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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HAROLD JONES, et al.,

Plaintiffs,

vs.

CERTIFIEDSAFETY, INC.

Defendants.

Lead Case No. 3:17-cv-02229-EMC
Consolidated with 3:17-cv-03892-EMC (*Crummie*)
Related to: 3:18-cv-04379-EMC (*Ross*)
3:19-cv-01338-EMC (*Jones II*)
3:19-cv-01380-EMC (*Jones III*)
3:19-cv-01381-EMC (*Jones IV*)
3:19-cv-01427-EMC (*East*)
3:19-cv-01428-EMC (*Jones V*)

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT

Date: January 2, 2020
Time: 1:30 p.m.
Courtroom: 5 (17th Floor)
Judge: Honorable Edward M. Chen

Jones Complaint filed: April 21, 2017

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Attorneys for Plaintiffs and the Putative Classes and Collective

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on January 2, 2020, at 1:30 p.m. in Courtroom 5 before Hon. Edward M. Chen of the United States District Court, Northern District of California, Plaintiffs in these consolidated and related actions, Harold Jones, Tierre Crummie, Genea Knight, Marcellous Ross, and Michael East ("Plaintiffs"), move the Court for preliminary approval of the Stipulation of Class, Collective, and Representative Action Settlement (the "Settlement Agreement" or the "Settlement," attached as **Exhibit 1** to the accompanying Declaration of Carolyn Hunt Cottrell) as to the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes, and approval of the Settlement as to the Collective. The Settlement globally resolves all of the claims in these actions on a class and collective basis. In particular, Plaintiffs move for orders:

As to the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes:

(1) Granting preliminary approval of the Settlement Agreement as to the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes;

(2) Conditionally certifying the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes for settlement purposes;

(3) Approving the proposed schedule and procedure for completing the final approval process for the Settlement as to the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes, including setting the Final Approval Hearing;

(4) Approving the Notice of Class Action Settlement and Hearing Date for Court Approval ("Class Notice") and the Notice of Class and Collective Action Settlement and Hearing Date for Court Approval ("Class/Collective Notice"), as they pertain to the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes (attached as **Exhibits A and C** to the Settlement Agreement, respectively);

(5) Preliminarily appointing and approving Schneider Wallace Cottrell Konecky Wotkyns LLP as Counsel for the Classes;

(6) Preliminarily approving Class Counsel's request for attorneys' fees and costs;

(7) Preliminarily appointing and approving Plaintiffs Jones, Crummie, Ross, and East as Class Representatives for the California Class; Plaintiffs Jones and Knight as Class Representatives

for the Washington Class; Plaintiff Jones as Class Representative for the Minnesota Class; Plaintiff Jones as Class Representative for the Illinois Class; Plaintiff Sandra Turner as Class Representative for the Ohio Class; and Plaintiff George Azevedo, Jr. as Class Representative for the Alaska Class[1];

(8) Preliminarily appointing and approving Heffler Claims Group as the Settlement Administrator for the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes; and

(9) Authorizing the Settlement Administrator to mail and email the approved Class Notice and Class/Collective Notice to the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes.

As to the Collective:

(1) Granting approval of the Settlement Agreement as to the Collective;

(2) Approving the Notice of Collective Action Settlement ("Collective Notice") and the Class/Collective Notice as they pertain to the Collective (attached as **Exhibits B and C** to the Settlement Agreement, respectively);

(3) Approving the proposed schedule for completing the settlement process as to the Collective;

(4) Approving and appointing Schneider Wallace Cottrell Konecky Wotkyns LLP as Counsel for the Collective for purposes of the Settlement;

(5) Appointing and approving the Plaintiffs as Collective Representatives for the Collective for purposes of the Settlement;

(6) Appointing and approving Heffler Claims Group as the Settlement Administrator for the Collective; and

(7) Authorizing the Settlement Administrator to mail and email the approved Collective Notice and the Class/Collective Notice to the Collective as set forth in the Settlement Agreement.

[1] Plaintiffs Turner and Azevedo, and the Ohio and Alaska Classes that they seek to represent, are not included in the operative complaints in the consolidated and related actions. Pursuant to the Settlement, Plaintiffs will file an accompanying stipulation seeking leave to amend the operative complaint in Lead Case No. 3:17-cv-02229-EMC to add (1) Plaintiffs Turner and Azevedo as Named Plaintiffs and Class Representatives, and (2) Ohio and Alaska law wage and hour claims, brought by Plaintiffs Turner and Azevedo, respectively, individually and on behalf of putative Rule 23 Ohio and Alaska classes.

Plaintiffs bring this Motion pursuant to Federal Rules of Civil Procedure 23(e) and long-established precedent requiring Court approval for Fair Labor Standards Act settlements.[2] The Motion is based on this notice, the following Memorandum of Points and Authorities, the Declaration of Carolyn Hunt Cottrell, and all other records, pleadings, and papers on file in the consolidated and related actions and such other evidence or argument as may be presented to the Court at the hearing on this Motion. Plaintiffs also submit a Proposed Order Granting Preliminary Approval of Class and Collective Action Settlement with their moving papers.

Date: November 22, 2019

Respectfully submitted,

/s/ Carolyn Hunt Cottrell
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David C. Leimbach
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SCHNEIDER WALLACE
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Attorneys for Plaintiffs and the Putative Classes and Collective

[2] *See, e.g., Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982); *Dunn v. Teachers Ins. & Annuity Ass'n of Am.*, No. 13-CV-05456-HSG, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016); *Otey v. CrowdFlower, Inc.*, No. 12-CV-05524-JST, 2015 WL 6091741, at *4 (N.D. Cal. Oct. 16, 2015).

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I. INTRODUCTION

These class and collective actions (the "Actions") are brought on behalf of current and former Safety Attendants and Safety Foremen for Defendant CertifiedSafety, Inc. ("Defendant" or "CertifiedSafety"), who provide safety and support services at the oil refinery locations of CertifiedSafety's clients. The Actions are based on Defendant's alleged violations of federal, California, Washington, Minnesota, Illinois, Ohio, and Alaska labor laws. After over two years of intensive litigation, including pleading challenges, numerous amendments to the complaints, conditional certification, the filing of a series of related actions to allege additional state law and joint employer claims against Defendant's oil refinery clients, two separate mediations, and extensive arm's-length negotiations between counsel, the Parties have reached a global settlement of the Actions, memorialized in the proposed Stipulation of Class, Collective, and Representative Action Settlement ("Settlement"). Plaintiffs seek preliminary approval of the Settlement as to the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes and approval of the Settlement as to the Collective.[1]

The Parties have resolved the claims of approximately 3,050 Safety Attendants and Safety Foremen, for a total non-reversionary settlement of $6,000,000. With this proposed Settlement, the Parties are resolving numerous wage and hour claims unlikely to have been prosecuted as individual actions. The Settlement provides an excellent benefit to the Classes and Collective and an efficient outcome in the face of expanding litigation. The Settlement is fair, reasonable, and adequate in all respects, and Plaintiffs respectfully request that the Court grant the requested approvals.

II. FACTUAL BACKGROUND

CertifiedSafety serves the oil refinery industry, providing its clients with personnel who specialize in planning, implementing, and executing safety protocols at refinery operations. Cottrell Decl., ¶ 8. Its clients are oil refinery operators in the United States, including but not limited to

[1] The Settlement is attached as **Exhibit 1** to the accompanying Declaration of Carolyn Hunt Cottrell in Support of Plaintiffs' Motion for Preliminary Approval of Class and Collective Action Settlement ("Cottrell Decl.").

Chevron, Andeavor/Tesoro, Phillips 66, Citgo, United Refining, and Shell.[2] *Id*. CertifiedSafety's Safety Attendants and Safety Foremen, who are classified as non-exempt employees, carry out these safety duties at refinery operations throughout the United States, including in California, Washington, Minnesota, Illinois, Ohio, Alaska, and numerous other states.[3] *Id*., ¶ 9. They provide support for the refinery companies' operations and protocols, including identifying, mitigating, and reporting potential safety hazards at their assigned worksites. *Id*.

Plaintiffs allege that Class Members—who work long and difficult hours, including shifts of 12 hours or more, up to seven days per week, often far away from their homes—experience wage and hour violations in their work with CertifiedSafety, and with the refineries as alleged joint employers. *Id*., ¶ 10. In particular, Plaintiffs allege that the Class Members experience significant amounts of pre- and post-shift off-the-clock work, including unpaid, on-duty time traveling to the actual work location through the massive refinery complexes, donning and doffing protective gear, undergoing security inspections, filling out paperwork, attending safety meetings, and retrieving required equipment. *Id*., ¶ 11. Plaintiffs also allege that Class Members are required to undergo unpaid training sessions in California in order to begin working for CertifiedSafety. *Id*. Plaintiffs further allege that the Class Members cannot take timely, full, off-duty meal and rest periods, due to a lack of break relief and the need to traverse the refinery to get to designated break locations. *Id*. Moreover, Plaintiffs allege that the Class Members regularly travel to refineries around the country for multi-week assignments, but are not adequately reimbursed for travel and lodging expenses, and are required to pay out-of-pocket for equipment including fire-protective gear, gloves, and steel-toed boots. *Id*.

As a result of these alleged violations, Plaintiffs allege that Defendants systematically violate the Fair Labor Standards Act, as well as California, Washington, Minnesota, Illinois, Ohio, Alaska labor law.[4] Throughout the relevant time period, Plaintiffs allege that Defendants eschewed

[2] Each of these refinery operators has been named as a Defendant on a joint employer basis in the Actions. CertifiedSafety and these refinery operators are collectively referred to as "Defendants."
[3] Plaintiffs and members of the proposed Classes and Collective are referred to hereafter as "Class Members" or "Safety Attendants" for ease of reading.
[4] Plaintiffs Jones, Crummie, Ross, and East represent the California Class; Plaintiffs Jones and Knight represent the Washington Class; Plaintiff Jones represents the Minnesota Class; Plaintiff

their obligations to Plaintiffs and Class Members by: (1) not paying Class Members proper minimum and overtime wages for work performed off-the-clock on a daily basis, as well as uncompensated training days; (2) failing to provide Class Members with a reasonable opportunity to take meal and rest periods, and failing to compensate Class Members when such meal and rest periods are not taken; (3) failing to reimburse necessarily-incurred expenses; and (4) failing to issue accurate, itemized wage statements.

Plaintiffs allege that, as joint employers, CertifiedSafety and the refinery Defendants are jointly liable for the violations at issue. Defendants have at all times denied, and continue to deny, all of these allegations, including Plaintiffs' theory that CertifiedSafety and the refinery Defendants are joint employers, and deny any and all liability for Plaintiffs' claims. Defendants further deny that Plaintiffs' allegations are appropriate for class/collective and/or representative treatment for any purpose other than for settlement purposes only.

III. PROCEDURAL HISTORY

A. Plaintiffs' Claims

Plaintiff Harold Jones filed the first lawsuit in the Actions against CertifiedSafety on April 1, 2017. ECF 1.[5] In his initial complaint, Plaintiff Jones alleged that CertifiedSafety violated the Fair Labor Standards Act ("FLSA") and the wage and hour laws of California by failing to pay non-exempt employees their earned wages, failing to provide legally compliant meal and rest periods, and failing to reimburse for work-related expenditures. On this basis, Plaintiff Jones brought claims against CertifiedSafety on behalf of a putative FLSA collective and a putative California class, and for civil penalties under the California Labor Code Private Attorneys General Act ("PAGA").

Plaintiff Tierre Crummie filed *Crummie* in the Superior Court of California, County of Alameda, on April 24, 2017. Plaintiff Crummie brought similar claims against CertifiedSafety under the wage and hour laws of California on behalf of a putative California class and for civil penalties under the PAGA. CertifiedSafety removed *Crummie* to the United States District Court

Jones represents the Illinois Class; Plaintiff Sandra Turner represents the Ohio Class; and Plaintiff George Azevedo, Jr. represents the Alaska Class. All of the Plaintiffs represent the nationwide Fair Labor Standards Act Collective.

[5] Unless otherwise indicated, ECF docket designations refer to docket entries in Lead Case No. 3:17-cv-02229-EMC.

for the Northern District of California on July 10, 2017. *Crummie* ECF 1.

Plaintiff Jones filed his First Amended Complaint ("FAC") in *Jones* on June 26, 2017, which added Plaintiff Genea Knight as an additional representative plaintiff. ECF 23. Plaintiff Knight brought similar claims against CertifiedSafety, under the wage and hour laws of Washington on behalf of a putative Washington class, in addition to FLSA claims. *Id*. Defendant moved to dismiss Plaintiffs' FAC on July 24, 2017, primarily on *Iqbal/Twombly* grounds. ECF 31. That motion was denied in large part, and Defendant filed its Answer on September 18, 2017. ECF 39, 42.

On February 8, 2018, pursuant to the parties' stipulation, Plaintiffs Jones and Knight filed their Second Amended Complaint to assert additional claims under the California Labor Code, re-assert a California waiting time penalty claim, and to proffer additional factual allegations relating to CertifiedSafety's mandatory training. ECF 100. On July 18, 2018, Plaintiff Marcellous Ross filed *Ross* against CertifiedSafety, Chevron, Valero Energy Corporation, and Valero Refining Company-California. Plaintiff Ross alleged similar wage and hour claims against these Defendants, on behalf of a putative FLSA collective and a putative California class. *Ross*, ECF 1. Plaintiff Ross agreed to voluntarily dismiss Valero Energy Corporation and Valero Refining Company-California via stipulation on September 12, 2018. *See Ross* ECF 30.

In late-2018, Plaintiffs filed a motion for leave to file a Third Amended Consolidated Complaint in *Jones*, and a motion for leave to file a First Amended Complaint in *Ross*. ECF 164; *Ross* ECF 58, 64. The proposed amendments would have significantly expanded both the *Jones* and *Ross* actions, by adding Michael East and George Azevedo, Jr., as additional Named Plaintiffs and Class Representatives; joint employer allegations against CertifiedSafety's oil refinery clients including but not limited to Shell, Andeavor, Phillips 66, and Citgo; and additional Rule 23 classes and state law causes of action under Alaska, Illinois, and Minnesota law.[6] *Id*. The Court granted the motions in part on February 20, 2019, declining to permit the addition of the refinery defendants and the additional state law claims, but permitting smaller-scale amendments. ECF 172; *Ross* ECF

[6] Plaintiffs had previously noticed a motion in *Jones* on May 15, 2018 to obtain leave for these proposed amendments via filing of a Third Amended Complaint, but the Court denied the motion without prejudice on October 26, 2019 in order for the Parties to delineate lead plaintiff and lead counsel responsibilities. *See* ECF 129, 149.

87.

Plaintiffs filed their operative Third Amended Consolidated Complaint ("TAC") in *Jones* and their operative First Amended Complaint in *Ross* (*Ross* FAC) on March 6, 2019. ECF 176; *Ross* ECF 91. CertifiedSafety answered the TAC and the *Ross* FAC on March 20, 2019. ECF 177; *Ross* ECF 87. Chevron filed a motion to dismiss the *Ross* FAC on March 20, 2019, which was fully briefed at the time the Parties reached an agreement to settle the case.[7] *See Ross* ECF 93, 95, 97, 101.

Plaintiffs then proceeded to file new actions to bring the wage and hour claims, including those under Illinois and Minnesota law, against CertifiedSafety and refineries on a joint employer basis:

- Plaintiff Jones filed *Jones II* (Case No. No. 3:19-cv-01338-EMC) on March 12, 2019, which alleges similar wage and hour claims under the FLSA, California, Washington, and Minnesota law against CertifiedSafety and Andeavor/Tesoro on behalf a putative FLSA collective and putative California, Washington, and Minnesota classes.
- Plaintiff Jones filed *Jones III* (Case No. 3:19-cv-01380-EMC) on March 14, 2019, which alleges similar wage and hour claims under the FLSA, California, and Washington law against CertifiedSafety and Phillips 66 on behalf a putative FLSA collective and putative California, and Washington classes.
- Plaintiff Jones filed *Jones IV* (Case No. 3:19-cv-01381-EMC) on March 14, 2019, which alleges similar wage and hour claims under the FLSA, California, and Illinois law against CertifiedSafety and Citgo on behalf a putative FLSA collective and putative California and Washington classes.
- Plaintiff Michael East filed *East* (Case No. 3:19-cv-01427-EMC) on March 18, 2019, which alleges similar wage and hour claims under the FLSA and California law against CertifiedSafety and United Refining on behalf a putative FLSA collective and a putative California class.
- Plaintiff Jones filed *Jones V* (Case No. 3:19-cv-01428-EMC) on March 18, 2019, which

[7] The Parties agreed to continue the hearing on Chevron's motion to dismiss pending the settlement process. *See Ross* ECF 101.

alleges similar wage and hour claims under the FLSA, California, and Washington law against CertifiedSafety and Shell on behalf a putative FLSA collective and putative California, and Washington classes.

At the time of mediation, Plaintiffs and Class Counsel intended to file additional actions to bring wage and hour claims under Ohio and Alaska law on behalf of putative Ohio and Alaska classes. Cottrell Decl., ¶ 14. As a result of the Settlement, the Parties agree that Plaintiffs will amend the operative complaint in *Jones* to add (1) Sandra Turner and George Azevedo, Jr. as Named Plaintiffs and Class Representatives, and (2) Ohio and Alaska law wage and hour claims, brought by Turner and Azevedo, respectively, individually and on behalf of putative Rule 23 Ohio and Alaska classes. *See* Settlement Agreement, ¶¶ 3.20, 5.1.1. The Ohio and Alaska Classes incorporate class periods that extend back three years from the April 23, 2019 mediation. *See* Settlement Agreement, ¶¶ 2.46.

B. FLSA Conditional Certification

The Parties stipulated to conditional certification of the FLSA Collective in *Jones*, which was granted on October 24, 2017. ECF 47. To date, 438 Safety Attendants have filed opt-in forms in the *Jones* action. *See* ECF 112. CertifiedSafety brought a motion to strike untimely and deficient opt-in forms on March 14, 2018, which Plaintiffs opposed. ECF 113, 116, 119. The Court granted the motion with respect to opt-in forms filed after the initial January 23, 2018 mediation, and with respect to three unsigned opt-in forms, but otherwise denied the motion. *See* ECF 128. As a result, 384 Safety Attendants have successfully opted in to the *Jones* action. Cottrell Decl., ¶ 15. Additionally, 87 Safety Attendants have filed opt-in forms in the *Ross* action; the Safety Attendants whose opt-in forms were stricken in *Jones* constitute many of the Opt-In Plaintiffs in *Ross*. *See Ross* ECF 107; Cottrell Decl., ¶ 15.

C. Consolidation and Relation of Actions

On February 16, 2018, CertifiedSafety moved to have the *Jones* action consolidated with *Crummie*, or in the alternative, to stay *Crummie*. ECF 103. Plaintiffs Jones and Knight opposed this motion, primarily on first-filing grounds and the status of *Jones* as involving a conditionally-certified FLSA collective in addition to a putative California Class. *See* ECF 106. Plaintiffs Jones and Knight filed a motion to appoint their attorneys, Schneider Wallace Cottrell Konecky Wotkyns

LLP, as interim lead counsel on March 21, 2018. ECF 115.

On May 15, 2018, the Court issued an order consolidating *Jones* with *Crummie*. ECF 128. This order also denied without prejudice the motion to appoint interim lead counsel on prematurity grounds, as the actions has not yet been consolidated. *Id*. On November 5, 2018, following the Court's order directing the Parties to delineate lead counsel responsibilities, Plaintiffs in *Jones* and *Crummie* stipulated to appoint Schneider Wallace Cottrell Konecky Wotkyns LLP as lead counsel on behalf of the Plaintiffs and putative Class and Collective Members in *Jones* and *Crummie*.[8] ECF 149, 152.

On October 30, 2018, Plaintiffs filed a notice of related cases and administrative motion to relate the *Ross* action to the consolidated *Jones/Crummie* action. ECF 150. The Court issued a related case order, finding the actions related, on November 16, 2018. ECF 157. On May 10, 2019, Plaintiffs filed a notice of related cases and administrative motion to relate the *Jones II, Jones III, Jones IV, East,* and *Jones V* actions to the consolidated *Jones/Crummie* action. ECF 186. The Court issued related case orders, finding the actions related, on May 15 and May 17, 2019. ECF 192, 195. All of the Actions are currently pending before the Honorable Edward M. Chen.

D. Discovery

The Parties have engaged in extensive discovery, including written discovery and depositions. On January 10, 2018, Plaintiffs deposed CertifiedSafety's Rule 30(b)(6) designee, Vice President of Human Resources Steve Hines. Cottrell Decl., ¶ 18. The deposition addressed topics including Defendant's corporate organization and decision-making responsibilities; its policies, practices, procedures, and systems for wage and hour issues, compensation, timekeeping, and scheduling; relevant investigations and reports; and the Class Members' job duties and responsibilities, the tools, equipment and gear that they use, and any work that they perform outside of their scheduled shifts. *Id*. The deposition also covered topics relating to Plaintiffs' joint employer claims. *Id*. Defendant took the depositions of Plaintiff Jones and Plaintiff Knight on January 15, 2018, and Plaintiff Crummie on January 11, 2018. *Id*., ¶ 19.

[8] Lawyers for Justice, PC remains actively involved in the litigation of the Actions.

Plaintiffs' counsel have additionally completed extensive outreach with Class Members, including over 240 in-depth intakes. *Id*., ¶ 20. The intakes covered topics including dates and locations of work, hours of work, pre-shift and post-shift off-the-clock work, meal and rest breaks, and reimbursement of work-related expenses. *Id*. Through the outreach process, Plaintiffs garnered substantial factual background regarding the alleged violations and the joint employer claims, which Plaintiffs' counsel utilized to build their case and proffer detailed allegations in the operative complaints. *Id*., ¶ 21; *see e.g.* ECF 176. Multiple Class Members that completed intakes provided additional documents to Plaintiffs' counsel. *Id*.

CertifiedSafety has additionally produced over 1,400 documents, including its general policies as well as time records, payroll records, and job assignment documents applicable to Plaintiffs Jones, Knight, and Crummie. *Id*., ¶ 22. CertifiedSafety also provided classwide figures, including the total number of class members, number of shifts worked, average hourly rates, and additional data points, ahead of each mediation, to enable Plaintiffs' counsel to evaluate damages on a Class and Collective basis. *Id*. This discovery was produced on an informal basis to facilitate mediation, and updated ahead of each mediation. *Id*.

Plaintiffs propounded formal discovery requests on CertifiedSafety, consisting of 135 requests for production of documents and nine special interrogatories, on March 21, 2018. *Id*., ¶ 23. CertifiedSafety served objections to these requests on May 7, 2018, but did not make substantive responses. *Id*. Thereafter, Plaintiffs and CertifiedSafety engaged in considerable meet and confer effort regarding substantive responses. *Id*., ¶ 24. This process was delayed when CertifiedSafety's initial counsel, Littler Mendelson, P.C. and Martin, Disiere, Jefferson & Wisdom, LLP, withdrew from the action on June 22, 2018, and were replaced by Winston & Strawn LLP. *Id*.; *see* ECF 133-135, 139-140. Ultimately, the Parties agreed to defer further meet and confer while they completed the second mediation that resulted in the instant Settlement. *Id*.

E. Mediation

Plaintiffs and CertifiedSafety first mediated this dispute on January 23, 2018 before Jeff Ross, a respected and experienced wage and hour mediator. Cottrell Decl., ¶ 25. This initial

mediation was unsuccessful, and litigation continued in the ordinary course, including the filing of the later actions and service of formal discovery requests. *Id*. On April 23, 2019, the Plaintiffs and CertifiedSafety participated in a second mediation session with Paul Grossman, another highly respected and experienced wage and hour mediator. *Id*., ¶ 26. The session lasted some 10 hours; at the end of the night, Mr. Grossman issued a mediator's proposal, which contained the essential terms of the instant Settlement. *Id*. All Parties accepted the proposal on that date. *Id*.

Throughout the mediation process, the Parties engaged in serious and arm's-length negotiations, culminating in the mediator's proposal. *Id.,* ¶ 27. After the mediation, counsel for the Parties worked to finalize the proposed long-form Settlement and corresponding notice documents, subject to the Court's approval. *Id.* As the Settlement is complex, involving hybrid Rule 23 and FLSA claims, numerous Defendants, and the resolution of eight separate actions as well as two additional potential actions, the drafting process was lengthy. After an initial draft was completed, six sets of subsequent edits were required to arrive at an agreement that was acceptable to all Parties and counsel, along with a separate drafting and revision process for the Class, Collective, and Class/Collective Notices. *Id.,* ¶ 28. Counsel for the Parties advised the Court of the status of the drafting process, culminating in a stipulation that set finalized deadlines for the completion of the Settlement Agreement and filing the instant motion. *See* ECF 197, 199, 201, 202, 203. The Settlement Agreement was fully-executed on November 21, 2019.

IV. TERMS OF THE SETTLEMENT

A. Basic Terms and Value of the Settlement

CertifiedSafety has agreed to pay a non-reversionary Gross Settlement Amount of $6,000,000 to settle all aspects of the case. Cottrell Decl., ¶ 30. The Net Settlement Amount, which is the amount available to pay settlement awards to the Class Members, is defined as the Gross Settlement Amount less: the payment made to the California Labor & Workforce Development Agency ("LWDA") pursuant to PAGA ($50,000)[9]; any enhancement payments awarded to the

[9] The Parties agree to allocate $50,000.00 of the Gross Settlement Amount to the settlement of the PAGA claims, which the Parties believe in good faith is a fair and reasonable apportionment. *Id.* The Settlement Administrator shall pay 75%, or $37,500.00, of this amount to the LWDA, and 25%, or $12,500.00, shall remain as part of the Net Settlement Amount. Cottrell Decl. at ¶ 31.

Class Representatives (up to $15,000 for Plaintiffs Jones, Knight, and Crummie; up to $10,000 for Plaintiffs Ross and East; and up to $5,000 for Plaintiffs Azevedo and Turner); the Settlement Administrator's fees and costs (estimated at $66,000.00); and any attorneys' fees and costs awarded to Plaintiffs' counsel (fees of up to 35% of the Gross Settlement Amount, or $2,100,000, plus costs not to exceed $70,000). *Id.*

The Gross Settlement Amount is a negotiated amount that resulted from substantial arms' length negotiations and significant investigation and analysis by Plaintiffs' counsel. Plaintiffs' counsel based their damages analysis and settlement negotiations on informal discovery, including the payroll and timekeeping data, depositions, and approximately 240 interviews with Class Members. Cottrell Decl., ¶ 32. Plaintiffs' counsel obtained average rates of pay for Safety Attendants in each jurisdiction (California, Washington, Minnesota, Illinois, Ohio, and Alaska, along with the average rate of pay for FLSA Opt-In Plaintiffs who did not work in any of those states), which were then used in conjunction with amounts of unpaid time to determine estimated damages for off-the-clock and overtime violations. *Id.*, ¶ 33. Based on outreach analysis, Plaintiffs applied a high-end damage assumption of 1.75 hours of off-the-clock time per day, along with each Safety Attendant missing 80% of their meal and rest periods. *Id.*

Using these assumptions and further assuming that Plaintiffs and the Class Members would certify all of their claims and prevail at trial, Plaintiffs' counsel calculated the total potential exposure if Plaintiffs fully prevailed on all of their claims—inclusive of derivative claims, penalties claims[10], and claims for liquidated damages from willful or bad faith conduct[11]—at approximately

[10] The damages figure includes Defendants' additional exposure to PAGA penalties. But note, because Labor Code §§ 1194.2, 203, and 226 already incorporate their own penalty provisions, an award of additional PAGA penalties – or an award of the maximum penalty amount provided by PAGA – is uncertain. *See* Cal. Lab. Code § 2699(f); *see also Guifi Li v. A Perfect Day Franchise Inc.*, 2012 WL 2236752 at *17 (N.D. Cal. 2012). Moreover, even assuming Plaintiffs' remaining claims qualify for PAGA penalties, any such award is not automatic. Cal. Lab. Code § 2699(e)(2); *see* also *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135-36 (Cal. App. Ct. 2012). This figure also includes treble damages for Washington Class Members under the Washington Consumer Protection Act, which are discretionary and capped at $25,000 per person. *See* RCW 19.86.020, 19.86.090.

[11] This figure includes liquidated damages for unpaid overtime under the FLSA. 29 U.S.C. § 216(b) (liquidated damages for unpaid overtime is in an amount equal to the unpaid overtime); *Haro v.*

$45.2 million. *Id*., ¶ 34. The total amount of damages is broken down as follows:

Plaintiffs calculated that unpaid wages owed, based on the assumption of 1.75 hours of off-the-clock work in each workday and inclusive of overtime, would total approximately $11.3 million for all Class Members in all jurisdictions. *Id*., ¶ 35. The bulk of these unpaid wages ($7.6 million) are owed to the approximately 1,370 California Class Members, who worked well in excess of half of the shifts of the Safety Attendants at issue in this lawsuit. Approximately $1.5 million is owed to the approximately 790 Washington Class Members.[12] *Id*. The $11.3 total amount includes off-the-clock damages for unpaid training time in California. Additionally, these amounts are subject to liquidated damages in certain jurisdictions, assuming that willfulness could be demonstrated, which would increase the potential unpaid wage damages to approximately $14 million. *Id*.

California and Washington Class Members are also able to recover for meal and rest break violations. Based on the assumption that 80% of their meal and rest periods are missed or otherwise non-compliant, California Class Members are owed approximately $3.5 million under the premium pay provisions of the California Labor Code, taking into account approximately 203 premium pay hours paid by CertifiedSafety. *Id*., ¶ 36. Washington Class Members are owed approximately $300,000 under Washington law, which requires that Class Members receive straight time pay for the entire duration of any missed or non-compliant break. *Id*. California Class Members are also able to recover directly for unreimbursed business expenses under California Labor Code § 2802, which Plaintiffs estimate at approximately $840,000. *Id*., ¶ 37.

Totaling the estimated damages for substantive (non-derivative) violations under California, Washington, Minnesota, Illinois, Ohio, Alaska law and the FLSA, as applicable, for unpaid off-the-

City of Los Angeles, 745 F.3d 1249, 1259 (9th Cir. 2014). If an employer's conduct constitutes a "knowing violation" of the statute, the FLSA's standard two-year statute of limitations may be extended to three years. 29 U.S.C. § 255(a). This figure also includes liquidated damages for unpaid overtime under the laws of Washington (RCW 49.46.090; RCW 49.52.70; RCW 49.52.50), Minnesota (Minn. Stat. § 177.27 Subd. 7), Ohio (ORC § 4111.14(J)), Alaska (AS 23.10.110), and punitive damages in the amount of 2% per month of the amount of underpayments under Illinois law (820 ILCS § 105/12(a)). Damages for unpaid overtime are not liquidated under California law.

[12] Plaintiffs separately analyzed off-the-clock work for the remaining jurisdictions; as these jurisdictions have between approximately 70 and 270 Safety Attendants during the relevant time periods, respectively, the damages amounts are much smaller than the California and Washington damages.

clock work, meal and rest period violations, and unreimbursed business expenses, Plaintiffs estimate that the total substantive damages are approximately $18.6 million. *Id*., ¶ 38. This amount includes liquidated damages where applicable, but does not include derivative claims (e.g., waiting time penalties, wage statement claims) and penalty claims (e.g., PAGA claims and Washington Consumer Protection Act treble damages). *Id*.

For derivate and penalty claims, Plaintiffs estimate the waiting time penalty claim for California Class Members under California Labor Code § 203 at approximately $8.7 million[13] and the wage statement penalty under California Labor Code § 226 at approximately $1.1 million. *Id*., ¶ 39. Plaintiffs estimate the PAGA penalties for applicable California Safety Attendants at approximately $6.8 million. *Id*., ¶ 40. Plaintiffs estimate the treble damages component for Washington Safety Attendants under the Washington Consumer Protection Act at approximately $6.6 million. *Id*., ¶ 41. Additionally, Plaintiffs estimate damages for unpaid wages upon termination for Minnesota Class Members at approximately $775,000, and damages for failure to keep accurate payroll records for Minnesota Class Members at approximately $982,000. *Id*., ¶ 42. Plaintiffs estimate damages for unpaid wages upon termination for Illinois Class Members at approximately $183,000, and damages for unpaid wages upon termination for Alaska Class Members at approximately $1.4 million.[14] *Id*. Totaling the estimated damages for derivative and penalty claims violations, Plaintiffs estimate that the total derivative and penalty damages are approximately $26.6 million. *Id*., ¶ 43.

The negotiated non-reversionary Gross Settlement Amount of $6,000,000 represents more than 53% of the approximately $11.3 million that Plaintiffs calculated for the core unpaid wages claims. *Id*., ¶ 44. When adding meal and rest break, derivative claims, and potential penalties, the $6,000,000 million settlement amount represents approximately 13.3% of Defendants' total potential exposure of $45.2 million. *Id.* Again, these figures are based on Plaintiffs' assessment of a best-case-scenario. To have obtained such a result at trial, Plaintiffs would have had to prove that

[13] This amount, and other figures for unpaid wages upon termination, assume that each Class Member was terminated once during their tenure with CertifiedSafety.

[14] Under Alaska's provision for unpaid wages at termination (AS 23.05.140), the penalty wages may continue for a period of up to 90 days, which results in the relatively high damages for Alaska Class Members.

all Class Members experienced the violations at the levels described above for every shift and every assignment, and that Defendants acted knowingly or in bad faith. *Id*.

Plaintiffs and their counsel considered the significant risks of continued litigation, described hereinafter, when considering the proposed Settlement. *Id*., ¶ 45. These risks were front and center, particularly given the nature of the off-the-clock work and that the Safety Attendants work in numerous and varying refinery locations, which would invariably complicate certification efforts and proving the claims on the merits. *Id*. In contrast, the Settlement will result in immediate and certain payment to Class Members of meaningful amounts. *Id*., ¶ 46. The average recovery is $1,199 per Class Member (this amount divides the *net* recovery by total number of Class Members), or approximately $119.50 per Workweek.[15] *Id*. This amount provides significant compensation to the Class Members, and the Settlement provides an excellent recovery in the face of expanding and uncertain litigation. In light of all of the risks, the settlement amount is fair, reasonable, and adequate. *Id*.

B. Class and Collective Definitions

An individual is eligible to share in the proposed Settlement if he or she belongs to any of the following[16]:

- The "**California Rule 23 Class**" means all current or former Safety Attendants and Safety Foremen employed by CertifiedSafety, or who attended pre-employment training conducted by CertifiedSafety, in the State of California at any time from April 21, 2013 to the date of Preliminary Approval.
- The "**Washington Rule 23 Class**" means all current or former Safety Attendants and Safety Foremen employed by CertifiedSafety in the State of Washington at any time from April 21, 2014 to the date of Preliminary Approval.
- The "**Minnesota Rule 23 Class**" means all current or former Safety Attendants and Safety Foremen employed by CertifiedSafety in the State of Minnesota at any time from March 12, 2016

[15] The net recovery per workweek does not incorporate the workweek weightings that reflect the increased value of state law claims and differing average rates of pay by state, set forth in Section IV.C, below.

[16] The Rule 23 Classes mirror the class definitions in the operative complaints. They are to be certified for settlement purposes only under Federal Rule of Civil Procedure 23.

to the date of Preliminary Approval.

- The "**Illinois Rule 23 Class**" means all current or former Safety Attendants and Safety Foremen employed by CertifiedSafety in the State of Illinois at any time from March 14, 2016 to the date of Preliminary Approval.
- The "**Ohio Rule 23 Class**" means all current or former Safety Attendants and Safety Foremen employed by CertifiedSafety in the State of Ohio at any time from April 23, 2016 to the date of Preliminary Approval.
- The "**Alaska Rule 23 Class**" means all current or former Safety Attendants and Safety Foremen employed by CertifiedSafety in the State of Alaska at any time from April 23, 2016 to the date of Preliminary Approval.
- **Opt-In Plaintiffs** are all Safety Attendants and Safety Foremen on whose behalf Plaintiffs' counsel has filed a consent to join the FLSA collective in any of the Actions, before the date of Preliminary Approval.

C. Allocation and Awards

The Net Settlement Amount to be paid to Class Members is approximately $3,651,500. Cottrell Decl., ¶ 48. Class Members will each receive a settlement award check without the need to submit a claim form.[17] *Id.*, ¶ 49. Each Class Member's settlement share will be determined based on the total number of weeks that the respective Class Member worked for Defendants during the applicable limitations period(s). *Id.*, ¶ 50. Specifically, each Class Member will be credited for the number of weeks that he or she worked for CertifiedSafety at any time (1) from April 21, 2013 to the date of Preliminary Approval for California Class Members; (2) from April 21, 2014 to the date of Preliminary Approval for Washington Class Members; (3) from March 12, 2016 to the date of Preliminary Approval for Minnesota Class Members; (4) from March 14, 2016 to the date of Preliminary Approval for Illinois Class Members; (5) from April 23, 2016 (i.e., the mediation date)

[17] Class Members are not required to submit an Opt-In Form to receive payment under the Settlement for their work in California, Washington, Minnesota, Illinois, Ohio, and Alaska during the relevant time periods. However, only Opt In Plaintiffs will be credited for work in other states, as the damages for work in those states are attributable to FLSA claims only. Class Members may opt out of the Rule 23 component of the Settlement, but those who are Opt-In Plaintiffs may not opt out of the FLSA component of the Settlement. Settlement Agreement, ¶ 4.9.2.

to the date of Preliminary Approval for Ohio Class Members; (6) from April 23, 2016 (i.e., the mediation date) to the date of Preliminary Approval for Alaska Class Members; and (7) if the Participating Individual is an Opt In Plaintiff, in all states other than California, Washington, Minnesota, Illinois, Alaska, and Ohio, from the three years preceding the date that Plaintiffs' counsel filed a Consent to Join form on behalf of the Opt In Plaintiff to the date of Preliminary Approval. Settlement Agreement, ¶ 4.13.2.1.

Each Workweek will be equal to one settlement share, but to reflect the increased value of state law claims and differing average rates of pay by state, Workweeks during which work was performed in California, Washington, Minnesota, Illinois, Ohio, and Alaska will be weighted more heavily. Specifically, Workweeks during which work was performed in California (including Workweeks in which a Participating Individual attended pre-employment training conducted by CertifiedSafety in California) will be equal to three settlement shares; Workweeks during which work was performed in Washington or Alaska will be equal to two settlement shares; Workweeks during which work was performed in Minnesota will be equal to 1.7 settlement shares; Workweeks during which work was performed in Illinois will be equal to 1.3 settlement shares; Workweeks during which work was performed in Ohio will be equal to 1.1 settlement shares; and Workweeks during which an Opt In Plaintiff performed work in any state other than California, Washington, Alaska, Minnesota, Illinois, and Ohio will be equal to one settlement share.[18] Settlement Agreement, ¶ 4.13.2.2. In the event that a Rule 23 Class Member, who is also an Opt In Plaintiff, opts out of the Rule 23 component of the Settlement, he or she will receive credit under the Settlement for all of his or her Workweeks nationwide from the three years preceding the date that Plaintiffs' counsel filed his or her Opt-In Form to the date of Preliminary Approval. In this circumstance, none of the Workweeks will be subject to any weighting (i.e., all Workweeks will be

[18] Plaintiffs performed an in-depth analysis of Workweek weightings and the underlying state law provisions to develop the weightings. Additionally, Judge Vince Chhabria recently granted final approval of a hybrid FLSA/Rule 23 wage and hour settlement that incorporated a workweek weighting of three for California state law claims and a workweek weighting of two for Washington state law claims, relative to FLSA-only Workweeks. *See Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3:17-cv-00251-VC, ECF 299 at 10:11-14, 305 (N.D. Cal. Oct. 23, 2019).

equal to one settlement share on an FLSA basis), even for work in California, Washington, Alaska, Minnesota, Illinois, and Ohio. Settlement Agreement, ¶ 4.13.2.3.

The total number of settlement shares (as weighted) for all Participating Individuals will be added together and the Net Settlement Amount will be divided by that total to reach a per share dollar figure. Settlement Agreement, ¶ 4.13.2.4. The resulting per share dollar figure will then be multiplied by each Participating Individual's number of settlement shares (as weighted) to determine his or her Individual Settlement Payment. *Id*. The Class, Collective, and Class/Collective Notices will provide the estimated Individual Settlement Payment and number of Workweeks for each Class Member, assuming full participation in the Settlement. Settlement Agreement, Exhs. A-C. Settlement Award and eligibility determinations will be based on employee workweek information that CertifiedSafety will provide to the Settlement Administrator; however Class Members will be able to dispute their workweeks by submitting evidence that they worked more workweeks than shown by CertifiedSafety's records. Settlement Agreement, ¶ 4.11.

Settlement Awards will be paid to Class Members by the Settlement Administrator within 30 days after the occurrence of the "Effective Date." Settlement Agreement, ¶ 4.16. Settlement Award checks will remain valid for 180 days from the date of their issuance. Settlement Agreement, ¶ 4.17. Any funds from checks that are returned as undeliverable or are not negotiated within 180 calendar days after issuance shall be tendered to the State Controller's Office Unclaimed Property Division (or similar/equivalent state agency) for the state where the Participating Individual most recently worked for CertifiedSafety. Settlement Agreement, ¶ 4.17. Upon completion of administration of the Settlement, the Settlement Administrator will provide a Post-Distribution Accounting in accordance with the Northern District's Procedural Guidance. Settlement Agreement, ¶ 4.18.

D. Scope of Release

The releases contemplated by the proposed Settlement are dependent upon whether the Participating Individual is an Opt In Plaintiff and/or a Rule 23 Class Member, and are tethered to the factual allegations. Opt In Plaintiffs will release any and all claims under the FLSA based on or arising out of the same factual predicates of the Actions. Settlement Agreement, ¶ 4.19.1. Rule 23

Class Members will release any and all claims under the applicable state law, based on or arising out of the same factual predicates of the Actions, the Complaints, and/or the allegations in the Complaints, including all claims that were or could have been raised in the Actions and any other wage and hour claims for damages, premiums, penalties, interest, attorneys' fees, and equitable relief. Settlement Agreement, ¶¶ 4.19.2-4.19.7. As to Rule 23 Class Members who are not Opt In Plaintiffs, those who negotiate their Rule 23 Settlement Checks will also release any and all claims under the FLSA arising from or related to their work for CertifiedSafety in the applicable Rule 23 state(s), based on these same factual predicates. *Id*. If such a Rule 23 Class Member does not deposit his or her check, he or she will not release any claims under the FLSA.

The releases are effective upon final approval of the Settlement. Settlement Agreement, ¶ 4.19.1. The release timing extends through the date of preliminary approval, and the Released Parties are Defendants and their related persons and entities. Settlement Agreement, ¶¶ 4.19.8, 2.37. By its express terms, the release only encompasses claims arising from the refinery's alleged joint employment of a Participating Individual with CertifiedSafety, and does not extend to any claims that may arise from the Participating Individual's direct employment with a refinery Defendant. Settlement Agreement, ¶ 2.37. The Class Representatives also agree to a general release. Settlement Agreement, ¶ 4.21.

E. Settlement Administration

The Parties have agreed to use Heffler Claims Group to administer the Settlement, for total fees and costs currently estimated at $66,000. Cottrell Decl., ¶ 60. The Settlement Administrator will distribute the Notice of Settlement via mail and email, calculate individual settlement payments, calculate all applicable payroll taxes, withholdings and deductions, and prepare and issue all disbursements to Class Members, the LWDA, the Class Representatives, Plaintiffs' counsel, and applicable state, and federal tax authorities. *Id.*; Settlement Agreement, ¶¶ 4.8, 4.13, 4.15. The Settlement Administrator is also responsible for the timely preparation and filing of all tax returns and reporting, and will make timely and accurate payment of any and all necessary taxes and withholdings. Settlement Agreement, ¶ 4.15.1. The Settlement Administrator will establish a settlement website that will allow Class Members to view the Class, Collective, and

Class/Collective Notices (in generic form), the Settlement Agreement, and all papers filed by Class Counsel to obtain preliminary and final approval of the Settlement. Settlement Agreement, ¶ 4.8.2. The Settlement Administrator will also establish a toll-free call center for telephone inquiries from Class Members. *Id*.

V. ARGUMENT

A. The Court Should Grant Preliminary Approval of the Settlement as to the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes and Approval of the Settlement as to the Collective

A certified class action may not be settled without Court approval. *See* Fed.R.Civ.P. 23(e). Approval of a class action settlement requires three steps: (1) preliminary approval of the proposed settlement upon a written motion; (2) dissemination of notice of the settlement to all class members; and (3) a final settlement approval hearing at which objecting class members may be heard, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement is presented. Manual for Complex Litigation, *Judicial Role in Reviewing a Proposed Class Action Settlement*, § 21.61 (4th ed. 2004). The decision to approve or reject a proposed settlement is committed to the sound discretion of the court. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Rule 23 requires that all class action settlements satisfy two primary prerequisites before a court may grant certification for purposes of preliminary approval: (1) that the settlement class meets the requirements for class certification if it has not yet been certified; and (2) that the settlement is fair, reasonable, and adequate. Fed.R.Civ.P. 23(a), (e)(2); *Hanlon*, 150 F.3d at 1020.

This class action settlement satisfies the requirements of Rule 23(a) and (b), and it is fair, reasonable, and adequate in accordance with Rule 23(e)(2). Cottrell Decl., ¶ 62. Accordingly, the Court should preliminary approve the Settlement as to the Classes.[19]

In the FLSA context, court approval is required for FLSA collective settlements, but the Ninth Circuit has not established the criteria that a district court must consider in determining

[19] Plaintiffs acknowledge that, in the event that the Settlement is not approved by the Court, class and collective certification would be contested by Defendants, and Defendants fully reserve and do not waive any arguments and challenges regarding the propriety of class and collective action certification.

whether an FLSA settlement warrants approval. *See, e.g., Dunn v. Teachers Ins. & Annuity Ass'n of Am.*, No. 13-CV-05456-HSG, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016); *Otey v. CrowdFlower, Inc.*, No. 12-CV-05524-JST, 2015 WL 6091741, at *4 (N.D. Cal. Oct. 16, 2015). Most courts in this Circuit, however, first consider whether the named plaintiffs are "similarly situated" to the putative class members within the meaning of 29 U.S.C. § 216(b), and then evaluate the settlement under the standard established by the Eleventh Circuit in *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982), which requires the settlement to constitute "a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Otey*, 2015 WL 6091741, at *4. "If a settlement in an employee FLSA suit does reflect a reasonable compromise over issues...that are actually in dispute," the district court may "approve the settlement in order to promote the policy of encouraging settlement of litigation." *Lynn's Food Stores*, 679 F.2d at 1354; *Otey*, 2015 WL 6091741, at *4.

The Court has already conditionally certified a collective under § 216(b) for Plaintiffs' FLSA claims, and 438 Safety Attendants have filed opt-in forms in the *Jones* action.[20] *See* ECF 112; Cottrell Decl., ¶ 63. Defendants have not moved for decertification of the FLSA claim. Cottrell Decl., ¶ 63. The proposed Settlement provides an excellent recovery to the Opt-In Plaintiffs in a reasonable compromise. Accordingly, the Court should approve the Settlement as to the Collective.

B. The Court Should Conditionally Certify the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes.

A class may be certified under Rule 23 if (1) the class is so numerous that joinder of all members individually is "impracticable"; (2) questions of law or fact are common to the class; (3) the claims or defenses of the class representative are typical of the claims or defenses of the class; and (4) the person representing the class is able to fairly and adequately protect the interests of all members of the class. Fed.R.Civ.P. 23(a). Furthermore, Rule 23(b)(3) provides that a class action seeking monetary relief may only be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and

[20] Additionally, 87 Safety Attendants have filed opt-in forms in the *Ross* action. *See Ross* ECF 107; Cottrell Decl., ¶ 15.

that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). Applying this standard, numerous cases similar to this case have certified classes of employees who have suffered wage and hour violations under the wage and hour laws of these states.[21] Likewise, Plaintiffs contend that the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes meet all of these requirements.

1. The Classes are numerous and ascertainable.

The numerosity prerequisite demands that a class be large enough that joinder of all members would be impracticable. Fed.R.Civ.P. 23(a)(1). While there is no exact numerical cut-off, courts have routinely found numerosity satisfied with classes of at least forty members. *See, e.g., Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 485 (E.D. Cal. 2006). Plaintiffs contend that the approximately 1,371 members of the California Class, 792 members of the Washington Class, 248 members of the Minnesota Class, 115 members of the Illinois class, 264 members of the Ohio class, and 70 members of the Alaska class render each class so large as to make joinder impracticable. Cottrell Decl., ¶ 64. The Class Members may be readily identified from CertifiedSafety's payroll records. *Id*.

2. Plaintiffs' claims raise common issues of fact or law.

The commonality requirement of Rule 23(a)(2) "is met if there is at least one common question or law or fact." *Fry v. Hayt, Hayt & Landau*, 198 F.R.D. 461, 467 (E.D. Pa. 2000). Rule 23(a)(2) has been construed permissively. *Hanlon*, 150 F.3d at 1019. Plaintiffs "need not show that every question in the case, or even a preponderance of questions, is capable of classwide

[21] *See, e.g., Caudle v. Sprint/United Mgmt. Co.*, No. C 17-06874 WHA, 2018 WL 6618280, at *7 (N.D. Cal. Dec. 18, 2018) (certifying California Rule 23 class in a case asserting policy-driven wage violations); *Shaw v. AMN Healthcare, Inc.*, 326 F.R.D. 247, 275 (N.D. Cal. 2018) (certifying California Rule 23 class in a case asserting policy-driven off-the-clock, overtime, and meal and rest break violations, in joint employment context); *Kirkpatrick v. Ironwood Commc'ns, Inc.*, No. C05-1428JLR, 2006 WL 2381797, at *14 (W.D. Wash. Aug. 16, 2006) (certifying Washington Rule 23 class in a case involving off-the-clock, overtime, and meal break violations under Washington law); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840, at *2 (E.D. Wash. May 16, 2005) (denying motion to decertify FLSA and Rule 23 classes of employees asserting federal and Washington law claims for wage and hour violations).

resolution." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013). "[E]ven a single common question" can satisfy the commonality requirement of Rule 23(a)(2). *Id*.

Plaintiffs contend that common questions of law and fact predominate here, satisfying paragraphs (a)(2) and (b)(3) of Rule 23, as alleged in the operative complaints. Cottrell Decl., ¶ 65. Defendants have uniform policies applicable to all Safety Attendants. *Id*., ¶ 66. Specifically, Plaintiffs allege that Safety Attendants all perform essentially the same job duties—performing safety duties pursuant to Defendants' standards and requirements. Plaintiffs allege that the wage and hour violations are in large measure borne of CertifiedSafety's relationship with the refineries and the standardized policies, practices, and procedures that the refineries impose, creating pervasive issues of fact and law that are amenable to resolution on a class-wide basis. In particular, Safety Attendants are subject to the same: hiring and training process; timekeeping, payroll, and compensation policies; meal and rest period policies and practices; and reimbursement policies. *Id*. Plaintiffs' other derivative claims will rise or fall with the primary claims. *Id*. Because these questions can be resolved at the same juncture, Plaintiffs contend the commonality requirement is satisfied for the Classes. *Id*.

With regards to the Collective, this Court has already made an initial determination that the Safety Attendants are similarly situated. Conditional certification motion called on the Court to "decid[e] whether a collective action should be certified for the purpose of sending notice of the action to potential class members." *Guilbaud v. Sprint/United Management Co.*, Inc., 2014 WL 10676582, at *1 (N.D. Cal. 2014). The Court concluded that Plaintiffs have satisfied their burden of making substantial allegations and a modest factual showing Safety Attendants were subject to a common practice or policy that violated the FLSA. ECF 48, p. 5. Because Defendants maintain various common policies and practices as to what work they compensate and what work they do not compensate, and apply these policies and practices to the Safety Attendants, Plaintiffs contend that there are no individual defenses available to Defendants. *Id*., ¶ 67.

3. Plaintiffs' claims are typical of the claims of the Classes.

"Rule 23(a)(3) requires that the claims of the named parties be typical of the claims of the members of the class." *Fry*, 198 F.R.D. at 468. "Under the rule's permissive standards, a

representative's claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Here, Plaintiffs contend that their claims are typical of those of all other Class Members. Cottrell Decl., ¶ 68. They were subject to the alleged illegal policies and practices that form the basis of the claims asserted in this case. *Id.* Interviews with Class Members and review of timekeeping and payroll data confirm that the employees throughout the United States were subjected to the same alleged illegal policies and practices to which Plaintiffs were subjected. *Id.*, ¶ 69. Thus, Plaintiffs contend that the typicality requirement is also satisfied. *Id.*

4. Plaintiffs and Class Counsel will adequately represent the Classes.

To meet the adequacy of representation requirement in Rule 23(a)(4), Plaintiffs must show "(1) that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously; (2) that he or she has obtained adequate counsel, and (3) that there is no conflict between the individual's claims and those asserted on behalf of the class." *Fry*, 198 F.R.D. at 469. Plaintiffs' claims are in line with the claims of the Classes, and Plaintiffs' claims are not antagonistic to the claims of Class Members. Cottrell Decl., ¶ 70. Plaintiffs have prosecuted this case with the interests of the Class Members in mind. *Id.* Moreover, Plaintiffs' counsel has extensive experience in class action and employment litigation, including wage and hour class actions, and do not have any conflict with the Classes. *Id.*, ¶¶ 5-7, 71.

5. The Rule 23(b)(3) requirements for class certification are also met.

Under Rule 23(b)(3), Plaintiffs must demonstrate that common questions "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." "The predominance analysis under Rule 23(b)(3) focuses on 'the relationship between the common and individual issues' in the case and 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Wang,* 737 F.3d at 545.

Here, Plaintiffs contend the common questions raised in this action predominate over any individualized questions concerning the California Class. Cottrell Decl., ¶ 72. The Classes are entirely cohesive because resolution of Plaintiffs' claims hinge on the uniform policies and

practices of Defendants, rather than the treatment the Class Members experienced on an individual level. *Id.* As a result, Plaintiffs contend that the resolution of these alleged class claims would be achieved through the use of common forms of proof, such as Defendants' uniform policies, and would not require inquiries specific to individual Class Members.[22] *Id.*

Further, Plaintiffs contend the class action mechanism is a superior method of adjudication compared to a multitude of individual suits. Cottrell Decl., ¶ 73. To determine whether the class approach is superior, courts are to consider: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed.R.Civ.P. 23(b)(3)(A)-(D).

Here, the Class Members do not have a strong interest in controlling their individual claims. Cottrell Decl., ¶ 74. The action involves thousands of workers with very similar, but relatively small, claims for monetary injury. *Id*. If the Class Members proceeded on their claims as individuals, their many individual suits would require duplicative discovery and duplicative litigation, and each Class Member would have to personally participate in the litigation effort to an extent that would never be required in a class proceeding. *Id.* Thus, Plaintiffs contend that the class action mechanism would efficiently resolve numerous substantially identical claims at the same time while avoiding a waste of judicial resources and eliminating the possibility of conflicting decisions from repetitious litigation and arbitrations. *Id.*

The issues raised by the present case are much better handled collectively by way of a settlement. *Id*., ¶ 75. Manageability is not a concern in the settlement context. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 593 (1997). The Settlement presented by the Parties provides finality,

[22] Although the amount of time worked off-the-clock and number of missed meal and rest periods may vary, these are damages questions and should not impact class certification. *Yokoyama v. Midland Nat. Life Ins. Co*., 594 F.3d 1087, 1094 (9th Cir. 2010). The fact that individual inquiry might be necessary to determine whether individual employees were able to take breaks despite the Defendants' allegedly unlawful policy is not a proper basis for denying certification. *Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701 (Cal. Ct. App. 2014).

ensures that workers receive redress for their relatively modest claims, and avoids clogging the legal system with numerous cases. Cottrell Decl., ¶ 76. Accordingly, class treatment is efficient and warranted, and the Court should conditionally certify the California, Washington, Minnesota, Illinois, Ohio, and Alaska Classes for settlement purposes.

C. The Settlement Should Be Preliminarily Approved as to the Classes and Approved as to the Collective Because It Is Fair, Reasonable, and Adequate.

In deciding whether to approve a proposed class or collective settlement, the Court must find that the proposed settlement is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *Lynn's Food Stores*, 679 F.2d at 1354-55; *Otey*, 2015 WL 6091741, at *4. Included in this analysis are considerations of: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Churchill Village, LLC. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (citing *Hanlon*, 150 F.3d at 1026). Importantly, courts apply a presumption of fairness "if the settlement is recommended by class counsel after arm's-length bargaining." *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 WL 1230826, at *6 (N.D. Cal. Apr. 1, 2011). There is also "a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). In light of these factors, the proposed settlement is fair, reasonable, and adequate.

1. The terms of the Settlement are fair, reasonable, and adequate.

In evaluating the fairness of a proposed settlement, courts compare the settlement amount with the estimated maximum damages recoverable in a successful litigation. *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 459 (9th Cir.2000). Courts routinely approve settlements that provide a fraction of the maximum potential recovery. *See, e.g.*, *Officers for Justice,* 688 F.2d at 623; *Viceral v. Mistras Grp., Inc.*, Case No. 15-cv-2198-EMC, 2016 WL 5907869, at *7 (N.D. Cal. Oct. 11,

2016) (Chen, J.) (approving wage and hour settlement which represented 8.1% of the total verdict value).[23] A review of the Settlement Agreement reveals the fairness, reasonableness, and adequacy of its terms. Cottrell Decl., ¶ 78. The Gross Settlement Amount of $6,000,000, which represents more than 53% of the approximate $11.3 million that Plaintiffs calculated in unpaid wages that would have been owed to all Class Members if each had been able to prove that he or she worked 1.75 hours off-the-clock in every workday during the relevant time period. *Id*. When adding other substantive claims and potential penalties, the $6,000,000 settlement amount represents approximately 13.3% of Defendants' total potential exposure of $45.2 million. *Id.* Again, these figures are based on Plaintiffs' assessment of a best-case-scenario. To have obtained such a result at trial(s), Plaintiffs would have had to prove that each Class Member worked off-the-clock for 1.75 hours in each workday and that Defendants acted knowingly or in bad faith. *Id.*, ¶ 79. These figures would of course be disputed and hotly contested. *Id*. The result is well within the reasonable standard when considering the difficulty and risks presented by pursuing further litigation. *Id*. The final settlement amount takes into account the substantial risks inherent in any class action wage- and hour case, as well as the procedural posture of the Actions and the specific defenses asserted by Defendants, many of which are unique to this case. Cottrell Decl., ¶ 80*; see Officers for Justice*, 688 F.2d at 623.

2. The Parties have agreed to distribute settlement proceeds tailored to the Classes and Collective and their respective claims.

In an effort to ensure fairness, the Parties have agreed to allocate the settlement proceeds amongst Class Members in a manner that recognizes that amount of time that the particular Class Member worked for Defendants in the applicable limitations period. The allocation method, which is based on the number of Workweeks, will ensure that longer-tenured workers receive a greater

[23] *See also Stovall-Gusman v. W.W. Granger, Inc.*, 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) ("10% gross and 7.3% net figures are 'within the range of reasonableness'"); *Balderas v. Massage Envy Franchising, LLP*, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (gross settlement amount of 8% of maximum recovery and net settlement amount of 5%); *Ma v. Covidien Holding, Inc.*, 2014 WL 360196, at *4-5 (C.D. Cal. Jan. 31, 2014) (9.1% of "the total value of the action" is within the range of reasonableness).

recovery. Moreover, the allocation tracks the differences in substantive law and penalty claims by weighting the Workweek shares more heavily for work performed in California and Washington. Cottrell Decl., ¶ 81. The allocation was made based on Class Counsel's assessment to ensure that employees are compensated accordingly and in the most equitable manner. *Id*. To the extent that any Class Member is *both* a FLSA Opt In Plaintiff and a member of a Rule 23 Class, these workers will only receive a recovery based on their workweeks as a Rule 23 Class Member for their work in California, Washington, Minnesota, Illinois, Ohio, and Alaska. *Id*., ¶ 82. Such workers will not receive a "double recovery."

A class action settlement need not benefit all class members equally. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983); *In re AT & T Mobility Wireless Data Services Sales Tax Litigation,* 789 F.Supp.2d 935, 979–80, 2011 WL 2204584 at *42 (N.D. Ill. 2011). Rather, although disparities in the treatment of class and collective members may raise an inference of unfairness and/or inadequate representation, this inference can be rebutted by showing that the unequal allocations are based on legitimate considerations. *Holmes,* 706 F.2d at 1148; *In re AT & T,* 789 F.Supp.2d at 979–80, 2011 WL 2204584 at *42. Plaintiffs provide rational and legitimate bases for the allocation method here, and the Parties submit that it should be approved by the Court.

3. The extensive discovery enabled the Parties to make informed decisions regarding settlement.

The amount of discovery completed prior to reaching a settlement is important because it bears on whether the Parties and the Court have sufficient information before them to assess the merits of the claims. *See, e.g.*, *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 617, 625 (N.D. Cal. 1979); *Lewis v. Starbucks Corp.*, No. 2:07-cv-00490-MCE-DAD, 2008 WL 4196690, at *6 (E.D. Cal. Sept. 11, 2008). Informal discovery may also assist parties with "form[ing] a clear view of the strengths and weaknesses of their cases." *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 454 (E.D. Cal. 2013).

The Parties engaged in extensive informal discovery, depositions, and class outreach that have enabled both sides to assess the claims and potential defenses in this action. Cottrell Decl., ¶¶ 17-22, 83. The Parties were able to accurately assess the legal and factual issues that would arise if the cases proceeded to trial(s). *Id*., ¶ 83. In addition, in reaching this Settlement, Plaintiffs' counsel

relied on their substantial litigation experience in similar wage and hour class and collective actions. Cottrell Decl., ¶¶ 5-7, 84; Plaintiffs' counsel's liability and damages evaluation was premised on a careful and extensive analysis of the effects of Defendants' compensation policies and practices on Class Members' pay. Cottrell Decl., ¶ 85. Ultimately, facilitated by mediator Paul Grossman, the Parties used this information and discovery to fairly resolve the litigation. Cottrell Decl., ¶ 86.

4. Litigating the Actions not only would delay recovery, but would be expensive, time consuming, and involve substantial risk.

The monetary value of the proposed Settlement represents a fair compromise given the risks and uncertainties posed by continued litigation. Cottrell Decl., ¶ 87. If the Actions were to go to trial(s) as class and collective actions (which Defendants would vigorously oppose if this Settlement Agreement were not approved), Class Counsel estimates that fees and costs would exceed $5,000,000. *Id.*, ¶ 88. Litigating the class and collective action claims would require substantial additional preparation and discovery. *Id.* It would require depositions of experts, the presentation of percipient and expert witnesses at trial, as well as the consideration, preparation, and presentation of voluminous documentary evidence and the preparation and analysis of expert reports. *Id.*

Recovery of the damages and penalties previously referenced would also require complete success and certification of all of Plaintiffs' claims, a questionable feat in light of developments in wage and hour and class and collective action law as well as the legal and factual grounds that Defendants have asserted to defend this action. *Id.,* ¶ 89. Off-the-clock claims are difficult to certify for class treatment, given that the nature, cause, and amount of the off-the-clock work may vary based on the individualized circumstances of the worker. *See, e.g., In re AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526, 539 (N.D. Cal. 2012), aff'd, No. 17-17533, 2019 WL 4898684 (9th Cir. Oct. 4, 2019); *Kilbourne v. Coca-Cola Co.*, No. 14CV984-MMA BGS, 2015 WL 5117080, at *14 (S.D. Cal. July 29, 2015); *York v. Starbucks Corp.*, No. CV 08-07919 GAF PJWX, 2011 WL 8199987, at *30 (C.D. Cal. Nov. 23, 2011). While Plaintiffs are confident that they would establish that common policies and practices give rise to the off-the-clock work for Safety Attendants, Plaintiffs acknowledged that the work was performed at dozens of different locations around the country, which were operated by numerous different oil companies. Cottrell

Decl., ¶ 90. With refinery policies and practices, the physical layout, and the nature of the work varying by location, Plaintiffs recognized that obtaining class certification would present a significant obstacle, with the risk that the Safety Attendants could only pursue individual actions in the event that certification was denied. Certification of off-the-clock work claims is complicated by the lack of documentary evidence and reliance on employee testimony, and Plaintiffs would likely face motions for decertification as the case progressed. *Id.* Given that the substantive damages are largely driven by the alleged off-the-clock work, and that the derivative and penalty claims are tethered to off-the-clock claims, Plaintiffs' counsel was required to significantly discount the hypothetical value of the claims when assessing the mediator's proposal for Settlement. *Id.*

Plaintiffs would encounter difficulties in moving for certification and proving their claims on the merits in part due to the fact that key Class Member timekeeping documents were kept in paper format. Cottrell Decl., ¶ 91. For example, Class Member timesheets that tracked the services performed were largely written by hand. *Id*. Plaintiffs would face fundamental logistical difficulties in reviewing and analyzing the massive amounts of hard copy records. *Id.*

Moreover, Plaintiffs considered the risk that the Court would, in the end, decline to find the refinery Defendants liable as a joint employer. *Id.*, ¶ 92. Though CertifiedSafety would still be liable in the event of a favorable outcome for Plaintiffs, a finding that the refinery Defendants are joint employers would ensure that the Class Members would be able to obtain full recovery, particularly in the event of a large award.[24] *Id*. Though Plaintiffs have filed pleadings alleging claims of liability against refinery Defendants on a joint employer basis, the issue would be heavily contested at summary judgment and/or trial(s). *Id*. If refinery Defendants are found not to be a joint employer, the value of the case would be lessened, and Plaintiffs had to consider this risk. *Id*.

In contrast to litigating this suit, resolving this case by means of the Settlement will yield a prompt, certain, and very substantial recovery for the Class Members. Cottrell Decl., ¶ 93. Such a result will benefit the Parties and the court system. *Id*. It will bring finality to over two years of

[24] *See, e.g., Am. Motorcycle Assn. v. Superior Court*, 20 Cal.3d 578, 590 (1978) (joint and several liability permits an injured person to obtain full recovery even when one or more of the responsible parties do not have the financial resources to cover their liability).

arduous litigation and eight separate Actions, and will foreclose the possibility of expanding litigation.

5. The Settlement is the product of informed, non-collusive, and arm's-length negotiations between experienced counsel.

Courts routinely presume a settlement is fair where it is reached through arm's-length bargaining. *See Hanlon*, 150 F.3d at 1027; *Wren*, 2011 WL 1230826, at *14. Furthermore, where counsel are well-qualified to represent the proposed class and collective in a settlement based on their extensive class and collective action experience and familiarity with the strengths and weaknesses of the action, courts find this factor to support a finding of fairness. *Wren*, 2011 WL 1230826, at *10; *Carter v. Anderson Merchandisers, LP*, No. EDCV 08-0025-VAP OPX, 2010 WL 1946784, at *8 (C.D. Cal. May 11, 2010) ("Counsel's opinion is accorded considerable weight.").

Here, the settlement was a product of non-collusive, arm's-length negotiations. Cottrell Decl., ¶ 94. The Parties participated in two mediations. The second mediation before Paul Grossman, who is a skilled mediator with many years of experience mediating employment matters, was a lengthy session that lasted well into the night. *Id.* The Parties then spent several months negotiating the long form settlement agreement, with several rounds of meet and confer and correspondence related to the terms and details of the Settlement. *Id.*, ¶ 95. Plaintiffs are represented by experienced and respected litigators of representative wage and hour actions, and these attorneys feel strongly that the proposed Settlement achieves an excellent result for the Class Members. *Id.*, ¶ 96.

D. The Class Representative Enhancement Payments are Reasonable.

Named plaintiffs in class action litigation are eligible for reasonable service awards. *See Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003).[25] The enhancement payments of up to $15,000 for Plaintiff Jones, Knight, and Crummie, up to $10,000 for Plaintiffs Ross and East, and

[25] "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) (named plaintiff received $50,000 for work in class action).

up to $5,000 for Plaintiffs Azevedo and Turner are intended to compensate Plaintiffs for the critical role they played in this case, and the time, effort, and risks undertaken in helping secure the result obtained on behalf of the Class members.[26] Cottrell Decl., ¶ 97. In agreeing to serve as Class and Collective representatives, Plaintiffs formally agreed to accept the responsibilities of representing the interests of all Class Members. *Id.*, ¶ 99. Defendants do not oppose the requested payments to the Plaintiffs as reasonable service awards. *Id.*, ¶ 100.

Moreover, the service awards are fair when compared to the payments approved in similar cases. *See, e.g.*, *Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3:17-cv-00251-VC, ECF 304 (N.D. Cal. Oct. 23, 2019) (approving $15,000 and $10,000 service awards in recent hybrid FLSA/Rule 23 settlement); *Guilbaud v. Sprint/United Management Co., Inc.,* No. 3:13-cv-04357-VC, Dkt. No. 181 (N.D. Cal. Apr. 15, 2016) (approving $10,000 service payments for each class representative in FLSA and California state law representative wage and hour action); *Van Liew v. North Star Emergency Services, Inc., et al.*, No. RG17876878 (Alameda Cty. Super. Ct., Dec. 11, 2018) (approving $15,000 and $10,000 service awards, respectively, to class representatives in California Labor Code wage and hour class action).[27]

E. The Requested Attorneys' Fees and Costs are Reasonable.

In their fee motion to be submitted with the final approval papers, Plaintiffs' counsel will request up to 35% of the Gross Settlement Amount, or $2,100,000, plus reimbursement of costs up $70,000. Cottrell Decl., ¶ 101. Plaintiffs' counsel will provide the lodestar information for Schneider Wallace Cottrell Konecky Wotkyns LLP and Lawyers for Justice, PC with their fee

[26] Moreover, Plaintiffs have agreed to a general release, unlike other Class Members. *See* Settlement Agreement, ¶ 4.21.

[27] *See also Contreras v. Bank of America*, No. CGC-07-467749 (San Francisco Super. Ct., Sept. 3, 2010) (approving $10,000 service payment for each class representative); *Castellanos* v. *The Pepsi Bottling Group*, No. RG07332684 (Alameda Super Ct., Mar. 11, 2010) (approving award of $12,500); *Novak v. Retail Brand Alliance, Inc.*, No. RG 05-223254 (Alameda Super. Ct., Sept. 22, 2009) (approving award of $12,500); *Hasty v. Elec. Arts, Inc.*, No. CIV 444821 (San Mateo Super. Ct., Sept. 22, 2006) (approving award of $30,000); *Meewes v. ICI Dulux Paints*, No. BC265880 (Los Angeles Super. Ct. Sept. 19, 2003) (approving service awards of $50,000, $25,000 and $10,000 to the named plaintiffs); *Mousai v. E-Loan, Inc.*, No. C 06-01993 SI (N.D. Cal. May 30, 2007) (approving service award of $20,000).

motion, and anticipate that the aggregate lodestar will be approximately on par with the requested fee award. *Id*. On this basis, the requested attorneys' fees award is reasonable. *Id*.; *see, e.g., Vizcaino v. Microsoft Corp.*, 290 F. 3d 1043, 1050-51 (9th Cir. 2002) ("Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award").

The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the benchmark. *Vasquez v. Coast Valley Roofing*, 266 F.R.D. 482, 491-492 (E.D. Cal. 2010) (citing *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000)); *Hanlon*, 150 F.3d at 1029; *Staton*, 327 F.3d at 952. However, the exact percentage varies depending on the facts of the case, and in "most common fund cases, the award exceeds that benchmark." *Id.* (citing *Knight v. Red Door Salons, Inc.*, 2009 WL 248367 (N.D. Cal. 2009); *In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1377-78 (N.D. Cal. 1989) ("nearly all common fund awards range around 30%")). In California, federal and state courts have customarily approved payments of attorneys' fees amounting to one-third of the common fund in comparable wage and hour class actions. *See, e.g., Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3:17-cv-00251-VC, ECF 304 (N.D. Cal. Oct. 23, 2019) (approving attorneys' fees of one-third of the gross settlement in recent hybrid FLSA/Rule 23 settlement); *Regino Primitivo Gomez, et al. v. H&R Gunlund Ranches, Inc.*, No. CV F 10–1163 LJO MJS, 2011 WL 5884224 (E.D. Cal. 2011) (approving attorneys' fees award equal to 45% of the settlement fund); *Wren,* 2011 WL 1230826 (approving attorneys' fee award of just under 42% of common fund).

In this case, given the excellent results achieved, the effort expended litigating the Actions, including the filing of numerous later actions to assert additional Rule 23 claims and joint employer claims against the refinery Defendants, and the difficulties attendant to litigating this case, such an upward adjustment is warranted. Cottrell Decl., ¶ 102. There was no guarantee of compensation or reimbursement. *Id.* Rather, counsel undertook all the risks of this litigation on a completely contingent fee basis. *Id.* These risks were front and center. *Id.* Defendants' vigorous and skillful defense further confronted Plaintiffs' counsel with the prospect of recovering nothing or close to nothing for their commitment to and investment in the case. *Id.*

Nevertheless, Plaintiffs and their counsel committed themselves to developing and pressing Plaintiffs' legal claims to enforce the employees' rights and maximize the class and collective recovery. *Id.*, ¶ 103. During the litigation, counsel had to turn away other less risky cases to remain sufficiently resourced for this one. *Id.* The challenges that Class Counsel had to confront and the risks they had to fully absorb on behalf of the class and collective here are precisely the reasons for multipliers in contingency fee cases. *See, e.g.*, *Noyes v. Kelly Servs., Inc.*, 2:02-CV-2685-GEB-CMK, 2008 WL 3154681 (E.D. Cal. Aug. 4, 2008); Posner, Economic Analysis of the Law, 534, 567 (4th ed. 1992) ("A contingent fee must be higher than a fee for the same legal services paid as they are performed… because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans").

Attorneys who litigate on a wholly or partially contingent basis expect to receive significantly higher effective hourly rates in cases where compensation is contingent on success, particularly in hard-fought cases where, like in the case at bar, the result is uncertain. This does not result in any windfall or undue bonus. In the legal marketplace, a lawyer who assumes a significant financial risk on behalf of a client rightfully expects that his or her compensation will be significantly greater than if no risk was involved (*i.e.*, if the client paid the bill on a monthly basis), and that the greater the risk, the greater the "enhancement." Adjusting court-awarded fees upward in contingent fee cases to reflect the risk of recovering no compensation whatsoever for hundreds of hours of labor simply makes those fee awards consistent with the legal marketplace, and in so doing, helps to ensure that meritorious cases will be brought to enforce important public interest policies and that clients who have meritorious claims will be better able to obtain qualified counsel.

For these reasons, Plaintiffs' counsel respectfully submits that a 35% recovery for fees is appropriate. *Id.*, ¶ 105. Class Counsel also requests reimbursement for their litigation costs. *Id.* Class Counsel's efforts resulted in an excellent settlement, and the fee and costs award should be preliminarily approved as fair and reasonable.

F. The Proposed Notices of Settlement and Claims Process Are Reasonable.

The Court must ensure that Class Members receive the best notice practicable under the circumstances of the case. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Eisen*

v. Carlisle & Jacquelin, 417 U.S. 156, 174-75 (1974). Procedural due process does not guarantee any particular procedure but rather requires only notice reasonably calculated "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). A settlement notice "is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Churchill Village LLC*, 361 F.3d at 575.

The Notices of Settlement, attached as **Exhibit A-C** to the Settlement Agreement, and manner of distribution negotiated and agreed upon by the Parties are "the best notice practicable." Cottrell Decl., ¶ 106; Fed.R.Civ.P. 23(c)(2)(B). All Class Members have been identified and the Notices of Settlement will be mailed directly to each Class Member, and emailed to those for whom CertifiedSafety has an email address. Cottrell Decl., ¶ 107. The proposed Notices are clear and straightforward, and provide information on the nature of the action and the proposed Classes and Collective, the terms and provisions of the Settlement Agreement, and the monetary awards that the Settlement will provide Class Members. *Id.* In addition, the Parties will provide a settlement website that provides a generic form of the Notice, the Settlement Agreement, and other case related documents and contact information. *Id.*, ¶ 108.

The proposed Notices fulfill the requirement of neutrality in class notices. Cottrell Decl., ¶ 109. *See* Conte, Newberg on Class Actions, § 8.39 (3rd Ed. 1992). They summarize the proceedings necessary to provide context for the Settlement Agreement and summarize the terms and conditions of the Settlement, including an explanation of how the settlement amount will be allocated between the Named Plaintiffs, Plaintiffs' counsel, the Settlement Administrator, and the Class Members, in an informative, coherent and easy-to-understand manner, all in compliance with the Manual for Complex Litigation's recommendation that "the notice contain a clear, accurate description of the terms of the settlement." Cottrell Decl., ¶ 109; Manual for Complex Litigation, Settlement Notice, § 21.312 (4th ed. 2004).

The Class and Class/Collective Notices clearly explain the procedures and deadlines for requesting exclusion from the Settlement, objecting to the Settlement, the consequences of taking or

foregoing the various options available to Class Members, and the date, time and place of the Final Approval Hearing. Cottrell Decl., ¶ 110. Pursuant to Rule 23(h), the proposed Notices of Settlement also sets forth the amount of attorneys' fees and costs sought by Plaintiffs, as well as an explanation of the procedure by which Class Counsel will apply for them. *Id.* The Notices of Settlement clearly state that the Settlement does not constitute an admission of liability by Defendants. *Id.* The Notices makes clear that the final settlement approval decision has yet to be made. *Id.*, ¶ 111. Accordingly, the Notices of Settlement comply with the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court. *See* Conte, Newberg on Class Actions, §§ 8.21 and 8.39 (3rd Ed. 1992); Manual for Complex Litigation, Certification Notice, § 21.311; Settlement Notice, § 21.312 (4th ed. 2004).

Furthermore, reasonable steps will be taken to ensure that all Class Members receive the Notice. Cottrell Decl., ¶ 113. Before mailing, CertifiedSafety will provide to the Settlement Administrator a database that contains the names, last known addresses, last known email addresses (if any), and social security numbers of each Class Member, along with the applicable number(s) of Workweeks for calculating the respective settlement shares. *Id.* The Notices of Settlement will be sent by United States Mail, and also via email to the maximum extent possible. The Settlement Administrator will make reasonable efforts to update the contact information in the database using public and private skip tracing methods. Within 14 days of receipt of the Class List from CertifiedSafety, the Settlement Administrator will mail the Notices of Settlement to each Class Member. *Id.*

With respect to Class Notices returned as undeliverable, the Settlement Administrator will re-mail any Notices returned to the Settlement Administrator with a forwarding address following receipt of the returned mail. *Id.*, ¶ 114. If any Notice is returned to the Settlement Administrator without a forwarding address, the Settlement Administrator will undertake reasonable efforts to search for the correct address, including skip tracing, and will promptly re-mail the Notice of Settlement to any newly found address. *Id*.

Rule 23 Class Members will have 60 days from the mailing of the Notices of Settlement to opt-out or object to the Settlement. *Id.*, ¶ 115. Any Rule 23 Class Member who does not submit a

timely request to exclude themselves from the Settlement will be deemed a Participating Individual whose rights and claims are determined by any order the Court enters granting final approval, and any judgment the Court ultimately enters in the case.[28] *Id.* Administration of the Settlement will follow upon the occurrence of the Effective Date of the Settlement. *Id.*, ¶ 116. The Settlement Administrator will provide Class Counsel and Defendants' Counsel with a report of all Settlement payments within 10 business days after the opt out/objection deadline. *Id.*, ¶ 117.

Because the proposed Notices of Settlement clearly and concisely describe the terms of the Settlement and the awards and obligations for Class Members who participate, and because the Notices will be disseminated in a way calculated to provide notice to as many Class Members as possible, the Notices of Settlement should be preliminarily approved.

G. The Court Should Approve the Proposed Schedule.

The Settlement Agreement contains the following proposed schedule, which Plaintiffs respectfully request this Court approve:

Date of preliminary approval of the Settlement as to Classes and approval of the Settlement as to the Collective	
Deadline for CertifiedSafety to provide Heffler Claims Group with the Class List	Within 14 days after the Court's preliminary approval of the Settlement
Deadline for Heffler Claims Group to mail the Notice of Settlement to Class Members	Within 14 days after Heffler Claims Group receives the Class List
Deadline for Rule 23 Class Members to postmark requests to opt-out or file objections to the Settlement	60 days after Notices of Settlement are mailed
Deadline for Heffler Claims Group to provide all counsel with a report showing (i) the names of Rule 23 Class Members and Opt In Plaintiffs; (ii) the Individual Settlement Payments owed to each Rule 23 Class Member and Opt In Plaintiff; (iii) the final number of Rule 23 Class Members who have submitted objections or valid letters requesting exclusion from the Settlement; and (iv) the number of undeliverable Notices of Settlement.	Within 10 business days after the opt out/objection deadline
Deadline for filing of Final Approval Motion	At least 35 days before Final Approval

[28] However, Rule 23 Class Members who are not Named Plaintiffs or Opt-In Plaintiffs will only release FLSA claims (related to their work in the applicable Rule 23 states) if they endorse or cash their Individual Settlement Payment checks.

	Hearing
Deadline for Heffler Claims Group to provide the Court and all counsel for the Parties with a statement detailing the Settlement Administration Costs and its administration of the Notice of Settlement process	At least 10 days before Final Approval Hearing
Final Approval Hearing	
Effective Date	The latest of: (i) if no appeal is filed, the expiration date of the time for filing or noticing any appeal of the judgment (*i.e.*, 30 days from the entry of judgment); (ii) if there is an appeal of the Court's judgment, the date of dismissal of such appeal, or the expiration of the time to file a petition for writ of certiorari to the United States Supreme Court; or (iii) if a petition for writ of certiorari is filed, the date of denial of the petition for writ of certiorari, or the date the judgment is affirmed pursuant to such petition.
Deadline for Heffler Claims Group to calculate the employer share of taxes and provide CertifiedSafety with the total amount of CertifiedSafety's Payroll Taxes	Within 7 days after Effective Date
Deadline for CertifiedSafety to pay the Gross Settlement Amount into the Qualified Settlement Account	Within 14 days after Effective Date
Deadline for CertifiedSafety to deposit the amount of CertifiedSafety's Payroll Taxes	Within 14 days after Effective Date
Deadline for Heffler Claims Group to make payments under the Settlement to Participating Individuals, the LWDA, Class Representatives, Plaintiffs' counsel, and itself	Within 30 days after the Effective Date
Check-cashing deadline	180 days after issuance
Deadline for Heffler Claims Group to tender uncashed check funds to the State Controller's Office Unclaimed Property Division (or similar/equivalent state agency) for the state where the Participating Individual most recently worked for CertifiedSafety	As soon as practicable after check-cashing deadline
Deadline for Heffler Claims Group to provide written certification of completion of administration of the Settlement to counsel for all Parties and the Court	As soon as practicable after check-cashing deadline

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant preliminary approval of the Settlement Agreement as to the Rule 23 Classes and approval of the Settlement Agreement as to the Collective, in accordance with the schedule set forth herein.

Date: November 22, 2019

Respectfully submitted,

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