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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DESIDERO SOTO, STEVEN STRICKLEN, STEEVE FONDROSE, LORENZO ORTEGA, and JOSE ANTONIO FARIAS, JR., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

O.C. COMMUNICATIONS, INC, COMCAST CORPORATION, and COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC;

Defendants.

Case No.: 3:17-cv-00251-VC

DECLARATION OF SARAH R. SCHALMAN-BERGEN IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

I, SARAH R. SCHALMAN-BERGEN, declare as follows:

1. I am a member in good standing of the bar of the Commonwealth of Pennsylvania, and I am admitted *pro hac vice* to this Court. I am a shareholder at Berger Montague PC and counsel for Plaintiffs and the Settlement Class in the above-captioned case. I am familiar with the file, the documents, and the history related to this case. The following statements are based on my personal knowledge and review of the files and, if called on to do so, I could and would testify competently thereto. I am submitting this Declaration in support of Plaintiffs' renewed motion for preliminary approval of the class action settlement. This declaration incorporates by reference the statements contained in the Declaration of Sarah Schalman-Bergen, submitted in connection with Plaintiffs' initial Motion for Preliminary Approval of Class Action Settlement, *see* ECF 284-3.

AMENDED SETTLEMENT AND ALLOCATION FORMULA

2. Plaintiffs sought preliminary approval of the initial Settlement Agreement on March 1, 2019, *see* ECF No. 284, which the Court denied on April 1, 2019, *see* ECF No. 286.

3. The Court's Order of April 1, 2019, articulated three reasons for denying the Plaintiffs' initial motion for preliminary approval: (1) because workweeks in Washington and California were credited a larger settlement share than workweeks in other states under the initial settlement agreement, the Court expressed concern that members of the FLSA collective were potentially "leaving money on the table that could be recovered through state law claims"; (2) under the initial settlement agreement, workweeks in Washington and California were initially credited the same settlement share, and the Court sought more detail regarding the justification for the allocation under California and Washington law; and (3) the Court noted that the "alleged wage and hour violations appear to have substantial merit" and "appear to be systemic" and, given the discount between the Gross Settlement Amount and the Defendants' potential exposure, the Court requested "some assurance . . . that the violations are not likely to recur." *See* Order Denying Mot. For Preliminary Approval of Settlement, ECF No. 286.

4. Following the Court's denial of Plaintiffs' Motion for Preliminary Approval, Class Counsel analyzed the issues identified in the Court's Order, and the parties engaged in subsequent

settlement negotiations and entered into the attached Addendum to Class Action Settlement Agreement ("Addendum"), attached hereto as **Exhibit 1**.

5. The Addendum modifies the Settlement Agreement to address the Court's first two issues as set forth in its Order and includes additional modifications to address certain language in the notice to conform with the Standing Order for Civil Cases before Judge Vince Chhabria as well as the United States District Court for the Northern District of California's Procedural Guidance for Class Action Settlements. *See* **Exhibit 1**.

6. Specifically, the Addendum amends the Settlement Agreement by modifying the allocation formula such that the allocation of settlement shares will more closely reflect the wage laws and remedies released in the various states where collective members worked. *See* **Exhibit 1**.

7. Consistent with the Court's Order, Plaintiffs initiated a review of the potentially applicable state law claims at issue. As identified at the Preliminary Approval Hearing on March 21, 2019, the vast majority of the 1,019 Technicians who form the FLSA collective worked in the states of California, Washington or Florida. The state-by-state breakdown for the Settlement Class and FLSA Collective Members is listed below:

State	**Number of Opt-In Plaintiffs Who Worked One or More Workweek In Each Applicable State** (**There are 1,019 total Opt-In Plaintiffs. Several Opt-In Plaintiffs worked in multiple states and, as such, when added together, the below totals more than 1,019.)*	**Number of Settlement Class Members**
California	674	3,752
Washington	21	419
Florida	330	N/A
Utah	8	N/A
Arizona	6	N/A
Oregon	4	N/A

8. Based on the wage laws and remedies within each applicable state, Class Counsel have revised the settlement distribution as follows: workweeks in California will receive 3 settlement shares, workweeks in Washington and Oregon will receive 2 settlement shares, workweeks in Utah and Arizona will receive 1.25 settlement shares, and workweeks in Florida will receive 1 settlement share.

9. As reflected on the chart attached hereto as **Exhibit 2** ("Wage Law Chart"), this distribution more closely accounts for the heightened protections under California law, as well as the variation among wage law claims and remedies in the various other states in which collective members worked.

10. At the preliminary approval hearing, the Court raised the question of whether California's provision requiring a time and a half premium to be paid after eight hours of work per day, and a double time premium after 12 hours of work, required California to be allocated a higher settlement share than Washington. *See* Cal. Lab. Code § 510. After review of the facts and data that was produced, while California law is unique in this respect, the availability of per day overtime premiums do not justify differentiating between California and Washington in this case. The data reveals that the Technicians almost always worked more than forty hours per week (such that the assumed 2.5 hours per week would almost always be paid at a time and half rate), but that they did not frequently work more than 12 hours per day. Indeed, of the overtime paid in California during the relevant time period, only 2% was paid at a double time rate. While in certain cases, these additional protections in California may justify an increase in settlement shares for work performed in California, in this case, it is the presence of the additional penalties warranted the amended allocation.

11. Given this revised allocation noted above, the Addendum also includes an accompanying increase to the Gross Settlement Amount by $10,555.21 to account for the addition of settlement shares attributable to the approximately 18 collective members who performed work in the states of Oregon, Utah and Arizona, so that the increased allocation does not reduce the awards to class and collective members who worked in other states below that proposed in the original Settlement Agreement. *See* **Exhibit 1**.

12. The increase to the Gross Settlement Amount was calculated by estimating the per share dollar amount under the allocation proposed in the Addendum and multiplying that amount by the number of workweeks attributable to class members who performed one or more workweeks in each applicable state and the increased settlement share (*i.e.* Share Value * Workweeks by Class Members with 1+ Workweek in Applicable State * Multiplier to Settlement Share). The Court's Order raises the question of whether the release applicable to Opt-In Plaintiffs who did not perform work in a state covered by a Rule 23 settlement class should be limited to a release of FLSA claims only. *See* Order at 2, n.1. While in certain cases it might make sense to limit a release of Opt-In Plaintiffs to FLSA only claims, in this case, given the small number of Opt-In Plaintiffs who worked in states where their state law claims are potentially more valuable than their FLSA claims besides California and Washington, and given the Court's Order compelling the Opt-In Plaintiffs to arbitration, the likelihood that an Opt-In Plaintiff would practically be in a position to litigate their state law claims in the absence of settlement is low. Class Counsel instead sought additional compensation to add to the Gross Settlement Amount in order to compensate Opt-In Plaintiffs who could potentially recover more than the FLSA based on their respective state law claims. These additional amounts satisfy the Court's concerns regarding the fairness of the allocation without further diluting the settlement shares of other class members.

13. Additionally, the Addendum clarifies that by participating in the Collective Action, and the Court having approved a Settlement, Collective Members agree to release any and all claims against Defendants through December 21, 2018, that were or could have been asserted under the FLSA and under Arizona, California, Florida, Oregon, Utah, and Washington law based on the identical factual predicate alleged in the operative Third Amended Complaint. *See* **Exhibit 1**.

14. The Addendum also clarifies that by not opting out of the Settlement, California and Washington Settlement Class members release any and all claims against Defendants through December 21, 2018, that were or could have been asserted under Washington or California law based on the identical factual predicate alleged in the operative Third Amended Complaint. *See* **Exhibit 1**.

15. Further, the Addendum clarifies that Class Counsel shall not seek to recover fees on this additional amount to the Gross Settlement Amount, and shall only seek approval of a Fee Award in an amount up to thirty-three and one-third percent (33.33%) of the Gross Settlement Amount set forth in the initial settlement agreement (*i.e.* up to one third of $7,500,000 or $2,500,000). *See* **Exhibit 1**.

16. The Addendum only provides for a release through December 21, 2018. *See* **Exhibit 1.** To the extent that violations, if any, occur after that date, Class Counsel remain in contact with numerous class members who are current employees, and who have the right to seek relief for these violations in the future, albeit that such claims would likely be litigated in individual arbitration absent further developments in case law or a legislative amendment to the Federal Arbitration Act.

ADDITIONAL CONSIDERATIONS

17. Paragraph 25 of the Declaration of Sarah Schalman-Bergen, submitted in support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement, *see* ECF No. 284-3, is amended as follows:

> 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 formal and informal discovery, including the payroll and timekeeping data, depositions, and approximately 270 interviews with Class Members. Plaintiffs' counsel analyzed the payroll data for all of these employees to obtain average hourly rates of pay, which was then used in conjunction with amounts of unpaid time to determine estimated damages for minimum wage and overtime violations. Based on outreach analysis, Plaintiffs assumed that they could reasonably prove 2.5 hours of off-the-clock time per **week**, along with meal period and rest break violations amounting to two penalty hours per week per Technician.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and based on my personal knowledge.

Executed on May 10, 2019, in Philadelphia, Pennsylvania.

Sarah R. Schalman-Bergen