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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DIMITRI DIXON and RYAN SELTZ, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

CUSHMAN & WAKEFIELD WESTERN, INC., CUSHMAN & WAKEFIELD, INC., and CUSHMAN & WAKEFIELD OF WASHINGTON DC, INC., and DOES 1-50, inclusive

Defendants.

Case No. 3:18-cv-05813-JSC

PLAINTIFFS' SUPPLEMENTAL BRIEFING IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS, COLLECTIVE, AND REPRESENTATIVE ACTION SETTLEMENT

Date: September 2, 2021
Time: 9:00 a.m.
Dept: Courtroom E, 15th Floor
Before: Hon. Magistrate Judge Jacqueline Scott Corley

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Plaintiffs Dimitri Dixon and Ryan Seltz appreciate the opportunity to submit this supplemental brief in support of their motion for preliminary approval of the settlement of their class, collective, and representative actions and to answer the Court's question in its Order Requesting Supplemental Briefing Re: Plaintiffs' Motion for Preliminary Approval, ECF 126 (Aug. 5, 2021).

I. PRELIMINARY BACKGROUND

The Parties' Stipulation and Agreement to Settle Class, Collective, and Representative Actions, ECF 115-1, ("Settlement Agreement") resolves the FLSA and California Class Action claims across three cases: (1) *Dixon v. Cushman & Wakefield Western, Inc.*, Case No. 3:18-cv-05813-JSC ("*Dixon I*"); (2) *Dixon v. Cushman & Wakefield, Inc.*, Case No. 3:20-cv-07001-JSC ("*Dixon II*"); and (3) *Seltz v. Cushman & Wakefield, Inc.*, Case No. 1:18-cv-02092-BAH ("*Seltz*"). Declaration of Laura L. Ho in Support of Plaintiffs' Motion for Preliminary Approval of Class, Collective, and Representative Actions Settlement, ECF 115 ("Ho Prelim. App. Decl.") ¶ 1. The Settlement Agreement resolves the claims of two groups of people. First, there is a Rule 23 opt-out class of California workers, consisting of 111 class members. Second, there is a 29 U.S.C. 216(b) collective of workers outside of California who must – if they have not already – opt into the FLSA claim to properly put themselves before the Court. That group consists of 367 individuals from various states outside of California. Together, the individuals in the two groups total the 476 people referenced on page 1 of Plaintiffs' opening brief (two people are in both groups because they moved to or from California while working for Defendants).

These two groups are governed by different procedural and substantive laws that must be taken into consideration when litigating their claims, as well as when settling their claims. "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013) (citing *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 177-78 (1989)). In *Campbell v. City of Los Angeles*, 903 F.3d 1090 (9th Cir. 2018) (Berzon, J.), the Ninth Circuit set out the significant differences between Rule 23 class actions and section 216(b) collective actions. *See id.* at 1101. The court noted that "[c]ollective actions and class actions are creatures of distinct texts—collective actions of section 216(b), and class actions of Rule 23—that impose distinct

requirements. *See* 7B Fed. Prac. & Proc. Civ. § 1807 (citing examples of cases so observing)." *Id.* One such difference is that in a Rule 23 class action, the court must affirmatively decide to "certify" the class and allow the action to proceed on a class basis, while in a section 216(b) collective action, workers may join the action by filing opt-in forms with the court, regardless of whether the court has decided that a court-approved notice should be sent to the workers (often referred to as "conditional" or "preliminary certification"). *Campbell,* 903 F.3d at 1101-02, 1104. Unlike in the Rule 23 context, preliminary certification in the FLSA context does not "produce a class with an independent legal status[ ] or join additional parties to the action." *Id*. at 1101. The court emphasized that despite the terminology of "certification" used in both kinds of cases, there is no "particular procedural parallels between collective and class actions." *Id*. at 1102.

This lack of "procedural parallels" is true in the settlement context as well. For settlement, while Rule 23 expressly requires that courts review settlement agreements that bind class members for fairness, reasonableness, and adequacy,[1] the FLSA has no such statutory requirement. *Flores v. TFI Int'l, Inc.,* No. 12-cv-05790-JST, 2019 WL 1715180, at *6 (N.D. Cal. Apr. 17, 2019) (Tigar, J.) (noting that the Ninth Circuit has not established criteria that a district court must consider in determining whether a collective action settlement under the FLSA warrants approval). Because the failure to opt into an FLSA lawsuit does not prevent potential members of the collective from bringing their own FLSA claim in the future, *McKenna v. Champion Int'l Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984), *abrogated on other grounds by Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), FLSA collective actions do not implicate the same due process concerns as Rule 23 class actions. *Beckman v. Key Bank, N.A.*, 293 F.R.D. 467, 476 (S.D.N.Y. 2013) ("[T]he standard for approval of an FLSA settlement is lower than for a class action under Rule 23."); *see also Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 469-70 (N.D. Cal. 2004) (Walker, J., "the FLSA suit provides a means of participation

[1] In addition to the express requirements of Rule 23, the Northern District of California has issued more detailed Procedural Guidance for Class Action Settlements, available at: https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/ (updated November 1, 2018 and December 5, 2018). The guidelines ask parties submitting *class action* settlements to address issues that are specific to Rule 23 class actions and have no application to section 216(b) collective actions.

for individuals who truly wish to join the suit, while requiring no action from those who do not wish to join."). Ninth Circuit district courts evaluating an FLSA settlement look only to see that the settlement constitutes "a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Flores*, 2019 WL 1715180, at *6 (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.3d 1350, 1352-53, 1355 (11th Cir. 1982)).

Accordingly, district courts in the Ninth Circuit and around the country routinely approve settlements in which Rule 23 class members and section 216(b) collective members are treated differently for purposes of opting out vs. opting in and the right to make objections. *See e.g.*, *Garcia v. PPG Indus., Inc.*, No. 3:15-cv-00319-WHO, ECF No. 48 (July 22, 2016) (Orrick, J.) (granting final approval of settlement of California class action that allowed class members to opt out or object, and nationwide FLSA collective of non-California workers who could choose to opt in and could not object), Ho Prelim. App. Decl. Ex. 5; *Foster v. Advantage Sales & Mktg.*, No. 18-cv-070205-LB, ECF 61 (May 28, 2020) (Beeler, J.) (same), Ho Prelim. App. Decl. Ex. 4; *Zorrilla v. Carlson Rests. Inc.*, No. 14 CIV. 2740 (AT), 2018 WL 1737139, at *2 (S.D.N.Y. Apr. 9, 2018) (finally approving settlement in which FLSA collective members not provided right to object); Supplemental Declaration of Deirdre Aaron in Support of Preliminary Approval, filed herewith ("Aaron Suppl. Decl.") ¶ 8 (*Zorilla* Non-California collective notice did not provide right to object); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 1878918, at *9 (N.D. Cal. May 3, 2013) (Armstrong, J. preliminarily approving settlement of California class nationwide collective and noting that "California Class members" could present objections and approving the procedure for opting in to the FLSA class); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 5402120 (N.D. Cal. Sept. 26, 2013) (order finally approving settlement).

Consistent with these authorities, and for the reasons set forth in Plaintiffs' opening brief and below, Plaintiffs submit that the proposed settlement should be given preliminary approval as to the Rule 23 California settlement class and should be approved as to the section 216(b) collective.

II. ANSWERS TO THE COURT'S QUESTIONS IN ITS ORDER REQUESTING SUPPLEMENTAL BRIEFING

The following sections respond to the Court's questions posed in its Order Requesting Supplemental Briefing Re: Plaintiffs' Motion for Preliminary Approval, ECF 126, following the order in which the questions were asked.

A. Issue 1: There Is No Reversion. Non-California Opt-In Eligible Plaintiffs Are Not Before the Court and Cannot Release Any Claims Unless They Affirmatively Opt In.

The Settlement Agreement provides for a "maximum" Total Settlement Fund of $4.9 million because Defendants do not need to fund any amounts allocated to Non-California Opt-in Eligible Plaintiffs unless and until those individuals affirmatively choose to opt into the FLSA claim and agree to be bound by the terms of the Settlement Agreement. *See* Settlement Agreement §§ 1.41(a); 2.8(a). This is *not* a reversion nor does it suggest that this settlement is tainted by collusion.

1. The Settlement Agreement does not include a reversion.

The Ninth Circuit has questioned reversions because they involve unclaimed funds by members of Rule 23 class actions, where the class judgment binds absent class members, but the defendants do not ultimately pay for the release of claims against them. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (courts need to be "particularly vigilant" in evaluating signs of collusion in *class action* settlements under Rule 23). The possibility of collusion between the parties is less of a concern in an FLSA collective action settlement, for which individuals must affirmatively opt into a case and the court does not take on the role of vigilant scrutinizer in place of absent class members. *See Flores*, 2019 WL 1715180, at *6.

The important differences between a Rule 23 class action and a section 216(b) collective action are why courts regularly approve – without suspicion of collusion – settlements that treat Rule 23 class and section 216(b) collective members differently in accordance with the unique rules governing each respective type of claim. For example, in Plaintiffs' Counsel's case *Garcia v. PPG Industries, Inc.*, No. 3:15-cv-00319-WHO, ECF No. 48 (July 22, 2016), Judge Orrick granted final approval of a settlement structured like the one proposed here, consisting of a California Rule 23 settlement class

and an FLSA collective of individuals who affirmatively joined the action. *See* Ho Prelim. Appr. Decl. Ex. 5, Supplemental Declaration of Laura L. Ho in Support of Preliminary Approval, filed herewith ("Ho Suppl. Decl.") ¶ 5. The settlement agreement contemplated payments for three groups of people: California class members, individuals who had already opted into the FLSA claim, and anyone outside of California who was eligible to opt into the FLSA claim but had not yet done so. *Id.* The FLSA-eligible non-opt-ins were required, in order to participate in the settlement, to submit a claim form and opt in to be able to receive a settlement payment. *Id.* The settlement provided that any amounts not claimed by those FLSA settlement members who were eligible to opt in would remain the property of the defendant, while all of the amounts allocated to California class members would be paid by the defendant. *See id.* California settlement class members were not required to submit a claim and opt into the settlement in order to receive their settlement award. *Id.*

It is even more common for courts outside of California to approve FLSA-only settlements for which the defendant does not fund a portion of the settlement used to pay for awards ultimately unclaimed or a portion of the settlement is paid back to the defendant after it provided funds to the administrator – in large part because many jurisdictions outside of California do not have the robust class action enforcement of unique state wage protection laws that California has. *See, e.g.*, *Warren v. Cook Sales, Inc.*, No. 15-0603-WS-M, 2017 WL 325829, at *4 (S.D. Ala. Jan. 23, 2017) (approving FLSA settlement in which defendant did not have to pay for amounts allocated to opt-in eligible settlement collective members who failed to timely file a claim form); *Przytula v. Bed Bath & Beyond Inc.*, No. 1:17-cv-05124 (MTM), ECF 123 (N.D. Ill. Jan. 29, 2019) (granting one-step approval of Plaintiffs' Counsel's FLSA case in which unclaimed funds and uncashed check amounts were not paid by defendant), Aaron Suppl. Decl. ¶ 5; *Schriver v. Golden Corral Corp.*, No. 4:17-cv-00136, ECF 67 (N.D. Ohio May 31, 2018) (granting one-step approval of Plaintiffs' Counsel's FLSA case in which unclaimed funds and uncashed check amounts were not paid by defendant), Aaron Suppl. Decl. ¶ 6; *Lauture v. A.C. Moore Arts & Crafts, Inc.*, No. 17-cv-10219-JGD, 2017 WL 6460244, at *1 (D. Mass. June 8, 2017) (granting one-step approval of Plaintiff's Counsel's FLSA case where unclaimed funds and uncashed checks were returned to defendant), Aaron Suppl. Decl ¶ 7.

The ability to certify Rule 23 class actions in California under the Unfair Competition Law, in which the FLSA serves as a predicate violation, brings the settlement of those claims under the Rule 23 settlement rubric. *See Cel-Tech Commn's., Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) ("By proscribing 'any unlawful' business practice, [the UCL] 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." (internal quotations and citation omitted)). That may explain why some courts have looked more closely at settlements when they pertain only to a class of California employees, as discussed in more detail below. The proposed settlement here is completely consistent with the most protective of those cases – here, all California employees are part of the Rule 23 class and will have the opportunity to opt out,[2] or stay in the class and have the opportunity to object. Any class members who do not opt out will automatically be sent a check if the Court ultimately approves the settlement. Although the Ninth Circuit has suggested that class members who do not opt out may also effectively release their FLSA claims due to the *res judicata* effect of releasing state-law claims,[3] class member checks will also have an opt-in on the back so that if the class member endorses the check they will also opt-in to the FLSA claim. In contrast, the settlement of FLSA-only claims for non-California collective members do not carry *res judicata* effect if they do not affirmatively choose to join the FLSA claim. If an individual does not opt in, the defendant does not get the unfair benefit of an FLSA release without payment.

[2] California Settlement Class Members eligible for a PAGA payment will not, however, be permitted to opt out of the PAGA payment or release. Under California law, aggrieved employees are not permitted to opt out of PAGA settlements. *Robinson v. S. Ctys. Oil Co.*, 53 Cal. App. 5th 476, 482 (2020) ("[T]here is no mechanism for opting out of the judgment entered on the PAGA claim."). PAGA is a unique type of claim in which employees stand in for the government as law enforcement, so all those who would be bound by an action by the government are also bound by a PAGA action. *Id.* (citing *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009)). A PAGA action is not a class action and does not require a two-step approval process, so PAGA settlements involve direct checks mailed to aggrieved employees without an opportunity to opt out. *See, e.g.*, *Loreto v. Gen. Dynamics Info. Tech.*, No. 3:19-cv-01366-GPC-MSB, 2021 WL 3141208, at *2 (S.D. Cal. July 26, 2021) (preliminarily approving settlement in which the PAGA payment would be sent to settlement class members even though they opt out of the class settlement); *JD Tamimi v. SGS N. Am. Inc*, No. SACV 19-965 PSG (KSx), 2021 WL 3417645, at *7 (C.D. Cal. Mar. 2, 2021) (same).

[3] *See Rangel v. PLS Check Cashers of Cal., Inc.*, 899 F.3d 1106, 1111 (9th Cir. 2018) (affirming dismissal of an individual's FLSA lawsuit where she had not opted out of previous state law class action settlement).

The cases cited in the Court's Order illustrate these principles. In *Khanna v. Inter-Con Sec. Sys., Inc.*, No. CIV S-09-2214 KJM GGH, 2012 WL 4465558 (E.D. Cal. Sept. 25, 2012) (Mueller, J.), the settlement class members were all California-based workers.[4] *Id.* at *4. To receive the portion of their settlement award allocated to their FLSA claim, settlement class members were required to fill out an opt-in/claim form and any unclaimed FLSA funds reverted to the defendant – a provision that caused the court to look more closely for signs of collusion. *Id.* at *8. The court ultimately approved the settlement agreement despite its hesitations about the reversion because the settlement as a whole was overall fair to the settlement class members. *Khanna v. Inter-Con Sec. Sys., Inc.*, 2014 WL 1379861, at *9 (E.D. Cal. Apr. 8, 2014) (granting final approval), *as modified by* 2015 WL 925707 (Mar. 3, 2015). Here, California Settlement Class Members are not required to fill out a claim form and their uncashed checks do not revert to the Defendants. Individuals outside of California (Non-California Opt-in Eligible Plaintiffs) are not before the court as absent class members and they would not release any claims unless they affirmatively opt in, so the Court does not have a responsibility to scrutinize the terms of the settlement as to their FLSA claims as it would for Rule 23 class members.

Flores v. Alameda Cty. Indus. Inc., No. 14-cv-03011-JD, 2015 WL 3763605 (N.D. Cal. June 16, 2015) (Donato, J.), also involved a hybrid class/collective action of only California workers who released both California Labor Code and FLSA claims.[5] At the court's urging at the preliminary approval stage, the parties agreed to revise the settlement agreement so that uncashed checks exceeding $10,000 would be redistributed to class members instead of reverting to the defendant. *Id.* at *2-3. The proposed settlement here is already in line with the revised settlement agreement in *Flores*. Defendants are obligated to fund the California portion of the Settlement Fund in full, regardless of how many California Settlement Class Members cash their checks. Uncashed checks paid to California Settlement Class Members will be sent to the Controller of the State of California for the

[4] The plaintiffs in *Khanna* alleged that the defendants' violations of federal wage and hour laws were a predicate violation for purposes of their UCL claim, thus bringing their FLSA claim within the realm of their Rule 23 class action. *See* Complaint, *Khanna v. Inter-Con Sec. Systems, Inc.*, No. CIV S-09-2214 KJM GGH, ECF 1 (E.D. Cal. Aug. 11, 2009), Ho Suppl. Decl. ¶ 18, Ex. F.

[5] The plaintiffs in *Flores* also included a UCL claim alleging violations of the FLSA as a predicate violation of the UCL. *See* First Amended Complaint, *Flores v. Alameda Cty. Indus. Inc.*, No. 14-cv-03011-JD, ECF 15 (N.D. Cal. Aug. 12, 2014), Ho Suppl. Decl. ¶ 19, Ex. G.

benefit of the Class Member. Settlement Agreement § 2.8(i)(1). No uncashed checks for any Settlement Class/Collective Members revert to the Defendants. Settlement Agreement § 2.8(i).

In *Dudum v. Carter's Retail, Inc.*, No. 14-cv-00988-HSG, 2015 WL 5185933 (N.D. Cal. Sept. 4, 2015) (Gilliam, J.), the court initially expressed skepticism at the reversion of all unclaimed funds over a fifty percent floor by class members who would be releasing their California Labor Code claims against the defendant. In a subsequent decision granting preliminary approval of the settlement, the court explained that only the portion of the settlement fund that was allocated to PAGA penalties required a claim form, and it was only from that portion of the settlement that any money reverted to the defendant.[6] *Dudum v. Carter's Retail*, 2016 WL 946008, at *1 (N.D. Cal. Mar. 14, 2016). It went on to find that the reversion was not inappropriate where the class members would otherwise receive their unpaid wages regardless of whether they submitted a claim form for PAGA penalties and the reversion was a necessary part of the compromise. *Id.* at *7-8. Here, Defendants are required to fund the full amount of the portion of the Settlement Fund allocated to California Settlement Class Members and no California Settlement Class Members are required to submit a claim form.

These cases are consistent with the approach in the proposed Settlement Agreement here, which ensures that California workers who have FLSA claims will receive a check for both their California Labor Code and FLSA claims *unless* they choose to opt out of the settlement. No California Settlement Class Members are required to submit a claim form prior to receiving a check. It is only the portion of the fund that is allocated to settlement awards for Non-California Opt-In Eligible Plaintiffs – who are not members of a Rule 23 class and are not before the Court until they affirmatively join the case – that Defendants are not obligated to fund. The Settlement Agreement therefore does not contain a reversion in which defendants get the benefit of a release without having to pay for it.[7]

[6] The settlement and the court's treatment of the PAGA claim are now out-of-date because under California law, PAGA settlements require a one-step approval process and directly mailed checks to aggrieved employees. *See supra* n.2.

[7] The 13 individuals who are part of the California Settlement Class *and* have opt-ed into the FLSA claim have already affirmatively agreed to be bound by the outcome of the FLSA claim, as explained below, but they are still able to object to the settlement generally.

2. Even if viewed as a reversion, the settlement of Non-California Opt-In Eligible Plaintiffs' claims should still be approved.

Even if the provision of the Settlement Agreement pertaining to the funding of Non-California Opt-In Eligible Plaintiffs' settlement awards could be seen as a reversion, reversion clauses "are not per se forbidden." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 895 F.3d 597, 612 (9th Cir. 2018) ("*In re Volkswagen*"); *see also Khanna*, 2013 WL 1193485, at *5 (noting that a reverter clause does not mean that the settlement is per se unfair to the FLSA settlement members).

Courts have approved reversion clauses in class action settlements where the award amount was substantial enough to incentivize individuals to submit a claim. The Ninth Circuit in *In re Volkswagen* held that the district court adequately explained why the reversion at issue raised no specter of collusion where, among other things, the class members received a substantial benefit worth thousands of dollars or more. 895 F.3d at 612. The court explained, "Given the amounts at stake, there is little chance class members will forego the benefits because of the effort of lodging a claim." *Id.* Here too, the settlement awards are significant – Non-California Opt-in Eligible Plaintiffs who worked as a Junior Appraiser (*Seltz*) will receive an average pre-tax award of $3,885.07 and those who worked as Appraisers or Senior Appraisers (*Dixon II*) will receive an average pre-tax award of $4,719.30. Ho Prelim. Decl. ¶ 29; *see also Zorrilla*, 2018 WL 1737139 (approving settlement, with reversion of unclaimed funds by class members, in which the average award was estimated to be $562.83); *cf. Mirfaishi v. Fleet Mortg. Corp.*, 356 F.3d 781, 783 (7th Cir. 2004) ("The part of the $2.4 million that is not claimed will revert to Fleet, and it is likely to be a large part because many people won't bother to do the paperwork necessary to obtain $10, or even a somewhat larger amount."). The substantial size of the settlement awards creates an incentive for Non-California Opt-In Eligible Plaintiffs to submit a claim, favoring the conclusion that there has been no collusion. *See In re Volkswagen*, 895 F.3d at 612.

Furthermore, the premise that reversions are disfavored in cases involving statutes where the goal of the statute is deterrence, *see Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d

1301, 1308 (9th Cir. 1990), is not applicable here. Deterrence has already been achieved in this case. Defendants will be responsible for paying the vast majority of the maximum $4.9 million Total Settlement Fund and have already made significant changes their pay practices in response to these lawsuits. *See* 4 Newberg on Class Actions § 12:29, Reversion to defendant(s) (5th ed.) ("[C]ritics [of reversions] are concerned that a reversionary fund undermines the deterrent function of the class suit …. If claiming is low and the fund reverts to the defendant, the lawsuit will cost the defendant little and hence deter it even less."). After these cases were filed, Defendants reclassified Junior Appraisers and began paying them overtime and changed the way they compensate Appraisers and Senior Appraisers so that they are not paid solely on a recoverable draw system. Applying the settlement's gross workweek values through the end of this month, that is an additional estimated value of over half a million dollars of benefit to putative class and collective action members. *See* Ho Suppl. Decl. ¶ 9. Thus, these lawsuits have already succeeded at deterring Defendants from violating federal and state wage and hour laws.

Plaintiffs estimate that Defendants will likely have to fund about $4 million of the $4.9 maximum Settlement Fund, assuming about 30% of Non-California Opt-In Eligible Plaintiffs submit a claim. Ho Suppl. Decl. ¶ 6. Plaintiffs' estimate is likely conservative because in Plaintiffs' Counsel's experience, the larger awards are more likely to be claimed, resulting in a higher percentage of the fund claimed than the percentage of claims filed. *See, e.g.*, *Garcia v. PPG Indus., Inc.*, No. 3:15-cv-00319-WHO, ECF No. 48 (July 22, 2016) (Orrick, J. granting final approval of settlement agreement in which 45 of 122 non-California individuals, or about 37%, who were eligible to submit claim forms did so for a total of 62.4% of the amount claimed, indicating that the larger awards were more likely to be claimed), Ho Supp. Decl. ¶ 5. The majority of awards to Non-California Opt-In Eligible Plaintiffs will be for thousands of dollars – an amount that will appear on the face of their Notice. Ho Supp. Decl. ¶ 7. This is not the type of "windfall" benefit to the defendant that courts are concerned with. *See Alvarez v. Direct Energy Bus. Mktg. LLC*, No. CV-16-03657-PHX-SPL, 2020 WL 1032800, at *3 (D. Ariz. Mar. 3, 2020) (granting final approval of settlement where the reversionary portion of the

settlement, which included all FLSA opt-ins and any class members who had not opted out and were bound by the release,[8] was twenty-five percent of the total settlement fund).

Finally, courts approve reversions where it was a key element of the settlement negotiations and crucial to getting defendants to the negotiating table. *See, e.g., Hightower v. JPMorgan Chase Bank, N.A.*, No. CV 11-1802 PSG (PLAx), 2015 WL 12644569, at *10 (C.D. Cal. Feb. 3, 2015) (preliminarily approving settlement with reversion for unclaimed amounts to class members who would release claims against the defendant where plaintiffs represented that the settlement "would never have been possible without agreement on the reversion term" and that had "the parties agreed to a non-reversionary settlement, it would have been for drastically less money than that made available to the Class through this compromise"). Here, court-ordered section 216(b) notices were issued in all three cases and the Non-California Opt-in Eligible Plaintiffs did not choose to join the litigation. They were thus not before the courts in the pending cases; nor had any of them filed their own FLSA lawsuits. The only way to include them in the global settlement was to structure the settlement such that Defendant did not have to pay them unless they first affirmatively opted in, but this time with a substantial settlement already in the offering. Defendant would not have agreed to settle their claims in any other way. Ho Suppl. Decl. ¶ 8.

For these reasons, the Court should approve the structure of the settlement agreement that is fair, reasonable, and adequate and protects the interests of California Settlement Class Members and fairly resolves the FLSA claims of the Non-California Settlement Collective Members.

B. <u>Issue 2: The Number of Total Settlement Class/Collective Members and Number of Settlement Class/Collective Members In Each Point Category.</u>

The number of Settlement Class/Collective Members for each point category is as follows:

- One Point Settlement Collective Members (*i.e.* Non-California Opt-in Eligible Plaintiffs): 347
- Two Point Settlement Collective Members (*i.e. Seltz/Dixon II* Opt-in Plaintiffs): 20

[8] *See* Settlement Agreement and Release, *Alvarez v. Direct Energy Bus. Mktg. LLC*, No. CV-16-03657-PHX-SPL, ECF 266-1 (D. Ariz. July 25, 2019).

- Three Point California Settlement Class Members (*i.e. Dixon I* Class Members who did not opt-in to the FLSA claim): 101
- Four Point California Settlement Class Members (*i.e. Dixon I* Class Members who also opted into the FLSA claim): 10

Ho Suppl. Decl. ¶ 2. The total number of Settlement Class/Collective Members is 476. *Id.* There are two Settlement Class/Collective Members who fall into more than one point category because they moved to/from California. *Id.*

C. Issue 3: The Allocation of the Net Settlement Fund for Each Point Category and Plaintiffs' Estimate of Defendant's Exposure.

Plaintiffs estimate (after taking out the amounts contemplated in the Settlement Agreement for settlement administration costs, attorneys' fees and costs, service awards, and the PAGA payment to the LWDA) that distribution amount from the Net Settlement Fund for each point category will be as follows:

- One Point Settlement Collective Members (*i.e.* Non-California Opt-in Eligible Plaintiffs): $1,343,825 (about $28 per workweek)
- Two Point Settlement Collective Members (*i.e. Seltz/Dixon II* Opt-in Plaintiffs): $98,150 (about $57 per workweek)
- Three Point California Settlement Class Members (*i.e. Dixon I* Class Members who did not opt-in to the FLSA claim): $1,524,983 (about $85 per workweek)
- Four Point California Settlement Class Members (*i.e. Dixon I* Class Members who also opted into the FLSA claim): $167,709 (about $113 per workweek)

Ho Suppl. Decl. ¶ 3. The only portion of the Settlement Fund that Defendants are not required to pay is the amount allocated to any Non-California Opt-in Eligible Plaintiff who does not submit a claim form. *Id.* ¶ 4; Settlement Agreement §§ 1.41(a), 2.8(a). Plaintiffs estimate that about 30% of the Non-California Opt-In Eligible Plaintiffs will submit a claim form, equivalent to at least $403,147.39 of the estimated distribution amount for that point category. Ho Suppl. Decl. ¶ 6. In other words, it is possible that Defendants will not have to fund about $940,67.24 of the settlement. *Id*. Settlement

Agreement §§ 1.41(a), 2.8(a). As explained above, this is likely a conservative estimate because in Plaintiffs' Counsel's experience, the larger awards are more likely to be claimed, resulting in a higher percentage of the fund claimed than the percentage of claims filed. *See, e.g.*, *Garcia v. PPG Indus., Inc.*, No. 3:15-cv-00319-WHO, ECF No. 48 (July 22, 2016) (Orrick, J.), Ho Supp. Decl. ¶ 5. Defendants are obligated to pay all other portions of the Total Settlement Fund – totaling around $4,000,000 after accounting for the expected claims rate. Ho Suppl. Decl. ¶ 6; Settlement Agreement §§ 1.41(a), 2.8(a).

The estimated Net Settlement Fund from which the settlement awards are calculated could increase should the Court decide to award less than Plaintiffs' requests for settlement administration costs, attorneys' fees and litigation costs, and service awards. Settlement Agreement § 2.8(c), (d), & (e). Should that happen, it is possible that the individual payment amounts for Settlement Class/Collective Members could slightly increase. The proposed notices have been revised to reflect that possibility. Ho Supp. Decl. ¶ 13, Exs. B-D.

The relative estimated distribution amount for each point category is fair and reasonable compared to the estimated exposure on the underlying claims. Overall, Plaintiffs estimate that the *maximum* total exposure in these three cases is around $61 million before consideration of litigation risks, which compared to the maximum Total Settlement Fund of $4.9 million represents an 8% recovery. Ho Prelim. App. Decl. ¶ 37. Plaintiff's Motion for Preliminary Approval, ECF 114 at pp. 14-15, set forth the authority that courts measure the projected exposure against the gross settlement amount, rather than the net settlement amount. *See also Foster*, No. 3:18-cv-07205-LB, ECF 61 at pp. 10 (citing cases on the percentage recovery compared to gross settlement amount), Ho Prelim. Decl. Ex. 4; *De Leon v. Ricoh USA, Inc.*, No. 18-cv-03725-JSC, 2019 WL 6311379, at *12 (N.D. Cal. Nov. 25, 2019) (Corley, J. granting preliminary approval where the gross settlement amount was approximately 10.85% of the total exposure across all claims); *Deaver v. Compass Bank*, No. 13-cv-00222-JSC, 2015 WL 8526982, at *7 (N.D. Cal. Dec. 11, 2015) (Corley, J. granting final approval where the gross amount of the settlement was 10.7% of the total potential liability exposure and citing cases approving gross settlement amounts between 5-10% of the potential recovery). This estimate

does not take into account the significant relief that came in the form of Defendants' changed pay practices in response to these lawsuits. *See* Ho Suppl. Decl. ¶ 9 (estimating that the settlement value of Defendant's change in pay practices through the end of this month is over $500,000).

Plaintiffs have provided a breakdown the maximum exposure for each claim and point category. *See* Ho Suppl. Decl. ¶ 14, Ex. E. For these estimates, Plaintiffs assumed that Class/Collective Members worked an average of 10 hours per week in overtime for both FLSA and California overtime claims. Plaintiffs also accounted for the fact that Junior Appraisers were reclassified as non-exempt on September 9, 2019, and that Defendants changed its pay practices for Appraisers and Senior Appraisers who received only recoverable draws in January 2021. Ho Suppl. Decl. ¶ 14. For California Class Members, Plaintiffs assumed an average of five missed meal and rest periods per week, and an average of $12.50 in unreimbursed expenses (for costs associated with Appraisers' use of their personal cell phones for business purposes) per week. For the California wage statement violation, which has a shorter statute of limitations period, Plaintiffs assumed that every Class Member who had an overtime or meal/rest period violation also had a wage statement violation in the same pay period. For the California waiting time penalties, Plaintiffs assumed that each Class Member who stopped working for Defendants in the applicable limitations period had a violation and accrued 30 days of wages as a penalty. Plaintiffs made the same assumptions for purposes of calculating PAGA penalties. *Id.* ¶ 15. Of course, this *maximum* exposure is not a realistic assessment of what Defendants would likely have to pay if the case were tried to judgment given the many difficulties of proof and litigation risks that Plaintiff would have to face with continued litigation. *Id.* ¶ 16.

The proposed Net Settlement Fund is, in Plaintiffs' Counsel's view, more than fair and reasonable, given the applicable litigation risks. Ho Suppl. Decl. ¶ 17. From the maximum exposure, Plaintiffs have also estimated the settlement value of each claim given the applicable litigation risks. To estimate the settlement value for Non-California Opt-In Eligible Plaintiffs (receiving one point per workweek), Plaintiffs applied a 60% discount to account for the inherent difficulties of proving hours worked, an additional 50% discount to account for Defendants' fluctuating workweek defense, a 50%

discount to account for the risks of litigating exemption defenses, a 50% discount to the liquidated damages to account for Defendants' good faith defense, and an overall 45% discount to account for the fact that this group of workers had an opportunity to join the FLSA claims and declined that opportunity, would not be properly before the court, and would likely recover nothing. Ho Suppl. Decl. ¶ 17(a).

For the *Dixon II*/*Seltz* Opt-Ins (receiving two points per workweek), Plaintiffs applied the same 60% discount for the risk of proving hours, the same 50% discount for Defendants' fluctuating workweek defense, the same 50% discount for the risks of litigating exemption defenses, the same 50% discount to liquidated damages, and an overall 10% discount to account for the risk of decertification. Ho Suppl. Decl. ¶ 17(b).

For the California Settlement Class Members who did *not* opt-into the FLSA claim during litigation (receiving three points per workweek), Plaintiffs applied a 60% discount to the value of the overtime claims to account for the difficulties in proving overtime hours worked; a 80% discount to the value of the meal and rest break claims to account for the difficulties in proving the number of missed meal and rest periods; a 50-95% discount on each claim to account for the risks of proving liability on each claim; a 50% discount to each of the class claims to account for the burden of moving for class certification and possibility of decertification; and a 99% discount on the value of the PAGA claim to account for the argument against awarding penalties when substantial wages are awarded and the court's discretion to reduce PAGA penalties particularly in the fact of pay practice changes. Ho Suppl. Decl. ¶ 17(c).

For the final group, the California Settlement Class Members who *did* opt-into the FLSA claim (receiving four points per workweek), Plaintiffs applied the similar discounts as with the three-point group: a 60% discount to the value of the overtime claims; an 80% discount to the value of the meal and rest break claims; a 50-95% discount per claim for risks proving liability; and a 99% discount on the value of the PAGA claim. Plaintiffs also applied a 50% discount to the liquidated damages to account for Defendants' fluctuating workweek defense and an additional 50% discount to the liquidated damages account to Defendants' good faith defense. Ho Suppl. Decl. ¶ 17(d).

Altogether, the expected distribution amount to all Settlement Class/Collective Members ($3,128,000, or $3,134,666,67 including the $6,666.67 PAGA distribution to California aggrieved employees) is more than fair and reasonable. Ho Suppl. Decl. ¶ 17. Looking at the settlement as a whole, the gross settlement amount should be preliminarily approved as a fair amount offered in settlement given the claims presented and the risks of continued litigation.

D. Issue 4: The Adequacy of the Parties' Selected *Cy Pres* Recipient.

The Parties have agreed that any funds from checks that remain uncashed by Non-California Eligible Plaintiffs who submit a Claim Form but fail to cash checks shall be distributed to the National Employment Law Project ("NELP"). Ho Suppl. Decl. ¶ 10. NELP is a non-profit organization that "fights for policies to create good jobs, expand access to work, and strengthen protections and support for low-wage workers and unemployed workers."[9] Considering the broad humanitarian and remedial purpose of the FLSA, and the fact that the alleged injury to Non-California Eligible Plaintiffs in this case was a violation of their right to overtime wages under state and federal law, NELP's work and interests align closely with those of Non-California Eligible Plaintiffs. *See Shanahan v. KeyBank*, No. 19-cv-2477, 2021 WL 1034403, at *5 (N.D. Ohio Mar. 16, 2021) (approving NELP as the cy pres recipient and finding that "NELP's 'interests reasonably approximate those being pursued by' Class Members as its nationwide mission of, inter alia, strengthening protections and support for low-wage workers is in line with the broad humanitarian and remedial purpose of the FLSA.") (citation omitted). NELP is also an appropriate *cy pres* recipient because its work is nationwide, like the geographic distribution of Non-California Eligible Plaintiffs, who worked for Cushman in approximately 30 states. Ho Suppl. Decl. ¶ 10. Finally, because Non-California Eligible Plaintiffs must submit a Claim Form (with their current address) to participate, and those who participate will receive a settlement check in the mail following final approval, Class Counsel anticipates that any distribution to NELP will be modest. *Id.* For these reasons, Plaintiffs' Counsel will request at final approval that NELP should be approved as the *cy pres* recipient in this case.

[9] *About NELP*, Nat'l Emp. L. Project, https://www.nelp.org/about-us/ (last visited August 12, 2021).

E. Issue 5: Individuals Who Have Not Affirmatively Opted into the FLSA Claim May Not Object to or Opt Out of the Settlement.

The Court has requested that Plaintiffs explain why certain individuals cannot object or opt-out of the settlement agreement, citing ECF Dkt. No. 115-1 §§ 2.5(b), (f). As explained above, this case covers the claims of two groups: a California Class, and a nationwide collective of workers outside of California who must – if they have not already – opt into the FLSA settlement in order to receive payment. As explained above, FLSA collective actions are different from Rule 23 opt out class actions, because Section 216(b) requires workers to affirmatively opt into the litigation. *See, e.g., Leuthold*, 224 F.R.D. at 469-70; *Flores*, 2019 WL 1715180 at *6. Since they are not part of the case until that happens, FLSA collective members need not "opt out" if they do not want their rights affected by the settlement, and that is why the settlement does not provide that option. Moreover, because potential members of the collective are not part of the case until they opt in, FLSA collective actions do not implicate the same due process concerns as Rule 23 class actions. *See Beckman*, 293 F.R.D. at 476; *McKenna*, 747 F.2d at 1213. Unlike California Class members, Non-California Opt-In Eligible Plaintiffs' rights are part of the settlement only if they affirmatively execute and return a claim form. Thus, since they are not part of the settlement, they do not raise the same due process concerns as Rule 23 opt out class members; as such, they are not entitled to object – just as a Rule 23 class member who requests exclusion is not entitled to object.

Courts thus routinely approve FLSA settlements in "one step" – the court considers just one approval motion, and upon approval, the putative collective members have two options: 1) submit a claim form, accept a settlement payment, and release FLSA claims; or 2) elect not to participate in the settlement, forgo a payment, but do not release their FLSA claims. There is no second step at which the court considers objections. [10] And in hybrid actions like this one, involving a Rule 23 class and a

[10] *See, e.g.*, *Henderson v. Russ Darrow Grp., Inc.*, No. 19-CV-1421, 2021 WL 973981, at *1 (E.D. Wis. Mar. 16, 2021) (finding the "one-step [FLSA] settlement approval process is appropriate"); *Bainter v. Akram Invs., LLC*, No. 17 C 7064, 2018 WL 4943884, at *2 (N.D. Ill. Oct. 9, 2018) (same); *Lauture*, 2017 WL 6460244, at *1 ("A one-step approval process is appropriate in FLSA settlements that do not include proposed Federal Rule of Civil Procedure 23 class releases."); *Blum v. Merrill Lynch & Co., Inc.*, No. 15 Civ. 1636, 2017 WL 8784449 (S.D.N.Y. May 15, 2017) (approving one-step settlement); *Briggs v. PNC Fin. Servs. Grp. Inc.*, No. 15-cv-10447, 2016 WL 7018566, at *1

FLSA collective, courts approve settlements which permit only class members, and not putative collective members, to object. *See supra* § I (citing *Garcia v. PPG Indus., Inc.*, No. 3:15-cv-00319-WHO, ECF No. 48 (July 22, 2016); *Foster v. Advantage Sales & Mktg.*, No. 18-cv-070205-LB, ECF 61 (May 28, 2020); *Zorrilla v. Carlson Rests. Inc.*, No. 14 CIV. 2740 (AT), 2018 WL 1737139 (S.D.N.Y. Apr. 9, 2018); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 1878918, at *9 (N.D. Cal. May 3, 2013)).

F. Issue 6: The Revised Proposed Notices.

The Parties have agreed to revised versions of the Notices which should address the Court's concerns regarding the minimum amount and information about Class Counsel's motion for attorneys' fees and costs and the right to object to the request. Ho Suppl. Decl. Exs. B-D.

Further, Plaintiffs clarify that the Parties have agreed that the Settlement Administrator will send the proposed Notices by both mail and email. *Id.* ¶ 11.

Dated: August 19, 2021

Respectfully submitted,

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(N.D. Ill. Nov. 29, 2016) (same); *Koszyk v. Country Fin.*, No. 16 Civ. 3571, 2016 WL 5109196, at *1 (N.D. Ill. Sept. 16, 2016) (same); *Prena v. BMO Fin. Corp.*, No. 15 C 09175, 2015 WL 2344949, at *1 (N.D. Ill. May 15, 2015) ("One step is appropriate because this is an FLSA collective action, where collective members must affirmatively opt-in in order to be bound by the settlement (including the settlement's release provision)."); *Bozak v. Fedex Ground Package Sys., Inc.*, No. 3:11-cv-00738-RNC, 2014 WL 3778211, at *2 (D. Conn. July 31, 2014) (approving one-step settlement).