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ALAMEDA COUNTY

MAY 10 2011

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA, NORTHERN DISTRICT

JESSICA NEU-HELMS, VALENE HAUPT, KATHERINE WOOLSTENCROFT and ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

UHS OF DELAWARE, INC. WHICH WILL TRANSACT BUSINESS IN CALIF. AS UNIVERSAL HEALTH SERVICES OF DELAWARE, INC.; ELMIRA NPS, LLC and DOES 1-100,

Defendants.

Case No. RG 08425516

ASSIGNED FOR ALL PURPOSES TO:
JUDGE STEVEN A. BRICK
DEPARTMENT 17

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING MOTION FOR:

(1) PRELIMINARY APPROVAL OF SETTLEMENT;

(2) APPROVING THE NOTICE OF PROPOSED CLASS SETTLEMENT, APPOINTING SETTLEMENT ADMINISTRATOR AND SETTING FINAL APPROVAL HEARING DATE

(SUPPORTING DECLARATIONS AND [PROPOSED] ORDER SUBMITTED CONCURRENTLY HEREWITH)

Date: May 17, 2011
Time: 3:00 p.m.
Reservation No.: 1175251

Action Commenced: December 15, 2008
No trial Date Set

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I. INTRODUCTION

By and through the instant application, Plaintiffs JESSICA NEU-HELMS, VALENE HAUPT and KATHERINE WOOLSTENCROFT hereby request that this Court enter an Order:

1. Granting preliminary approval of the Settlement Agreement;[1]
2. Approving the Settlement Administrator and maximum settlement costs; and
3. Approving the Notice of Pendency of Class Action, Proposed Settlement and Hearing Date ("Class Notice") and setting a hearing date for Plaintiffs' Motion for Final Approval.[2]

This motion is made based on this Memorandum, the Declarations submitted herewith and exhibits thereto, the complete file and records of this action, and any further briefing or arguments of counsel.

On or around March 30, 2011, the Class Representatives and Defendants reached an agreement in principle to resolve this litigation after an all day formal mediation session. All parties and their counsel had executed the Settlement Agreement by May 3, 2011.

The *non-reversionary* Settlement Agreement encompasses all claims Plaintiffs asserted in the Operative Complaint on behalf of themselves and a class of approximately 596 non-exempt employees who worked in the job classifications of Educational Assistant ("EA"), One-to-One Aide ("1:1") and/or Van Driver ("Driver") at any of twenty-one non-public schools ("NPSs" or "UHS Schools") in California affiliated with defendant UHS of Delaware, Inc. ("UHSD"), including defendant ELMIRA NPS, LLC ("Elmira"),[3] at any time from December 15, 2004 through the date on which this Court grants preliminary approval (the "Class Period").[4]

Plaintiffs' operative complaint alleges that Defendants unlawfully deprived the class members ("CMs") of compensation for missed off-duty meal periods and rest breaks and addresses common questions pertaining to the validity of "on-duty meal period agreements" ("ODMPAs") allegedly signed by a majority of the CMs. Plaintiffs seek various forms of relief for themselves and for all other

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[1] A copy of the fully executed settlement agreement, entitled "JOINT STIPULATION OF CLASS ACTION SETTLEMENT" ("Settlement Agreement") is attached as Exhibit 1 to the Declaration of Ryan L. Hicks ("Hicks Decl.") filed herewith.

[2] The proposed Class Notice Package is attached to the Settlement Agreement as Exhibit A.

[3] All of the UHS Schools are identified in the Settlement Agreement at §7.

[4] Settlement Agreement, at §8.

similarly situated EAs, 1:1s and Drivers who worked at UHS Schools in California during the Class Period.

Plaintiffs have agreed to settle their and the CMs' wage and hour claims in exchange for Defendants' agreement to pay the class $3,500,000, including the costs of administering the Settlement Agreement, any enhancement awards to the respective Plaintiffs, and reasonable attorneys' fees and costs. The Settlement Agreement satisfies all of the criteria for preliminary settlement approval under California Law and falls well within the range of what constitutes a reasonable compromise for claims of this nature and size. Furthermore, Plaintiffs have addressed all of the concerns specifically identified in the Court's "Issues to Be Addressed in Application for Preliminary Approval of Class Settlements" (*see, e.g.*, the Court's December 17, 2010 CMC Order).

II. PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS

On December 14, 2008, Plaintiffs filed their initial Complaint against Defendants in the Alameda County Superior Court on behalf of themselves and all similarly situated non-exempt EAs, 1:1s and/or Drivers who worked at any NPSs owned and/or operated by Defendant UHSD (including defendant Elmira) since December 14, 2004. On January 29, 2009, Plaintiffs filed their First Amended Complaint ("FAC"), the Operative Complaint in the instant action. In the FAC, Plaintiffs assert causes of action for (1) failure to provide off-duty meal periods in violation of Labor Code ("LC") §§226.7 and 512 and the applicable Wage Order (8 C.C.R. §11050), (2) failure to provide rest periods in violation of LC §§226.7 and 512 and the applicable Wage Order (8 C.C.R. §11050), (3) failure to provide accurate wage statements in violation of LC §§226, 1174, & 1174.5, (4) waiting time penalties under LC §203, (5) Unfair Business Practices in violation of Bus. & Prof. Code §17200, *et seq.*, (6) penalties pursuant to the Private Attorneys General Act, LC §2698 *et seq.*, and associated penalties, interest, injunctive and declaratory relief and attorneys' fees and costs.

On March 9, 2010, Defendants filed their Answer to the FAC. Thereafter, the parties engaged in thorough pre-certification discovery including extensive written discovery and depositions focused on both certification issues and the merits. Plaintiffs propounded four sets each of Special Interrogatories and Requests for Production of Documents, and deposed the UHS Schools' Regional Vice President, the schools' current and former Human Resources executives, the schools' Regional

Controller, and the person UHSD designated as "most qualified" to testify regarding the corporate interrelationships among it and the UHS Schools. Hicks Decl. at ¶5. Defendants produced nearly 1,700 pages of responsive documents in response to Plaintiffs' formal discovery requests. *Id.*

Defendants propounded over two hundred special interrogatories to Plaintiffs, and included a number of requests for production of documents in their Notices of Depositions. *Id.* at ¶6. Defendants deposed each plaintiff for a full day, and deposed Ms. Neu-Helms for a second day. *Id.* Plaintiffs produced nearly four hundred pages of responsive documents from their own files. *Id.*

Pursuant to the framework contemplated in *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal. App. 4th 554, Defendants produced contact information for all then-putative CMs who did not object to such production. Hicks Decl.at ¶7. Thereafter, Plaintiffs' counsel sent the then-putative CMs a blank declaration that requested testimony under oath regarding the individual CM's experiences regarding meal and rest periods. At least 166 CMs returned declarations, all of which Plaintiffs submitted as evidence, with an accompanying summary, with their Motion for Class Certification. *Id.* at ¶7; *See* Exhibit 9 to the Declaration of Ryan L. Hicks Supporting Motion for Class Certification, Filed August 13, 2010.[5] After an ensuing dispute regarding the declarations, the Court by its June 28, 2010 Order allowed Defendants to depose a sample of up to 15 of the declarants. Ultimately, Defendants deposed seven then-putative CMs. Hicks Decl. at ¶7. The parties had many discovery disputes regarding, *inter alia*, CM contact information, UHSD's corporate inter-relationships, discovery related to any school other than Elmira and pre-certification communications with then-putative CMs. *Id. at* ¶¶8-9.

On August 13, 2010 Plaintiffs filed their Motion for Class Certification, which the Court granted in part on October 27, 2010, naming the Law Offices of Michael Sorgen and Hoyer & Associates counsel for the class ("Class Counsel"). *Id.* at ¶10. Thereafter, the parties agreed to engage in a mediation session and the Court referred the case to mediation on December 17, 2010. In preparation for the mediation session, Plaintiffs informally requested, and Defendants produced:

- All ODMPAs attributed to CMs;

[5] All evidence which is already part of the record for this case (and available on the Court's website) will be cited herein and not attached as exhibits in an effort to prevent re-submission of over 1,000 pages of evidence.

- All rest break logs completed at any of the UHS Schools during the Class Period
- Payroll information which identified for each CM: dates of employment, job classifications over time, pay rates over time, facilities worked at over time and employee ID numbers; and
- All available school year calendars for the UHS Schools.

Id. at ¶11. Using this data, Plaintiffs retained an expert, Dr. Richard Drogin, to analyze the payroll data and calculate the maximum damages available to Plaintiffs were they to prevail on all of their claims at trial. *Id.* at ¶12; Dr. Drogin's Damages Assumptions and Analyses are attached as Ex. 3 to to the Hicks Decl. Class Counsel has obtained sufficient discovery to evaluate the likelihood of success on the merits. *Id.* at ¶13. The extensive investigative and discovery also apprised Class Counsel of the potential litigation risks facing Plaintiffs and the CMs. *Id.*

On March 30, 2011, the parties attended[6] (or were available by phone in the case of Ms. Neu-Helms) an exhaustive twelve-hour mediation session with Lynn Frank, Esq. of Frank and Feder LLC, Mediators, a highly respected and neutral mediator with substantial wage and hour class action experience. *Id.* at ¶14. Plaintiff submitted a thorough Mediation Brief summarizing the evidence Class Counsel had marshaled and synthesized (much of which has already been submitted to the Court in support of Plaintiffs' Motion for Class Certification), the state of the applicable law and Dr. Drogin's comprehensive class-wide damages analysis. *Id.* At the conclusion of the mediation, the parties drafted a memorandum of understanding outlining the key settlement terms and thereby agreed in principle to resolve this litigation. *Id.* It took the parties another four weeks of bilateral negotiations before they ultimately agreed on and executed the Settlement Agreement. *Id.*

Plaintiffs and Class Counsel are of the opinion that the Settlement Agreement is well within the range of reasonableness and is in the best interests of the CMs in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendants and potential appellate issues.

[6] On the eve of the mediation session, the parties became aware of an alleged potential conflict of interest in another case involving Mr. Sorgen's firm and UHSD. However, as the parties were fully prepared to conduct the mediation and because Mr. Hoyer's firm was not a party to the alleged potential conflict, they proceeded with the mediation session which ultimately resulted in the proposed Settlement Agreement.

III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT BECAUSE IT MEETS ALL CRITERIA.

1. Settlement Class Size and Determination.

Through the payroll information Defendants provided prior to the mediation session, Defendants has identified 596 CMs who worked under job codes in their internal databases which corresponded to the EA, 1:1 and Driver job titles during the Class Period. *Id.* at ¶15.

2. This is a Fixed Common Fund Settlement Which Provides for a *Cy Pres* Distribution of Unclaimed Funds.

The non-reversionary Settlement Agreement provides that Defendants will pay a total of $3,500,000 to compensate the Plaintiffs and the CMs who do not opt-out[6] of the class, including enhancements to each of the Plaintiffs in an amount up to $10,000 for their service to the class[7], Plaintiffs' attorneys' fees and expenses[8], including the claims administrator's fees and expenses up to $25,000[9] and a $7,500 of PAGA penalties to the California labor & Workforce Development Agency.[10] Within 14 days of the Effective Date of the Court's Final Approval of the Settlement Agreement and these deductions, CMs who have not timely opted out of the Class will be sent a *pro rata* share of the remaining Settlement funds in an amount based on number of weeks he or she worked as an EA, 1:1 and/or Driver during the Class Period.[11] The sum of any settlement checks returned as undeliverable or un-cashed within 120 days of Final Approval will be donated to the UHS Foundation (*see* www.uhs.net/foundation), which provides charitable relief for UHS employees who are victims of natural disasters, or another *cy pres* beneficiary designated by the Court.[12]

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[6] Pursuant to the terms of the Settlement Agreement (§40(a)), if more than 10% of the CMs opt out of the settlement, Defendant may withdraw from and void the Settlement Agreement.

[7] Settlement Agreement at §34(a)(i).

[8] Class Counsel will seek reimbursement of actual litigation costs, and a fee award of up to one fourth of the settlement fund. Through April 27, 2011, Class Counsel and their staff have expended 1,457 hours on this litigation and in so doing accumulated a $550,919.50 lodestar . Declaration of Michael S. Sorgen Supporting Motion for Preliminary Approval ("Sorgen Decl.") at ¶¶4-16, Ex. 2. Class Counsel has also advanced $37,013.24 in litigation costs which will be included in their request for attorneys' fees and costs at the Final Approval Hearing. *Id.*, Ex. 3. Class Counsel will submit updates of its contemporaneous billing records and an updated itemized cost journal with their Motion for Final Approval so as to reflect all work performed and costs incurred in the prosecution of this Class Action.

[9] Settlement Agreement at §34(a).

[10] Settlement Agreement at §34(a)(ii).

[11] Settlement Agreement at §§34-35. The aggregate number of estimated workweeks worked by CMs will be divided by the number of estimated workweeks worked by each CM who does not opt out to determine each CM's *pro rata* share of the Net Settlement Fund.

[12] Settlement Agreement at §35(d).

3. The Value of the Proposed Settlement to the Class Is Within the Bounds of Reasonableness.

The well-recognized factors that a trial court should consider in evaluating the reasonableness of the value of a class action settlement agreement include, but are not limited to:

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

Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801. "[A] presumption of fairness [of a proposed class action settlement] exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal.App.4th 116, 128 (*quoting Dunk, supra*, at 1801); *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 799. However, the *Kullar* and *Clark* courts also noted that a court must be independently satisfied that the consideration being received (here $3,500,000) is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. *Clark, supra,* at 452, *quoting Kullar, supra,* at 129.

i. The Settlement was Reached Through Arm's-Length Negotiations

That the settlement was reached through arm's-length negotiations is exemplified by the over two years of contentious litigation and that the proposed settlement was achieved only after the matter was certified as a class action (despite Defendants' vigorous opposition) and a formal mediation with a prominent wage and hour mediator, Lynn Frank of Frank and Feder.

Defendants, as evidenced in their papers opposing certification and subsequent complex case management conference statements, believed and maintained that the Class should not have been certified, that they could successfully decertify the class and that they had a good chance of defeating the class claims on the merits.[13] Furthermore the parties legitimately disputed various

[13] *See, generally,* Defendants' Opposition to Motion for Class Certification and supporting evidence, filed August 25, 2010; all nine Joint Complex Case Management Conference Statements filed to date (the CMC Statements of Nov. 16 and Dec. 10. 2010 statements regarding Defendants' intent to file a motion for decertification).

defenses raised by Defendants, who were faced with the prospect of lengthy and expensive litigation against experienced counsel and against an already-certified class.

On the other hand, while Class Counsel remain ultimately confident in the merits of its legal arguments, Plaintiffs were put in the position of negotiating a settlement at this juncture based on unsettled law, possibly facing years of litigation to achieve a verdict which still may not have been collectible for many years due to potential appellate issues, and/or uncertainties regarding the precise amount of damages due to each CM. It was agreed upon by Class Counsel and the class representatives that a settlement at this juncture in the sum agreed upon was in the best interests of the class.[14]

ii. <u>Sufficient Discovery and Investigation Has Been Completed to Warrant Settlement.</u>

A court must "receive and consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed." *Kullar, supra,* at 133. Here, the parties have engaged in hotly-contested formal discovery for over two years and then, after certification, cooperative informal discovery in order to optimize the utility of the mediation. (*see* Section II, *supra*). The parties each submitted voluminous evidence at the Certification stage which was relevant and probative not only to certification but also to the merits of the underlying claims. Plaintiffs engaged an expert to assess the maximum value of the claims using data from Defendants' own payroll databases and related information, totaling approximately $6,930,000 before adding attorneys' fees and costs.[15]

A discussion of each of the claims follows to explain to the Court that "the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released" and "the risks and expenses of attempting to establish and collect on those claims by pursuing them in the future" which resulted in any discount in the settlement amount. *Clark, supra,* at 800, (*quoting Kullar, supra,* at 129, emphasis omitted).

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[14] Hicks Decl. at ¶13, 16; Sorgen Decl. at ¶3; Declaration of Richard A. Hoyer Supporting Application for Preliminary Approval ("Hoyer Decl.") at ¶5.

[15] Hicks Decl. at ¶12, Ex. 3.

a. Meal Period Claims

Plaintiffs submitted voluminous testimony supporting their Motion for Class Certification (which the Court granted) in the form of 169 declarations of CMs and testimony from CMs, UHSD executives, and a former principal of one of the schools regarding both the "nature of the work" performed by the CMs and the frequency with which CMs took meal periods, if any.[16] It is virtually undisputed that the CMs did not take "off-duty" meal periods. Plaintiffs have obtained all of the purported ODMPAs signed by CMs (and identified those who had not executed such an agreement), the dates of employment and pay rates for all CMs. *Id.* Based on this data, Plaintiffs estimated the maximum exposure to Defendants for the Meal Period violations, including pre-judgment interest as of the date of the mediation, at approximately $2.94 million.[17]

While Plaintiffs remain confident that they would prevail on the merits at trial, Defendants have maintained throughout this litigation that the ODMPAs are valid pursuant to 8 C.C.R. §11040(11), that the "nature of the work" exception to that section of the Wage Order is applicable to all CMs and if it is not, then that determination must be made on an individualized basis.[18]

This area of law is unsettled. There are few cases in which the validity of ODMPAs has been challenged or the "nature of the work" exception of 8 C.C.R. §11040(11) has been fully litigated. None of these cases are directly on point.[19] Thus, even if the matter were litigated at trial, as a matter of first impression, the case would likely be appealed all the way to the Supreme Court, precluding any recovery for the class for years. *Id.*

CMs also worked in multiple positions with different children in multiple schools, and signed ODMPAs which were not completely uniform.[20] Under such circumstances, there is a risk of multiple sub-classes or that further testimony of CMs could show that the nature of the work of the CMs was

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[16] *See* Hicks Decl. at ¶¶17-22 for a full description of the and analysis done regarding meal breaks and for citations to evidence already submitted to the Court.

[17] Ex. 3 to the Hicks Decl.

[18] Hicks Decl. at ¶19.

[19] Hicks Decl. at ¶20. *See, e.g. West v. Circle K Stores* (E.D. Cal. 2006) 2006 WL 1652598 (certification stage); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit* (S.D.Cal. 2009) 2009 WL 2448430 (Denial of summary judgment regarding ODMPAs in the transportation industry); *Faulkinbury v. Boyd* (2010) 185 Cal.App.4th 1363, rev. granted Oct. 13, 2010 no. S184995 (certification stage; security guards).

[20] Hicks Decl. at ¶21.

in fact not uniform across the class. In such case Defendants could successfully decertify the class, especially if the Supreme Court affirms *Faulkinbury, supra,* on the issues of predominance with respect to the validity of ODMPAs and meal period claims, generally.[21] Class Counsel were aware of these risks and took them into account when discounting the meal period claims. *Id.* at ¶22.

b. Rest Period Claims

At the certification stage Plaintiffs submitted substantial evidence regarding the merits of the rest break claims. *Id.* at ¶24. Plaintiffs later obtained all of the "rest break logs" executed by CMs. *Id.* at ¶11. Based on the evidence submitted to the Court and the other information gained after certification, Plaintiffs calculated the maximum value of the rest period claims, including pre-judgment interest as of the date of the mediation, to be $1.94 million.[22]

Plaintiffs planned on deposing a statistically significant sample of CMs regarding rest break practices and then presenting such testimony at trial to bolster the evidence already submitted to the Court regarding rest break practices and are confident that they would prevail at trial.[23] Nevertheless, Defendants have asserted throughout the litigation that they were only required to and did make rest breaks available to the CMs, and that the reasons that any CM missed any individual rest break raise individualized determinations.[24] Indeed, CMs consistently testified at deposition that they often falsely reported taking a break so that they or their supervisor would not get in trouble, but they could not consistently specify which rest break log entries were false, and which were not.[25]

As with the meal period claims, caselaw is unsettled. However, there are a number of cases which have been pending before the California Supreme Court for over two years and which should resolve the ambiguities in this area of law.[26] Plaintiffs also intended to present novel theories of

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[21] Hicks Decl. at ¶21.

[22] Hicks Decl. at ¶24., Ex. 3. The CM declaration testimony led to a weighted average of CMs taking approximately 17.4% of their rest breaks. $1.94 million represents the maximum rest break damages available minus that 17.4%

[23] Hicks Decl. at ¶25.

[24] Hicks Decl. at ¶26; *see also* Defendants' Opposition to Motion for Class Certification and supporting evidence, filed August 25, 2010; all nine Joint Complex Case Management Conference Statements filed to date (the CMC Statements of Nov. 16 and Dec. 10. 2010 statements regarding Defendants' intent to file a motion for decertification).

[25] Hicks Decl. at ¶26.

[26] *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, *rev. granted* Oct. 22, 2008 S166350 and at least six other related cases are currently pending before the Supreme Court. *Brinker* and its progeny held that employers need not ensure that meal

liability which would be matters of first impression and likely would be appealed all the way to the Supreme Court.[27] As with the meal period claims, further testimony and/or an unfavorable decision in *Brinker* could provide Defendants with evidence or authority that proof of damages for the rest break claims is necessarily an individualized inquiry and which might enable them to successfully decertify on that basis. Class Counsel were aware of these risks and took them into account when discounting the rest break claims. *Id.* at ¶28.

c. Waiting Time Penalties

The waiting time penalties claim is derivative of the meal and rest period claims with the added requirement that those claimed violations be "willful." To the extent that Plaintiffs prevail on either the meal or rest period claims, Defendants would be liable to the approximately 500 CMs who are no longer employed at the UHS Schools in an amount up to 30 days pay. *Id.* at¶29. Using the payroll data provided by defendants, the maximum value of the waiting time penalties claims was approximately $830,000 as of the date of the mediation.[28]

Plaintiffs believe that the requirements of the "nature of the work" exception were clear throughout the Class Period, and that employers are required to at minimum *authorize and permit* employees to take rest breaks under the relevant provisions of the applicable Wage Order.[29] However, Defendants are likely to argue that there was a "good faith dispute" as to whether wages were owed to the CMs under 8 C.C.R. §13520 and will attempt to prove that any failure to pay wages to the CMs was not "willful" under LC §203, and thus they would not be liable for waiting time penalties.[30] Class Counsel took these risks into account when assessing the waiting time penalties claims.[31]

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and rest periods are taken but only that they are available. Regardless of how this issue may play out, it was clear to the parties that the matter would require a significant investment in terms of both time and costs to prepare and try the case.

[27] Hicks Decl. at ¶27.

[28] Ex. 3 to Hicks Decl.

[29] Hicks Decl. at ¶30; *see Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 781-783; *Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157 at 1201-1204.

[30] Hicks Decl. at ¶31.

[31] Hicks Decl. at ¶32.

d. **Wage Statement Claims**

To the extent that Defendants are liable to Plaintiffs and the Class for either meal period or rest break violations, all wage statements for pay periods during which a class member missed a meal period or rest break would necessarily be violative of Labor Code §226. Using the payroll data provided by defendants, the maximum value of the waiting time penalties claims was approximately $679,000 as of the date of the mediation. *Id.* at ¶33. The parties have vigorously disputed whether Plaintiffs and the CMs were "injured" as a result of any inaccurate wage statements. *Id.* at ¶34. Class Counsel took these risks into account when assessing the wage statement claims. *Id.* at ¶35.

e. **PAGA Claims**

While the Operative Complaint includes a PAGA claim, Defendants have argued throughout this litigation that Plaintiffs did not meet the pre-filing notice and exhaustion requirements of LC §2699.3.[32] Moreover, the LC violations asserted already have statutory penalties, making the PAGA claim duplicative and without value. *Id.* Nevertheless, since the PAGA claim has not been dismissed, Plaintiffs have allocated $10,000 of the Gross Settlement Fund to the PAGA claim, with the appropriate $7,500 in penalties to be awarded to the LWDA.[33]

f. **UHSD as an Employer**

Under recent California Supreme Court standards Plaintiffs believe that it is beyond dispute that UHS employed the CMs. *Martinez v. Combs* (2010) 49 Cal.4th 35, 69-70. (An employer "suffers or permits" work where it has the power to hire and fire workers, to set wages and hours, and to tell workers when and where to report). Though Plaintiffs submitted ample evidence at the certification stage to prove that UHSD may be treated as an employer of the CMs, there is still a remote possibility that UHSD could submit evidence showing to the contrary.[34]

iii. **Class Counsel is Experienced and Endorses the Settlement.**

Experienced counsel, operating at arm's length, have weighed all of the foregoing factors and endorse the proposed settlement. Class Counsel has experience not only in class actions and

[32] Hicks Decl. at ¶36, 37; see all nine Joint CMC Statements filed to date.

[33] Settlement Agreement at §35(d).

[34] Hicks Decl. at ¶¶38-39.

employment litigation, but specifically in wage and hour class actions (*See* Sorgen Decl., ¶2 and Ex. 1; Hoyer Decl., ¶¶2-4; Hicks Decl. at ¶¶2-3). Class Counsel is experienced and qualified to evaluate the Class claims and the viability of the defenses. *Id.* The recovery for each Class member is substantial, given the risks inherent in litigation and the defenses asserted. This settlement is fair, adequate and reasonable and in the best interests of the Class.

iv. <u>No Objections Can be Made Until the Final Approval Hearing.</u>

It is impossible to address the fourth factor in the reasonableness assessment until after the Class is notified of the proposed settlement. Should any CMs object to the proposed settlement, the Court can evaluate such concerns at the Final Approval Hearing.

4. <u>The Scope of the Release Provisions Corresponds Only to Claims Related to the Class Claims.</u>

Pursuant to the Settlement Agreement, the CMs would release Defendants and their corporate parents, subsidiaries and affiliates from any and all claims which were asserted in the operative complaint.[35] The release provision also releases any claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201, *et seq.*, any tort claim for conversion, or any other claim arising out of the same facts as the claims asserted here.[36] No other claims are released by the proposed settlement. The release provision does not contain any language which would release any claims which, if known, would have changed a CM's decision to participate, file a claim, object or opt out. The settlement does not ask the Court to enjoin CMs from filing related claims until Final Approval.

5. <u>The Plaintiffs' Proposed Enhancement Awards are Fair and Reasonable.</u>

The Settlement Agreement provides for an enhancement award of up to $10,000 to each of the Plaintiffs subject to the Court's approval, in recognition of their efforts and work in prosecuting the class action.[37] Pursuant to the Court's preference and *Clark, supra*, the Plaintiffs have submitted declarations herewith explaining their efforts and time spent prosecuting this action on behalf of the

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[35] Settlement Agreement at §28.

[36] *Id.*

[37] Settlement Agreement at §34(a)(i). *See Bell v. Farmers Ins. Exch.*, (2004) 115 Cal. App. 4th 715, 726.

class.[38] If approved, the $10,000 enhancement awards would each constitute approximately 0.28% of the Gross Settlement Fund and combined they still constitute less than one percent of that fund. Assuming the Court approves Class Counsel's full award of attorneys' fees and costs, the average individual settlement amount will be approximately $4,288.[39] The proposed enhancement awards are appropriate in light of Plaintiffs' respective personal investment of time and risk in this litigation.

6. The Proposed Settlement Places No Affirmative Duties or Obligations on Class Members.

Other than filing out an exclusion form and mailing it back to the Claims Administrator, or objecting to the Settlement at the Final Approval Hearing, the Settlement Agreement places no affirmative duties of obligations on CMs. If they do nothing, they will receive their *pro rata* share of the settlement by mail.

7. Method of Notice.

California statutory and case law vests the Court with broad discretion in fashioning an appropriate notice program so long as it satisfies all due process requirements. Civil Code §1781; *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 970-974; C.R.C. 3.769. The actual form and contents of the notice are within the Court's discretion. *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 251.

Plaintiffs, with the input of Defendants, have drafted a Class Notice document in "plain English" which clearly notifies the CMs of the meaning and nature of the Action and the Class, the key terms and provisions of the Settlement Agreement, the manner in which payments to class members will be calculated, the application of Class Counsel for attorneys' fees and costs, the Plaintiff's proposed enhancement awards, the time, date and place of the Final Approval Hearing (once set by the Court), and the procedures and deadlines for requesting exclusion from the Class

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[38] While plaintiff Neu-Helms was not named a Class Representative due to her Declaration not being filed along with Plaintiffs' Class Certification Motion (it was filed at the hearing), she has put in as much effort and work as the other class representatives, and Defendants have agreed to an enhancement award for her as well as the two Class Representatives. Settlement Agreement at §34(a)(i). *See also* Hicks Decl. at ¶40; Declaration of Valene Haupt; Declaration of Katherine Woolstencroft; Declaration of Jessica Neu-Helms

[39] Assuming a $875,000 award of attorneys' fees, $37,000 in costs, $20,000 in administration costs, $7,500 in PAGA payments to the LWDA and $30,000 in Representative Enhancement Awards, the Net Settlement Fund should be approximately $2,555,500. Dividing the Net Settlement Fund among approximately 596 CMs based on the information provided by Defendants yields an average settlement award of $4,287.75. Additional CMs identified during the settlement administration process will reduce the average individual award slightly, while any opt outs will increase the average award.

and/or objecting to the settlement.[40] Within seven (7) days of the Court granting preliminary approval of the Settlement Agreement, Defendants will provide Class List to the proposed settlement administrator, CPT Group, Inc. (www.cptgroup.com).[41] The administrator will then perform a search of the National Change of Address Database to obtain the most current mailing addresses of the CMs.[42] Within seven days of that search, CPT will send the CMs by First-Class U.S. Mail the Notice Package.[43] The Notice Deadline will be thirty (30) days from the date Notice is mailed.[44] The last day for a CM who is sent a second Notice Package to return an exclusion form will be 15 days after the Notice Package is re-mailed.[45]

A copy of the Notice Package will be available on Class Counsel's website. Plaintiffs and Class Counsel are unaware of any manner available to provide greater notice to the CMs than directly mailing them a Notice package.

8. Explanation of Claims Procedures and Forms

As this is not a claims-made settlement, the procedure for a CM to receive his or her *pro rata* share of the Settlement Agreement's common fund is simple: do nothing. A form and procedure is only necessary to return if the CM wishes to opt out of the class or to object to the Settlement Agreement. If a CM disputes the number of workweeks which Defendants' records indicate that they worked, then they may provide documentation and/or some explanation of contrary dates of employment to the administrator.[46]

9. Tax Consequences

Settlement disbursements to CMs will be allocated in thirds, 33.33% as wages, 33.33% as penalties and 33.33% as interest, since success on either the meal period or rest break claims would

[40] The Notice Packet, which consists of the Proposed Class Notice and Exclusion Form, is attached as Exhibit A to the Settlement Agreement.

[41] Settlement Agreement at §35(a)(i).

[42] Settlement Agreement at §35(a)(ii).

[43] Settlement Agreement at §35(a)(iii).

[44] Settlement Agreement at §35(a)(iv).

[45] Settlement Agreement at §35(a)(vii).

[46] Settlement Agreement at §35(a)(vi).

likely lead to derivative penalties and pre-judgment interest.[47] The employer portion of the taxes (FICA, FITU, SDI, etc.) shall be paid out of the Net Settlement amount. *Id.*

10. <u>Estimated Administration Costs</u>

Tony Cortes, a representative of proposed settlement administrator CPT Group, has provided an estimate of approximately $13,240.54 for administration costs (Ex. 4 to Hicks Decl.). The Settlement Agreement allows for administrative costs of up to $25,000.[48]

11. <u>Class Counsel's Request for Attorneys' Fees and Costs is Reasonable.</u>

Class Counsel's request for attorneys' fees and costs in the amount of 25% of the Gross Settlement Fund (an amount equal to approximately one-third of the Net Settlement Fund)[49] is entirely reasonable when viewed against analogous cases filed in California state courts, where awards of one-third are not uncommon and can sometimes reach as high as 45%.[50]

A prevailing employee in an action seeking unpaid premium wages and related penalties is entitled to reasonable attorneys' fees. LC §§226, 226.7, 203, 210 and 2699. California Courts, in exercising their broad discretion to determine the appropriate fee pursuant to a fee-shifting statute, may base their calculations on the "lodestar" and "multiplier" methods. *See, e.g. PCLM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 ("*Drexler*")("trial court has broad authority to determine the amount of a reasonable fee," ordinarily using lodestar/multiplier approach).

As of the date of this filing, Class Counsel has invested approximately 1,457 hours into this case over a period of nearly two and one-half years.[51] Class Counsel's hourly rates charged are reasonable,[52] and the requested award for fees and costs is supported by contemporaneous time

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[47] Settlement Agreement at §35(b)(ii). Hicks Decl. at ¶43.

[48] Settlement Agreement at §3.

[49] Settlement Agreement at §5.

[50] *See, e.g., Cristman v. Good Guys, Inc.* (San Diego Super. Ct. 2007) Case No. GIS21929 (33.33% fee award plus costs); *BCI Overtime Cases,* (San Bernadino Super. Ct. 2007) J.C.C.P.4280 (same); *Menchyuk v. Beverages & More, Inc.* (Alameda Super. Ct. 2006) Case No. RG05196918 (same); *O'Hara v. Factory 2-U Stores, Inc.* (Alameda Super. Ct. 2002) Case No. 834123-5 (same); *Davis v. The Money Store, Inc.* (Sacramento Super. Ct. 2000) Case No. 99AS01716 (same); *In Re Milk Antitrust Litigation* (L.A. Super. Ct. 1998) Case No. BC070061 (33.33% award); *In Re Facsimile Paper Antitrust Litigation* (S.F. Super. Ct. 1995) Case Nos. 961814, 963201 and 963590 (33.33% award plus costs); *In Re Liquid Carbon Dioxide Cases* (S.D. Super. Ct. 1996) J.C.C.P. 3012 (same); *Abzug v. Kerkorian* (L.A. Super. Ct. 1990) Case No. CA-000981 (45% award plus costs); *Haitz v. Meyer* (Alameda Super. Ct. 1990) Case No. No. 572968-3 (45% award).

[51] Ex. 2 to Sorgen Decl. (lodestar report and summary).

[52] *See* Declaration of Richard Pearl specifically analyzing the reasonableness of Class Counsel's hourly rates.

records which were converted to a task-based lodestar report and summary.[53] Although Class Counsel includes attorneys from two law firms, Class Counsel took appropriate steps to eliminate or minimize any unnecessary duplication of effort.[54] Class Counsel ensured that tasks were performed by attorneys with appropriate experience and exercised appropriate "billing partner" discretion in reviewing the bills before submission to the Court.[55] The agreed to attorneys' fees are justified and reasonable, especially in light of the outstanding results achieved for the benefit of the class.

Moreover, upon consideration of such factors as the novelty and difficulty of the questions involved and the skill displayed in presenting them, the extent to which the nature of the litigation precluded other employment by the attorneys, and the contingent nature of the fee award, Class Counsel would be entitled to have the lodestar figure adjusted upward.[56] *See Drexler, supra,* at 1095-1096. In California, courts regularly use a multiplier of 2.0 or greater in statutory fee cases to approximate market fees. *See, e.g., City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 82-85 (court approved lodestar multiplier of 2.34). In this case, the effective multiplier will be 1.54, without yet considering the substantial additional work still to be performed by Class Counsel in effectuating and implementing the Settlement Agreement.

12. The Proposed Settlement Will Have No Effect on Any Other Pending Cases.

Class Counsel is aware of no case pending in any other jurisdiction in which similar class claims are asserted on behalf of the CMs.[57]

IV. THE COURT SHOULD APPOINT CPT GROUP AS THE SETTLEMENT ADMINISTRATOR AND APPROVE THE COSTS OF SETTLEMENT ADMINISTRATION.

The Settlement contemplates that the parties have jointly selected a Settlement Administrator who will be responsible for mailing and re-mailing class notices, processing opt-out requests, calculating individual settlement awards, preparing reports for the Court and the parties, and

[53] Sorgen Decl. at ¶¶7-14, Exs. 2 (lodestar report and summary) & 3 (costs incurred).

[54] Sorgen Decl. at ¶15; Hoyer Decl. at ¶10-11.

[55] Sorgen Decl. at ¶15; Hoyer Decl. at ¶12.

[56] Sorgen Decl. at ¶5-6; Hoyer Decl. at ¶¶6-7.

[57] Hicks Decl. at ¶41.

verifying payments. Based on Counsel's experience, CPT Group, Inc. is well qualified to serve as the Settlement Administrator. Counsel for the parties nominate CPT Group, Inc. to be the Settlement Administrator and request that the Court appoint CPT Group, Inc. as the Settlement Administrator and that it preliminarily approve the payment of up to $25,000 to CPT Group, Inc.

V. THE COURT SHOULD SET A SCHEDULE FOR FINAL APPROVAL.

Where a court grants preliminary approval to a class settlement, the court's order must include the time, date and place of the final approval hearing, and any other matters deemed necessary for the proper conduct of a settlement hearing. C.R.C. 3.769(e). The parties respectfully submit that the Court should issue the following schedule for the final approval hearing and related events, assuming the Court preliminarily approves the Settlement Agreement.

June 7, 2011	Mailing of the Class Notice, which includes employment data for calculation of each CM's share of the Net Settlement Award.
July 7, 2011	Notice Deadline. The last day for CMs to challenge employment data, file an objection to the proposed settlement, or to return an exclusion form to opt-out of the class.
July 25, 2011	Latest possible Notice Deadline for any CM whose notice is re-mailed.
August 8, 2011	Final Approval Hearing (or as the Court's calendar allows).
August 15, 2011	Deadline for Defendant to Deposit the Gross Settlement Amount into the Settlement Proceeds Escrow Account (assuming no objectors).
August 22, 2011	Deadline for full disbursement of the Settlement to the CMs, Plaintiffs, Class Counsel and the LWDA (assuming no objectors).

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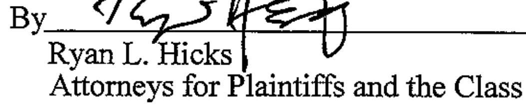
VI. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the instant motion be granted in its entirety.

Respectfully submitted,

DATED: May 2, 2011

LAW OFFICES OF MICHAEL S. SORGEN

By 
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