UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: CV 17-04210 SJO (JEM) **DATE:** March 22, 2018

TITLE: Jarel Brown v. Saks and Company, LLC

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFF:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT [Docket No. 38]

This matter is before the Court on Plaintiff Jarel Brown's ("Brown" or "Plaintiff") Unopposed Motion for Preliminary Approval of Class Action Settlement("Motion"), filed January 15, 2018. Defendant Saks & Company, LLC ("Saks") filed a response on January 26, 2018 ("Response"). The Court found this matter suitable for disposition without oral argument and vacated the hearing set for February 20, 2018. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS** Plaintiffs' Motion.

I. FACTUAL AND PROCEDURAL HISTORY

A. Allegations in Plaintiffs' Second Amended Complaint

Plaintiff's Second Amended Complaint, filed December 22, 2017, alleges the following. Defendant Saks is a Delaware corporation operating with its designated principle place of business located in New York. (Second Amended Complaint ("SAC") ¶ 25, ECF No. 36.) Plaintiff was a salesperson employed by Saks and brought this class action on behalf of himself and all individuals who hold or held the position of "Salesperson", "Brand Ambassador", or other similarly situated "non-exempt" employees who are or were paid on a "draw commission basis" and who are currently employed by or formerly employed by Saks and any of Saks's subsidiaries or affiliated companies. (SAC ¶¶ 1, 25.) Saks paid salespersons a commission draw and on a commission/non-discretionary bonus wage basis. (SAC ¶ 2.) Based upon information and belief, Defendant paid salespersons overtime at one and one half times their draw rate, instead of one and one half times their regular rate of compensation and/or excludes commissions and non-discretionary bonuses from their regular rate calculations and overtime payments. (SAC ¶ 3.) From August 1, 2016 to the present, Defendant has failed to pay salespersons wages and/or overtime when they work more than eight hours per day or forty hours per week. (SAC ¶ 4.) Defendant did not include all of the compensation owed to salespersons for the non-productive time associated with their rest period in their regular rates when calculating overtime wages. (SAC ¶ 4.) Defendant failed to implement a lawful rest period policy for salespersons or

compensate salespersons for the non-productive time associated with rest periods when they worked shifts more than a major fraction of four hours worked. (SAC ¶¶ 5-7.) From August 1, 2016 to the present, salespersons were not compensated with one hours' worth of pay at their regular rate of compensation or at the proper rate when they were not provided a compliant rest period. (SAC ¶ 9.) Defendant failed to separately compensate employees for non-productive time associated with their rest periods and for time spent performing non-selling related tasks. (SAC ¶ 10.) From August 1, 2016 to the present, Defendant did not properly compensate salespersons when they were not provided with a complaint meal period. (SAC ¶ 11.) During that same time period, Defendant also " knowingly and intentionally failed to issue accurate and complete itemized wage statements in writing." (SAC ¶ 13.) Defendant also improperly excluded Brand Ambassadors' annual side pay and non-discretionary and regularly paid seasonal bonus amounts when calculating their overtime rates. (SAC ¶ 4.)

Plaintiff asserts the following eight causes of action against Saks in the SAC: (1) failure to pay separately and hourly for non-productive time associated with rest periods and non-selling activities under California Labor Code §§ 1194 and 1194.2; (2) failure to pay wages and/or overtime under California Labor Code §§ 510, 1194, and 1199; (3) failure to provide meal periods pursuant to California Labor Code §§ 226.7 and 512, and IWC Wage Order No. 7-2001, § 11; (4) failure to provide paid rest periods and pay non-compliant rest period premiums pursuant to California Labor Code § 226.7, and IWC Wage Order No. 7-2001, § 12; (5) violation of California Labor Code § 226(a), (e), and (h); (6) unfair competition pursuant to California Business and Professions Code § 17200; (7) violations of Labor Code §§ 201-203; and (8) penalties pursuant to California Labor Code §§ 2699, et seq. (*See generally* SAC.)

Plaintiff seeks compensatory damages in the amount of unpaid wages and/or overtime not paid; penalties pursuant to California Labor Code § 226(e); injunctive relief pursuant to California Labor Code § 226(h); prejudgment and post judgment interest; an order enjoining Defendant from not providing class members with minimum wages; proper wages or overtime; proper compensation for non-compliant meal periods; rest periods; accurate itemized wage statements; restitution for unfair competition; waiting time penalties; relief pursuant to California Labor Code § 2699; costs; and attorneys' fees. (SAC Relief Requested.)

B. Procedural Background

On April 22, 2014, Saks employee Nick Perez ("Perez") sent a letter to the California Labor and Workforce Development Agency ("LWDA") pursuant to the Private Attorney General Act of 2004 ("PAGA") outlining many of the same unlawful minimum wage, overtime, rest period, meal period, and wage statement practices stated in the SAC. (SAC, Ex. 3.) On December 23, 2015, Perez sent another PAGA notice reiterating the same claims. (SAC, Ex. 4.) On the same day, Saks employee Nina Shirazi provided notice to Saks of some of the conduct alleged in the SAC. (SAC ¶ 14.)

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Prior to the filing of the instant action, plaintiffs in a related action[1] in San Francisco Superior Court reached a settlement involving similar claims to those alleged here by a class consisting of "all persons employed as a non-exempt of hourly-paid employee by Defendant in California during the period from April 24, 2010 through July 29, 2016." (Declaration of Craig J. Ackermann ISO Mot. ("Ackermann Decl.") ¶ 9.) Plaintiff therefore does not seek damages for the period before August 1, 2016 in the instant action. (Ackermann Decl. ¶ 9.)

Plaintiffs commenced the instant action on June 6, 2017 (ECF No. 1), filed a First Amended Complaint ("FAC") on July 20, 2017 (ECF No. 22), and filed a Second Amended Complaint ("SAC") on December 19, 2017. (ECF No. 31.) The Court held a scheduling conference on August 28, 2017 during which it set a trial date of October 30, 2018 and a deadline for Plaintiffs to file a motion for class certification of December 4, 2017. (Minutes of Scheduling Conference, ECF No. 26.)

Plaintiff filed the instant motion for preliminary approval of class action settlement (the "Motion") on January 15, 2018, including declarations from Plaintiff's Counsel and a copy of the proposed Settlement Agreement. (*See* Mot., ECF No. 38.)

II. DISCUSSION

Federal Rule of Civil Procedure 23(e) ("Rule 23(e)") provides that "[t]he claims, issues, or defenses of a . . . class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). "Approval under [Rule] 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 525 (C.D. Cal. 2004). The Ninth Circuit has held that there is a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992) (citations omitted); *see also Van Bronkhorst v. Safeco Corp.,* 529 F.2d 943, 950 (9th Cir. 1976) (stating that "there is an overriding public interest in settling and quieting litigation," and this "is particularly true in class action suits") (footnote omitted). It is also true, however, that "[i]n the settlement context, the court must pay 'undiluted, even heightened, attention' to class certification requirements because the court will not have the opportunity to adjust the class based on information revealed at trial." *Ma v. Covidien Holding, Inc.*, No. SACV 12-02161-DOC (RNBx), 2014 WL 360196, at *1 (C.D. Cal. Jan. 31, 2014) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 952-53 (9th Cir. 2003)).

[1] *Nick Perez, et al v. Saks & Company, et al.*, San Francisco Superior Court Case No. CGC-14-38900 ("*Perez*").

The Court must therefore evaluate the adequacy of the Amended Settlement Agreement in light of Rule 23(e). *See id.* "Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the 'universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable.'" *Class Plaintiffs,* 955 F.2d at 1276 (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983)).

Because the purpose of this Order is to determine whether preliminary settlement approval should be given, "the court will only determine whether a proposed class action settlement deserves preliminary approval and lay the ground work for a future fairness hearing." *Alberto v. GMRI, Inc.,* 252 F.R.D. 652, 659 (E.D. Cal. 2008) (quoting *DIRECTV*, 221 F.R.D. at 525) (internal quotation marks and original formatting omitted). "At the fairness hearing, after notice is given to putative class members, the court will entertain any of their objections to (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement." *Alberto,* 252 F.R.D. at 659 (citation omitted). "Following the fairness hearing, the court will make a final determination as to whether the parties should be allowed to settle the class action pursuant to the terms agreed upon." *Id.* (citing *DIRECTV, Inc.*, 221 F.R.D. at 525). Overall, "[t]he initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge." *Officers for Justice*, 688 F.2d at 625.

A. Certification of the Class

"In order to approve a class action settlement, a district court must first make a finding that a class can be certified." *Vasquez v. Coast Valley Roofing, Inc.,* 266 F.R.D. 482, 485-86 (E.D. Cal. 2010) (citing *Molski v. Gleich*, 318 F.3d 937, 943, 946-50 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.,* 603 F.3d 571, 617 (9th Cir. 2010). Pursuant to Rule 23, "approval of the class is appropriate where the plaintiff establishes the four prerequisites of [Rule] 23(a)—(1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation—as well as one of the three requirements of Rule 23(b)." *Id.* at 486 (citing *Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 365 (D. Ariz. 2009)).

Here, the proposed class is comprised of "all current and former non-exempt employees who worked at a Saks-branded retail store in the State of California at any time during the Class Period who were paid pursuant the to the alleged draw commission plan by which Plaintiff was paid." (Mot. 14.) The Court now examines whether this proposed class complies with the requirements of Rule 23(a) and (b).

1. Numerosity

A proposed class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Courts have routinely found the numerosity requirement satisfied when the class

comprises 40 or more members." *Vasquez*, 266 F.R.D. at 486 (citing *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y.1998)). Here, Plaintiffs aver that approximately 530 individuals are in this position, a sufficiently large number to satisfy the numerosity requirement. (Ackermann Decl. ¶ 4.)

Plaintiffs seeking certification must also establish impracticability of joinder. A court should consider "not only the class size but other factors as well, including the geographic diversity of class members, the ability of individual members to institute separate suits, and the nature of the underlying action and the relief sought." *Nat'l Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986). The limited size of any individual plaintiff's recovery is also relevant. *See Edmondson v. Simon*, 86 F.R.D. 375, 379 (N.D. Ill. 1980). In this case, where the potential recovery by any individual member of the potential class is presumably relatively small, as evidenced by the proposed average recovery of approximately $828 per potential class member, the Court finds that individual members of the proposed class would likely be unwilling or unable to institute separate lawsuits. Moreover, the filing of individual suits by 530 separate plaintiffs would create a significant burden on judicial resources.

In sum, the Court finds the numerosity requirement of Rule 23(a)(1) satisfied.

2. Commonality

Rule 23(a) also demands "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy the commonality requirement, plaintiffs' "claims must depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, —, 131 S. Ct. 2541, 2551 (2011). "This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single significant question of law or fact." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013), *cert. denied*, — U.S. —, 135 S. Ct. 53 (2014) (emphasis and internal quotation marks omitted). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

In this case, the class is composed of a targeted group of Saks employees holding particular job titles during a particular time period. Plaintiff alleges Saks failed to properly pay the class members compensation for overtime, rest, and non-productive time periods; implement a lawful rest period policy; compensate class members when they were not provided with compliant meal or rest periods; and furnish class members with accurate itemized wage statements. In light of the narrow class definition, the Court finds the commonality requirement of Rule 23(a)(2) satisfied.

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3. Typicality

Typicality requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The purpose of this requirement "is to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (internal quotation marks omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (internal quotation marks omitted) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

Here, Plaintiff is a California resident who has been employed as a Salesperson by Saks since November 11, 2014. (Mot. 4.) Plaintiff holds one of the positions covered by the class definitions and has been subjected to Saks' alleged violations of the California Labor Code. In sum, Plaintiff's claims are based on the same factual, legal, and remedial theories as those of the putative class members. Thus, the Court finds the typicality requirement of Rule 23(a)(3) satisfied.

4. Adequacy

Rule 23(a)(4) permits certification of a class action if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit applies a two-prong test to determine whether representation meets this standard: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (quoting *Hanlon*, 150 F.3d at 1020).

Here, Plaintiffs have no known interests antagonistic to the interests of other putative class members. Moreover, to the extent the proposed $7,000 incentive award to Brown contemplated in the Settlement Agreement can be viewed as creating disparate interests in the outcome of the litigation, not every conflict of interest between a class representative and class members prevents satisfaction of the adequacy prong; instead, only a fundamental conflict that goes to the heart of the litigation prevents certification, and speculative conflicts must be disregarded at the certification stage. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 3.26, at 3-143 (3d ed. 1992). As is discussed in more detail in Section II(C)(1)(c)(ii), *infra*, the Court finds the contemplated $7,000 incentive award to not be so high as to cause a fundamentally disparate interest between Plaintiff and other putative class members.

The Court likewise finds that Plaintiffs and their attorneys vigorously litigated this action, and reached a proposed settlement that will provide $438,925 to the approximately 530 individuals who were allegedly harmed by Saks' practices. (Ackermann Decl. ¶ 5.) Plaintiffs' counsel appear

to be experienced class action litigators having handled hundreds of class and representative actions, and having successfully resolved more than half. (Ackermann Decl. ¶ 22.) The Court thus finds that Plaintiff and his attorneys have served and will continue to serve as adequate representatives in this action.

5. Certification Under Rule 23(b)(3)

"In addition to fulfilling the four prongs of Rule 23(a), the proposed class must also meet at least one of the three requirements listed in Rule 23(b)." *Spann v. J.C. Penney Corp.*, 307 F.R.D. 514 (C.D. Cal. 2015) (citing *Dukes*, 564 U.S. at —, 131 S. Ct. at 2548). Here, Plaintiffs seek conditional class certification under Rule 23(b)(3), (*see* Mot. 6), which requires the court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3).

"A court evaluating predominance and superiority must consider: (1) 'the class members' interests in individually controlling the prosecution or defense of separate actions;' (2) 'the extent and nature of any litigation concerning the controversy already begun by or against class members;' (3) 'the desirability or undesirability of concentrating the litigation of the claims in the particular forum;' and (4) 'the likely difficulties in managing a class action.'" *Spann*, 307 F.R.D. at 519 (quoting Fed. R. Civ. P. 23(b)(3)).

a. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623. "Though there is substantial overlap between [the Rule 23(a)(2) commonality test and the Rule 23(b)(3) predominance test], the Rule 23(b)(3) test is far more demanding[.]" *Wolin*, 617 F.3d at 1172 (internal quotation marks omitted). The "focus is on the relationship between the common and individual issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (internal quotation marks omitted). "[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (internal quotation marks omitted).

As noted above, Plaintiff asserts the following causes of action in the SAC: (1) failure to pay separately and hourly for non-productive time associated with rest periods and non-selling activities under California Labor Code §§ 1194 and 1194.2; (2) failure to pay wages and/or overtime under California Labor Code §§ 510, 1194, and 1199; (3) failure to provide meal periods pursuant to California Labor Code §§ 226.7 and 512, and IWC Wage Order No. 7-2001, § 11; (4) failure to provide paid rest periods and pay non-compliant rest period premiums pursuant to

California Labor Code § 226.7, and IWC Wage Order No. 7-2001, § 12; (5) violation of California Labor Code § 226(a), (e), and (h); (6) unfair competition pursuant to California Business and Professions Code § 17200; (7) violations of Labor Code §§ 201-203; and (8) penalties pursuant to California Labor Code §§ 2699, et seq. (*See generally* SAC.) The Court must address the elements of each asserted cause of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) ("Considering whether questions of law or fact common to class members predominate begins . . . with the elements of the underlying cause of action.") (internal quotation marks omitted).

i. CA Rest Periods, Meal Periods, and Non-Productive Time Claims

Plaintiff's SAC alleges that Defendant did not comply with California Labor laws by failing to properly calculate and pay wages for non-productive time. (SAC ¶¶ 4-7.) Plaintiff also alleges that Defendants did not separately or properly compensate salespersons for non-productive time associated with their rest periods, time spent performing non-selling related tasks, time periods when they were not provided with compliant meal periods. (SAC ¶ 9-11.) Because the alleged violations on the part of Defendant is due to system-wide wage miscalculations of wages and failure to implement compliant meal and rest periods, and the only individualized analysis is the calculation of the number of weeks worked during the Class Period, the legal and factual issues common to all class members dominate. The Court therefore finds the predominance inquiry to be satisfied with respect to Plaintiff's rest period, meal period, and non-productive time claims.

ii. CA Wage & Overtime Claims

Plaintiff's wage and overtime claims under CA Labor Laws similarly concern system-wide miscalculations. The relevant California Labor Code sections require Defendant to timely pay all regular and overtime wages to its employees and not to withhold any wages due. The minimal individualized analysis is greatly outweighed by common legal and factual issues. The predominance inquiry of Rule 23(b)(3) is therefore satisfied with respect to Plaintiff's wage and overtime claims based on California Labor Code.

iii. Unfair Competition

Plaintiff's SAC alleges that Defendant violated the California Business and Professions Code § 17200 by engaging in conduct that is "unfair, unlawful, and harmful to Plaintiff, the general public, and the Proposed Classes." Predominance is established for this claim, because the "focus...will be on the words and conduct of the defendants rather than on the behavior of the individual class members." *Ortega v. J.B. Hunt Transp., Inc.*, 258 F.R.D. 361, 367 (C.D.Cal.2009); *Local Joint Executive Bd. of Culinary/Bartender Trust Fund*, 244 F.3d at 1162 ("When common questions present a significant aspect of the case and they can be resolved for all members of the class in

a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.").

iv. CA Wage Statement Claims

California Labor Code § 226 requires employers to furnish its employees with written, itemized wage statements showing, among other things, the gross and net wages earned, total hours worked, and all applicable hourly rates along with the corresponding number of hours worked at each rate. Cal. Lab. Code § 226(a). Plaintiff, in the SAC, alleges that Defendant violated this code section for each pay period during the Class Period because the wage statements provided to its California employees failed to accurately portray this information. (SAC ¶ 13.) The statutory penalty for this violation is $50 per employee for the initial pay period in which a violation occurred and $100 per employee for each violation in each subsequent pay period, not to exceed an aggregate penalty of $4,000. Cal. Lab. Code § 226(e). Because the "injury arises from defects in the wage statement, rather than from a showing that an individual experienced harm as a result of the defect," common issues dominate and the requirements of 23(b)(3) are met. *Lubin v. Wackenhut Corp.*, 5 Cal. App. 5th 926, 959 (Ct. App. 2016), *reh'g denied* (Dec. 14, 2016), *review denied* (Mar. 15, 2017).

b. Superiority

"[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy. Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010) (citation and internal quotation marks omitted). "In cases in which plaintiffs seek to recover relatively small sums and the disparity between litigation costs and the recovery sought may render plaintiffs unable to proceed individually, '[c]lass actions may permit the plaintiffs to pool claims which would be uneconomical to bring individually.'" *Spann*, 307 F.R.D. at 531 (quoting *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir.), *cert. denied*, 534 U.S. 973, 122 S. Ct. 395 (2001) (further finding that "[i]f plaintiffs cannot proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover") (internal quotation marks and alteration omitted)).

Because the amounts that members of the putative class would stand to recover by litigating their claims on an individualized basis appears to be relatively small, and because any member of the class who wishes to control his or her own litigation may choose to opt out of the class, *see* Fed. R. Civ. P. 23(c)(2)(B)(v), the Court finds that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3).

6. Conclusion Regarding Conditional Class Certification

For the foregoing reasons, the Court finds that conditional certification of the following class under Rule 23(b)(3) is appropriate for the purpose of settlement:

> All current and former non-exempt employees who worked at a Saks Fifth Avenue retail store in the State of California at any time from August 1, 2016 through and including the Preliminary Approval Date who were paid pursuant to the alleged draw commission plan by which Plaintiff was paid.[2]

B. Notice to Class Members

Upon preliminary approval of the settlement offer, Defendant will, within twenty-one (21) days, provide to the Settlement Administrator Class Information for purposes of mailing the Notice of Settlement to Class Members ("Settlement Notice"). (Joint Stipulation of Class Action Settlement Agreement ("SA") ¶ 3.8.2) Once the Settlement Administrator is in possession of the Class Information, it will conduct a national change of address search and a skip trace for the most current address of all former Class Members and update their addresses as necessary. (SA ¶ 3.8.3.) Twenty-one (21) days after receipt of the Class Information, the Settlement Administrator will mail the Class Notice to all Class Members by First Class U.S. Mail, after determining the most current mail address for each Class Member, including but not limited to the use of skip tracing. (SA ¶ 3.8.3.) Any Class Notices returned as non-deliverable on or before the twenty-one (21) days before the Response Deadline shall be re-mailed to the forwarding address affixed thereto. Otherwise, the Settlement Administrator shall make reasonable efforts to obtain an update mailing address. (SA ¶ 3.8.4.)

All Class Members will be mailed a Settlement Notice. (SA ¶ 3.8.) The Settlement Notice will be substantially in the form of Exhibit A to the Joint Stipulation of Class Action Settlement Agreement. Each Settlement Notice will provide: (i) information regarding the nature of the Action; (ii) a summary of the Settlement's principal terms; (iii) the Settlement Class definition; (iv) each Class Member's estimated Individual Settlement Payment and the total number of hours each Class Member worked during the Class Period; (v) the dates which comprise the Class Period; (vi) instructions on how to submit Requests for Exclusion; (vii) an explanation that Class Members who do not file timely requests for exclusion will be unable to sue, continue to sue, or be a part of any other lawsuit against Defendant and other Released Parties regarding the Released Claims in this Settlement; (viii) the deadlines by which the Class Member must postmark or fax Request for

[2] The Court hereinafter refers to persons meeting this description as the "Class" or "Class Members."

Exclusions or Postmark Notice of Objection to the Settlement; (ix) instructions on how to object to the Settlement; (x) the date of the Court's final approval hearing; (xi) how to obtain additional information about the proposed Settlement. (*See generally* Settlement Notice.)

In this case, the Court finds that the Settlement Agreement provides a robust direct notice plan that is well-suited to identifying and notifying the affected class members. Indeed, the Settlement contains a number of safeguards against sending notice to invalid addresses, making use of both the National Change of Address Database and skiptracing. The Court has also reviewed the proposed Settlement Notice and concludes that it clearly and concisely describes the nature of the litigation, the class definition, that Class Members may elect to object or opt-out of the Settlement and the process for doing so, and the binding nature of the settlement. (*See* Settlement Notice.) The Settlement Notice is particularly useful because it is individualized to each Class Member and provides both the number of hours worked during the Class Period and the estimated individual settlement payment in a straightforward, easy to understand manner. (*See* Settlement Notice.) Finally, the Settlement Notice sufficiently describe the terms of the settlement "to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)). Thus, the Court finds that the notice requirements of Rule 23(c)(2) have been satisfied.

C. Fairness, Adequacy, and Reasonableness of the Amended Settlement Agreement

"Having determined that class treatment appears to be warranted, the [C]ourt must now address whether the terms of the parties' settlement appear fair, adequate, and reasonable." *Alberto v. GMRI, Inc.,* 252 F.R.D. 652, 664 (E.D. Cal. 2008); *see also Class Plaintiffs,* 955 F.2d at 1276. In assessing whether a class action settlement agreement is fair, adequate, and reasonable, courts examine several factors, including:

> [T]he strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). "Given that some of these factors cannot be fully assessed until the court conducts its fairness hearing, 'a full fairness analysis is unnecessary at th[e preliminary approval] stage.'" *Alberto,* 252 F.R.D. at 665 (quoting *West v. Circle K Stores, Inc.*, No. Civ. S-04-0438 WBS GGH, 2006 WL 1652598, at *9 (E.D. Cal. June 13, 2006)).

Instead, preliminary approval and notice of the settlement terms to the proposed class are appropriate where "[1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with the range of possible approval . . . ." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). The Court need not "specifically weigh[ ] the merits of the class's case against the settlement amount and quantif[y] the expected value of fully litigating the matter." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Instead, the Court need only determine whether the proposed settlement is "the product of an arms-length, non-collusive" negotiation. *Id.*

1. Overview of the Settlement Terms

The Settlement Agreement broadly provides that Saks shall pay $638,800 to fund: (i) Individual Settlement Payments; (iii) Litigation Costs; (iv) approved Attorneys' Fees and Costs; (v) approved Settlement Administration Costs; (vi) Plaintiff's Service Awards; and (v) PAGA Penalties. (Mot. 1.) The approximately 530 Class Members are estimated to receive $438,925 of the Settlement amount. (SA 3.9.4.) The "Class Period" is defined as the period from August 1, 2016 through the date the Court preliminary approves the Settlement. (SA ¶ 1.8.)

The Settlement Agreement appears to have been reached after a lengthy investigation, all-day mediation with Scott Markus, an experienced California-based wage-and-hour mediator, and multiple weeks of exchanging of information between the parties following the mediation (Ackermann Decl. ¶¶ 10-11.) In early December 2017, the parties reached a settlement in principal and agreed to draft and negotiate a long-form agreement detailing the Settlement Agreement. (Ackernmann Decl. ¶ 11.) On or around January 12, 2018, the parties fully executed the Settlement Agreement. (Ackernmann Decl. ¶ 11.)

a. Estimate of the Value of the Case

Class Counsel formulated damages analysis, along with Defendant's defenses, to evaluate claims. Plaintiff valued the claims, in light of Defendant's defenses, at approximately: 1.) $100,000 for the claim based on Defendant's failure to separately account and pay for non-productive time associated with rest periods; 2.) $920,000 for the rest period claims; 3.) $794,500 for the wage statement claim; 4.) 44,000 for overtime pay; 5.) $30,000 for meal period claims; and 6.) $450,000 for PAGA penalties and unpaid wages claim. (Ackermann Decl. ¶ 26.) Defendant contends that Plaintiff would not prevail on class certification because individual issues predominate, as sales associates fell into many different categories and were paid differently from one another. Plaintiff's Counsel estimates there is a 70% chance that the Class will be certified and that the realistic overall value of all claims is $1.64 million, and therefore asserts that the proposed $638,800

settlement—a 61% discount—is a fair compromise in light of the costs and uncertainties posed by litigation. (Ackermann Decl. ¶ 26.)

The Court is somewhat perplexed by the manner in which the valuation of the claims has been calculated. For instance, Counsel applied a 65% discount to the wage discount claim of $2,227,750 (1 x $50 x 530 Class Members for the initial pay period) + (47 x $100 x 530 Class Members). Plaintiff states that the discounted claim is $794,500, but the Court calculates that the application of a 65% discount to this claim would be $779,712.50. Furthermore, Plaintiff values the rest period claim at approximately $1.77 million (22,424.6 work weeks x 5 days per work week x $15.80/hour), but the origin of the 22,242.6 work weeks is unclear and the Court asks the parties to provide further clarification as to this figure. While the Court does not find these calculations to be inherently unreasonable in light of the costs, risks, and uncertainties of litigation, the parties should provide further clarification and significantly more detail regarding the calculation method used and any discounts applied.

b. Administration and Allocation of Settlement Funds

According to the terms of the SA, Defendant must, within 15 days of the effective date of the Settlement, provide $638,800 to the Settlement Administrator, who shall deposit the funds in the Settlement Fund Account and disburse the funds in the manner and at the time set forth in the Settlement Agreement. The proposed allocation of the Gross Settlement Amount is as follows:

	Total Amount
Gross Settlement Amount	$638,800
Attorneys' Fees (25 Percent of GSA)	$159,700
Litigation Costs	$13,300
Settlement Administration Costs	$10,500
PAGA Payment to LWDA (75% LWDA portion)	$9,375
Plaintiff's Service Award	$7,000
Net Settlement Amount	**$438,925**

Distribution of the Net Settlement Amount of $438,925 to the individual Class Members is accomplished by dividing the Net Distribution Fund by the total number of weeks worked by Class Members during the Class Period (rounded up) to establish a weekly value. (SA ¶ 3.9.4.) Each Class Member's Individual Settlement Payment will then be determined by multiplying the total number of weeks he or she worked during the Class Period (rounded up) by the weekly value.

(SA ¶ 3.9.4.)

Individual Settlement Payments will be paid from the Net Distribution Fund and mailed by First Class U.S. Mail to Class Members' last known mailing address within thirty (30) calendar days following the Effective Date of the Settlement. The Parties agree that any checks returned to the Settlement Administrator because the address is incorrect will be transmitted by the Settlement Administrator to the State of California Controller's Office, Unclaimed Property Fund, after 121 days from the date Individual Settlement Payments were mailed. (SA ¶ 3.9.3.)

Each Class Member's settlement amount will be divided between taxable and non-taxable consideration as follows: 1.) one third allocated to alleged unpaid wages for which an IRS Form W-2 will be issued; 2.) one third will be allocated to alleged penalties for which an IRS Form 1099 will issue; and 3.) one third will be allocated to alleged interest for which an IRS Form 1099 will issue. The Settlement Administrator will be responsible for calculating the employer- and employee-side taxes owed on the wage portion of each Class Member's Individual Settlement Payment and paying these amounts to the appropriate state and federal agencies, within the timing required by applicable state and/or federal law. (SA ¶ 3.9.5.)

Finally, the payments will also not be considered compensation or earnings for purposes of benefits sponsored by Defendant. (*See* SA ¶ 3.10.) The Court is hesitant to permit the provision excluding any payments made pursuant to the SA from impacting employee's eligibility for or calculation of any employee pensions or other benefits. Employee benefits are part and parcel of an employee's compensation and loss of these benefits is, in effect, a reduction in compensation. To the extent that these payments are wages earned by Class Members and owed to them by Defendant, they should be included in the calculation of any benefits. The parties should provide support for not including the payments in the calculation of any benefits in the motion for final approval of the class action settlement.

c. Other Payments

The Settlement Agreement contemplates that the following sums may be distributed from the Gross Settlement Amount to the following groups: (1) an estimated $10,500 to the Claims Administrator in administration costs; (2) up to $7,000 to Plaintiff in incentive fees; (3) $9,375 PAGA payment to LWDA; and (4) up to $159,700 to Plaintiff's attorneys, Ackermann & Tilajef, P.C., Winston Law Group P.C., and Melmed Law Group, P.C., for reasonable attorneys' fees and up to $13,300 for reimbursement of costs expended litigating this action. (Ackermann Decl. ¶ 5.)

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i. Administrative Fees

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The Parties selected Simpluris, Inc. ("Simpluris") to serve as the Settlement Administrator and have provided an all-in proposal for its fees and costs to administer the settlement. (Ackermann Decl., Ex. 2.) These expenses are generally allowable provided their amounts are reasonable. *See, e.g., Alberto*, 252 F.R.D. at 669; *Vasquez*, 266 F.R.D. at 484. The actual amounts expended, however, have not been determined, as the notice plan has not yet begun. The Court shall make a final determination as to the reasonableness of the requested administrative fees at the final approval hearing.

ii. Incentive Awards

The Settlement Agreement contemplates a $7,000 award to named Plaintiff. In evaluating incentive awards, the Court may consider whether there is a "significant disparity between the incentive award[] and the payments to the rest of the class members" such that it creates a conflict of interest. *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013). Courts are also to consider "the number of class representatives, the average incentive award amount, and the proportion of the total settlement that is spent on incentive awards." *In re Online DVD*, 779 F.3d at 947.

"Incentive awards typically range from $2,000.00 to $10,000.00," and "[h]igher awards are sometimes given in cases involving much larger settlement amounts." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 266-67 (N.D. Cal. 2015) (collecting cases). Plaintiff's counsel claims that Plaintiff attended an all-day mediation, spent time reviewing documents, and prepared for and attended his deposition. Plaintiff's proposed $7,000 incentive awards fall in the "typical range" and the Court finds that Plaintiff's preparation and participation in the settlement process justifies the large incentive award. The Court thus finds this award to be reasonable

iii. Attorneys' Fees and Costs

"In order for a settlement to be fair and adequate, 'a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement.'" *Alberto,* 252 F.R.D. at 667 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003)). "The district court has discretion to use either the percentage-of-the-fund method or the [lodestar] method in calculating fee awards in common fund cases." *Alberto,* 252 F.R.D. at 667 (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)). The lodestar method takes into account counsel's reasonable hours and counsel's reasonable hourly rate and, if necessary, a multiplier thought to compensate for various factors. *See Franco*, 2012 WL 5941801, at *18 (citation omitted). A percentage analysis involves an award of a percentage of the class recovery. *State of Fla. v. Dunne* , 915 F.2d 542, 544-45 (9th Cir. 1990); *Powers v. Eichen,* 229 F.3d 1249, 1256 (9th Cir. 2000) (citations omitted) (establishing 25 percent of the recovery as the "benchmark"); *In re*

Activision Sec. Litig. , 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) ("[N]early all common fund awards range around 30%.")

In the Ninth Circuit, "no presumption in favor of either the percentage or the lodestar method encumbers the district court's discretion to choose one or the other." *In re Wash. Pub. Power*, 19 F.3d at 1296. Instead, "when determining attorneys' fees, the district court should be guided by the fundamental principle that fee awards out of common funds be reasonable under the circumstances." *Id.* (citation and quotation marks omitted).

The requested attorneys' fees represent approximately 25 percent of the Gross Settlement Amount. As with administrative expenses, the Court will make a final determination as to the reasonableness of the requested attorneys' fees and expenses at the final approval hearing.

d. Opting Out and Objecting

The Settlement Agreement contains provisions that permit Class Members to either opt out of the settlement or object to the terms of the settlement at the final approval hearing. (*See* SA ¶¶ 3.8.6, 3.8.7.) Because the Settlement Agreement and Settlement Notice discussed in Section II(B), *supra*, each clearly and conspicuously disclose (1) that a Class Member must opt out of the settlement by timely submitting a written Request for Exclusion to the Settlement Administrator in order to not be bound by its terms; and (2) that a Class Member may object to the settlement by filing a written Notice of Objection to the Settlement Administrator by the Response Deadline, the Court concludes that the Settlement Agreement will put Class Members on adequate notice of their rights under the Settlement Agreement. (*See* SA ¶¶ 3.8.6, 3.8.7.)

e. Release

The Settlement Agreement contains a release provision under which the named Plaintiff agrees to "release [Saks] from the [asserted claims]." (SA ¶ 3.6.) Plaintiff expressly waives any and all rights under Section 1542 of the California Civil Code, "which releases all claims and damages of every kind and nature, actual or potential, known and unknown, which exist or could arise out of Plaintiff's employment, through and including the date of his execution of this Settlement Agreement." (SA ¶ 3.7.) Although the release is relatively broad, because it is limited to causes of action based on facts alleged in the SAC, the Court finds the waiver does not render the Settlement unfair, unreasonable, or inadequate, particularly because it might have been infeasible to settle this litigation without such a waiver and because Class Members who do not wish to have their claims released may opt out of the settlement. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:0-ML-02151 JVS (FMOx), 2013 U.S. Dist. LEXIS 123298, at *279-*280 (C.D. Cal. July 24, 2013); *see also In re OCA, Inc.*, No. 05-2165 Section R(3), 2008 U.S. Dist. LEXIS 84869, at *43-*44

(E.D. La. Oct. 17, 2008) ("Courts have consistently approved releases in class action settlements that discharge unknown claims relating to the factual issues in the complaint.").

f. Dispute Provisions

The Settlement Agreement provides that Class Members may dispute their weeks worked if they believe they worked more weeks in the Class Period than Defendant's records show by submitting information to the Settlement Administrator no later than the Response Deadline. (SA ¶ 3.8.8.) In order to file their dispute, the Class member must send a signed letter to the Settlement Administrator within the Response Deadline that contains identifying information along with the number of pay checks claimed and any supporting documentation for this claim. (SA ¶ 3.8.8.) Should there still be a dispute, the Settlement Administrator will consult with the parties to resolve the dispute in good faith and will make a final decision based on the information presented by the Class Member and Defendant. (SA ¶ 3.8.8.) The Court finds that these provisions are sufficient to permit a Class Member to dispute factual matters affecting eligibility for and amount of any Individual Settlement Payments.

2. Review of Applicable *Hanlon* Factors[1]

a. Strength of Plaintiff's Case

Although Plaintiffs have provided little evidence or argument regarding the perceived strength of their case, given the stage of the litigation and the myriad undecided questions of fact and law, the Court finds that this factor weighs in favor of preliminary approval. *See Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, *5 (C.D. Cal. July 21, 2008) (finding this factor weighed in favor of final approval where motions for summary judgment were pending, "indicat[ing] that the strength of plaintiffs' case has not yet been tested and that it favors a finding that the settlement is fair as a result").

b. Risk, Expense, Complexity, and Likely Duration of Further Litigation

The Court also finds that continuing to litigate this putative class action dispute will present substantial obstacles to Plaintiffs, likely requiring significant investment of both time and money, especially considering no summary judgment motions have yet been filed. "Because this litigation has terminated before the commencement of trial preparation, factor (2) also militates in favor of the settlement." *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2007 WL 951821, *3 (N.D. Cal.

[1] Because this Order concerns only preliminary settlement, a number of factors, including the class members' reaction to the proposed settlement and the presence of a governmental participant, are not applicable.

Mar. 28, 2007); *see also In re Portal Software, Inc. Securities Litig.*, No. C-03-5138 VRW, 2007 WL 4171210, *3 (N.D. Cal. Nov. 26, 2007) (recognizing that the "inherent risks of proceeding to summary judgment, trial and appeal also support the settlement").

c. The Risk of Maintaining Class Action Status Throughout the Trial

Whether or not the action would have remained a class action neither weighs in favor of or against a finding that the settlement is fair. Saks has not challenged conditional certification for settlement purposes, but would likely vigorously challenge certification should the litigation be forced to proceed on the merits.

d. The Amount Offered in Settlement

This factor is discussed in detail in Section II(C)(1)(a), *supra*. Further clarification of the damages calculation theory is necessary to determine whether the amount offered is fair and reasonable.

e. The Extent of Discovery Completed and Stage of Proceedings

"'The extent of discovery may be relevant in determining the adequacy of the parties' knowledge of the case.'" *DIRECTV*, 221 F.R.D. at 527 (quoting *Manual for Complex Litigation, Third*, § 30.42 (1995)). "'A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.'" *Id.* (quoting 5 W. Moore, *Moore's Federal Practice*, § 23.85[2][e] (Matthew Bender 3d ed.)). In this case, the parties exchanged Rule 26(a) initial disclosures, Defendant noticed and took Plaintiff's deposition, and Plaintiff noticed the deposition of Defendant's Rule 30(b)(6) designee for November 14, 2017. (*See* Ackermann Decl. ¶ 10.) On August 14, 2017, Plaintiff provided written discovery, included requests for admission, interrogatories, and requests for document production, which Defendant responded to and provided a set of documents. (Ackermann Decl. ¶ 10.) Defendant provided additional documents, including Plaintiff's personnel file, paystubs, time records, commissions summary, and earnings summary, as well as Defendant's employee handbook and documents reflecting its commission plan and rest break policy. (Ackermann Decl. ¶ 10.) Defendant provided additional data when the parties agreed to participate in private mediation. (Ackermann Decl. ¶ 10.) The parties did not reach a resolution during the full-day mediation, but the parties exchanged further information during the following weeks and negotiated a prospective settlement. (Ackermann Decl. ¶ 11.) Thus, the Court concludes that this factor weighs in favor of preliminary settlement approval.

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f. The Experience and Views of Counsel

Both Plaintiffs and Saks appear to be represented by experienced counsel, who have litigated numerous class action disputes. (*See* Ackermann Decl. ¶¶ 12-24; Declaration of Jonathan Melmed ISO Mot. ("Hanson Decl.") ¶ 6; Declaration of David S. Winston ISO Mot. ("Winston Decl.) ¶¶ 3-6.) Accordingly, this factor weighs in favor of preliminary settlement approval.

g. There Is No Indicia of Collusion

A settlement negotiated by experienced attorneys and reached with the assistance of an experienced mediator through a negotiating process supports a determination that the process was not collusive. *See, e.g., Carter v. Anderson Merchandisers, LP*, Nos. EDCV 08-0025-VAP (OPx), EDCV 09-0216-VAP (OPx), 2010 WL 1946784, at *7 (C.D. Cal. May 11, 2010) (settlement is likely the product of arms-length negotiation if it is reached through "formal mediation sessions presided over by an experienced mediator"). This appears to be the case here, as the parties participated in mediation and spent the following negotiating a possible settlement. (Ackermann Decl. ¶ 11.) Moreover, although the Court has noted some potentially problematic provisions within the Settlement Agreement, none appear to be the product of collusion between Plaintiffs and their counsel, on the one hand, and Saks on the other.

III. RULING

For the foregoing reasons, the Court **GRANTS** Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Motion for Certification of Settlement Class. A Final Approval Hearing will be held on **Monday, July 16, 2018**, at 10:00 a.m., during which the Court will consider, *inter alia*, (1) whether the Settlement should be finally approved as fair, reasonable, and adequate; (2) Plaintiffs' Counsel's application for attorneys' fees and expenses; (c) Plaintiffs' request for Class Representative Payments; and (d) the Settlement Administrator's request for administrative fees.

IT IS SO ORDERED.