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and the Settlement California Class and FLSA Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EDGAR VICERAL and DAVID KRUEGER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MISTRAS GROUP, INC.; and DOES 1-50, inclusive,

Defendant.

CASE NO. 3:15-cv-02198-EMC
(Assigned to Hon. Edward M. Chen)

CLASS ACTION

JOINT SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT PURSUANT TO COURT'S AUGUST 2, 2016 ORDER

DATE: August 18, 2016
TIME: 1:30 p.m.
CTRM: 5

I. INTRODUCTION

On July 19, 2016, Plaintiffs Edgar Viceral and David Krueger, individually and on behalf of all others similarly situated, ("Plaintiffs") filed their Unopposed Motion for Preliminary Approval of Class and Collective Action Settlement (ECF Doc. No. 70). Thereafter, on August 2, 2016, the Court issued an Order RE Supplemental Briefing on Plaintiffs' Motion for Preliminary Approval (ECF Doc. No. 71). The Court ordered the Parties to provide a joint supplemental brief addressing 11 issues. This brief addresses those issues. For ease of reference, the brief follows the same organization of the Court's Order in addressing each of the 11 issues. On the evening of August 8, 2016, Defendant was provided an opportunity to review and comment on this brief prior to its submission to the Court.

II. DISCUSSION

1. 33 1/3% of the Common Fund is a Reasonable Attorney's Fees Award,

Pursuant to the Settlement Agreement (previously filed with the Court as ECF Doc. No. 70-1), Class Counsel will seek fees not to exceed 33 1/3% of the Maximum Settlement Amount of $6,000,000.00. In addition to the Settlement, Section 216(b) of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq*. ("FLSA") and California wage and hour law, including but not limited to California Labor Code §§226(e), 1194(a), 2802, 2699 and California Code of Civil Procedure § 1021.5 authorize Plaintiffs to apply for an award of reasonably attorneys' fees and costs. Defendant does not oppose Class Counsel's requested amount of fees.

33 1/3% of the common fund is a reasonable attorneys' fees award in light of this excellent result and the hard work expended by Class Counsel on this case. "[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to reasonable attorney's fees from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Ninth Circuit routinely awards attorneys' fees under the common fund approach "[b]ecause the benefit to the class is easily quantified in common-fund settlements" and avoids the "often more time-consuming task of calculating the lodestar." *In re Bluetooth v. Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). The common fund approach is an appropriate method for awarding attorneys' fees because it "ensures that each member of the winning party contributes proportionately to the payment of attorneys' fees." *Staton v. Boeing Co.*, 327 F.3d 938,

967 (9th Cir. 2003). This approach ensures that class members, who have accepted the benefits from a common fund recovery, also accept their fair *pro-rata* responsibility to contribute towards the attorneys' fees and costs that created the fund in the first place. *Id*. The equity of the common fund approach is confirmed by the fact that it mirrors the legal marketplace. The typical contingency fee contract ranges from 33 1/3 to 40% of the total recovery. *See* Alba Conte, *Attorney Fee Awards § 2:8* (3rd ed. 2013). Thus, common fund fee awards of 33 1/3% are more than a reasonable charge to a class. *See Vizcaino v. Microsoft Corp.*, 142 F.Supp.2d 1299, 1304 (W.D. Wash. 2001) *aff''d* 290 F.3d 1043 (9th Cir. 2002). A common fund award of attorneys' fees and costs is appropriate here because Plaintiffs have created an ascertainable common fund from which reasonable attorneys' fees can be recovered. The proposed Settlement creates a common fund of $6,000,000.00 that will substantially benefit approximately 4,500 Class Members. Each participating Class Member will receive an ascertainable, *pro-rata* share of the Settlement. In addition, Plaintiffs' requested fee award constitutes a fair charge to the Class Members for excellent result obtained by the Settlement. The requested one-third of the fund is actually equal to the fee that Class Counsel would have expected if they had negotiated individual retainer agreements with each Class Member, which is typical in order to attract competent counsel in the marketplace for representation in wage and hour class actions of this nature.

In addition, this is a reasonable award because it is commensurate with the awards approved by this and other courts in comparable class actions. Courts routinely award attorneys' fees that exceed the plaintiffs' recovery because such awards encourage the vindication of important employee rights. In complex wage and hour class actions the courts have approved attorneys' fees for 33% of the settlement fund. *See Quezada v. Con-Way Freight, Inc.*, No. 09-cv-3670, Order Granting Final Approval ¶ 9, ECF No. 214 (N.D. Cal. Jan. 15, 2015) (awarding one-third of $2 million settlement fund as fees); *Franco v. Ruiz Food Prods., Inc.*, No. 1:10-cv-02354, 2012 WL 5941801, at *15 (E.D. Cal. Nov. 27, 2012) (awarding $825,000 in attorneys' fees; 33% of the total settlement); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI AKO, 2012 WL 5364575, at *8 (E.D. Cal. Oct. 31, 2012) (approving $1,221,000 in fees; 33% of the gross settlement); *Stuart v. Radioshack Corp*., No. c-07-4499 EMC, 2010 WL 3155645, at *5-*7 (N.D. Cal. Aug. 9, 2010)

(awarding one-third of $4.5 million settlement fund); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) (awarding $100,000 in fees; 1/3 of the gross settlement); *Garcia v. Gordon Trucking, Inc*., No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575, at *8 (E.D. Cal. Oct. 31, 2012) (approving fees of $1,221,000; 33% of the gross settlement). Many of these cases involved significantly shorter litigations. *Franco*, 2012 WL 5941801, at *21 (settlement after two years of litigation); *Garcia*, 2012 WL 5364575, at *10 (settlement after two-and-a-half years of litigation); *Vasquez*, 266 F.R.D. at 484 (settlement after less than three years of litigation); *Garcia*, 2012 WL 5364575, at *10 (settlement after two-and-a-half years of litigation).[1] California state courts have also approved similar fee awards in class action litigations. *In re Cellphone Fee Termination Cases*,

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[1] *See also Williams v. MGMPathe Commc'n Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (33% awarded); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 297-98 (N.D. Cal. 1995) (citation to 73 district court opinions in which fees awarded ranged from 30 to 50%). *In Re Pacific Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (33% fee award); *Quezada v. Con-Way Freight, Inc.*, No. 09-cv-3670 (N.D. Cal. Jan. 15, 2015), Order Granting Final Approval ¶ 9, ECF No. 214 (one-third); *Wren v. RGIS Inventory Specialists*, No. C-06-05778, JCS, 2011 WL 1230826, at *29 (N.D. Cal. Apr. 1, 2011) (42%); *Stuart v. Radioshack Corp*., No. c-07-4499 EMC, at *5-*7, 2010 WL 3155645 (N.D. Cal. Aug. 9, 2010) (one-third); *Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 WL 248367, at *5 (N.D. Cal. Feb. 2, 2009) (30%); *Martin v. FedEx Ground Package Sys., Inc*., No. C 06-6883 VRW, 2008 WL 5478576, at *8 (N.D. Cal. Dec. 31, 2008) (one-third); *In Re Activision Sec. Litig.*, 723 F.Supp. 1373, 1375 (N.D.Cal. 1989) (noting that fee awards in common fund cases "almost always hover[] around 30%"); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 448 (E.D. Cal. 2013) (one-third); *Singer v. Becton Dickinson & Co.*, 2010 WL 2196104 at *8 (S.D. Cal. June 1, 2010) (33 1/3%); *Ingalls v. Hallmark Mktg. Corp*., Case No. 08cv4342, Doc. No. 77 (C.D. Cal. Oct. 16, 2009) (33 1/3%). *Cicero v. DirectTV, Inc*., 2010 WL 2991486, at *7 (C.D. Cal. July 27, 2010) (case survey of class action settlements demonstrate that "50% [of settlement fund] is the upper limit, with 30-50% commonly awarded in cases in which the common fund is relatively small."); *Regino Primitivo Gomez, et al. v. H&R Gunlund Ranches, Inc.*, No. CV F 10–1163 LJO MJS, 2011 WL 5884224 (E.D. Cal. 2011) (45%); *Birch v. Office Depot, Inc.*, Case No. 06cv1690 DMS (S.D. Cal. Sept. 28, 2007), Order Granting Final Approval ¶ 13, ECF No. 48 (40% fee); *Romero v. Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 14, 2007) (noting that "fee awards in class actions average around one-third of the recovery"). *See also Big Lots Overtime Cases*, JCC Proceeding No. 4283 (San Bernardino Super. Ct., Feb. 4, 2004) (33%); *Barela v. Ralph's Grocery Co.*, No. BC070061 (Los Angeles Super. Ct., June 5, 1998) (same); *Davis v. The Money Store, Inc.*, No. 99AS01716 (Sacramento Super. Ct., Dec. 26, 2000) (same); *Ellmore v. Ditech Funding Corp.*, No. SAVC 01-0093 (C.D. Cal., Sept. 12, 2002) (same); *Miskell v. Auto. Club of S. Cal.* (Orange County Super. Ct., No. 01CC09035, May 27, 2003) (same); *Sconce/Lamb Cremation Cases*, JCC Proceeding No. 2085, (Los Angeles Super. Ct., Mar. 24, 1992) (same).

186 Cal. App. 4th 1380, 1388 (2010) (awarding fees and costs amounting to 35% of the total recovery); *Roos v. Honeywell Int'l, Inc.*, 241 Cal. App. 4th 1472, 1494 (2015) (awarding up to 37.5% of a common fund)

Additionally, Plaintiffs recognize that the "benchmark" rate for attorneys' fees in class actions in the Ninth Circuit is 25%; however, the facts in this case support an upward adjustment to 33 1/3%. Here, Plaintiffs, through Class Counsel, achieved a high level of success through the monetary results of the Settlement, which justifies the requested fee award. The Settlement provides $6,000,000.00 to the Class Members. The average individual awards to Class Members are significant. *See* Unopposed Motion for Preliminary Approval of Class and Collective Action Settlement, Section III, Terms of Settlement (ECF Doc. No. 70); *infra* Sections 2-3. In addition, the gross recovery represents approximately 12% of the estimated combined value of the California Class claims and 5% of the above estimated combined value of the FLSA Collective Class (discussed in further detail below in Section 3) of the likely recovery at trial if they were to prevail. Moreover, the Settlement is non-reversionary and thus, the entire Settlement amount will be paid out.

Class Counsel have demonstrated substantial skill, diligence, and high quality of work in achieving the proposed Settlement and its creation of a common fund of $6,000,000.00. *See* Supplemental Declaration of Carolyn Hunt Cottrell in Supporting of Plaintiffs' Motion for Preliminary Approval of Class and Collective Action Settlement Pursuant to Court's August 2, 2016 Order (filed *ex parte* and under seal pursuant to Court's August 2, 2016 Order and discussing in detail Class Counsel's extensive work conducted[2]). Of note, while the case seemingly appears to be in an early procedural posture before this Court, in actuality significant informal discovery, negotiations, and case advancement has taken place. *See* ECF Doc. No. 70, Section II.C, D (Plaintiffs' Investigation, Settlement Negotiations). The billing records provided herewith (under seal pursuant to Court order), document that the Class Counsel incurred 2,076.95 hours pursuing this

[2] Plaintiffs note that while this information is presently presented under seal, per Court order, their fee motion will set forth significant detail describing Class Counsel's work on the matter in support of the fee request.

matter.[3] This time was related to the necessary litigation tasks, in order to both prepare and move the case forward from the Plaintiffs' perspective, and to respond to the Defendant's full and complete defense on all issues. Given the hours worked, and the billing rates ranging from a low of $150.00 per hour to a high of $795.00 per hour, the total lodestar incurred equals $1,007,859.00. The total fee which would flow from 33 1/3% of the common fund would be $2,000,000.00. Thus, utilizing a basic lodestar plus multiplier method, the fee would equal what would be awarded based on a percentage of the fee, at 33 1/3%.

The case also raises complicated legal and factual issues that require intensive and careful analysis under the law, particularly as related to Plaintiffs' claims regarding compensation for training time and the adoption of and compensation for the time worked during alternative workweek schedules. The *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947)/Department of Labor test examines the following factors to determine the nature of the training relationship, including whether: (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; (2) the training is for the benefit of the trainee; (3) the trainees do not displace regular employees, but work under their close observation; (4) the employer that provides the training derives no immediate advantage from the activities of the trainee; and on occasion his operations may actually be impeded; (5) the trainees are not necessarily entitled to a job at the conclusion of the training period; and (6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training. *Harris v. Vector Marketing Corp.*, 716 F.Supp.2d 835, 842 (N.D. Cal. 2010); *see also Harris v. Vector Marketing Corp.*, 753 F.Supp.2d 996, 1014 (N.D. Cal. 2010). Defendant's training program must meet the above criteria in order to defeat Plaintiffs' claims that the training time is compensable in this case. This is a complex debate, which will require significant focus in this case since Defendant contends it properly compensates for overtime.

Additionally, assessing the implementation of and compensation for time worked during

[3] The Court allowed the hours to be stated under seal, but since the hours will be part of any fee motion that will be filed, they are expressed here without sealing. The actual attorney billing records are being filed herewith under seal.

alternative workweek schedules under California law is complex and requires extension work. The California Industrial Welfare Commission, Wage Order 16-2001 and Labor Code § 511 governs alternative workweek schedules. The law creates an extensive framework of procedures that must be carefully analyzed. *See* Lab. Code § 511; 8 Cal. Code Regs. §§ 11100-11130, 11150 (authorizing alternative workweeks of workdays exceeding eight hours without overtime pay if specified criteria are met, including but not limited to full disclosure and a secret ballot voting process). With respect to this litigation, these questions raise difficult and complicated issues between the Parties that will not be quickly and easily decided because they have serious implications on overtime compensation and Defendant's potential exposure to liability.

Class Counsel have also taken considerable risk in litigating this case not just because it has been done on a wholly contingent basis, but also because Mistras had several considerable defenses to Plaintiffs' claims that made success far from certain. The risks of litigation are detailed below in Section II.5, Risks of Litigation.

Plaintiffs will fully address the fee request for Class Counsel in the fee motion which, pursuant to the Court's August 2, 2016 Order, will be filed at least 21 days before objections to the proposed Settlement are due.

2. The Expected Recovery Per Class Member is Based on the Net Settlement Fund and is Significant.

The Court requested under point two of its Order for Plaintiffs to clarify if Plaintiffs' estimated payouts were based on the Net Settlement fund or Gross Settlement fund. To clarify, Plaintiffs' estimates are indeed based on the projected Net Settlement Amount. Any statement to the contrary on page 10:24-25 was incorrect.

3. The Full Verdict Value of the Case Underscores the Reasonableness of the Settlement.

The Court requested under point three of its Order for Plaintiffs to provide the full aggregate value of the asserted claims under both California law and the FLSA. Plaintiffs provide those estimates below using the same underlying estimates that they used in their individual calculations.

California Claims:

Overtime:	$15,760, 650 (Average hourly rate of 25 x. 1.5 x 4 OT Hours x. 105,111 work weeks).
Meal/Rest Periods:	$ 5,255,550 (Average hourly rate of 50 x 2 Missed Meal or Rest Periods a week x 105,111 work weeks).
Wage Statement:	$ 2,400,000 ($4,000 Max Award x 600 full time employees with at least 1.5 years of employment since April 2014)
203 Penalties:	$ 6,882,139 (Max Award - 30 days x Average Hourly Rate) For Former Employees)
PAGA:	$ 3,238,000 ($12,952,000 (25% Of The Estimated PAGA Award – 75% Of Award Goes To California Attorney General)
TOTAL:	**$ 33, 536,339 (Gross - No Reduction For Fees and Costs)**

The gross settlement fund to the California class under the present split of 65% to the California Class and 35% to the FLSA Collective is **$3,900,000.** This figure is approximately 12% of the above estimated combined value of the California class claims.

FLSA Claim(s):

Overtime:	$ 40,356,450 (Average hourly rate of 25 x. 1.5 x 4 OT Hours x. 269,043 work weeks).
TOTAL:	**$ 40,356,450 (Gross - No Reduction For Fees and Costs)**

The gross settlement fund to the FLSA collective class under the present split of 65% to the California Class and 35% to the FLSA Collective class is **$2,100,000.** This figure is approximately 5% of the above estimated combined value of the FLSA Collective Class. The differential in value between the FLSA Collective and California Class is justified as described further in the following section, by the much more difficult task of keeping a national collective class certified as well as by the additional claims asserted by the California Class.

The Court also requests that Plaintiffs provide an estimate as to each of Plaintiffs' FLSA claims, noting that Plaintiffs' FLSA release includes claims for minimum wage and record keeping violations. To be clear, Plaintiffs' primary FLSA claim is premised on Defendants' alleged failure

to pay overtime (OT). While minimum wage claims were indeed referenced in the Complaints, and thus are being released by this global settlement, it was learned through discovery and production of extensive payroll records that under federal law there simply were not any realistic minimum wage violations.

This determination flows from a central difference between California state minimum wage laws, and the minimum wage rights derived from the FLSA. Under the FLSA, minimum wage violations are predicated on the hourly rate of a worker falling below the federal minimum wage, based on the total number of hours worked in a week divided by the applicable minimum wage. Here, after the records were produced it was learned that the average hourly rate of the class was $25.00, such that when considering any potential minimum wage issues when juxtaposed against the approximately four (4) hours of off-the-clock per week, assuming that those hours did not trigger an OT claim, the hourly rate would always result in well more than minimum wage being paid for all the hours worked in the week. Ergo, while OT was a viable claim to assert for the alleged off-the-clock hours, minimum wage violations flowing from those same hours if OT was not triggered, was not a viable claim.

As to record keeping issue, Plaintiffs do not assert that the class was entitled to damages under the FLSA based on a failure to keep proper records. Rather, to the extent that incorrect record keeping took place, the significance is that it would affect the burden of proof with respect to the number of hours an employee worked. Thus, while it is included in the release so as to afford global relief to the Defendant paying the six million dollar settlement, there was no additional value to be attributed to the claims from this issue.

4. The Distribution of the Settlement Fund between the California and FLSA Classes is Reasonable.

The Court's Order also requests clarification as to the reason the Net Settlement Fund is allocated 65% to the California Class and 35% to the FLSA class. As explained further herein, this allocation is based in large part on the difficulties Plaintiffs faced in maintaining a national class under the FLSA, coupled with the claim differential possible under the respective laws governing the state claims as opposed to the federal claims.

In particular, the FLSA Collective Class is made up of persons who worked in numerous states across the country for different Mistras customers. By direct contrast, the California Class is comprised of employees whose work experiences are shaped solely by California's comprehensive and protective Labor Code. Perhaps for this reason, the interviews conducted by Plaintiffs' counsel indicated that the California Class members experiences were more cohesive and thus, more amenable to possible certification. This became even more apparent during the mediation when the 500 declarations obtained by the Defendant were discussed. *See infra* Section II. 5 (discussing the declarations). The differing strengths of certifiability were critical and had to be taken into account when valuing the claims of the California Class as opposed to those of the FLSA Collective Class members. There are some cases wherein the federal law offers a more cohesive structure for ensuring collective relief. In this case, the opposite was true, thus triggering the allocation suggested by Class Counsel.

Another important reason supporting the proposed allocation is that the California Class members do indeed have additional causes of action that are simply not available under the FLSA. This not only adds potential value, but more importantly, offers an alternative route to possible recovery for the California Class members that simply does not exist under the federal claims asserted, in the event that the alleged overtime claims under both state and federal law ultimately proved unsuccessful. At bottom, the additional California claims simply add further opportunities to the California Class members to achieve a recovery in the first place. As discussed above, the only realistic claim asserted on behalf of the FLSA Class members was the one primary cause of action for failure to pay overtime. By contrast, the opportunity to pursue additional claims under California law is a benefit available only to those protected by our state's "employee friendly" wage laws. As applied herein, based on the trial estimates set forth above, when broken out on a weekly basis, a FLSA Collective Class member could be entitled to a possible overtime recovery of anywhere from 0-$150 (4 OT x. $25 x. 1.5) whereas a California Class member could be entitled to recover approximately 2.3 times as much, that being 0-$380 (OT of the same $150, plus $100 for missed

meal periods or rest periods, plus $100 for the wage statement claim and $30 for the PAGA claim).[4]

Furthermore, if we assume hypothetically, as alluded to above, that the overtime claim was ultimately not successful under either state or FLSA law, a California Class member could still potentially recover under the additional claims. Under that scenario, a California Class member (not taking into potential account 203 penalties available for a former employee) could still potentially obtain up to $230 per week for the non-overtime claims, whereas a FLSA Collective Class member would have no alternative route to any other recovery under that same scenario.

With all these factors in mind Class Counsel concluded that it would be fair and reasonable to allocate the Net Settlement fund between the settlement classes in the manner proposed - 65% in favor of the California Class and 35% to the FLSA Class. While other allocations are obviously possible, this particular allocation, based on the facts available, the claims asserted and the strength of the potential certification issues, made the 65/35 allocation seem both reasonable and proper. There is no advantage to counsel in any way that could flow from this allocation, and as to the representative plaintiffs, one worked out of state and one did not, and allocation issues simply were not a factor one way or the other. The only goal was to reasonably permit settlement funds to flow in a manner that reflected the relative strength of the claims, an imprecise exercise at best, but one based on thought and reason. There is no precise mathematical formula to attach to a situation such as that presented here, in the hypothetical discussed above, wherein no recovery is made for overtime claims, but still the California Class members would have the possibility to recover for missed meal or rest periods, wage statement violations, waiting time penalties, or PAGA claims.

For all these reasons, it is submitted that the suggested allocation is a reasonable means to reflect not only the respective values of the claims, but also the basic fact that the California Class members are simply afforded multiple additional opportunities to recover in the first place, that are not available under federal law.

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[4] The $380 potential recovery could potentially substantially increase for former employees if Waiting Time Penalties under Labor Code Section 203 ("203") were added. 203 Penalties are calculated by awarding the employee his or her daily rate – here at least 8 hours a day times $25 – for each day the employer is late with the final paycheck up to 30 days.

5. There are Significant Risks in this Litigation; and Ultimately, the Amount of the Settlement Allocated to PAGA Penalties is Reasonable.

A. Risks

In reaching this Settlement, Class Counsel considered the uncertainty and risks of further litigation, the expense and duration of further litigation, and the burdens of proof necessary to achieve certification of the case, establish liability against Defendant, and defeat its defenses.

First, there is the expense and duration of further litigation. Litigating this action would not only delay recovery, but also would be expensive, time-consuming and involve substantial risk. If this case were to go to trial as a class and collective action, Class Counsel estimate that fees and costs would well exceed $2,000,000.00. Litigating the class and collective action claims would require substantial additional preparation and discovery. It would require depositions of experts, the presentation of percipient and expert witnesses at trial, as well as the consideration, preparation, and presentation of voluminous documentary evidence and the preparation and analysis of expert reports. There is also the delay and duration of further litigation. The litigation was filed in April 2015. The matter has been pending for nearly one and a half years. Certification and dispositive motions have yet to be filed. The Court's previous Case Management and Pretrial Order for Jury Trial (ECF Doc. No. 43) scheduled nearly a year between class certification and trial. In light of the current posture of the case, Class Counsel would still need to prepare and file a class certification motion. Thus, the litigation would likely remain pending for nearly another year and a half, and potentially longer taking into consideration unforeseen delays and scheduling issues.

The risks of maintaining class action status in this case as well as demonstrating Defendant's ultimate liability at trial are also significant. Recovery of the damages and penalties would require complete success and certification of all of Plaintiffs' claims, a questionable feat in light of recent developments in wage and hour and class and collective action law as well as the legal and factual grounds that Mistras has asserted to defend this action.

Specifically, Mistras has asserted numerous complete liability defenses against Plaintiffs' claims, many of which were supported by the declarations gathered by Defendant. *See generally* Defendant's Answer to Consolidated First Amended Complaint (ECF Doc. No. 42); the declarations

are discussed in detail below. For example, Mistras raised several defenses to Plaintiffs' off-the-clock claims, including that (1) Class Members did not perform work off-the-clock; (2) any off-the-clock work was *de minimis*; (3) Mistras properly paid Class Members for compensable training time; (4) Mistras properly provided Class Members with legally compliant meal and rest breaks[5,6]; (5) Mistras paid Class Members for all hours worked, including overtime; and (5) Mistras properly implemented alternative workweek schedules in California, avoiding any overtime liability.

Mistras also intended to raise several defenses against class certification[7], including that (1) that individualized determinations regarding the type and amount of off-the-clock work, if any,

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[5] Under *Brinker*, it is necessary to determine not simply whether a meal period was missed, shortened, or taken late, but the reasons why the meal period was missed, shortened, or late. *See Brinker v. Superior Court*, 53 Cal.4th 1004, 1040 (2012).

[6] In California, employers must provide employees who work more the five hours per day with a thirty minute, uninterrupted, unpaid meal period. *See* Cal. Labor Code § 512. But, Mistras will likely argue that California law does not require that employers ensure that meal periods are taken by non-exempt employees; it merely requires that employers make meal periods available to employees to the extent they elect to take them. *Brinker*, 53 Cal.4th at 1040. Likewise, Mistras will likely argue that nevertheless, "[p]roof that an employer had knowledge of employees working through meal periods will not alone subject the employer to liability for premium pay [under Cal. Labor Code § 512]; employees cannot manipulate the flexibility granted to them by employers to use their breaks as they see fit to generate such liability." *Id.; see also Dailey v. Sears, Roebuck & Co.*, 214 Cal.App.4th 974, 1000-01 (2013) (class certification of meal break claim denied where there was no substantial evidence that the employer "employed any policy or routine practice to deprive proposed class members of 'off duty'" meal breaks; evidence that plaintiff and other putative class members were "never even told [they were] allowed a meal period" was insufficient to certify a class because "nothing in [this] evidence indicates that Sears *prohibits* class members from taking uninterrupted meal . . . breaks, or that it has a uniform policy of *requiring* 'on-duty' meal … breaks.")

[7] Although collective actions under 29 U.S.C. § 216 are subject to a less stringent standard than Rule 23,"courts must still consider the relationship between common and individual issues in order to determine whether a collective action can be fairly managed." *Gardner v. Western Beef Properties, Inc.*, 2013 WL 1629299, *5 (E.D.N.Y. March 25, 2013); *see also Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (observing that "there is little difference [between Rule 23 and the ad hoc approach used to analyze whether a collective class is 'similarly situated']" as "both approaches allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons.") Accordingly, collective conditional certification presents no easy hurdle. Further, "the more opt-ins there are in the class, the more the analysis under § 216(b) will mirror the analysis under Rule 23." *Gardner*, 2013 WL 1629299 at *6. For example, in *Espenscheid v. DirectSat USA., LLC*, 705 F.3d 770, 772 (7th Cir. 2013), in analyzing a collective and class action involving 2,341 employees, stated: "the

(footnote continued)

completed by Class Members would overwhelm common issues[8]; (2) that individualized determinations regarding the amount of wages owing, if any, would overwhelm common issues; and (3) whether Class Members actually took meal and rest breaks would overwhelm any common issues.

If Mistras succeeded on any of these or other defenses to class certification, Mistras would likely further argue that its success would necessarily impact Plaintiffs' derivative claims[9,10,11]. In

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provisions of Rule 23 are intended to promote efficiency as well . . . and in that regard are as relevant to collective actions as to class actions. And so we can, with no distortion of our analysis, treat the entire set of suits before us if it is a single class action."

[8] Courts routinely have held that off-the-clock claims are not suitable for class or collective treatment if the employer has uniform lawful policies requiring pay for all hours worked, as these cases require highly individualized inquiries dependent on unique deviations from the policies in effect. *See, e.g., Brinker v. Superior Court*, 53 Cal.4th 1004, 1052 (2012) (denying class certification because proof of off-the-clock liability would have "had to continue in an employee-by-employee fashion, demonstrating who worked off-the-clock, how long they worked, and whether [the employer] knew or should have known of their work."); *Collins v. ITT Educational Services, Inc.*, 2013 WL 6925827, *6 (S.D. Cal. July 30, 2013) (denying class certification because, "in light of the employer's uniform written policies that . . . prohibited off-the-clock work . . . explaining the reasons for the discrepancy in the time worked and the time paid would require an individualized inquiry."); *Ortiz v. CVS Caremark Corp.*, 2013 WL 6236743, *9 (N.D. Cal. Dec. 2, 2013) (denying class certification of off-the-clock claims because of the individualized inquiries involved such as "vagaries of the store an employee worked in, the time of year, or the manager who was in charge."); *Zivali v. AT&T Mobility, LLC*, 784 F. Supp.2d 456 (S.D.N.Y. 2011) (decertifying FLSA off-the-clock putative class and holding that the company's policies and timekeeping system were lawful under the FLSA and thus the resolution of the many fact-specific issues would essentially require 4,100 mini trials); *Diaz v. Electronics Boutique*, 2005 WL 2654270 (W.D.N.Y. 2005) (holding that the plaintiff's allegations that he worked off-the-clock and that his timesheets were improperly altered "are too individualized to warrant collective action treatment.").

[9] Mistras would likely argue that Plaintiffs' wage statement claims are entirely derivative of their underlying claims for off-the-clock work and missed meal and rest periods. As a result, all of the reasons why Plaintiffs' off-the-clock and meal and rest break claims cannot be certified additionally would apply to their wage statement claims. Employers often argue that there are additional obstacles to certifying wage statement claims. For example, Labor Code § 226(e) requires employees to prove that, for each allegedly inaccurate wage statement, each putative class member suffered injury as a result of the inaccuracy. It is the position of employers that as the "injury" requirement prescribed by § 226(e) necessarily implicates a variety of individual questions, courts routinely deny certification of wage statement claims. *See, e.g., Jasper v. C.R. England, Inc.*, 2009 WL 873360, *6 (C.D. Cal. Mar. 30, 2009) ("The questions of what information was missing from the statements given to each of the class members and how each class member was injured is likely

(footnote continued)

the end, Plaintiffs would then be left with only their individual claims and the Class and Collective would potentially recover nothing.

Thus, the risks of litigation are significant. This is particularly true since Defendant has represented to Class Counsel that the declarations it has collected support its defenses. In particular, defense counsel has explained that the California Class Members and FLSA Class Members generally and overwhelmingly stated in individualized and non-cookie-cutter declarations that they: recorded all hours worked; were paid their standard and/or overtime rates for all hours recorded as worked; never worked unrecorded hours; were never instructed to work "off the clock"; recorded all mandatory online training; were paid for all such training; were paid overtime for all overtime recorded; that to the extent they attended voluntary trainings, they did so outside of their regularly scheduled work hours, they did not perform any other work duties during such training, that voluntary training involved topics related to new skills for a job other than their current job; and that they attended such trainings of their own accord and not at the behest of any supervisor; were not

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to require individualized proof."); *Villacres v. ABM Indus.*, 2009 WL 111686, *3 (C.D. Cal., Jan. 14, 2009) (denying motion for class certification because the "plaintiff does not aver class members suffered common actual injuries stemming from the alleged [wage statement] deficiencies").

[10] Mistras would also likely argue that Plaintiffs' waiting time penalties claims are also derivative of their underlying claims, and thus class certification will be likely denied for the same reasons. Other possible arguments that present risks for class certification include that each class member would need to establish, not just that additional pay was owed, but that the failure to pay was "willful" and without a good faith defense. Under Cal. Labor Code § 203, an employer is liable for waiting time penalties only if it "willfully" fails to pay wages when they are due. *See also Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345, 354, fn. 3 and 4 (2002); *see also* 8 C.C.R. § 13520 ("A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist."); *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 8-9 (1981) (finding that there was no "willful" nonpayment of wages because the state of the applicable law was unclear); *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 325 (2005) ("A good faith belief in a legal defense will preclude a finding of willfulness."); *Nordstrom Commission Cases*, 186 Cal.App.4th 576, 584 (2010) ("There is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether and when the wages are due.")

[11] *See, e.g., Briosos v. Wells Fargo Bank*, 737 F.Supp.2d 1018, 1033 (N.D. Cal. 2010); *Aleksick v. 7–Eleven, Inc.*, 205 Cal.App.4th 1176, 1185 (2012) ("When a statutory claim fails, a derivative UCL claim also fails.").

required to commute to work in any specific manner or vehicle; were allowed but not required to carpool; and did not perform work before or during commute to/from worksites. In addition, California Class Members also stated that they: were aware of Mistras's meal and rest break policy; were able to take meal periods according to the policy; were never prevented from taking breaks; were able to take breaks throughout a workday as desired; never reported missing a meal period or rest break; and regularly and personally reviewed their wage statements and found them correct.

Defendant further argues that an arbitration agreement distributed to employees in California removes from the lawsuit approximately one half of the California Class and the corresponding members of the FLSA Collective CLASS, irrespective of other defenses related to certification or liability. This further demonstrates the reasonableness of the total settlement value and the risks of further litigation.

B. PAGA[12]

The PAGA award of $20,000.00 falls well within the range of reasonableness. 75% of this award shall be allocated to the Labor and Workforce Development Agency; 25% shall be included in the California Settlement Allocation.

Labor Code § 2699 provides a private right of recovery of statutory penalties for any violation of the Labor Code, except those for which a civil penalty is specifically provided. Labor Code Section 2699(f). In other words, PAGA penalties apply when an alleged Labor Code violation does not already have a penalty provision. *Id.*; *Caliber Bodyworks, Inc. v. Sup. Ct. (Herrera)*, 134 Cal.App.4th 365, 377 (2005). Notably, because Labor Code §§ 1194.2 (liquidated

[12] Mistras may even raise certification arguments with respect to Plaintiffs' PAGA claims. There is some authority that the representative claim needs to comply with Rule 23. *See Fields v. QSP*, 2012 WL 2049528, *5 (C.D. Cal., June 4, 2012) (concluding that because PAGA is a "procedural mechanism by which litigants may recover for absent plaintiffs, akin to a class action," the plaintiff "must meet the requirements of Rule 23 to proceed with her PAGA claim"); *Ivery v. Apogen Techs., Inc.*, 2011 WL 3515936, *3 (S.D. Cal. Aug. 8, 2011) (concluding that PAGA "contravenes federal procedural requirements" and thus a PAGA litigant in federal court must comply with Rule 23); *Thompson v. APM Terminals Pac. Ltd.*, 2010 WL 6309363, *2 (N.D. Cal. Aug. 26, 2010) ("To the extent Plaintiff here seeks to bring a representative PAGA action on behalf of other non-party, unnamed aggrieved employees in federal court, such a claim must meet the requirements of Rule 23.")

damages), 204 (semi-monthly payments), 203 (waiting time penalties), and 226 (failure to provide itemized wage statements) already incorporate their own penalty provisions. Thus, an award of additional PAGA penalties pursuant to these provisions is unlikely because Court's avoid issuing awards that may be considered double recoveries when employees elect to receive damages pursuant to other Labor Code provisions. *See* Cal. Lab. Code § 2699(f); *see also Guifi Li v. A Perfect Day Franchise Inc.*, 2012 WL 2236752 at *17 (N.D. Cal. 2012) (denying the recovery of PAGA penalties in addition to Section 226 penalties; "the Court is aware of no authority that would permit double recovery of essentially the same penalties").

In addition "under section 2699, subdivision (e)(2) a trial court may 'exercise its discretion *to award lesser* penalties based on the enumerated considerations.'" *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012). Often, courts find that the PAGA award is "unjust, arbitrary, oppressive, or confiscatory based on the facts and circumstances of th[e] case." *Id.* Here, the facts would likely weigh in a significant downward adjustment of any PAGA award. As discussed in detail herein as well as Plaintiffs' motion papers (ECF Doc. No. 70), there are a number of risks in proceeding with this litigation, namely Defendant's complete defense to the factual allegations. If Plaintiffs are unable to meet their burden in demonstrating Defendant's liability on the underlying Labor Code violations, their PAGA penalties necessarily lose significant value and/or completely fall to the side. Moreover, while the Labor Code provisions have potential greater value than the FLSA claims as discussed above, the PAGA penalties turn on the number of employees – separate and apart from the value of the damages. *See Villacres v. ABM Indus., Inc.*, 189 Cal.App.4th 562, 579-80 (2010) (distinguishing between civil penalties and statutory penalties). Here, the number of California Class Members is significantly less than the number of FLSA Class Members: approximately 1,000 California Class Members of the nearly 4,500 total California and FLSA Class Members. Accordingly, the extent of damages is far less. The Parties took all of these issues, among others, into consideration when negotiating the PAGA award as part of the settlement.

Ultimately, the $20,000.00 is reasonable not only based on the circumstances of this case, but also when comparing this matter to case law. PAGA penalties often make up a relatively small portion of a class action settlement. *See Nen Thio v. Genji, LLC*, 14 F.Supp.3d 1324, 1330 (N.D.

Cal. 2014) (granting preliminary approval where the total gross settlement amount was $1,250,000.00 and the LWDA payment was $10,000.00); *Schiller v. David's Bridal, Inc.*, 2012 WL 2117001, at *2, *14 (E.D. Cal. June 11, 2012) (report and recommendation recommending final approval of a settlement with a maximum settlement amount of $518,245.00 with a LWDA payment of $7,500.00, reasoning that the award comported with PAGA awards in other cases); *Gong-Chun v. Aetna Inc.*, 2012 WL 2872788, at *4, *17 (E.D. Cal. July 12, 2012) (granting final approval of a settlement with a gross settlement amount of $700,000.00 and a LWDA payment of $15,000.00); *Ceja-Corona v. CVS Pharmacy, Inc.*, 2015 WL 222500, at *2-*3 (E.D. Cal. Jan. 14, 2015) (recommending that preliminary approval be granted where a $7,500.00 of a $900,000.00 settlement was allocated to the LWDA, where the Plaintiffs gave the LWDA notice of the settlement) *report and recommendation adopted by Ceja-Corona v. CVS Pharmacy, Inc.*, 2015 WL 925598 (E.D. Cal. Mar. 3, 2015); *Chu v. Wells Fargo Investments, LLC*, No. C 2011 WL 672645, at * 1 (N.D.Cal. Feb. 16, 2011) (approving PAGA settlement payment of $7,500.00 to the LWDA out of $6.9 million common-fund settlement); *Franco v. Ruiz Food Products, Inc.*, 2012 WL 5941801, at *14 (E.D. Cal. Nov. 27, 2012) (approving $10,000.00 award out of $2,500,000.00 settlement); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575, at *3 (E.D. Cal. Oct. 31, 2012) (approving $10,000.00 award out of $3.7 million common-fund settlement).

6. The Check-Cashing Process is a Reasonable Method for FLSA Class Members to Opt In.

The primary thrust of the Court's inquiry in this section appears to focus on the concern that without any affirmative mechanism to enable FLSA Class members to indicate their intent to opt-in to the collective action, and to then release those claims, the settlement process could violate the rights of the FLSA Class members. The Court, at 5:6-9 of its Order, notes that there is no requirement for there to be a notation on the check stating that the act of endorsing the check indicates such consent to join, and thereby release the FLSA claims. The parties are then invited to address whether such mechanism(s) should be required.

In the matter of *Woods v. Vector, Inc.*, 14-CV-00264-EMC (N.D. Cal.), this Court recently addressed a similar situation. There, as here, the settlement included the process where settlement

checks were being mailed out to everyone who did not affirmatively opt-out of the class, without the added burden of requiring claim forms to be submitted. That situation also triggered the scenario where FLSA class members would not have affirmatively indicated their intent to opt-in and release the FLSA claims. In *Woods, supra*, at Docket No. 276, at 4:21-25, the Court approved of a two-part process whereby (1) an endorsement was added to the back of the check expressing the Class member's intent to both opt-in to the FLSA claims and to then release said claims, with the endorsement language being openly visible to the Class member before endorsing the check, and (2) similar language was also added to the transmittal document by which the check was distributed to the Class members, such that when receiving the check, the Class members were again informed of the significance of the subsequent act of endorsing and cashing the settlement check. Given those two added mechanisms, the Court therein agreed that the FLSA requirement to inform the Class members of both the need to opt-in, and the subsequent release of FLSA claims via the endorsement of the check, was duly satisfied.

Here, having considered the Court's comments in the subject Order, the Parties suggest that the same two mechanisms be put in place. Accordingly, attached hereto is the proposed language to be set forth (1) on the back of the check where the endorsement will be made by the Class members when cashing the check they will eventually receive for the FLSA settlement, **Exhibit "A"** hereto, as well as (2) the language to be added to the transmittal document which will accompany the check when mailed to the Class member, **Exhibit "B"** hereto.

With these additional mechanisms in place, the Parties submit that the Court's concerns should be alleviated and they ask approval of the two part process discussed above, as well approval of the documents submitted herewith, being the check endorsement at Exhibit "A" and the transmittal document language at Exhibit "B". This will enable the Parties to effect both the opt-in and the release of the FLSA claims in this "no claim form" settlement process, when the FLSA claims are ultimately the subject of notice to the collective action class members.

7. <u>The Notice to FLSA Class Members of the Settlement is Reasonable.</u>

The Court has inquired as to why notice is proposed to be sent to the FLSA Class members following approval of the state law settlement, and thus, after the objection period for the state law

class. The essence of the response is that this reflects the fundamental difference between state law Rule 23 "opt-out" classes, as compared to FLSA based "opt-in" classes.

Under Rule 23, all putative class members are deemed to be part of a certified class or settlement of a class action, ***unless they affirmatively opt out*** by submitting an exclusion form or submitting an exclusion letter, as the case may be. In stark contrast, under the rules of the FLSA, no putative collective action members are actually participating class members ***unless they affirmatively opt into the class*** upon receipt of notice of conditional certification, or otherwise as discussed above in this settlement context.

Under the state law proceedings, a class member who is automatically included in the class must thus express his or her dissatisfaction with the settlement by way of an objection. By contrast, an FLSA member simply expresses his or her negative feelings about the class by "walking away from it" - by not giving assent to participating in the action. All rights are reserved, and they are free to then act or not act, individually. Unlike the required act of having to exclude oneself from a Rule 23 class action, there is simply no requirement to exclude oneself from an FLSA action. Do nothing – and you are not a member. Here, upon receipt of a settlement check following approval of the settlement, the recipient is free to endorse and cash the check, and thus participate, or to refuse or fail to do so, and thus reserve all rights. Therefore, it is the Court that acts as the "gateway" to allowing the settlement to proceed forward, and then the FLSA settlement recipients then act or do not act, at their pleasure.

While it is true that some cases do involve a mailing to both Rule 23 and FLSA members, that is simply not required under the FLSA, and approval is commonly ruled on before the notice is mailed out. The Court, alone, rules on all aspects of the reasonableness of the settlement. Thus, it is submitted that the process envisioned under this settlement agreement is proper and should be approved.

8. <u>The Parties will Present Responses to Objections from Class Members to the Court.</u>

As instructed by the Court, the Parties will file any responses to objections fourteen (14) days before the final approval hearing.

9. Defendant has Provided CAFA Notice.

The CAFA notice pursuant to 28 U.S.C. §1715(b) was sent by Defendant on August 4, 2016. The 90-day notice period from the August 4, 2016 date must expire before the expected final approval hearing date in this case. A list of the states to which CAFA notice was provided is attached hereto as **Exhibit "C"**.

10. Class Notice for California Class (Exhibit 1 of Settlement Agreement)

The Parties have attached hereto as **Exhibits "D" and "E"**, revised versions of the California Class Notice and California Class Form, which incorporate the points addressed by the Court in its Order. The Parties will likewise ensure that the Settlement website will include the Settlement, operative complaint, the Court's order granting preliminary approval, the motion for final approval, and Plaintiffs' motion for attorney's fees.

In its Order, the Court further inquired whether an opt-out or exclusion form is warranted, rather than requiring an individual Class member to submit an exclusion letter. The Parties have considered the Court's point and are amenable to circulating exclusion forms to California Class Members. The Parties have attached hereto as **Exhibit "F"** a draft of the California Class Exclusion Form, to be included in the Notice Packet to California Class Members along with the Class Notice and Class Form, discussed above[13].

11. Class Notice for FLSA Class (Exhibit 2 of Settlement Agreement)

The Parties have attached hereto as **Exhibits "G" and "H**", revised versions of the FLSA Class Notice and FLSA Class Form, which incorporate the points addressed by the Court in its Order. The Parties will likewise ensure that the Settlement website will include the Settlement, operative complaint, the Court's order granting preliminary approval, the motion for final approval, and Plaintiffs' motion for attorney's fees. (*See also supra* Section II.7, addressing notice to the FLSA Class.)

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[13] The Exclusion Form may increase Administrator costs.

III. CONCLUSION

The Parties negotiated a fair and reasonable settlement of a case that provides relief that may very well have never have been realized but for this class action. Accordingly, Plaintiffs move the Court to preliminarily approve the Settlement as to the California Class and finally approve it as to the FLSA Class.

DATED: August 9, 2016

SCHNEIDER WALLACE
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States District Court, Northern District of California, by using the Court's CM/ECF system on August 9, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

Date: August 9, 2016

Respectfully Submitted,

/s/ *Carolyn H. Cottrell*
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