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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO

14 Gene Jovich, Hung Tran, and Leonard Greilich
15 individually and on behalf of all others similarly
16 situated,

17 Plaintiffs,

18 vs.

19 Southern Wine & Spirits of America, Inc., a
Florida Corporation,

20 Defendant.

Case No.: CV 10-04405 JSW

**NOTICE OF MOTION AND MOTION FOR
APPROVAL OF CLASS COUNSEL'S FEES
AND COSTS; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION; [PROPOSED] ORDER**

Date: December 7, 2012
Time: 9:00 a.m.
Crtm: 11
Judge: Hon. Jeffrey S. White

[Filed Concurrently With the Declarations of
Morris J. Baller and Julian Hammond]

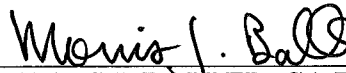
1 PLEASE TAKE NOTICE that on December 7, 2012 at 9:00 a.m., or as soon thereafter as
2 counsel may be heard, Plaintiffs Gene Jovich, Hung Tran, and Leonard Greilich (“collectively
3 “Plaintiffs”) will move this Court, before the Honorable Jeffrey S. White, in Courtroom 11 of the
4 United States Courthouse for the Northern District of California, 450 Golden Gate Avenue, San
5 Francisco, CA 94102, pursuant to Fed. R. Civ. P. 23(e) and Local Rule 54-5, for an order awarding
6 Class Counsel their attorneys’ fees and litigation-related expenses incurred in the litigation of all issues
7 pertaining to the above-captioned litigation. Plaintiffs seek attorneys’ fees in the amount of
8 \$1,050,000.00, and costs in the amount of \$55,889, which requests are not opposed by Defendant
9 Southern Wine & Spirits of America, Inc. (“Defendant” or “SWS”), as set forth at paragraph 59.1.1 of
10 the Stipulation of Settlement between Plaintiffs and Defendant (the “Settlement Agreement”), which
11 was filed as an exhibit to Plaintiffs’ Motion for Preliminary on July 6, 2012.¹

12 The motion is based on this Notice, the Memorandum of Points and Authorities filed herewith,
13 the Settlement Agreement and all exhibits thereto, the Declarations of Morris J. Baller and Julian
14 Hammond, the documents and records on file in this matter, and such additional arguments,
15 authorities, and evidence and other matters as may be presented by the parties. A Proposed Order
16 Granting Motion for Attorney’s Fees and Costs is submitted herewith.

17 Dated: September 26, 2012

Respectfully submitted,

18 GOLDSTEIN, DEMCHAK, BALLER, BORGAN &
19 DARDARIAN



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27 ¹ This Motion is filed substantially before the end of the period for class members to object to or opt
28 out of the settlement, pursuant to *In re Mercury Interactive Corp. Sec. Lit.*, 618 F.3d 988, 993-994 (9th
Cir. 2010), so that class members will have the opportunity and means to review the basis for Class
Counsel’s request for costs and fees before the end of the period for objecting to or opting out of the
settlement.

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ATTORNEYS FOR PLAINTIFFS AND THE
SETTLEMENT CLASS

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Plaintiffs hereby move the Court to approve the award of attorneys' fees in the amount of
4 \$1,050,000.00; and itemized litigation costs in the amount of \$55,889. The amounts of each of these
5 awards are provided for in paragraph 59.1.1 of the Settlement Agreement (attached to the
6 Memorandum of Points and Authorities in Support of Motion for Preliminary Approval of Class
7 Action Settlement ("Motion for Preliminary Approval"), and Defendant does not to oppose these
8 proposed payments. As set forth herein, the amounts sought all fall well within the range of
9 reasonableness under the facts and circumstances of this case where Plaintiffs obtained a \$3.50 million
10 settlement for the approximately 870 current and former Sales Representatives of Defendant, of which
11 approximately \$2,291,691 will actually be paid out to Class Members after the payment of all costs
12 and fees awarded as well as service awards to class members, administration fees, and establishment of
13 a \$50,000 Reserve Fund,² and where Class Counsel's actual lodestar fees incurred will, by the time of
14 final approval, very nearly equal the amount of the fees requested,³ and where the requested costs (and
15 \$2,000 in additional costs, for which recovery is not sought) were actually and reasonably incurred.⁴
16 Based thereon, Plaintiffs respectfully request that the Court approve these amounts in full.

17 II. CLASS COUNSEL ARE ENTITLED TO RECOVER THEIR
18 REASONABLE FEES AND COSTS INCURRED ON BEHALF OF THE CLASS

19 Class Counsels' request for attorneys' fees in the amount of \$1,050,000.00 – which constitutes
20 30% of the \$3,500,000.00 Settlement Fund – is well within the range of reasonableness under
21 applicable standards. This is especially true when it is considered that Class Counsels' fee application
22 only requests attorney's fees an enhancement of less than 5% of their actual combined total lodestar
23 expended on this case to date,⁵ which is significantly below the fee awards deemed reasonable in other

24
25 ² Declaration of Morris J. Baller ("Baller Dec."), filed with this Motion, at ¶ 5.a.

26 ³ Baller Dec. at ¶¶ 7, 9.

27 ⁴ *Id.* at ¶¶ 7, 8.

28 ⁵ *Id.* ¶ 9. And likely to be close to or even less than 100% of lodestar fees by the time the notice process, final approval, and supervision of payout to class members is completed.

1 similar precertification class action settlements where courts approved reasonable multipliers to the
2 combined total lodestar sought. Based thereon, Class Counsel respectfully requests that the Court
3 enter an order approving the fee amounts requested in full.

4 **A. Class Counsel Are Entitled To Recover Their Reasonable Fees And Costs Under**
5 **California Code of Civil Procedure §1021.5 and Labor Code §280 .**

6 Since Plaintiffs' claims are based on substantive California law, California law provides the
7 basis for their entitlement to an award of attorneys' fees. *See Sandoval v. Roadlink United States Pac.,*
8 *Inc.*, 2011 U.S. Dist. LEXIS 130378, * 29 (C.D. Cal. Oct. 9, 2011); *Mangold v. California Public*
9 *Utilities Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,
10 1047 (9th Cir. 2002) ("Because Washington law governed the claim, it also governs the award of
11 fees."). As set forth below, the applicable California statutes under which Class Counsel are entitled to
12 recover fees and costs are California Code Civil Procedure Section 1021.5 and Labor Code § 2802(c).

13 Plaintiffs are entitled to a recovery of fees for Class Counsel's work since they are prevailing
14 parties under Code of Civil Procedure § 1021.5. "The award of attorney fees is proper under Section
15 1021.5 if '(1) plaintiffs' action 'has resulted in the enforcement of an important right affecting the
16 public interest,'; (2) 'a significant benefit, whether pecuniary or non-pecuniary, has been conferred on
17 the general public or a large class of persons'; and (3) 'the necessity and financial burden of private
18 enforcement are such as to make the award appropriate.'" *See Press v. Lucky Stores*, 34 Cal. 3d 311,
19 317-18 (1983); and *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 703 (2006)
20 (holding that "[a]ttorney fees may be awarded under Code of Civil Procedure section 1021.5 for ...
21 class action suits benefiting a large number of people."). As set forth below, each of these elements
22 has been satisfied in the prosecution of this Action:

23 First, the instant lawsuit has resulted in the enforcement of important rights affecting the
24 overall public interest. Indeed, it is the codified "policy of this state to vigorously enforce minimum
25 labor standards in order to ensure employees are not required or permitted to work under substandard
26 unlawful conditions ..., and to protect employers who comply with the law from those who attempt to
27 gain a competitive advantage at the expense of their workers by failing to comply with minimum labor
28 standards." *See Cal. Lab. Code § 90.5(a)*. Specific to the rights at issue in this case, the California

1 Supreme Court has given a broadly worker-protective construction to the provisions of Lab. Code
2 § 2802, requiring that employers “indemnify” their employees for expenses incurred in the course of
3 work for the employer. *See, Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554, 567, 569-571
4 (2007).

5 Second, the instant action also has conferred a significant benefit on a sufficiently large class of
6 current and former Sales Representatives of SWS. The resulting Settlement successfully enforced the
7 above public policies by securing a monetary benefit which approximately 870 class members will
8 enjoy. *See* Baller Dec. at ¶ 4.⁶ Settlements extending benefits to far fewer individuals have been
9 deemed to establish this element. *See e.g. Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.
10 App. 4th 1, 16-17 (2007) (“Estrada's personal motivation does not diminish the fact that he pursued
11 this public interest class action not only for himself but on behalf of a class comprised of FedEx's past
12 and present drivers and ultimately obtained awards for 209 drivers. [] No more is required to satisfy the
13 ‘significant benefit,’ ‘public interest,’ and ‘large class of persons’ requirements of Code of Civil
14 Procedure section 1021.5.”).

15 Third, the necessity and financial burden of private enforcement render the award appropriate,
16 as the amount of Class Counsel’s lodestar (*see* below at pp. 7-8), clearly evidences that the litigation of
17 the matter “imposed financial burden on plaintiffs which was out of proportion to their individual stake
18 in the matter.” *See Baggett v. Gates*, 32 Cal. 3d 128, 142 (1982).

19 Apart from Plaintiffs’ claim for fees under C.C.P. § 1021.5 on a public-benefit theory, the
20 Labor Code itself specifies that employees who enforce their rights under Labor Code § 2802(a) shall
21 recover their costs and fees. *See*, Labor Code § 2802(c). Since Plaintiffs have clearly prevailed in
22 obtaining a significant settlement vindicating the rights of a large class of employees to reimbursement
23 of business expenses required by Labor Code § 2802, but not previously paid, they are entitled to an
24 award for their counsel of reasonable attorneys’ fees.

25 ///

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28 ⁶ Assuming 100% participation, the maximum settlement award per class member will likely exceed \$4, 000 while the average settlement amount will be \$2,367. Baller Dec. ¶ 5.d.

1 **The Amount of Fees Requested Is Reasonable.**

2 The amount of attorneys' fees sought by Class Counsel falls well within the zone of
3 reasonableness whichever method this Court applies to evaluate the attorneys' fees requested. "Under
4 California and Ninth Circuit precedent, a court has discretion to calculate and award attorneys fees
5 using either the lodestar method or the percentage-of-the-fund method" (*Martin v. AmeriPride Servs.*,
6 2011 U.S. Dist. LEXIS 61796, 22 (S.D. Cal. June 9, 2011)), although "[a]warding a percentage of the
7 common fund is particularly appropriate 'when each member of a certified class has an undisputed and
8 mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf.'" *See*
9 *Collins v. Cargill Meat Solutions Corp.*, 2011 U.S. Dist. LEXIS 69316 (E.D. Cal. June 28, 2011)
10 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980)).

11 1. **The Fee Amount Allocated By The Settlement Agreement Is Well Within the**
12 **Range of Reasonableness Under the "Percentage Of The Fund" Method**

13 The amount of attorneys' fees sought here – which is 30% of the total fund (Settlement
14 Agreement, at ¶¶ 59.1, 59.1.1) – is well within the range deemed reasonable under the "percentage of
15 the fund" method in similar wage and hour cases.

16 Under the "percentage of the fund" approach, "a lawyer who recovers a common fund for the
17 benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund
18 as a whole." *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) (quoting *Boeing Co.*, 444 U.S. at
19 478). "When assessing whether the percentage requested is reasonable, courts look to factors such as:
20 (a) the results achieved; (b) the risk of litigation; (c) the skill required; (d) the quality of work; (e) the
21 contingent nature of the fee and the financial burden; and (f) the awards made in similar cases."
22 *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010). In this case, the
23 applicable percentage must be applied to the entire Settlement Fund amount, because although former
24 employee class members must submit timely claims to participation in the monetary distribution of the
25 Fund (Settlement Agreement ¶ 61.10), any funds not claimed by such former employee class members
26 will be re-allocated and paid out to current employee class members and those former employee class
27 members who submit timely claims (*id.* ¶ 61.12). There will be no reversion of any of the Settlement
28 Fund to SWS in this case (*id.* ¶ 59.1.5).

1 Applying the above standards, Plaintiffs' request for an award of fees amounting to 30% of the
2 total settlement amount is reasonable. It is important to underscore that the claims at issue carried a
3 risk of loss at either the class certification stage or on the merits, especially considering two factors
4 particular to this case. First, this is, to the knowledge of Plaintiffs' and Class Counsel, the first case in
5 which a claim for unreimbursed business expenses under Labor Code § 2802 was brought against an
6 employer that was already paying a substantial business expense allowance to class members.⁷
7 Second, this is the first case, to the knowledge of Plaintiffs' and Class Counsel, brought on similar
8 claims against a unionized employer, on behalf of employees within the scope of a collective
9 bargaining agreement that addresses the expense reimbursement question and contains a mandatory
10 grievance/arbitration clause, raising the possibility of federal LMRA preemption or CBA arbitration
11 defenses to the claim.⁸ Baller Dec. at ¶ 11. Notwithstanding these risks, Class Counsel (who
12 undertook representation on a contingency basis and advanced all litigation costs) were able to resolve
13 the Class' claims with a reasonable settlement at an early stage in the litigation (July 6 Baller Dec. at
14 ¶¶ 12, 17). *See e.g. Wade v. Minatta Transp. Co.*, 2012 U.S. Dist. LEXIS 12056, *3-4 (N.D. Cal. Feb.
15 1, 2012) ("there are a number of circumstances that justify increasing the fee award beyond the 25%
16 benchmark" including the fact the settlement amount is "not merely the product of a large class, but
17 reflects the work performed by Plaintiffs' counsel.").

18 Moreover, the percentage sought by Class Counsel (*i.e.* 30%) is consistent with judicially
19 approved awards in other similar wage and hour cases. *See e.g. Downs v. US Foodservice, Inc.*, Case
20 No. 3:10-cv-02163 EMC (N.D. Cal., September 4, 2012) (Judge Chen of this Court approved payment
21 of 30% of total settlement amount of \$3.0 million in wage and hour class action involving meal and
22 rest break claims); *Bond v. Ferguson Enterprises, Inc.*, 2011 WL 2648879, *12 (E.D. Cal., June 30,
23 2011) (awarding attorney's fees amounting to 30% of a \$2.25 million settlement in a trucker meal
24

25 ⁷ SWS was paying \$600 per month to Class Members by the time the case settled, and by Class
26 Counsel's calculations had paid out \$14.5 million in expense allowances to Class Members during the
27 Class Period. *See* Baller Decl. ¶ 5.f.

28 ⁸ Indeed, SWS asserted both of those affirmative defenses in its Answer, reserving them for later
motions. Had SWS filed and won a motion based on LMRA preemption, it would have been fatal to
Plaintiffs' state law-based claims. *See*, Baller Decl. ¶ 11.

1 break class action, and concluding “Plaintiff’s request for a multiplier of 1.75 of its lodestar is
2 reasonable.”); *Knight v. Red Door Salons, Inc.*, 2009 U.S. Dist. LEXIS 11149 (N.D. Cal. Feb. 2, 2009)
3 (awarding 30% of a \$500,000 common fund in attorneys’ fees in a wage and hour class action); *Martin*
4 *v. FedEx Ground Package System, Inc.*, 2008 WL 5478576, *8 (N.D. Cal.) (trucker meal break class
5 action where the court approved attorneys’ fees of 1/3 of common fund stating, *inter alia*, “[b]ecause
6 the lodestar cross check revealed a relatively low multiplier of 1.48, the court is satisfied that counsel’s
7 requested fee award is not unreasonable”).

8 In fact, while in the Ninth Circuit “25% [is] considered the benchmark[,]” it is recognized that
9 “in ‘most common fund cases, the award exceeds that benchmark.’” *See Vasquez*, 266 F.R.D. at 491.
10 Based on an examination of cases by the court in *Martin v. Ameripride Servs.*, 2011 U.S. Dist. LEXIS
11 61796 (S.D. Cal. June 9, 2011), awards ranging between 30% and 50% of the fund are generally
12 approved as reasonable in wage and hour class actions where the settlements are less than \$10 million,
13 such as the instant case:

14 The Ninth Circuit has held that 25% of the gross settlement amount is the benchmark
15 for attorneys fees awarded under the percentage method, with 20 to 30% as the usual
16 range in common fund cases where the recovery is between \$50 and 200 million.
17 *Vizcaino*, 290 F.3d at 1047. Other case law surveys suggest that 50% is the upper
18 limit, **with 30-50% commonly being awarded in cases in which the common fund**
19 **is relatively small.** *See Rubenstein, Conte and Newberg, Newberg on Class Actions*
20 **at § 14:6. Indeed, California cases in which the common fund is small tend to**
21 **award attorneys fees above the 25% benchmark.** *See Craft v. County of San*
22 *Bernardino*, 624 F. Supp. 2d 1113, 1127 (C.D. Cal. 2008) (holding attorneys fees for
23 large fund cases are typically under 25% and cases below \$10 million are often more
24 than the 25% benchmark). More particularly, courts may award attorneys fees in the
25 30-40% range in wage and hour class actions that result in recovery of a common fund
26 under \$10 million. *See Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92
27 (E.D. Cal. 2010) (citing to five recent wage and hour class actions where federal
28 district courts approved attorney fee awards ranging from 30 to 33%); *Singer v.*
Becton Dickinson and Co., 2010 U.S. Dist. LEXIS 53416, 2010 WL 2196104, * 8
(S.D. Cal. June 1, 2010) (approving attorney fee award of 33.33% of the common
fund and holding that award was similar to awards in three other wage and hour class
action cases where fees ranged from 30.3% to 40%); *Romero v. Producers Dairy*
Foods, Inc., 2007 U.S. Dist. LEXIS 86270, 2007 WL 3492841 (E.D. Cal. Nov. 14,
2007).

25 *See Martin*, 2011 U.S. Dist. LEXIS 61796, at 22-23 (bolding added).

26 Thus, applying the above standards to the facts, Plaintiffs’ request for 30% of the total
27 settlement amount as fees for Class Counsel is well within the zone of reasonable attorneys’ fees
28 awards for the quality of services Class Counsel rendered and the results they obtained for the Class.

1 2. **The Fee Amount Allocated By The Settlement Agreement Is Also Well Within the**
2 **Zone of Reasonableness Under The Lodestar Method**

3 The amount of attorneys' fees sought here is also reasonable under the "lodestar" method,
4 which "may be used as a crosscheck to assess the reasonableness of the percentage award." *See*
5 *Collins*, 2011 U.S. Dist. LEXIS 69316, *28. As set forth below, reasonableness may be gleaned from
6 the fact that Class Counsels' fee application requests an award (\$1,050,000) that is less than 5% greater
7 than Class Counsel's combined total lodestar as of a date more than two months before the final
8 approval hearing, which is significantly below the 1.2-2.0 multipliers deemed reasonable in a number
9 of similar precertification settlements cited or quoted above in the text.⁹

10 In determining the reasonableness of the fee under the lodestar method, the Court must begin
11 with the "lodestar" figure, which "is calculated by multiplying the number of hours the prevailing party
12 reasonably expended on the litigation by a reasonable hourly rate...." *See Hensley v. Eckerhart*, 461
13 U.S. 424, 433 (1983); *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 322 (1983). "That figure may then
14 be increased or reduced by the application of a 'multiplier' after the trial court has considered other
15 factors concerning the lawsuit." *Id.*

16 Applying the first step in this analysis, Class Counsels' collective lodestar to date totals
17 \$1,001,652, which is shown in Class Counsels' supporting declarations (Baller Dec. ¶¶ 7 and 9, Exh.
18 2; Declaration of Julian Hammond ("Hammond Dec."), ¶ 3 and Exh. 1.

19 The reasonableness of Class Counsels' lodestar is bolstered by the fact that Class Counsel
20 (1) maintained contemporaneous, detailed time records (July 6 Baller Dec. ¶ 18; July 6 Hammond Dec.
21 ¶ 7), and (2) used hourly billing rates commensurate with rates of practitioners with similar experience

22
23 ⁹ As held by the Ninth Circuit, a multiplier serves very important public policy objectives, and is
24 intended to "reward [contingency] attorneys for taking the risk of non-payment by paying them a
25 premium over their normal hourly rates for winning contingency cases[.]" and "provides the 'necessary
26 incentive' for attorneys to bring actions to protect individual rights and to enforce public policies."
27 *Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 1008 (9th Cir. 2002). As
28 further explained by the California Supreme Court, "[t]he economic rationale for fee enhancement in
 contingency cases ... [is that] '[a] lawyer who both bears the risk of not being paid and provides legal
 services is not receiving the fair market value of his work if he is paid only for the second of these
 functions.'" *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-1133 (2001). Here, however, Class Counsel is
 not seeking a substantial multiplier, but in fact would be compensated at approximately their regular
 hourly billing rates.

1 within the California legal market, as well as rates approved as reasonable in similar cases. *See*; July 6
2 Baller Dec. ¶ 18; July 6 Hammond Dec. ¶ 3.

3 Under the second step, “[t]he ‘lodestar multiplier’ is calculated by dividing the percentage fee
4 award by the lodestar calculation.” *See Collins*, 2011 U.S. Dist. LEXIS 69316, at 32). In this case,
5 however, Plaintiffs do not seek a multiplier since their total combined lodestar approximately equals,
6 or barely exceeds (and may ultimately be more than) the amount of the fees requested. Thus, although
7 a reasonable multiplier would be deemed permissible under California law,¹⁰ such a multiplier is not
8 sought here even though a positive multiplier would have been warranted based on the facts that:
9 (1) Class Counsel loaned their services out with no guarantee of being paid (July 6 Baller Dec. ¶ 14);
10 (2) the unusual factual posture of the case (Class Members in collective bargaining unit entitled to
11 substantial monthly expense allowance payments) carried an increased risk of loss, and (3) Class
12 Counsel was able to resolve this case at an early stage. *See* Baller Dec., ¶ 11.

13 The foregoing strongly demonstrates the reasonableness of the amount agreed upon in the
14 Settlement. The Court should approve an award of attorneys’ fees in the amount of \$1,050,000.

15 3. **The Class Does Not Oppose The Amount of Fees Sought**

16 Another significant factor bearing on the reasonableness of the fees sought is that, subsequent
17 to receiving Notice of the fee amounts sought, no class member has to this date filed an objection.¹¹
18 “The absence of objections or disapproval by class members to Class Counsel’s fee request further
19 supports finding the fee request reasonable.” *See In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS
20 13555, *71 (C.D. Cal. June 10, 2005).

21 _____
22 ¹⁰ Under California law, “[m]ultipliers can range from 2 to 4 or even higher.” *See Wershba v. Apple*
23 *Computers, Inc.*, 91 Cal. App. 4th at 254-255. Multipliers in excess of two have been deemed
24 appropriate even in cases where class counsel’s efforts have been highly criticized. *See e.g. Chavez v.*
25 *Netflix, Inc.*, 162 Cal. App. 4th 43 (2008) (upholding 2.5 multiplier where initial settlement terms were
26 required to be revised based on objection of FTC); *Kakani v. Oracle Corp.*, 2007 U.S. Dist. LEXIS
27 95496, at 4, 15 (N.D. Cal. 2007) (holding that a multiplier of 2 was appropriate for pre-certification
28 settlement despite an express finding that the initial settlement proposal was “collusive.”).

¹¹ Because this Motion is filed before the end of the period specified in the Notice for filing of
objections, it is still possible that one or more Class Members could object to the settlement. However,
the absence of even a single objection during the first five weeks of the period after Notice was sent to
Class Members, and the extremely low rate of requests for exclusions from the settlement (only one
out of the 847 Class Members to whom Notice was delivered, *see* Baller Dec., Exh. 1) indicates that
the Class accepts and supports the settlement.

1 4. **Plaintiffs' Fee Request Passes Muster Under *Bluetooth* and *Kellogg*.**

2 The present Settlement also comports with the heightened standards of scrutiny for awarding
3 attorney's fees in class actions that the Ninth Circuit articulated in *In re Bluetooth Headset Products*
4 *Liability Litigation*, 654 F. 3d 935 (9th Cir. 2011) ("*Bluetooth*").

5 In *Bluetooth*, the Ninth Circuit vacated and remanded an award of fees by a district court in
6 approving a class action settlement, finding that the district court did not fully assess the
7 reasonableness of the fee request and settlement as a whole. *Id.* at 943, 947. The court reasoned that
8 the disparity between the value of the class recovery (a \$100,000 *cy pres* award) and class counsel's
9 compensation (\$800,000) gave rise to an inference of unfairness. *Id.* at 938. However, *Bluetooth* is
10 factually inapposite to the present case. In *Bluetooth*, there was no monetary benefit to the class, *id.*
11 whereas here the settlement has resulted in a significant net payment to the class of \$2,291,691 and
12 the fee award sought of \$1,050,000 is not disproportionate to the class recovery. Further, in marked
13 contrast to *Bluetooth*, here the absence of a clear sailing fee provision lends legitimacy to the
14 Settlement. Moreover, in the present case no funds will revert to Defendant. In *Bluetooth* the court
15 employed the lodestar method without calculating a reasonable lodestar amount and failing to
16 perform a cross-check against the percentage of the common fund. *Id.* at 943. Here, Plaintiffs'
17 counsel seek a reasonable percentage of 30% of the common fund and the requested fee award is
18 also reasonable under a lodestar check, since the total attorney's fees sought are about equal to, and
19 may become less than, Class Counsel's combined total lodestar. Accordingly, *Bluetooth* poses no
20 bar to Plaintiffs' requested fees.

21 **C. The Amount of Costs Sought Is Reasonable.**

22 Plaintiffs also request reimbursement from the common fund for out-of-pocket expenses
23 incurred by Class Counsel during this litigation, in the amount of \$55,889 – an amount slightly *less*
24 *than* their actual expenditures. Class Counsel are entitled to recover “those out-of-pocket expenses
25 that would normally be charged to a fee paying client.” *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.
26 1994). It is appropriate to reimburse Class Counsel for such expenses from the common fund. *See e.g.*
27 *Leonard, et al. v. Baumer (In Re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec.*
28 *Litig.)*, Case No. CV87-3962RN(GX), 1989 WL 73211 at *6 (C.D. Cal. Mar. 9, 1989).

1 The Settlement Agreement provides for the recovery of costs not to exceed \$55,889.00. *See*
2 Settlement Agreement at ¶ 59.1.1. In their Declarations filed in support of Plaintiffs' Motion for
3 Preliminary Approval, Class Counsel detailed costs and expenses totaling to the amount sought (July 6
4 Baller Dec. ¶ 25 and Exh. 3, July 6 Hammond Dec. ¶ 9 and Exh. 3), and have now incurred more costs
5 than the amount sought to be recovered in Plaintiffs' Motion. Baller Dec. ¶ 8.

6 The great majority of the costs for Plaintiffs in this case were incurred for professional fees
7 paid by the parties in equal amounts to two professionals whose assistance was instrumental in the
8 settlement of the action: a survey expert from the forensic consulting firm of HemmingMorse, who
9 conducted two separate surveys in 2011 and 2012 to provide the parties with a factual basis for
10 negotiations based on reports of mileage driven by Class Members, and Judge Edward Panelli (Ret.) of
11 JAMS, who conducted full-day mediation sessions in 2011 and 2012. *See*, Settlement Agreement,
12 Exh. 1 to Plaintiffs' Motion for Preliminary Approval, ¶¶ 9-11. These, as well as the other categories
13 of costs incurred by Plaintiffs' Counsel (filing fees, court report transcript fees, travel to depositions
14 and mediations, client travel and meeting costs, copying, delivery, telephone, and on-line research fees,
15 among others), are the common types of costs regularly billed to paying clients and recoverable in
16 cases where statutory cost-shifting provisions are available, as they are here. Labor Code § 2802(c).

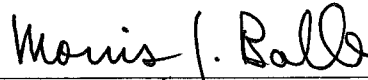
17 III. CONCLUSION

18 Based on the foregoing, Plaintiffs respectfully request that, at the time the Court rules on
19 Plaintiffs' motion for final approval of the settlement, this Court should enter an Order approving the
20 award of attorneys' fees in the amount of \$1,050,000 and costs in the amount of \$55,889 pursuant to
21 the terms set forth in the Settlement Agreement.

1 Dated: September 26, 2012

Respectfully submitted,

2 GOLDSTEIN, DEMCHAK, BALLER, BORGAN &
3 DARDARIAN

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