Carolyn Hunt Cottrell (SBN 166977)
David C. Leimbach (SBN 265409)
Scott L. Gordon (SBN 319872)
SCHNEIDER WALLACE
COTTRELL KONECKY
WOTKYNS LLP
2000 Powell Street, Suite 1400
Emeryville, California 94608
Telephone: (415) 421-7100
Facsimile: (415) 421-7105
ccottrell@schneiderwallace.com
dleimbach@schneiderwallace.com
sgordon@schneiderwallace.com

Shanon J. Carson (*pro hac vice*)
Sarah R. Schalman-Bergen (*pro hac vice*)
Neil K. Makhija (*pro hac vice*)
BERGER MONTAGUE, P.C.
1818 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
Tel: (215) 875-3000
Fax: (215) 875-4604
scarson@bm.net
sschalmanbergern@bm.net
nmakhija@bm.net

Attorneys for Plaintiffs, the Collective and Potential Classes

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO

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

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

Date: May 30, 2019
Time: 10:00 a.m.
Courtroom: 4 (17th Floor)
Judge: Honorable Vince Chhabria

Complaint Filed: January 18, 2017

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

NOTICE IS HEREBY GIVEN that on [DATE], at 10:00 a.m. in Courtroom 4 before Hon. Vince Chhabria of the United States District Court, Northern District of California, Plaintiffs Desidero Soto, Steven Stricklen, Steeve Fondrose, Lorenzo Ortega, and Jose Antonio Farias, Jr. ("Plaintiffs") renew their motion for preliminary approval of the Class Action Settlement Agreement and Addendum to Class Action Settlement Agreement (the "Amended Settlement Agreement" or the "Amended Settlement," attached to the Declaration of Sarah R. Schalman-Bergen ("Schalman-Bergen Decl.") as **Exhibit 1**) as to the California and Washington Classes, and approval of the Settlement as to the Collective. In particular, Plaintiffs move for orders:

As to the California and Washington Classes:

(1) Granting preliminary approval of the Amended Settlement Agreement as to the California and Washington Classes;

(2) Conditionally certifying the California and Washington Classes for settlement purposes;

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

(4) Approving the revised Notice of Settlement as it pertains to the California and Washington Classes (attached as **Exhibit A** to the Addendum to Class Action Settlement Agreement);

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

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

(7) Preliminarily appointing and approving the Plaintiffs Soto, Stricklen, and Farias as Class Representatives for the California Class, and Plaintiff Ortega as Class Representative for the Washington Class;

(8) Preliminarily appointing and approving CPT Group, Inc. as the Settlement Administrator for the California and Washington Classes; and

(9) Authorizing the Settlement Administrator to mail the approved Notice of Settlement to the California and Washington Classes.

As to the Collective:

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

(2) Approving the revised Notice of Settlement as it pertains to the Collective;

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

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

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

(6) Appointing and approving CPT Group, Inc. as the Settlement Administrator for the Collective; and

(7) Authorizing the Settlement Administrator to mail the approved Notice of Settlement to the Collective as set forth in the Settlement Agreement.

Plaintiffs bring this Motion pursuant to Federal Rule of Civil Procedure 23(e) and long-established precedent requiring Court approval for Fair Labor Standards Act settlements.[1] The Motion is based on this notice and the following Supplemental Memorandum of Points and Authorities, and incorporates by reference Plaintiffs' initial Notice of Motion and Motion for Preliminary Approval of Class and Collective Action Settlement, ECF No. 284, and all supporting materials filed therewith including the Memorandum of Points and Authorities, the Declaration of

[1] *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).

Sarah R. Schalman-Bergen, as well as all other records, pleadings, and papers on file in this action and such other evidence or argument as may be presented to the Court at the hearing on this Motion. Plaintiffs also resubmit a Proposed Order Granting Preliminary Approval of Class and Collective Action Settlement with their moving papers.

Date: May 10, 2019

Respectfully submitted,

/s/ Carolyn Hunt Cottrell
Carolyn Hunt Cottrell
David C. Leimbach
Scott L. Gordon
SCHNEIDER WALLACE
COTTRELL KONECKY
WOTKYNS LLP

Shanon J. Carson (*pro hac vice*)
Sarah R. Schalman-Bergen (*pro hac vice*)
Neil K. Makhija (*pro hac vice*)
BERGER MONTAGUE PC

Attorneys for Plaintiffs, the Collective and Settlement Classes

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

I. INTRODUCTION

Plaintiffs file this Renewed Motion for Preliminary Approval of Class and Collective Action Settlement, which addresses each of the concerns articulated in the Court's April 1, 2019, Order denying preliminary approval to the Settlement. *See* ECF 286.

As set forth in Plaintiffs' Motion for Preliminary Approval of Class and Collective Action Settlement, ECF No. 284, which is incorporated herein by reference, this class and collective action is brought on behalf of current and former non-exempt Technicians[2] who install cable television, phone, security, and internet services for Defendants O.C. Communications, Inc., Comcast Corporation, and Comcast Cable Communications Management, LLC (collectively, "Defendants"). This is a wage and hour hybrid state law class action under Rule 23 of the Federal Rules of Civil Procedure and federal law collective action under the Fair Labor Standards Act ("FLSA") and is based on Defendants' alleged violations of federal, California, and Washington labor laws. Following two years of intensive litigation – including extensive discovery and motions to compel arbitration – the parties engaged in two separate mediations and extensive arms-length negotiations between counsel and reached a settlement of the underlying action that resolved the claims of 4,513 settlement class members, for a total non-reversionary settlement of $7,500,000. The settlement provides immediate and substantial relief to Settlement Class Members, who would otherwise be forced to litigate their cases in individual arbitration.

Plaintiffs sought preliminary approval of the initial settlement on March 1, 2019, *see* ECF No. 284, which the Court denied on April 1, 2019, *see* ECF No. 286. The Court's Order requested additional information regarding three issues: 1) whether the settlement allocation was fair and reasonable with respect to the claims of members of the FLSA collective who did not work in Washington or California, on the basis that they may also have state law wage and hour claims; 2) whether the settlement allocation was fair and reasonable insofar as workers from California and

[2] The term "Technician" is used through the operative Third Amended Class and Collective Action Complaint, which describes the Technicians' roles and work duties. *See generally* Third Amended Class and Collective Action Complaint, ECF No. 253-1.

Washington would be entitled to the same settlement shares; and 3) what assurances Defendants could provide that the alleged violations would not occur in the future. *See* ECF No. 286.

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"). *See* Schalman-Bergen Decl., Ex. 1. 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. *Id.* 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. Given this revised allocation, 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.

The parties also met and conferred regarding the Court's third articulated issue, in response to which Defendant OC Communications ("OCC") is concurrently submitting a declaration from Steven Fazio, Vice President of Human Resources. In the declaration, Mr. Fazio details changes that have been made to OCC's policies and practices since the lawsuit was filed. Critically, Class Members are not waiving their right with respect to any conduct that occurs after December 21, 2018, and therefore Class Members will retain the right to pursue claims against OCC and/or Comcast in individual arbitrations to the extent any unlawful conduct occurs after that date.

For the reasons that follow, and for the reasons articulated in Plaintiffs' initial Motion for Preliminary Approval, *see* ECF No. 284, which are incorporated by reference, the Court should grant preliminary approval to the Amended Settlement.

II. SUMMARY OF SETTLEMENT TERMS IN THE ADDENDUM

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.

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

Schalman-Bergen Decl. ¶7.

After a review of the relevant state wage and hour laws, or lack thereof, and subsequent arms' length negotiations, the parties agreed to enter into the Addendum, which squarely addresses the Court's first two concerns. Specifically, under the Settlement Agreement as amended by the Addendum:

- As in the initial Settlement Agreement, each workweek will be equal to one (1) settlement share. Under the Addendum, to reflect the increased value of state law claims, workweeks during which work was performed in California will be equal to three (3) settlement shares, workweeks during which work was performed in Washington or Oregon will be equal to two (2) settlement shares, and workweeks during which work was performed in Arizona or Utah will be equal to 1.25 settlement shares. *See* Schalman-Bergen Decl., Ex. 1 at ¶E.

- The definition of "Gross Settlement Amount" has been amended to adjust the Gross Settlement amount from $7,500,000 to $7,510,555.21, to reflect the Defendants' increased contribution to account for the revised settlement shares. 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 id.* at ¶A.

- 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 id.* at ¶¶B, C.

- Other 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 id.* ¶¶B, C.

- The release language on settlement checks has been amended based on the recipient, as follows:

  - (a) For Named Plaintiffs and Collective Members: "This check is your settlement payment in connection with the court-approved class action Settlement in *Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3-17-cv-00251-VC (N.D. Cal.). By you having consented to join the Collective Action, and the court having approved a Settlement, you have released OCC, Comcast, and other Releasees of claims under the Fair Labor Standards Act and, if applicable, claims under Arizona, California, Florida, Oregon, Utah, and Washington law, as defined in the Settlement Agreement."

  - (b) For other California Settlement Class Members: "This check is your settlement payment in connection with the court-approved class action Settlement in *Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3-17-cv-00251-VC (N.D. Cal.). By not opting out of the Settlement, you have released OCC, Comcast, and other Releasees of claims under California law as defined in the Settlement Agreement. By signing or cashing your check, you consent to join the Collective Action and affirm your release of claims under the Fair Labor Standards Act against Releasees."

  - (c) For other Washington Settlement Class Members: "This check is your settlement payment in connection with the court-approved class action Settlement in *Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3-17-cv-00251-VC (N.D. Cal.). By not opting out of the Settlement, you have released OCC, Comcast, and other Releasees of claims under Washington law as defined in the Settlement Agreement. By signing or cashing your check, you consent to join the Collective Action and affirm your release of claims under the Fair Labor Standards Act against Releasees."

  See id. at ¶C.

- The "Objections" section of the Settlement has been amended to include language reflecting that "[t]he Court will only require substantial compliance with the requirements for submitting an objection." *See id.* at ¶D.

- The proposed Notice to Settlement Class Members has been updated to address the amendments above. *See id.* at ¶C.

In light of these revisions, and as explained more fully below, Plaintiffs respectfully request that the Court preliminarily approve the Amended Settlement Agreement, as amended by the Addendum, and grant the instant renewed motion.

III. THE COURT SHOULD APPROVE THE SETTLEMENT ALLOCATION PLAN AND GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT

A. Legal Standard for Approval of Plan of Allocation to Settlement Class Members

After consideration of the Addendum, the additional information provided in this renewed Motion, as well as the Plaintiffs' initial Motion and supporting materials filed with these Motions, the Court should preliminarily find that the Amended Settlement, as amended, and including the allocation formula, is fair and reasonable. "Approval of a plan of allocation of settlement proceeds in a class action . . . is governed by the same standards of review applicable to approval of the settlement as a whole: the plan must be fair, reasonable and adequate." *In re Oracle Sec. Litig.*, No. C–90–0931–VRW, 1994 WL 502054, at *1–2 (N.D. Cal. June 16, 1994) (citing *Class Pls. v. City of Seattle*, 955 F.2d 1268, 1284–85 (9th Cir. 1992)); *see also, e.g.*, *Cotter v. Lyft, Inc.*, No. 13-CV-04065-VC, 2017 WL 1033527, at *6 (N.D. Cal. Mar. 16, 2017) (Chhabria, J.) (approving settlement allocation plan as "fair, reasonable, and adequate").

In applying this standard, courts have observed that "the standard of review requires only an allocation plan that has a reasonable, rational basis; it does not require the best possible plan of allocation." *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 1917, 2016 WL 6778406, at *3 (N.D. Cal. Nov. 16, 2016) (citation and internal quotation marks omitted) (approving settlement allocation plan, observing that "although it is possible that a more precise allocation plan could be fashioned, undertaking such an effort would be time-consuming and costly"); *accord In re*

Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., No. MDL 2672 CRB (JSC), 2017 WL 2212780, at *10 (N.D. Cal. May 17, 2017), *aff'd*, 746 F. App'x 655 (9th Cir. 2018). Additionally, "the fact that [a] plan of allocation is recommended by experienced and competent counsel further cuts in favor of approving [a] plan of allocation." *Gaudin v. Saxon Mortg. Servs., Inc.*, No. 11-CV-01663-JST, 2015 WL 7454183, at *8 (N.D. Cal. Nov. 23, 2015) (alterations, quotation marks, and citation omitted).

Applying these considerations, courts regularly approve settlement allocation plans that apportion funds according to the relative amount of damages suffered by class members, *see, e.g., id.* (approving settlement that allocated shares on a pro rata basis determined by the class members' injuries), and also approve settlement allocation plans that apportion funds around the relative strengths of the class members' respective claims, *see, e.g. In re Oracle Sec. Litig.*, 1994 WL 502054 at *1 (approving settlement allocation that accounted for the strength of class members' causes of action).

Likewise, in hybrid Rule 23 / FLSA actions – such as the instant matter – courts regularly approve settlement allocation plans that allocate settlement shares based on the relative strength of potentially applicable state wage claims or remedies. *See, e.g.,* Notice of Mot. and Mot. for Final Approval of Settlement at 4 and Order Granting Final Approval of Settlement and Final Judgment at ¶12, *Walton et. al v. AT&T Services, Inc.*, Nos. 207 & 221, 3:15-cv-03653 (N.D. Cal. Feb. 14, 2018), ECF No. 221 (Chhabria, J.) (granting final approval of settlement in hybrid Rule 23 / FLSA action and finding proposed settlement allocation based on workweeks in or outside of California to be "fair and reasonable" where California settlement shares were worth 3x non-California settlement shares given the strength of California claims and penalties); *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *2 (C.D. Cal. Nov. 18, 2014) (granting final approval of settlement in hybrid Rule 23 / FLSA action that apportioned a greater pro rata share per workweek to California class members); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-

01283 SBA, 2013 WL 1878918, at *6 (N.D. Cal. May 3, 2013) (granting preliminary approval of settlement allocation plan in hybrid Rule 23 / FLSA matter where allocation provided greater compensation to class members in California to account for greater remedies available under California law).

Here, the parties have agreed to allocate the settlement proceeds amongst class members in a manner that (1) recognizes the amount of time that the particular class member worked for Defendants in the applicable limitations period, and (2) accounts for the possibly increased value of potentially relevant state law claims. Specifically, each class member will be credited for the number of weeks that he or she worked for Defendants and each workweek will be equal to one settlement share. This ensures that longer-tenured workers receive a greater recovery. And as described herein, workweeks in certain states will receive higher settlement shares based on the state's applicable wage laws and remedies. This settlement distribution that accounts for both tenure and geography is fair, reasonable, and adequate and should accordingly be approved. *See generally Pierce*, 2013 WL 1878918.

B. The Amended Allocation of Settlement Shares for California and Washington Workweeks is Fair and Reasonable

The Settlement Agreement, as amended by the Addendum, resolves the wage and hour claims of the individuals who filed Opt-In Consent Forms to join the case, as well as the state law claims of workers in California and Washington, the two states where there were a sufficient number of class members to meet the numerosity standard under Rule 23(a)(1). As set forth in the original Settlement Agreement, class members who worked in California and Washington would receive additional shares (3x) as a result of releasing their state law claims as part of the settlement of the Rule 23 classes. In denying the Motion for Preliminary Approval, however, the Court noted the greater protections afforded to workers under California law and questioned the initial settlement's equal distribution of shares between workweeks in California and Washington, and also expressed concern about whether FLSA collective members outside of California and

Washington would receive sufficient consideration for the release of their state law claims. *See* ECF 286.

Consistent with the Court's April 1, 2019 Order, Class Counsel have conducted an additional analysis of potentially applicable state wage claims and, based on the wage laws and remedies within each applicable state, have revised the settlement distribution as follows: workweeks in California will receive three settlement shares, workweeks in Washington and Oregon will receive two settlement shares, workweeks in Utah and Arizona will receive 1.25 settlement shares, and workweeks in Florida will receive one settlement share.[3] 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.

Class Counsel proposed a modification to the initial allocation formula, so that work performed in California will receive three settlement shares for each workweek, while work performed in Washington will receive two settlement shares for each workweek. As the Court noted, California affords greater applicable protections to workers than the other states covered by the collective – including Washington. For example, California law requires that employers compensate employees for one full hour of pay for each missed meal break and rest break, whereas Washington law does not provide such heightened relief. *Compare* Cal. Lab. Code § 226.7(c) ("If an employer fails to provide an employee a meal or rest or recovery period. . . the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.") *with* Wash. Admin. Code 296-126-092 (mandating meal and rest breaks but providing no heightened penalty on employers failing to provide such breaks). Additionally, if wages are owing to an employee at the time of termination of employment, California law provides for penalties under which employers must

[3] Defendants have agreed to contribute to the Gross Settlement Amount an additional $10,555.21 to account for the additional shares.

pay the employee's wages or compensation for up to 30 days from the due date. *See, e.g.*, Cal. Lab. Code § 203. California also imposes penalties for inaccurate wage statements, *see* Cal. Lab. Code § 226, and California's Labor Code Private Attorney General Act ("PAGA") provides an additional avenue for recovery for aggrieved employees and imposes additional penalties in the form of "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." *See generally* Cal. Lab. Code § 2699.

Washington law also offers significant protections to employees. Importantly for this case, as cited above, Washington, unlike under the FLSA, mandates meal and rest breaks be provided to workers. Wash. Admin. Code 296-126-092. In addition, employers who willfully fail to pay wages owed are liable for double damages, *see* Wash. Rev. Code § 49.52.070, and under the Washington Consumer Protection Act, a court may, in its discretion, award up to three times the actual damages sustained – up to $25,000 – for violations of state law prohibiting unfair methods of competition, *see* Wash. Rev. Code §§ 19.86.090 & 19.86.020; however, because the remedies and penalties available under California law potentially offer greater recovery, it is fair and reasonable in this case for California workweeks be credited at a higher rate than Washington workweeks.

To illustrate these differences, Plaintiffs have included a chart that demonstrates potential recovery under both Washington and California law, attached to the Schalman-Bergen Declaration as Exhibit 2 ("Wage Law Chart"). As demonstrated by the Wage Law Chart, the potential recovery under California law is particularly significant as compared to Washington based upon the availability and extent of the meal and rest break penalties, PAGA penalties, and waiting time penalties.[4] *See* Schalman-Bergen Decl., Ex. 2. While an allocation formula necessarily involves

[4] 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

a certain degree of rough justice, especially in a case that concerns off-the-clock work alleged, given the strength of the California laws and potential avenues for recovery, it is "fair and reasonable" to allocate a greater number of settlement shares to California workweeks – the Court should accordingly approve the Amended Settlement allocation that accounts for the strength of the protections available under California law. *Cf., e.g.*, Order Granting Final Approval of Settlement and Final Judgment at ¶12, *Walton et. al v. AT&T Services, Inc.*, Nos. 207 & 221, 3:15-cv-03653 (N.D. Cal. Feb. 14, 2018), ECF No. 221 (Chhabria, J.) (granting final approval of settlement in hybrid Rule 23 / FLSA action and finding proposed settlement allocation based on workweeks in or outside of California to be "fair and reasonable").

C. The Amended Allocation of Settlement Shares to FLSA Collective Members is Fair and Reasonable

The Court also expressed concern about whether FLSA collective members outside of California and Washington would receive sufficient consideration in exchange for the release of their state law claims in addition to their FLSA claims. ECF 286. As noted above, of the approximately 348 FLSA Collective Members who are entitled to workweek shares outside of Washington or California, the vast majority (330 – 95%) performed work exclusively in Florida – a state in which there are no state laws that would provide for greater relief than the FLSA. *See, e.g.*, Fla. Const. art. X, § 24, Fla. Stat. § 448.110 (establishing minimum wage and requirements for recovery; however, any such protections are not applicable here, as the average wages of the workers exceeded minimum wage, even without additional off-the-clock work performed).

---

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. *See* Schalman-Bergen Decl. ¶10. Indeed, of the overtime paid in California during the relevant time period, only 2% was paid at a double time rate. *Id.* While it may be that in certain wage and hour cases the availability of premiums based on the amount of work performed per day in California may justify an increase in settlement shares over work performed in other states, in this case, it is the presence of the additional penalties discussed, and not the per day overtime premium provisions, that supports the amended allocation.

Schalman-Bergen Decl., ¶7; *id.*, Exhibit 2. The remaining 18 FLSA collective members worked one or more workweek in Utah (8), Oregon (4) and Arizona (6). *See id.* at ¶7. Each of these states have passed specific state wage laws that potentially provide remedies in excess of those available under the FLSA. Based on the strength of the remedies available under Oregon law, workweeks in that state have been allocated two settlement shares, and based on the relative strength of the remedies in Utah and Arizona, particularly as compared to Florida, workweeks in those states have been allocated a 1.25 settlement share. *See id.* at Ex. 1, ¶E. The Addendum provides an additional negotiated amount of $10,555.21, to account for these increased shares without further diluting the settlement awards to other class members. *See id.* at Ex. 1, ¶A.[5]

Specifically, as reflected above and on the Wage Law Chart, Oregon, like Washington, provides greater applicable protections for workers than the laws of Utah, Arizona, and Florida. For example, Oregon requires that employers provide meal and rest breaks. *See, e.g.*, Or. Admin. R. 839-020-0050. Oregon also provide heightened penalties as compared to the other states. For example, if wages are owing to an employee at the time of termination of employment, Oregon law provides for penalties under which employers must pay the employee's wages or compensation for up to 30 days from the due date. *See* Or. Rev. Stat. § 652.150. Based on these considerations, particularly when viewed against the remedies available in the other states as

[5] 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.

described herein and in the supporting materials, workweeks in Oregon, like Washington, have been allocated two settlement shares.

By contrast, as reflected in the Wage Law Chart, Florida law does not provide any state law remedies for unpaid overtime, and Opt-In Plaintiffs in Florida cannot expect to recover more in overtime wages than that provided to them under the FLSA.[6] While Arizona and Utah do not have specific laws or penalties governing overtime pay, both states have wage payment and collection laws that arguably could yield additional penalties for unpaid overtime work performed than that provided by the FLSA – as such, the Amended Settlement provides a slightly increased settlement share to workweeks in those states. Specifically, successful litigants may be entitled to treble damages for unpaid wages in Arizona, *see, e.g.*, A.R.S. §§ 23-355(A), and a heightened damages award in Utah, *see, e.g.*, Utah Code § 34-28-9.5. However, unlike California, Washington, and Oregon, both Utah and Arizona impose certain barriers to recovery – such as exhaustion requirements for certain categories of wage claims, *see, e.g., id.*, and shorter statutes of limitations, *see, e.g., Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 218 Ariz. 293, 299, 183 P.3d 544, 550 (Ariz. Ct. App. 2008) (finding that one-year statute of limitation applied to claim for treble damages for unpaid wages under A.R.S. 23-355).

Given the greater protections afforded to workers under the laws of California, Washington, and Oregon, and the potentially applicable remedies under Utah and Arizona law, it is fair and reasonable for workweeks in those states to be accorded a relatively increased share of the settlement proceeds – accordingly, workweeks in Utah and Arizona have been allocated 1.25 settlement shares. This amended allocation plan is fair, reasonable, and adequate, and has a rational basis in distinguishing between potential state law recoveries that Settlement Class Members might expect to recover. *See In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL

[6] While Florida has protections around minimum wages owed, the average wages of the workers exceeded minimum wage even without additional off-the-clock work performed, such that a departure from the allocation formula was not warranted. In addition, recovery under Florida's minimum wage laws is subject to a notice/exhaustion procedure. *See* Fla. Stat. § 448.110.

6778406, at *3. Plaintiffs accordingly request that the Court approve the allocation plan as proposed in the Amended Settlement.

D. Defendant OCC Is Submitting A Declaration Regarding Its Policies and Practices To Respond To the Court's Concern Regarding Future Conduct

In denying Plaintiffs' initial motion for preliminary approval, the Court observed that the "alleged wage and hour violations appear to have substantial merit" and "appear to be systemic." *See* ECF No. 286. Given this observation, the Court requested "some assurance . . . that the violations are not likely to recur." *See id.*

In response, Defendants will be submitting to the Court the Declaration of Steven Fazio, Vice President of Human Resources at Defendant O.C. Communications, Inc., which attempts to respond to the Court's concerns, and sets forth additional information about changes to the company's wage practices since Plaintiffs filed this lawsuit.

Importantly, the Settlement Agreement only provides for a release through December 21, 2018. *See* Schalman-Bergen Decl., Ex. 1 ¶B. 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, though such claims would likely be litigated in individual arbitrations absent further developments in case law or a legislative amendment to the Federal Arbitration Act. The Parties will be available to answer any further questions on this issue at the Preliminary Approval Hearing.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court grant preliminary approval of the Settlement Agreement, as amended by the Addendum, so that notice may be issued to the class and the settlement can proceed to final approval in accordance with the schedule set forth in Plaintiffs' initial Motion.

Date: May 10, 2019

Respectfully submitted,

/s/ Carolyn Hunt Cottrell
Carolyn Hunt Cottrell
David C. Leimbach
Scott L. Gordon
SCHNEIDER WALLACE
COTTRELL KONECKY
WOTKYNS LLP

Shanon J. Carson (*pro hac vice*)
Sarah R. Schalman-Bergen (*pro hac vice*)
Neil K. Makhija (*pro hac vice*)
BERGER MONTAGUE PC

Attorneys for Plaintiffs, the Collective and Potential Classes