others: the experience, skill and sophistication required for the types of legal services typically performed; the rates customarily charged in the markets where legal services are typically performed; and the experience, reputation and ability of the attorneys and staff members. Marshall Decl. ¶ 28; Kornfeld Decl. ¶ 11; Houck Decl. ¶ 5; Burkett Decl. ¶ 11. The hourly rates charged for attorneys working on this matter range from $265 to $650 and for staff members from $75 to $200. *See* Marshall Decl. ¶ 27; Burkett Decl. ¶ 11; Houck Decl. ¶¶ 5; Kornfeld Decl. ¶¶ 10-12. Class Counsel's rates have been approved in class action cases brought in both state and federal courts in Washington. *See* Marshall Decl. ¶ 29; Kornfeld Decl. ¶¶ 11-12; Houck Decl. ¶ 8. Thus, the rates charged are reasonable in light of the work performed and the experience of the attorneys and staff performing the work.

Here, Class Counsel seek an award of $1,272,867.25, which is nearly identical to the lodestar fees Class Counsel have incurred in this matter plus the additional fees Class Counsel anticipate they will incur to see this case through final resolution ($1,238,466.25 plus $15,000

Should the Court determine that complete billing records are required to assess the reasonableness of Class Counsel's fee request, Class Counsel will provide full, detailed time records for in camera review upon request.

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equals $1,253,466.25). Thus, the fees are reasonable and the Court should grant Class Counsel's request for $1,272,867.25 in fees.

3. A multiplier is fair and reasonable under the circumstances.

Further supporting the reasonableness of Class Counsel's request are the considerations supporting a multiplier. Class Counsel's fee request is almost identical to its anticipated total lodestar and requires a multiplier of less than 1.02 to arrive at the settlement award amount. The risks Class Counsel undertook in litigating this case support the award of this very modest multiplier and demonstrate that the requested award is quite reasonable under the circumstances.

Under Washington law, courts may adjust the lodestar amount upward to "compensate the attorneys for the risk that litigation would be unsuccessful and that no fee would be obtained, or where the quality of services rendered was superior." *Burnside v. Simpson Paper Co.,* 66 Wn. App. 510, 532, 832 P.2d 537 (1992), *aff'd*, 123 Wn. 2d 93, 864 P.2d 937 (1994); *see also Bowers*, 100 Wn.2d at 598-99 (an upward adjustment recognizes "the contingent nature of success, and the quality of work performed"). "In contingency cases … Washington courts have recognized that the prospect of an upward adjustment is an important tool in encouraging litigation." *Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 221, 293 P.3d 413 (2013). One court surveyed Washington state court cases in which multipliers were considered, finding that multipliers were most often awarded in cases "brought under liberally construed remedial statutes with fee-shifting provisions designed to further the statutory purposes," including cases involving wage claims. *Berryman v. Metcalf*, 177 Wn. App. 644, 668 & 682, 312 P.3d 745 (2013).

Here, an upward adjustment of the lodestar would be appropriate on both grounds. First, Class Counsel took this case on contingency. Class Counsel litigated this case for nearly six years with no remuneration and faced a significant risk that they would never recover any fees. *See* Marshall Decl. ¶ 26; Burkett Decl. ¶ 8; Houck Decl. ¶ 3; Kornfeld Decl. ¶ 8. Indeed,

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the prevailing wage claim in this case presented a novel, unanswered question whether travel time relating to pump operator work must be paid at a prevailing rate of wage. Only after the Court granted Plaintiffs' motion for partial summary judgment and denied Defendant's motions on that issue were Class Counsel able to settle this case and obtain the significant benefits provided by the Settlement for members of the Settlement Classes. *See, e.g.*, *Hill v. Garda CL Nw., Inc.,* 198 Wn. App. 326, 368, 394 P.3d 390 (2017), *rev'd on other grounds by Hill v. Garda CL Nw., Inc.*, 424 P.3d 207 (Wash. 2018) (affirming award of 1.5 multiplier in part because the case "presented novel issues about the character of legally-sufficient rest breaks" and noting that "success was very risky at the outset of litigation").

Not only did the case present a risky legal issue, but Defendant also employed a "kitchen sink" approach to defending this case, which included removal of the case to federal court, multiple requests for reconsideration or appellate review of this Court's rulings, several motions for summary judgment, repeated attempts to defeat class certification or decertify the Classes, and heavily contested discovery. *See* Section II, *supra*. Class Counsel remained tenacious throughout the litigation, ultimately recovering more than $1.1 million for the Settlement Classes. *See Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 743, 75 P.3d 533 (2003) (awarding a 1.5 multiplier where "the case was contingent, [the plaintiff] proceeded at considerable risk, defense counsel granted no concessions, and there was no assurance of recovery"). Washington courts have approved a multiplier of 1.5 in similar wage cases. *See, e.g.*, *Hill*, 198 Wn. App. at 366-69.

Second, Class Counsel provided superior representation, including obtaining a favorable summary judgment ruling on a novel issue regarding prevailing wage travel time compensation. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 335-36, 858 P.2d 1054 (1993) (affirming a 1.5 multiplier "based upon the fact that part of the fees were contingent upon success, and on the quality of the work performed by plaintiffs'

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attorneys in a difficult case"). The high quality of the representation provided in this matter further supports a request for a multiplier.

Class Counsel request only a very modest multiplier of 1.02. Because the relevant factors would support a higher multiplier here, Class Counsel's fee request is quite reasonable. Alternatively, even if the Court were to find that Class Counsel's lodestar should be reduced by 20 percent due to time spent inefficiently, downward adjustments of the requested hourly rates, or other factors reducing the overall lodestar figure, Class Counsel's multiplier to arrive at the requested award for fees would be a modest 1.27. This is still well below the 1.5 multiplier often awarded in wage cases taken on a contingency basis.

Thus, considering the lodestar fee request and the relevant factors for a multiplier adjustment, Class Counsel's fee request is fair and reasonable.

D. The settlement administration expenses award is reasonable.

The Settlement Agreement provides for payment of settlement administration expenses from the common settlement fund. Marshall Decl., Ex. 1, § II.C.7. Here, Simpluris is administering the Settlement for an estimated fee of $5,500 (capped at $7,000), including mailing initial notices to 200 members of the Settlement Classes, remailing undeliverable notices, receiving and validating any requests for exclusion, mailing settlement checks, updating addresses, maintaining the settlement website and telephone line, and distributing settlement funds. Kincannon Decl. ¶¶ 3-4, 13; *see generally* Marshall Decl., Ex. 1.

The amount requested in settlement administration expenses is very low in light of the work required to administer the Settlement and the size of the Settlement Classes. Indeed, the parties anticipated the costs of settlement administration would likely be higher, allocating up to $20,000 to settlement administration expenses in the Settlement Agreement. *See* Marshall Decl., Ex. 1, § II.C.7. But Simpluris agreed to administer the Settlement for less than half that amount, resulting in an increased award to the Class Fund. Kincannon Decl. ¶ 13. Thus, the settlement administration expenses are very reasonable under the

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circumstances and are necessary to inform members of the Settlement Classes of the Settlement and to ensure that the Settlement is fairly administered. Thus, Plaintiffs request approval of a settlement administration expense award of up to the maximum capped fee of $7,000. If the ultimate settlement administration cost is Simpluris's current estimate of $5,500 or is otherwise anything less than $7,000, the remainder will be added to the Class Fund.

E. The requested service awards for the named Plaintiffs are reasonable.

"Incentive" or "service" awards "are intended to compensate class representatives for work undertaken on behalf of a class." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015). Such awards are generally approved so long as the awards are reasonable and do not undermine the adequacy of the class representatives. *See Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013). These awards promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009).

The requested awards of $7,500 for each of the four named Plaintiffs are reasonable in light of the work performed by Plaintiffs and are well in line with awards approved by other courts. *See, e.g., Pelletz v. Weyerhauser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash. 2009) (approving $7,500 service awards and citing decisions approving awards in other cases). The proposed service awards are in recognition of more than five years of substantial service and efforts by the named Plaintiffs on behalf of the Classes. Plaintiffs assisted Class Counsel in investigating the claims and preparing the complaint. Houck Decl. ¶ 14. Plaintiffs responded to multiple rounds of written discovery. *Id.* All four Plaintiffs had their depositions taken. *Id.* And Plaintiffs were prepared to testify at trial, if necessary. *Id.* Further, Plaintiffs' support of the Settlement is independent of any service award and not conditioned on the Court awarding any particular amount or any award at all. *Id.* Thus, Plaintiffs' adequacy as class representatives is unaffected by the proposed service awards. The requested awards are well deserved and should be approved.

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VI. CONCLUSION

This $2,550,000 settlement is fair, adequate, and reasonable in light of the potential obstacles to recovery in this case and the risks of continued litigation. Awards of $7,500 to each of the named Plaintiffs are reasonable given their service to the Settlement Classes. An award of up to $7,000 for settlement administration expenses is also appropriate. Finally, it is appropriate for the Court to grant Class Counsel's request for $1.4 million in attorneys' fees and costs given the excellent result for the Settlement Classes and the many years of hard-fought, contingent representation. For these reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlement and enter the Proposed Order Granting Final Approval.

VII. LCR 7(B)(5)(B)(VI) CERTIFICATION

I certify that this motion contains 6,429 words, pursuant to Plaintiffs' concurrently-filed request for permission to file an overlength brief of no more than 6,500 words.

RESPECTFULLY SUBMITTED AND DATED this 31st day of October, 2018.

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