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and SAMSONITE CORPORATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROSALIE PEARSON and DENNIS NEWSHAM, individually, on behalf of others similarly situated, and on behalf of the general public,

Plaintiff(s),

v.

SAMSONITE COMPANY STORES, INC., SAMSONITE CORPORATION, and DOES 1 – 50, inclusive,

Defendant(s).

Case No. CV 09-01263 JSW

NOTICE OF MOTION AND JOINT MOTION FOR PRELIMINARY APPROVAL OF JOINT STIPULATION OF SETTLEMENT AND RELEASE BETWEEN PLAINTIFFS AND DEFENDANTS

Judge: Hon. Jeffrey S. White
Courtroom: 11, 19th Floor

Date Action Filed: March 24, 2009
Hearing: December 18, 2009, 9:00 a.m.[1]

[1] Concurrently with this Motion, the parties file a stipulation seeking this hearing date.

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SUMMARY OF ARGUMENT

Plaintiffs, two managers working at a Samsonite Company Stores store in California and in New York, claim that Samsonite (who operates retail stores where they sell the Samsonite brand luggage) improperly classified all store managers as exempt employees. Had they been properly classified, Plaintiffs claim, they would be entitled to unpaid wages, penalties and interest. The case was extensively litigated during past approximately eight months, including the exchange of multiple sets of written discovery, production of thousands of documents, and a host of depositions of top company managers, a former manager, and one Plaintiff.

Pursuant to court order, the Parties participated in mediation with the Court-appointed mediator, Baldwin Lee. The mediation was contentious, lasting two full days. Eventually the mediator made a mediator's proposal, which the Parties accepted on November 5, 2009. The Parties are now seeking this Court's approval of the detailed settlement agreement arrived at through extensive additional negotiation since that date, resolving the case on a class basis.

Through the present Settlement, Samsonite proposes to pay $850,000 to all 89 of the class members to resolve all outstanding wage and hour claims under the Fair Labor Standards Act, California, and New York law. This is in addition to the approximate total amount of $116,000 that Samsonite paid to certain class members as part of separate agreements that were negotiated after the present lawsuit was filed. It is submitted that this is an exceptional result, especially given circumstances that diminished the potential class members and their recovery, the inherent litigation risks, and the additional litigation risk created by the bankruptcy filing by Samsonite during the pendency of this case. The settlement is fair to the class as it provides compensation for overtime hours, liquidated damages, interest, using advantageous assumptions under federal and state laws – with no reversion to Defendants. As such, the agreement meets the Ninth Circuit's standards for approval, articulated in *Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

Based on the reasons stated herein, the Parties request that the Court certify the class for settlement purposes, appoint Class Counsel, and grant preliminary approval of this settlement.

NOTICE OF MOTION, MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES

NOTICE OF MOTION AND MOTION

Notice is hereby given that on December 18, 2009 at 9:00 a.m. in the Courtroom of the Honorable Jeffrey S. White, this Court will hear the parties' Joint Motion for Preliminary Approval of the Stipulation of Settlement Between Plaintiffs and Defendants.[2] Among other reasons, the parties move that this Court should swiftly and without reservation certify a class and grant preliminary approval, because: the parties' settlement agreement is fair to the Plaintiff class; there was a prior settlement agreement between Defendants and the Department of Labor which limits the recovery which many Plaintiffs could recover in this case; Defendant has already implemented a reclassification of all Store Managers to be non-exempt; and, because of Defendant Samsonite Company Stores, Inc.'s bankruptcy filing in September of 2009, and plaintiffs' observations regarding the financial pressures on the industry as a whole, which affect Plaintiffs, who need the settlement disbursements now. A Proposed Order is attached hereto.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a wage and hour, misclassification case under the Fair Labor Standards Act, 29 U.S.C. §216 (FLSA), and California and New York law, in which, after the proposed settlement is approved, 89 Store Managers of an entity that filed for Chapter 11 bankruptcy during the pendency of this case[3] (Samsonite Company Stores, Inc.[4]) will have recovered nearly a million dollars, plus injunctive relief: to wit – the Store Manager position has now been reclassified as non-exempt for all employees going forward. Especially in light of the fact that Defendants

[2] The parties have filed, concurrently with this Motion, a separate joint motion seeking this hearing date.

[3] This entity is scheduled to emerge from bankruptcy, and may do so prior to the final approval hearing in this matter. A Plan of Reorganization, was approved by the bankruptcy court, effective November 4, 2009. *See* Declaration of Daniel H. Lee ("*Lee Dec.*"), and Exhibit 1 attached thereto. The bankruptcy court has vacated the automatic stay that was previously imposed by section 362 of the Bankruptcy Code when SCS filed for Chapter 11 bankruptcy on or about September 2, 2009. *Id.*

[4] Plaintiffs maintain, and Defendants dispute, that Samsonite Company Stores' parent, Samsonite Corporation, is also an employer of Plaintiffs and the class based upon the expansive definition of "employer" under the FLSA and California and New York wage/hour law – however, this issue is outside the scope of this Motion. All parties seek resolution now.

Samsonite Company Stores, Inc., and Samsonite Corporation (hereinafter, "Samsonite") settled a misclassification case with the U.S. Department of Labor regarding Store Managers and paid hundreds of thousands of dollars of relief to many class members in 2007 (who waived all prior claims) (*see* Exhibit J to Joint Stipulation of Settlement and Release Between Plaintiffs and Defendants (hereafter, the "*Settlement*" – attached as Exhibit 1 to this Motion)), the deal is an abundantly fair one for the class.

After this suit was filed, Samsonite already, voluntarily paid over $116,000 to a number of Store Managers nationwide and reclassified all of them as non-exempt. *See Settlement.* Through the present Settlement, Samsonite proposes to pay an additional $850,000 to class members to resolve all outstanding wage and hour claims under the Fair Labor Standards Act and California and New York law. *See Settlement*, Exhibit D. Even after reasonable attorneys' fees on the total of more than $966,000 of recovery are deducted, as well as all litigation and settlement costs, the deal will result in an average additional payment for each of these individuals of nearly $6,300 (in addition to $1,300 each, on a verage, already paid) – an exceptional result, especially given circumstances of this case. *Declaration of Bryan Schwartz.* This settlement provides compensation for overtime hours, liquidated damages, interest, and, for California and New York class members, recovery for a hos t of state claims, using the most advantageous assumptions under each state's laws. *See Settlement.* As discussed *infra,* Courts routinely approve wage/hour settlements in comparable cases resulting in far less recovery to individual class members. To ensure the recovery for the class against a company in difficult financial circumstances, the Court should grant preliminary approval of this settlement without delay.

Apart from the practical concerns of proceeding against an entity that filed for bankruptcy during the pendency of this case, which has previously settled with the Department of Labor, the Settlement is a good result for the class in light of Plaintiffs' litigation risk in the case. *Schwartz Dec.* Samsonite has denied and continues to deny all of the Plaintiffs' misclassification, itemized wage statement, meal and rest period, vacation, and other claims and further argues and asserts

that, even if Samsonite's classification system and pay practices were found unlawful, its conduct was not willful, as discussed *infra*. Dkt. #21.

The parties have conducted discovery prior to arriving at the instant settlement, including the exchange of dozens of interrogatories and admissions, thousands of documents, and a host of depositions of top company managers, a former top manager, and one Plaintiff. *Schwartz Dec.*

Ultimately, the terms of the settlement were entered into after in lengthy, arms-length negotiations leading up to and through two full days of mediation with the Court-appointed mediator, Baldwin Lee. *Id.*. *See also Lee Dec.,* at Exhibit 2. Baldwin Lee heads the Employment Law Group in Northern California for the law firm of Allen Matkins. *Lee Dec,* Exh. 2. He has extensive experience litigating, and serving as a mediator, in wage and hour claims. *Id.* Mr. Lee earned his undergraduate degree from Stanford University and his law degree from the University of Chicago Law School *Id.* After law school, he clerked for U.S. District Judge Ginger Berrigan. *Id.* Prior to and during this mediation, extensive and confidential compensation information was disclosed by Defendants to Plaintiffs, which was the basis of the calculations of recovery for each class member in the settlement reached. *Schwartz Dec.* Eventually the mediator, Mr. Lee, made a mediator's proposal, which the Parties both accepted on or about November 5, 2009. *Lee Dec.*

The parties recognize that the final settlement reached is less than the perfect outcome for either party – zero liability sought by Defendants, or full relief sought by Plaintiffs, respectively – but represents a fair compromise and an exceptional result for the Plaintiff class given: the number of claims excluded by prior settlement; the changes Samsonite has already implemented; the litigation risks; the facts that Samsonite filed for Chapter 11 bankruptcy during the pendency of this case, and the financial condition of the Plaintiffs (some of whom are being laid off as a result of Samsonite Company Stores' bankruptcy filing). *Schwartz Dec.*

II. FACTUAL BACKGROUND

A. Defendants have reclassified the Store Manager position.

In Department of Labor ("DOL") case number 1444551, in January 2007, Samsonite reached a settlement with the DOL and in connection with that case, it thereafter reclassified

some of its Store Managers as non-exempt. *See Settlement,* Exh. J. Since this case was filed, Samsonite has reclassified all of its remaining Store Managers nationwide to be non-exempt employees. *See Settlement*, at Section XIV.

B. Plaintiffs have developed a substantial factual record warranting certification and justifying the settlement.[5]

Declarations and deposition testimony taken to date establishes that Plaintiffs and the class members are/were similarly-situated and meet the standards for certification for settlement purposes, in that:

1) the 89 employees subject to the settlement all worked as exempt Store Managers during the putative class period[6] (*see Settlement,* at Section II and Exhibit B);
2) Plaintiffs Pearson and Newsham worked as exempt Store Managers during the relevant period and share the claims of the putative class members (*Schwartz Dec.,* Exhibit 1, Plaintiffs' and Other Store Managers' Declarations ("*Store Managers' Decs.*")));
3) Plaintiffs submit that (and Defendants dispute) Defendants have followed common policies and practices with respect to all of the putative class members – including a job requirement of all Store Managers that they work at least 45 hours per week – such that, extensive unpaid overtime work is common to the entire class for the period in which they were classified as exempt (*Schwartz Dec.,* Exhibit 2, Fed.R.Civ.P. 30(b)(6) Deposition of Lucy Rose, Excerpts ("*Rose Depo.*"), at p. 114); and

[5] Though Defendants stipulate to certification for settlement purposes (*Settlement,* at Section IV), Defendants do not stipulate to Plaintiffs' arguments articulated in this section, and expressly dispute many of them. *See infra.*

[6] The Settlement calculates the class period as three years from the date the statute was tolled (September 2, 2009) (*Settlement*, at Section II.h) for all class members who did not previously opt-into this case who worked for Samsonite outside of California and New York, based upon the maximum permissible recovery for a willful violation under the FLSA. 29 U.S.C. § 255(a); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988). The covered period was calculated as four years from the date the suit was filed for all class members in California, and six years from the date the suit was filed for all class members in New York. *See Settlement,* at Section II.h. California and New York have four-year (under Cal. B.P.C. §17200) and six-year (N.Y. C.L.S. Labor §198(3)) statutes of limitations, respectively, regardless of willfulness, and the statute would be tolled at the time the class action was first filed*, i.e.,* March 24, 2009, under *Crown Cork Seal Company, Inc. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983), rather than the opt-in date or the date the FLSA period was explicitly tolled, *i.e.*, September 2, 2009.

4) Plaintiffs submit that (and Defendants dispute) common issues predominate as to putative class members' misclassification claims, which Plaintiffs would seek to establish with common proof (*see, e.g., Schwartz Dec.*, Exhibit 3, Fed.R.Civ.P. 30(b)(6) Deposition of Fred Peirce, Excerpts (*"Peirce Depo.*"), at pp. 136-154).

1. Plaintiffs would argue, if the matter were not resolved through settlement, that certification is appropriate and liability warranted as a matter of law concerning Store Managers who fail to meet the executive exemption test because they did not supervise 80 or more hours of subordinates' time each week, which can be established through common proof.

As to the predominance of common issues, Defendants agree that the basis for their claimed exemption as to the Plaintiffs and putative class members is exclusively the executive exemption. *Schwartz Dec.,* Exhibit 4, F ed.R.Civ.P. 30(b)(6) Deposition of Robert Cooper, Excerpts ("*Cooper Depo.*"), at pp. 165-168. The executive exemption, under the FLSA, California, and New York law requires that each exempt "employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent." 29 C.F.R. §541.100, *et seq.;* Cal. Code Regs., tit. 8, § 11070(1)(A)(1); 12 N.Y. Comp. R. & Regs. § 141-3.2(c)(1)(i). Plaintiffs claim that Defendants settled in 2007 with the Department of Labor (DOL) after they were admonished that the Department had found the executive exemption was inapplicable to all or most of Defendants' store managers because they did not customarily and regularly manage two or more full-time employees or their equivalents. *Cooper Depo.*, at pp. 148-149 (citing DOL settlement). Plaintiffs claim that after the DOL settlement, Samsonite did not immediately reclassify all of its Store Managers who lacked supervision over two or more full-time employees or equivalents, but has done so gradually, with many Store Managers (including Plaintiffs) reclassified after this suit was filed. *Id.* at 149-154. Plaintiffs claim that Defendants possess and have discussed among upper management all of the centrally-kept data demonstrating which Store Managers were not supervising adequate subordinates' hours, and

when certain Store Managers who formerly supervised more than 80 hours of time ceased to routinely do so. *Id.* at 159.

2. Plaintiffs would argue, if the matter were not approved for settlement, that certification and liability are appropriate, class-wide, because the executive exemption cannot apply to Samsonite's Store Managers, since they do not meet the duties test of the exemption.

If the settlement is not approved, Defendants will argue that class members who oversaw two or more employees or their equivalents were properly classified as exempt under the executive exemption. *Cooper Depo.*, at pp. 165-168. However, Plaintiffs and putative class members in this case, and even former Samsonite Store Managers whose own claims fall outside the statute of limitations,[7] testify that all across the country, in California, New York, Florida, Texas, Wisconsin, and Nevada, their primary responsibility was fulfilling sales goals set by their district and regional managers and providing customer service. *See Store Managers' Decs.* Plaintiffs estimate that they spent 2/3 to 90% of their time on sales, and testify that their store manager duties were not very different from the responsibilities performed by their non-exempt co-workers. *Id.* All were required to make sales goals their top priority, and spent the vast majority of their time on the sales floor together. *Id.* They testify that when not engaged in sales, they (like their co-workers) spent significant time cleaning the store, changing light bulbs or fixture displays, performing other maintenance tasks, and physically restocking merchandise, based on instructions in the corporate manuals over which they had little or no control. *Id.* They testify further that they did not have the final say on any hiring or termination decisions, and that coworkers were usually hired by higher level managers based on those managers' judgment. *Id.* The witnesses testify that as store managers across the country at Defendants, they spent very little time on personnel matters overall, had no authority over setting and adjusting subordinates' rates of pay, and only limited discretion in setting employees' hours of work. *Id.* They testify that they did not take action based upon employee complaints and grievances, but rather, had to report

[7] Plaintiffs would argue that these non-party witnesses' consistent testimony, despite the lack of any potential personal financial recovery, makes Store Managers Jhon Velasquez, Thomas Upham, and Alexis Cooper especially credible.

these to their managers and/or human resources officials, and likewise did not monitor or implement legal compliance measures. *Id.* Store managers nationwide were not primarily responsible for keeping production and sales records, according to Plaintiffs' declarations, because this data was maintained electronically and reviewed by upper management. *Id.* Plaintiffs contend that they did not plan or control the budget for their stores, and ultimately, store managers' jobs were much more similar to those of assistant managers than to the company's true executives. *Id.* The foregoing assertions are disputed by the Defendants.

Plaintiffs maintain that Samsonite's executives never objectively studied what Store Managers actually did on a day-to-day basis and never reviewed the amount of time store managers spent on managerial duties. *Cooper Depo.*, at pp. 160-161, 171-172. If the matter were not resolving amicably, Plaintiffs would argue, on a class-wide basis, that Defendants cannot meet their burden to prove the executive exemption, as a matter of law, without proof that the classification was properly based upon the nature of store managers' actual duties – proof that Defendants do not have. *Id.*

Beyond the time spent on non-exempt work, Plaintiffs would argue, if the matter proceeded and did not settle amicably, that the relative importance of non-exempt work performed by the Store Managers far outweighs any incidental executive-level responsibilities they possess. Plaintiffs argue that Mr. Cooper felt it was important, as a matter of company policy, that the Plaintiffs and putative class members "be the top salesperson in the store." *Schwartz Dec.*, Exhibit 5, David Fuller Deposition, Excerpts ("*Fuller Depo.*," at Fuller Depo. Exhibit 3), at pp. 144-145. Defendants' records produced in discovery show that Store Managers company-wide were accountable for their sales figures like other store employees. *Cooper Depo.*, at pp. 139-140 (*citing* Cooper Depo. Exh. 12). Plaintiffs argue that Mr. Cooper, as the Fed.R.Civ.P. 30(b)(6) deponent, admitted the importance of store managers' sales objectives. *Cooper Depo.*, at pp. 114-116, 120-123 (*citing* Cooper Depo. Exh. 8) (stating selling time would not be less than 2/3 of store managers' time, and that their first priority is customer service); 134 (*citing* Cooper Depo. Exh. 11) (stating that District Managers and Area Managers review store

managers' sales performance along with all other employees' sales performance). According to Plaintiffs, Mr. Cooper acknowledged that store managers at Defendants are evaluated "on following the sales process, sales guidelines, that we expect them to follow." *Id.* at pp. 129-130.

Were the matter to proceed through litigation, and not settle, Plaintiffs would argue using common proof that, company-wide, the Store Managers' core job responsibilities were the same (or virtually the same) as those of the non-exempt store employees. *Cooper Depo.*, at pp. 62-66, 68 (*citing* Cooper Depo. Exh. 5). The exempt store managers' job profile at Samsonite was *literally* the same job description as that for non-exempt assistant managers and those already reclassified non-exempt store managers – with the first responsibility listed as "Drive sales/customer service," and the second and third listed key responsibilities requiring that they "Consistently deliver brand enhancing store standards that create a positive customer experience," and "Achieve established sales and profit plan." *Id.* All (exempt and non-exempt) employees in charge of stores – including non-exempt "supervisors" (aka "third-keys"), "assistant managers," and already reclassified, non-exempt store managers – are involved in approving checks, giving refunds, handling returns, and counting and depositing a store's funds. *Id.* at 66-67.

3. Plaintiffs would argue, if the settlement was not approved, that the extent of centralized control and common policies, practices, and procedures concerning Store Managers both warrants certification and demonstrates that they Store Managers lacked substantial discretionary powers.[8]

Plaintiffs would further argue using common proof that the extent of centralized policies, practices, and procedures exercising control over all of the stores both warrants class certification and evidences that Store Managers were improperly misclassified as exempt executives.

[8] In New York and California, employers must prove that the executive exemption is warranted because the employees in question "customarily and regularly exercise discretionary powers." 12 N.Y. Comp.Codes R. & Regs. tit. 12, § 141-3.2(c)(1)(i)(d); Cal.Code Regs., tit. 8, § 11070(1)(A)(1). *See also Balce v. Lucky Chances, Inc.,* 2008 WL 564792, *3 (N.D. Cal. February 28, 2008) (White, J.) (*citing Sav-On Drug Stores, Inc. v. Sup.Ct.,* 34 Cal.4th 319, 338 (2004)). While discretionary powers are not explicitly part of the FLSA's test under new Department of Labor (DOL) regulations, they remain a relevant consideration in analyzing whether employees' primary duties are managerial, when considering the executive exemption under the FLSA. *See, e.g., Morgan v. Family Dollar Stores, Inc.,* 551 F.3d 1233, 1262-1263, 1270 n.57 (11th Cir. 2008) ("[T]he new [DOL] regulations do not preclude, and are consistent with, our consideration of the frequency with which an employee exercises discretionary powers in our primary duty analysis.").

Plaintiffs' eight submitted declarations corroborate that there were identical company practices in six completely different regions of the country – and should be enough, standing alone, to warrant FLSA certification. *Store Managers' Decs.*[9]

If not resolved amicably, Plaintiffs would contend that each store's goals are set centrally by upper management. *Cooper Depo.,* at p. 183. The store managers "set" their subordinates' goals only based upon a company-prescribed formula relating to the numbers of hours worked *(id.* at pp. 184-185), and following the company's policy concerning the setting of sales goals. *Id.* at p. 185. M oreover, decisions regarding the stores' budgets (and even whether stores remain open or closed on a given day) are centrally directed by the company's top executives. *Id.* at pp. 22-26. Store managers do not have input into their budgets. *Id.* at 26. All stores, among other things: have the same training program (*id.,* at pp. 181 -182); have the same performance evaluation process (*id.,* at p. 182); report to same upper management (*id.*, at p. 187); have the same, largely-automatic merchandising (*id.* at pp. 85 -89; *see also Fuller Depo.,* at pp. 48 -49); have centrally planned, extremely detailed store design (*Cooper Depo.* at 93-98); and, participate in national sales contests. *Id.* at pp. 137 -138. All Store Managers follow the same company manuals. *Peirce Depo,* at pp. 51-53. Policies and procedures for petty cash, bank deposits, and all daily store operation, are included in Defendants' policy and procedures manual. *Cooper Depo.* at pp. 72-73.

Along the same lines, Plaintiffs would argue that complaints regarding wage/hour and EEO regulations are handled above the store managers' level. *Id.* at pp. 78-79. Store Managers need approval from their higher-ups if they want to miss part of a day. *Id.* at 123-125 (*citing* Cooper Depo. Exh. 9). Store managers have to go through multiple levels of management to: have repairs done in their stores (*id.*, at pp. 45 -48 (*citing* Cooper Depo. Exh. 2); close a store

[9]As to the point of law regarding the relatively small number of declarations needed to justify FLSA certification, *see, e.g., Beauperthuy v. 24 Hour Fitness, USA, Inc.*, 2008 WL 793838, *3 (N.D. Cal. March 24, 2008) (Conti, J.) (ten declarations found sufficient for conditional certification); *Rees v. Souza's Milk Transp., Co., et al.,* 2006 WL 738987, **3-4 (E.D. Ca. Mar. 22, 2006) (two); *DeAsencio v. Tyson Foods, Inc.*, 130 F.Supp.2d 660, 663 (E.D. Pa. 2001) (four); *Camper v. Home Quality Mgmt., Inc.*, 200 F.R.D. 516, 529 (D. Md. 2000) (four); *Guzman v. Varco Intern., Inc.*, 2002 WL 32639237 at *3 (S.D. Tex. May 30, 2002) (three).

temporarily, during regular business hours, for an unusual occurrence (*id.* at 48-53 (*citing* Cooper Depo. Exh. 3)); throw out a non-functioning piece of equipment (*id.*at 53-56 (*citing* Cooper Depo. Exh. 4); and to obtain approval for overtime hours by non-exempt employees (*id.* at 61). Plaintiffs, if forced to litigate the matter, rather than settling, would argue using common proof of Defendants' policies that Store Managers are not trusted even to pick their color of their own shoes during working hours. *Id.* at pp. 98-109 (*citing* Cooper Depo. Exh. 7).

Furthermore, Plaintiffs would argue, using common proof, that the Store Managers are not relatively free from supervision, and that, on the contrary, District Managers, who oversee Store Managers, according to Defendants' 30(b)(6) testimony, are "constantly" in stores. *Cooper Depo.*, at p. 132. T hey are always "spending a significant amount of time on a sales floor in a store, along with a Store Manager, on a weekly basis." *Id.* However, these true executives (*i.e.,* District Managers) do not login to the register and track their sales goals and selling hours with a 40-hour week, and unlike Store Managers, they are not evaluated on their sales productivity. *Id.* Rather, District Managers and Area Managers, among other upper management personnel, closely review Store Managers' and all store employees' sales productivity on a regular basis. *Id.* at 134 (*citing* Cooper Depo. Exh. 11).

If the matter did not settle, Plaintiffs would attempt to prove with their testimony and Defendants' officials' statements, applicable to the entire class, that Store Managers lacked hiring/firing authority sufficient to justify the executive exemption. *Store Managers' Decs.* Plaintiffs submit that Store Managers cannot: advertise a position; add a position; finalize a hiring decision; extend an offer of employment; or determine the rate of pay. *Cooper Depo.*, at pp. 34-38. For any disciplinary action, the next level of management is consulted – and if it is any kind of "severe" discipline, HR must also be involved. *Id.* at pp. 39-40. HR and upper management must approve all promotions, raises, and terminations. *Id.* at pp. 40-42.

All of the foregoing arguments are disputed by the Defendants.

4. If the matter proceeded through litigation, Plaintiffs would seek to show willfulness and lack of good faith through common proof of prior wage/hour cases against Samsonite.[10]

Finally, Plaintiffs would argue that certification is appropriate because Plaintiffs would use common proof to show willfulness and lack of a good faith defense - namely, the Labor Department's prior findings and Defendants' settlement with the Department. Plaintiffs would argue that Defendants' violations were willful because Defendants were engaged in an ongoing cost-benefits analysis regarding reclassification, despite knowing they were violating the law. *Cooper Depo.,* at pp. 149-154, 159; *Peirce Depo.,* at pp. 136-154. Moreover, Defendants had other related wage claims filed against them in Oregon (*Cooper Depo.*, at p. 163) and Wisconsin. *Schwartz Dec.,* at Exhibit 6, Wisconsin Wage Complaint of Thomas Upham. These arguments currently are, and would continue to be, disputed by the Defendants.

C. Defendants Have Developed A Factual Record Demonstrating Plaintiffs' Litigation Risks, Warranting Settlement.

In addition to the litigation risk that arose when Samsonite Company Stores filed for Chapter 11 bankruptcy in September of 2009, Defendants have developed a factual record which they contend will enable them to argue that Plaintiffs' and the putative class members' duties justified the executive exemption, or, alternatively, that any misclassification was not willful.

1. Samsonite would argue, if the matter was not amicably resolved, that Store Managers were properly classified.

Defendants note that the Store Managers' job description states that they are expected to:

- Supervise and train sales associates in the performance of their duties

[10] *See Chao v. A-One Medical Services, Inc.,* 346 F.3d 908, 919 (9th Cir. 2003) ("[W]e find probative A-One's former FLSA violations, even if they were different in kind from the instant one and not found to be willful. The fact that A-One previously had run-ins with the Labor Department certainly put A-One and Black on notice of other potential FLSA requirements.") (*citing Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003); *Hodgson v. Cactus Craft of Arizona,* 481 F.2d 464, 467 (9th Cir.1973) (evidence of prior investigations establishes willfulness); *Horrocks v. Daggett County*, 2006 WL 2598331, at **5-6 (D.Utah Sept. 11, 2006) (*citing Chao*, holding that prior FLSA violations can demonstrate willfulness); *Baker v. D.A.R.A. II, Inc.,* 2008 WL 191995, at **5-7 (D.Ariz. Jan. 22, 2008) (same); *Adams v. Inter-Con Sec. Systems, Inc.,* 242 F.R.D. 530, 542 (N.D. Cal., 2007) (same, *citing Richland Shoe); Wren v. RGIS Inventory Specialists*, 2007 WL 4532218, *10 (N.D.Cal. December 19, 2007) (Spero, M.J.) (other litigation against employer suggests willfulness).

- Assign hours to store associates
- Conduct regularly scheduled performance reviews with all eligible sales associates
- Have authority to make hiring and termination decisions, and
- Efficiently manage the store.

Cooper Depo., at Exh. 5.

Defendants argue that the duties outlined in Samsonite's company manual and the Code of Federal Regulations were carried out by each store manager, as described by a third party witness, David Fuller. Samsonite submits that Mr. Fuller supervised all of Samsonite Company Stores' ("SCS") high-end "Black Label" retail stores (which include the stores that Mr. Newsham and Ms. Pearson managed). Defendants assert that his testimony establishes that Store Managers:

- were responsible for supervising and training the assistant managers and other employees who worked at their respective stores (*Fuller Depo.* at 79.);
- were responsible for customer relations (*id.* at 80);
- approved returns or exchanges (*id.* at 81);
- dealt with customer complaints (*id.* at 82);
- were responsible for ensuring that employees who worked in their stores met their individual sales goals, and managed their teams' sales performance (*id.* at 85-86);
- were responsible for setting the schedules for the people that worked in their store (*id.* at 89);
- were expected to monitor and analyze the expenses for their respective stores (*id.* at 90);
- were responsible for "identifying the need and presenting the case" for hiring more people in their respective stores (*id.* at 90-91);
- had the authority to reduce the workforce in their respective stores (*id.* at 92);
- recruited new sales associates, including reviewing job applications, deciding who to interview, and who to offer a job (*id.* at 93 - 95);
- were responsible for disciplining employees with verbal and written warnings. (*id.* at 100);

- were responsible for monitoring punctuality of the employees and workplace safety (*id.* at 101 – 103);
- engaged in outside networking activities on Samsonite's behalf (*id.* at 107 – 108);
- and, were ultimately held responsible for the performance of their stores. *Id.* at 118.

Defendants emphasize the following testimony by Mr. Fuller:

> Q: Based on your interaction with the store managers and your knowledge of their jobs, were store managers the people that were ultimately held responsible for the performance of their stores?
>
> A: Absolutely. (Fuller Dep. at 118.)
>
> ***
>
> Q: Mr. Fuller, did store managers have the responsibility and authority to make suggestions and recommendations as to hiring, firing, disciplining, promotion and/or change of status of employees?
>
> A: Yes.
>
> Q: Whatever suggestions or recommendations that were made, were those given significant weight?
>
> A: Yes. They were. *Fuller Depo,* at pp. 144 - 145.

Based on the foregoing, Defendants maintain that Mr. Fuller testified that both Ms. Pearson and Mr. Newsham were properly categorized as exempt employees. He stated that "they both had a lot of managerial duties to deal with." *Fuller Depo.*¸at p. 114.

2. Defendants would argue, if the matter were not settled, that Plaintiffs' claims that they should have been classified as non-exempt employees are not credible.

Defendants summarize Plaintiffs arguments as follows, that: (1) their primary duty was sales, not management; (2) they did not customarily and regularly supervise employees for 80 or more hours in a week; (3) they spent significant time cleaning the store, changing the light bulbs of fixture displays, and physically restocking merchandise; and (4) they did not exercise significant discretion and independent judgment.[11] *See, e.g., Store Managers Decs.* In sum,

[11] Defendants submit that Store managers who perform clerical work can still be properly classified as an exempt employee – even when they are engaged in such activities more than 50 percent of the time. A manager "in a retail establishment … may have management as their primary duty *even if the assistant managers spend more than 50*

Plaintiffs contended that they, and the other store managers, were primarily salespeople, not executives. *Id.*

In response, Defendants would make the following arguments, all of which are contested by Plaintiffs. First, Plaintiffs' claims are directly rebutted by the testimony of David Fuller, cited *supra*. Second, Defendants would argue that Plaintiffs claims are not credible. Defendants submit that Mr. Newsham was hired by Samsonite as a store manager, paid $77,225 per year to run a high-end store on Madison Avenue. *Store Manager Decs.*, at Newsham Dec. Samsonite would argue that it hired Mr. Newsham because of his experience managing stores. *See Lee Dec.,* at Exhibit 3, Newsham Employment Application. Mr. Newsham was "responsible for store operations" at Bombay for two years, supervised three department managers at Century 21 Department stores for one year, was responsible for operating two stores locations (in addition to training staff and motivating sales staff) at Cingular Wireless for one year, and was responsible for retail operations at Tekserve for one year. *Id.*

Defendants contend that, in rating his own performance, Mr. Newsham indicated in his review that he thought "outside the box to generate sales and to motivate store staff," and enjoyed "finding partners that will accept a revenue sharing marketing relationship." *Lee Dec.*, at Exhibit 4, Newsham Evaluations. Mr. Newsham indicated that he "cut payroll and significantly cut storage fees." *Id.* He was focused on "sales generation through networking." *Id.* He stated that "as a manager, I focused on growing the business and growing the team." *Id.* Mr. Newsham states that he worked closely with the Madison Avenue Business Improvement District, made new inroads with vendors, attended several marketing events, and found a solution for better storage and customer delivery needs. *Id.*

Based on the foregoing, Defendants would argue that Mr. Newsham was given high level responsibilities and carried out those responsibilities in running the Madison Avenue store.

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percent of the time performing nonexempt work such as running the cash register." 29 C .F.R. § 541. 700(c) (emphasis added).

Likewise, Defendants argue that Ms. Pearson also functioned at a high managerial level. Ms. Pearson was hired to run one of the flagship Black Label stores for Samsonite in San Francisco. Samsonite would argue that Ms. Pearson is being paid approximately $70,000 per year. *Store Managers' Decs.,* at Pearson Dec. Similar to Mr. Newsham, Defendants would argue that Ms. Pearson also has extensive experience in managing retail stores. *Lee Dec.*, at Exhibit 5, Pearson Employment Application. For instance, as an assistant store manager at Century 21 Department Stores, where she was paid approximately $85,000 per year, she was in charge of "running of store operations." *Id.*

In her performance evaluations, Ms. Pearson was praised for her leadership skills. *Lee Dec.,* at Exhibit 6, Pearson Performance Evaluations. Ms. Pearson's supervisor commented that Ms. Pearson has the respect to all store associates, expects excellence from all associates and holds them accountable for their actions. *Id.* Ms. Pearson was praised for her "good job maintaining, hiring and training her staff." *Id.* It was noted that she "works independently with every little direction needed from the District Managers." *Id.* Ms. Pearson stated that she has "strong leadership skills" and that she was a "good manager." *Id.*[12]

3. Defendants would argue, if the matter were not settled, that, the Store Managers either customarily or regularly directed the work of two or more other employees, or were converted to a non-exempt status.

Defendants would argue that the Store Managers who were classified as exempt employees, such as Pearson and Newsham, customarily or regularly directed the work of two or more other employees. Following an investigation conducted by the Wage and Hour Division of the DOL in or about 2006, Defendants entered into a settlement agreement on a national basis to avoid the potential cost and expense of litigation. *See Settlement,* Exh. J. One of the key factors Defendants state they considered in determining whether a store manager was to be classified as exempt or non-exempt was whether the Store Managers customarily and regularly supervised the equivalent of two or more full time employees (i.e. full time indicates as working 40 hours a

[12] Defendants would also argue that any testimony by other opt-in claimants to describe their alleged daily activities is suspect because, among other reasons, opt-in Plaintiffs Thornton, Shaker, and Conn were terminated. *Store Managers' Decs.*

week) in a workweek – 80 hours of supervision total per workweek. *Id.* Defendants contend that, if the matter did not resolve amicably, they would utilize the extensive records in their possession, some of which have been produced to the plaintiffs, to attempt to show that all of its Store Managers "customarily and regularly" supervised a total of 80 hours of work per workweek.

4. Defendants would argue, if the matter were not settled, that, even if Store Managers were misclassified, they were classified as exempt (and ultimately reclassified as non-exempt) in good faith, and that therefore, they are not liable under the FLSA.

If the matter were not resolved amicably, Defendants would argue the "good faith defense," under 29 U.S.C. Section 259(a), which provides that employers are not liable for the extended, three-year statute of limitations under the FLSA if they "prove that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative … approval, or interpretation, of [the Wage and Hour Division of the Department of Labor." *General Electric Co. v. Porter*, 208 F.2d 805, 816-817 (9th Cir. 1953); *Frank v. McQuigg*, 950 F.2d 590, 598-599 (9th Cir. 1991). Defendants would argue that when it was determined that certain store managers were not customarily or regularly directing the work of two or more other employees, Samsonite Company Stores converted those store managers to a non-exempt status pursuant to the "80 hour" guideline stated in the settlement agreement that Samsonite entered into with the DOL. *Cooper Depo.,* at pp. 149-152, 157-158. Defendants would argue that after the DOL settlement, Samsonite conducted periodic internal audits. *Id.* Samsonite contends that they reviewed the hours worked by the non-managerial employees at each store, and Defendants maintain that the 80 hour guideline they followed was based, specifically, "on discussions that [Samsonite] had with the Department of Labor" in connection with the DOL settlement. *Id*. Defendants also claim that they have examined whether the Store Managers are performing managerial duties that are outlined in the company's job descriptions, such as interviewing, hiring and firing, and coaching the employees, and made a decision whether to convert each Store Manager to a non-exempt employee based upon such. *Peirce Depo.,* at pp. 137 – 142, 149.

Based on the foregoing, Defendants would also argue that Defendants cannot be found to have acted willfully, which, Defendants believe, would also defeat plaintiffs' claim that they are entitled to liquidated damages under the FLSA.[13]

5. Samsonite would argue, if the matter were not amicably resolved, that a substantial portion of the class have waived most or all of their claims and are, in any event, not entitled to participate in this collective/class action suit, by virtue of private releases they signed with the company.

Thirty of the 89 individuals who will recover if this Settlement is approved have signed agreements with Defendants since Plaintiffs filed this lawsuit, in which those thirty Store Managers agreed to waive claims and not to participate in this suit, and for which they were paid varying sums in settlement, totaling $116,251.08. *See Settlement.* If the matter were not resolved amicably, then Defendants would argue that Store Managers executed those releases voluntarily, after being made aware of the allegations in this lawsuit and their right to recover of alleged unpaid wages, penalties and interest. Defendants would argue that each Store Manager was given an opportunity to review the proposed release, was advised that he or she had no obligation to sign it, had the right to consult an attorney about it, and that no negative actions would be taken against him/her for not signing it. *See Horenstein v. Mortgage Mkt., Inc.*, 9 Fed. Appx. 618, 619 (9th Cir. 2001); *Kelly v. City & County of San Francisco*, 2008 U.S. Dist. LEXIS 108871 (N.D. Cal. June 30, 2008). Defendants' view is that since no class was certified, as a constitutional matter, and under existing case law, they were free to speak to the putative class members to try and resolve potential claims. *See, e.g., Gulf Oil Co. v. Bernard* 452 U.S. 89, 101-102 (1981). Defendants would argue, if the matter were not amicably resolved, that, the ability to participate

[13] Samsonite would argue, also, if the matter were not amicably resolved, that plaintiffs' claim for violation of California's meal and rest period law will fail as such a claim is not credible.

in a collective action is waivable, and was properly waived by the 30 individuals who signed releases with Defendants.[14]

Plaintiffs respond to Defendants' waivers by stating, among other arguments, that the FLSA specifically prohibits such unsupervised waivers (*Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641 (unwaivable statutory rights)), as do Cal. Labor Code sections 206 and 206.5 (providing that an employer shall not require the execution of a release of a claim or right on account of wages due). *See also Gentry v. Superior Court*, 42 Cal.4th 443, 456 (2007) (aligning California law with *Barrentine*).

However, despite the uncertainty on this issue, all 30 of those who already executed separate private waivers with Samsonite are also being compensated under the present Settlement according to the same formula applicable to all other class members, subtracting from their proposed allocation only the amount they were actually, already paid – *i.e.,* they receive neither any windfall nor any diminishment in their settlement allocation as a result of the waivers.

D. Plaintiffs' and the putative class members' claims are addressed fairly and adequately in the settlement.

Because Plaintiffs argue that Defendants have had a policy of a forty-five hour workweek for Store Managers, the Settlement is designed to provide five hours per week during the class period of overtime compensation to each class member. *See Settlement*, at Section XVIII.[15] As

[14] For more regarding this approach, *see, e.g., Chindarah v. Pick Up Stix, Inc.,* 171 Cal.App.4th 796 (2009); *Watkins v. Wachovia Corp.*, 172 Cal.App.4th 1576, 1587 (2009) (*following Chindarah*).

[15] Under the settlement, class members in New York and California recover overtime at 1.5 times their regular rate of pay, and all other class member recover at 0.5 times their regular rate of pay (which includes a hefty median average of 11.74% in commissions) (*see* Settlement, at Section XVIII), using the FLSA's fluctuating workweek method, since Defendants could argue that exempt Store Managers were salaried employees mutually understood to be paid a fixed salary regardless of how many hours they worked. *See* 29 C.F.R. § 778.114. California's Supreme Court, in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 572-573 (1996), while disapproving on other grounds *Skyline Homes, Inc., v. Dept. of Industrial Relns.*, 165 Cal.App.3d 239 (1985), held that California law does not recognize the Federal fluctuating workweek method. *See also* a relevant opinion letter of California's Division of Labor Standards Enforcement, at: http://www.dir.ca.gov/dlse/opinions/1997-12-03-2.pdf. Likewise, New York law contains specific regulations for calculating overtime – none of which allow the fluctuating work week method, according to Plaintiffs. Under New York law, non-exempt employees must be paid one and a half times their regular rate for hours worked over forty. 12 NYCCR 142-2.2; 12 NYCCR 142-2.16. For salaried employees, overtime is calculated by dividing the weekly salary by the total hours worked per week, and multiplying by 1.5. *Id.* Neither New York statute nor regulation makes any mention of the fluctuating workweek method.

described (in a footnote) *supra*, the class period used for each individual is the longest permitted by law – six, four, or three years, respectively, for New York, California, and all other class members. *See Settlement,* at II.h. If the matter had not been resolved amicably, and if Defendants were to challenge these statutory periods (or the willfulness requirement for three years under the FLSA) in future litigation, it is possible that fewer individuals would recover for less time than they do under the settlement.

The settlement provides, in addition, that all class members be paid 10% simple interest on their back overtime wages. *See Settlement*, at Section XVIII.[16] Moreover, the settlement pays each class member liquidated damages for the full three years of his/her FLSA claim (*id.*), to which class members would not be entitled if Defendants were to prevail in their arguments that their classification of Store Managers as exempt was reasonable and in good faith.[17]

California class members are paid additional amounts for the state claims raised in the suit, which Defendants dispute, and which Plaintiffs are waiving in the Settlement.[18] Each receives compensation for three hours per week of eligibility at his/her regular rate of pay for meal/rest period premiums under Cal. Labor Code §226.7 and 512 (*see* Settlement, at Section XVIII), regarding which they might receive no compensation in the future at all, depending on how the California Supreme Court rules on a pending case interpreting the state's meal/rest

[16] *See Bell v. Farmers Ins. Exchange,* 135 Cal.App.4th 1138, 1150 (2006) ("We conclude that the trial court properly applied the 10 percent prejudgment interest rate provided by Civil Code section 3289 to the accrual of unpaid wages. The enactment of Labor Code section 218.6 confirmed the propriety of this rate, which was supported by persuasive authority prior to its enactment."); *Gelof v. Papineau*, 648 F.Supp. 912, 929 (D.Del. 1986), *affirmed in relevant part, and vacated on other grounds,* 829 F.2d 452, 456 (3rd Cir. 1987) (the forum state's statutory rate of interest governs); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 556-557 (9th Cir. 1983) (awarding California's then-statutory rate of 7%). There is other authority awarding much lower rates of prejudgment interest on federal claims (*e.g.,* the prime rate, or T-bill rate – *see, e.g., EEOC v. O'Grady*, 857 F.2d 383, 391-392 (7th Cir. 1988); *Western Pacific Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984)), or holding that prejudgment interest is not awarded at all where, as here, liquidated damages are recovered in the Settlement (*see, e.g., Shea v. Galaxie Lumber & Const. Co., Ltd.*, 152 F.3d 729, 733 (7th Cir. 1998) – *but see Criswell*, 709 F.2d at 556-557 (case under the FLSA (ADEA, specifically) holding that liquidated damages and prejudgment interest serve different purposes, and thus may both be awarded). Regardless, the 10% simple interest paid here is abundantly fair to the class.

[17] *See* 29 U.S.C. § 260; *Bratt v. County of Los Angeles,* 912 F.2d 1066, 1071-72 (9th Cir. 1990).

[18] The parties do not address separately in this brief the merits of all of the California class's Labor Code claims. If Plainitffs prove willful misclassification, then violations of these Labor Code sections are – Plaintiffs would argue, and Defendants will assume for settlement purposes – a matter of course. *See Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 605 (E.D.Cal. 2008).

period premium requirements.[19] Each receives the maximum allowable compensation for itemized wage statement penalties ($50 for the first pay period and $100 for each additional pay period, up to $4,000), under Cal. Labor Code §226(e) (*see* Settlement, at Section XVIII), which they would only recover in litigation if they could prove a "knowing and intentional" failure to comply with California's wage/hour laws, which Samsonite has adamantly denied throughout this case. *See* Defendants' Answer to First Amended Complaint. (Docket # 21)

California and New York class members will recover under the Settlement for alleged vacation time underpayments alleged under state law by the representative Plaintiffs in the Complaint, based upon a policy under which Samsonite purportedly promised to pay vacation time based upon hours worked. According to Plaintiffs' allegations, Samsonite only actually paid vacation based on an assumed 40 hours per week for Store Managers, who were required to work 45 hours per week – and were thus shortchanged vacation accrual for at least five hours a week for each week during the covered period.[20] Defendants claim that, at some point, the company changed its vacation policy, and that in any event, the vacation policy was not intended to be a contractual obligation. *Cooper Depo.*, at pp. 195-196.[21] Notwithstanding the disputed issue, the Settlement compensates New York and California class members fully for these vacation claims.

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[19] Currently, there is a split between California Courts of Appeal between those requiring that employers ensure that employees take breaks, and those merely requiring that breaks are made available to employees. *Compare: Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 962-963 (2005) (employer must ensure breaks or pay premiums); *Bufil v. Dollar Financial Group, Inc.*, 162 Cal.App.4th 1193, 1199 (2008) (following *Cicairos*); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1189 (2008) (same); *Zavala v. Scott Bros. Dairy*, 143 Cal.App.4th 585, 591-595 (2006) (same); and *Aguiar v. Cintas Corp. No. 2*, 144 Cal.App.4th 121, 135 (2006) (same); *with Brinkley v. Public Storage, Inc.*, 2008 WL 4716800 (Cal.App.2 Dist.) (Nov. 5, 2008) (employer must only make available). The California Supreme Court has accepted review of and is expected to decide this issue squarely, in *Brinker Restaurant Corporation, et al. v. Superior Court*, 80 Cal.Rptr.3d 781 (Cal.App.4 Dist. 2008), *review granted and opinion superseded, Brinker Restaurant v. Sup. Ct. (Hohmbaum)*, Case Number S166350 (October 22, 2008).

[20] Plaintiffs claim that Mr. Cooper admitted their allegations, assuming that Defendants' published policy was in effect. *Cooper Depo.*, at pp. 195-196 (*citing* Cooper Depo. Exh. 17). He was asked and answered as follows in deposition:

Q: The vacation policy, as indicated here in this Exhibit 17, plaintiffs' 3, provided for 1.54 hours for 40 hours worked, but Miss Pearson worked more than 40 hours in each of the given weeks. So why wouldn't she be entitled to more than 1.54 hours in each of those weeks?

A. If that policy were in effect, as I'm reading this, then these hours that occurred while that policy was in effect, or vice versa, then yes, I could see where that would be the case.

[21] *But see* Cal. Labor Code §227.3; *Suastez v. Plastic Dress-Up Co.,* 31 Cal.3d 774, 780 (1982) (vacation "is not a gratuity or a gift, but is, in effect, additional wages for services performed," or a "form of deferred compensation").

Plaintiffs Newsham and Pearson have FLSA retaliation claims that, following the filing of the suit, they were reclassified as non-exempt (appropriately), but with a demoted rate of pay – which Defendants dispute. Dkt. #14, Amended Complaint at ¶¶29-32.[22] The Settlement makes them whole for these claims, though Defendants would argue, if the matter proceeded, that the Plaintiffs' reclassification and the calculation of their pay rate were conducted in the same manner as with other employees who did not raise wage/hour allegations, and were not in any way retaliatory.[23]

All of the settlement allocations are reduced by 30% from the relief described, to account for the litigation risk described above, and reduced by 25% attorneys' fees and the litigation costs and costs of settlement administration. *Schwartz Dec.* Even so, Plaintiffs and the class members will recover substantially for each claim they have for every week in which they were eligible for any recovery, for an average of nearly $6,300 per class member. *Id.* The settlement is a fair one.

E. Plaintiffs' Observations Regarding Samsonite and the Retail Industry's Precarious Financial Position Recommend the Court's Swift Preliminary Approval of this Settlement.

As the Court is aware, Samsonite Company Stores, Inc., the undisputed employer of Plaintiffs and the putative class, and a retail luggage and accessories seller, filed for Chapter 11 bankruptcy in September of 2009. Dkt. #32. Plaintiffs submit that there has been a sharp decline in recent years in the retail sales industry nationwide, which is only now starting (experts hope) to stabilize. *See Schwartz Dec.*, Exhibit 7, 2009 Articles Regarding Retail Industry Recession. This year, Samsonite had to close some of its retail stores. As such, the money to be provided to the proposed settlement class could not come at a more desperately-needed moment. *See, e.g., Store Managers' Decs.,* at Juan Gaviria Dec., ¶9.

[22] The instance of alleged retaliation against Ms. Pearson – which is of the same nature as the alleged retaliation against Mr. Newsham, alleged in the Amended Complaint – occurred after the Complaint was amended in this matter. *Schwartz Dec.* If the matter was to proceed in litigation, then Plaintiffs would seek to amend to add Ms. Pearson's retaliation claim as well. *Id.* Regardless, the Settlement would waive Ms. Pearson's retaliation claims along with Mr. Newsham's.

[23] Nothing contained in this motion or any documents referred to or contemplated herein, nor any action taken to carry out the Stipulation of Settlement, shall be construed or deemed an admission, concession or indication of fault, liability, damages, culpability, negligence, or wrongdoing on the part of the Released Parties.

One unemployed opt-in Plaintiff in this action, for example, indicated he was laid off from his job with Samsonite on October 1, 2009. *Id.* Since then, despite diligently searching for another job, he has remained unemployed, and is relying on a meager unemployment check which has put me under great financial strain. *Id.* He now has no health insurance and cannot afford to visit the doctor to treat a chronic injury, and struggles to make mortgage payments on his condominium. *Id.* He testifies that prompt payment of the Settlement funds would be of great financial help and would assist him in getting back on his feet. *Id.*

III. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT PURPOSES AND GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT.

A. Certification for Settlement Purposes Is Appropriate.

Wage/hour misclassification cases, in which exempt employees challenge their exempt status, tend to be amenable to class and collective treatment, because the plaintiffs are challenging class-wide policies regarding job classification, and evaluation of the plaintiffs' claims depends on common proof. *See, e.g., Kairy v. Supershuttle International, Inc.*, 2009 WL 1457971 (N.D. Cal. May 21, 2009) (White, J.); *Beauperthuy v. 24 Hour Fitness USA, Inc.,* 2007 WL 707475 (N.D.Cal. Mar.6, 2007) (Conti, J.); *Castle v. Wells Fargo Financial, Inc.,* 2008 WL 495705, *6 (N.D.Cal. Feb. 20, 2008) (Illston, J.); *Gjurovich v. Emmanuel's Marketplace, Inc.,* 282 F.Supp.2d 91 (S.D.N.Y.2003); *Champneys v. Ferguson Enter. Inc.,* 2003 WL 1562219 (S.D.Ind. Mar. 11, 2003). In particular, here: 1) Plaintiffs maintain and provide evidence (*see supra*) of the common policies, practices, and procedures, and common issues applicable to all the putative class members; 2) Defendants' primary defense, the executive exemption, is the same for the entire class (with a sub-group of 30 regarding whom Defendants also raise a waiver defense); and 3) the Settlement agreement is fair in both its relief proposed to be provided and the procedures by which it intends to operate. *See Settlement. See also Kairy*, 2009 WL 1457971, at *2. The parties have agreed, for settlement purposes, to have this action proceed as a collective action under the FLSA, 29 U.S.C. § 216(b). *See Settlement*.

Moreover, as to state claims, the District Court has broad discretion to certify classes concerning state claims under Rule 23, as well. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Where, as here, questions of law and fact concerning the applicability of the executive exemption defense are common and predominate, Rule 23 certification is appropriate for purposes of settlement, as requested by the parties. *Dukes v. Wal-Mart, Inc.,* 509 F.3d 1168, 1176 (9th Cir. 2007). As discussed, *supra*, Plaintiffs submit that Samsonite followed common compensation practices throughout its stores, thus presenting common factual questions. Likewise, though the parties disagree on whether Defendants' former classification of Store Managers as exempt was lawful, Plaintiffs submit that the lawfulness of the classification is an overriding question of law. *See, e.g., Otsuka v. Polo Ralph Lauren Corp.,* 251 F.R.D. 439, 445-447 (N.D.Cal. 2008) (Illston, J.) (defendant maintained its policies were lawful under California law, but the centrality of this question itself warranted certification). As to adequacy of representation (Rule 23(a)(4)), the Plaintiffs submit that their interests are identical to the interests of other members of the class (*see Store Managers' Decs.*), and Plaintiffs' attorney submits that he is qualified, experienced in wage/hour class litigation, and able to conduct this litigation. *See Schwartz Dec. See also, generally, Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998). Defendants do not allege any conflicts between the Plaintiffs and the class thus far, or doubt Plaintiffs' counsel's experience, thus far. Plaintiffs and their counsel have been actively pursuing the interests of the putative class throughout this litigation, developing what Plaintiffs contend is a strong factual record warranting certification (*see supra*), and which led to the very substantial and fair settlement presented herein. *Schwartz Dec.* Class litigation is superior, since many of the class members' claims will be too small to pursue individually, such that lost access to the courts will result from a failure to certify. *Tierno v. Rite Aid Corp.,* 2006 WL 2535056, **10-11 (N.D. Cal. August 31, 2006) (Henderson, J.).[24]

[24] For all the foregoing reasons, the class certification sought here meets the standards discussed in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997), and is imminently distinguishable from that case, in which different class members' widely divergent health conditions in asbestos litigation precluded the class from proper certification in a settlement context. Class members are subject to common questions of law and fact relating to whether they were properly classified as exempt from the FLSA and state wage laws by Samsonite – whether the Store Managers were primarily salespersons (as Plaintiffs allege), etc. The issue of the propriety of this classification,

B. The Notices and Settlement Meet the Standards Set Forth in Fed.R.Civ.P. 23(e) and the 9th Circuit's *Officers for Justice* Case.

As the 9th Circuit has explained, citing the Fed.R.Civ.P. 23(e) threshold for final settlement approval, "[T]he universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable." *Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). At the same time, "[t]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." *Id.* at 624. The agreement is fair, adequate, and reasonable – it provides substantial recovery for Plaintiffs under difficult circumstances. *Schwartz Dec.*

The 9th Circuit's standard of evaluation of the fairness, adequacy, and reasonableness of a settlement requires this Court to balance several factors:

> the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Officers for Justice, 688 F.2d at 625. *See also Hanlon,* 150 F.3d at 1011 .

1. The strength of the Plaintiffs' case.

Plaintiffs' case has some strengths – *e.g.,* the difficult-to-justify (in Plaintiffs' view) exempt classification of Store Managers prior to their reclassification, based on the executive exemption under the FLSA, California, and New York law, since they appear to have so many sales and routine store maintenance duties, and since so much of their job is governed by central policies, practices, and procedures. *See generally Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233 (11th Cir. 2008). Plaintiffs emphasize that, as this Court has stated, courts usually grant at least FLSA conditional certification and apply a lenient standard to such. *Kairy,* 2009 WL

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and the class members' interest in receiving overtime and, in California, meal/rest period compensation and itemized wage statement compensation overrides all other issues. The named plaintiffs adequately represent the Store Manager position affected by this settlement and hail from California and New York, where Rule 23 claims were brought, and there are no conflicts of interest between the named parties and the class members. The claims of the named parties and all the class members are identical – namely, that they were misclassified and denied compensation as a result. Class counsel has effectively represented nationwide wage and hour classes many times – including in this case, to date. *Schwartz Dec.*

1457971, at **1-2. Yet, Defendants would argue that these employees were properly exempt (relying, *e.g.,* on *Baldwin v. Trailer Inns, Inc.*, 266 F .3d 1104 (9th Cir. 2001)) and were reclassified in an abundance of caution, and that recovery is limited in any event, because of Defendant's prior settlement and its actions to reclassify. Defendants would argue that their actions to reclassify Store Managers demonstrate good faith and a lack of willfulness as to any violations, warranting a shorter statute of limitations under the FLSA, and threatening recovery under the FLSA, of liquidated damages and other penalties.

2. The risk, expense, complexity, and likely duration of further litigation.

As discussed, *supra*, further litigation would be accompanied by significant risks for Plaintiffs, including but not limited to the prospects of losing class action status, of having the California Supreme Court adopt a low threshold for employers on m eal/rest period premium compensation, and of failing to establish willfulness or prove the applicability of a four-year statute of limitations in California or a six-year statute in New York. *Schwartz Dec.* Further litigation would cost millions and could entail litigating challenging issues of state and Federal law, *e.g.*: whether individual releases are valid to waive collective action rights, along with state wage/hour claims; whether Samsonite Corporation is a properly-named employer under federal and state wage law; the unsettled debate regarding meal/rest period compensation in California; whether the fluctuating workweek method should be applied to damages calculations; and, whether certification is appropriate. *Schwartz Dec.* Finally, the likely duration of further litigation – which, with a trial and appeals, would easily last another three years – would be at Plaintiffs' peril. Plaintiffs' counsel believes that continuing to litigate long-term against Samsonite would be imprudent in light of current economic realities and many class members' unemployment. *Id.*

3. The risk of maintaining class action status throughout the trial.

As discussed, *supra*, Defendants would argue the merits of their classification system, and against certification, absent the settlement posture, and/or would argue for decertification. Defendants would argue, that individual issues predominate over the alleged issues that are

common to the purported class. *See* Defendant's Answer to First Amended Complaint (Docket # 21.) Defendants reserve the right to raise these arguments should it be necessary to do so.

4. The amount offered in settlement.

As discussed in depth *supra*, the five hours per week of overtime, plus liquidated damages, 10% interest, three hours per week of California meal/rest, itemized wage statement penalties, vacation time compensation, and recovery for alleged retaliation against the named Plaintiffs under the Settlement – discounted modestly and appropriately for litigation risk and attorneys' fees – all suggest a fair offer. *Schwartz Dec.* Plaintiffs submit that collecting nearly one million dollars from a company that declared bankruptcy, which has already settled many of the class's claims with the Department of Labor and taken steps to reclassify and change its wage/hour practices, in an industry rife with nationwide closures, layoffs, and bankruptcies, is an achievement. *Id.* The average proposed recovery for 89 class members from the Settlement is $6,287.47, in addition to the average $1,306.19 already recovered by class members after the lawsuit was filed. *Id.* In total, Store Managers will average $7,593.66 in their pockets (before taxes) as a result of this case. The amount vastly exceeds many other wage/hour class settlements approved as adequate and fair in the recent past by this Court. *See, e.g., Gerlach v. Wells Fargo & Co.*, 05-cv-00585-CW) (N.D. Cal.) (Wilken, J.) (Dkt. #'s 315, 331, 332) (attached for the Court's convenience to *Schwartz Dec.,* Exhibit 9) (settlement class members received $9,000,000 among 4,200 class members, or an average of $2,142 each); *Stanfield v. First NLC,* 06-cv-3892-SBA (N.D. Cal.) (Armstrong, J.) (Dkt. #'s 315, 324) (attached for the Court's convenience to *Schwartz Dec.,* Exhibit 10) (settlement class members received $9,218,333.33 among 2,940 class members, or an average of $3,135 each); *Rosenburg v. International Business Machines Corp.,* 06-cv-00430-PJH (N.D. Cal.) (Hamilton, J.) (Dkt. #'s 104, 127, 128, 129, 130, 134) (attached for the Court's convenience to *Schwartz Dec.,* Exhibit 11) (approximately 11,000 settlement class members received under $4,500 each on average from a settlement worth approximately $66,600,000, after deducting 25% in fees, $45,000 in named plaintiffs' service payments, and $250,000 in costs).

Here, the parties have created a minimum recovery for all class members of $500, ensuring that every class member of the 89 will substantially benefit from the Settlement and providing each with an incentive to opt-in/file a claim. *Settlement,* at Section XVIII. Courts have often approved settlements with such minimum recoveries – and much lower ones. *See, e.g., Rosenburg,* 06-cv-00430-PJH (Dkt. #104) (*Schwartz Dec.,* Exhibit 11), at p. 11 ($50 minimum recovery); *Stanfield,* 06-cv-3892-SBA (Dkt. #315), *Schwartz Dec.,* Exhibit 10, at p. 10 ($500).

Moreover, the Court should find it significant that, under the agreement, Samsonite will pay the employer's share of the appropriate payroll taxes on the back-wages portion of each class member's settlement recovery. *Settlement,* at Section XXI.d. *See also, e.g., Rosenburg v. International Business Machines Corp.*, 2007 WL 2043855, at *5 (N.D. Cal. July 12, 2007) (Hamilton, J.). The Court should also weigh heavily that the covered period in the agreement is appropriately calculated based on the most optimistic available statute of limitations (going back four years in California, as arguably permitted under §17200, and six years in New York). *Id.*

Finally, unlike in this Court's *Kakani* decision (*Kakani v. Oracle Corp.,* 2007 WL 1793774 (N.D.Cal. June 19, 2007) (Alsup, J.)), no funds whatsoever of the settlement fund can revert to Samsonite under any circumstances. *See Settlement,* at Section X.e. All workers' existing claims are only extinguished when they receive settlement offers, and class action notices are provided to all settlement class members. *Id.*, at Sections VII, VIII, XVIII. The detailed and relevant release in the instant case does not implicate the concerns related to the sweeping release present in *Kakani*. *Id.*, at Sections VI, VII, VII. The Store Manager position is represented adequately by the representative Plaintiffs. Dkt. #14, Amended Complaint, at ¶¶5-6.

5. The stage of the proceedings.

Here, the parties conducted protracted, arms'-length negotiations regarding how to address the remaining claims of the class members. *Schwartz Dec.* The parties exchanged extensive discovery, took depositions, endured days of mediation, and tracked hundreds of hours of legal work to date. *Id.* The parties have stipulated to certification, pursuant to the settlement agreement, and meet the criteria for certification, *supra*.

6. The experience and views of counsel.

Plaintiffs submit that their counsel has litigated numerous nationwide class and collective wage/hour actions and recognizes the result obtained here as a fair one. *Schwartz Dec.* This settlement agreement is the result of arms'-length negotiations between experienced counsel representing the interests of the Plaintiffs and Defendants, after thorough investigation. *Id. See also Staton v. Boeing,* 327 F.3d 938, 960 (9th Cir. 2003); *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1291 (9th Cir. 1992). "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.,* 485 F. Supp. 610, 622 (N.D. Cal. 1979) (Orrick, J.); *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819 (D. Mass 1987); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (Orrick, J.) ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight").

7. **The presence of a governmental participant. N/A.** The Department of Labor settled a previous matter with Samsonite, but has no role in these proceedings.

8. The reaction of the class members to the proposed settlement.

Though the agreement has not yet received preliminary approval, some class members have been notified of the proposed terms, and are pleased with the result. *Schwartz Dec.* Anecdotal evidence suggests the gratitude of class members, and the desperate need of class members for this settlement to be effectuated promptly. *Schwartz Dec.*; *Store Managers' Decs.,* at Gaviria Dec., ¶9. The reaction of the class members in the instant case supports preliminary approval of the settlement.

B. The Process for Administering this Settlement Support Preliminary Approval.

Procedurally, the notice the parties have agreed to send in this matter clearly indicates to all class members that their rights will be affected by the outcome, and provide them with a clear procedure for opting-into, opting-out of, or withdrawing from the class. *Settlement,* Exhibits F, G, and H (Proposed Class Notice). As envisioned in *Officers for Justice*, 688 F.2d at 624, no one in the class will be left without notice. All class members will have a full 90 days, pursuant to the Settlement, to opt-in/file a claim, opt-out, or withdraw, and the settlement administrator will send

a reminder notice after sixty days to class members who have not yet filed claims. *Settlement*, at Section XXIV. This time is ample – longer than normally afforded to class members – and this procedure is fair. *Schwartz Dec. Compare Kakani,* 2007 WL 1793774, at *5 n. 2 (45 days to file claim can be unreasonably brief).

C. The Enhancements to the Representative Plaintiffs are Reasonable and Fair.

Courts in this Circuit frequently award enhancement payments to lead plaintiffs for their efforts in prosecuting the case. *See, e.g., Glass v. UBS Financial Services, Inc.*, 2007 WL 221862, *16 (N.D.Cal. 2007) (Chesney, J.) (approving payments of $25,000 to each named plaintiff). *See also In re Heritage Bond Litigation*, 2005 WL 1594403, *18 (awarding incentive payments of between $5,000 and $18,000); *Van Vranken v. Atlantic Richfield Co.,* 901 F.Supp. 294, 300 (N.D.Cal.1995) (Williams, J.) (awarding $50,000 to a lead plaintiff). The two named Plaintiffs who brought this case to counsel and represented their entire class of Plaintiffs will be compensated, per the agreement, $5,000, each for their service to the Court and to their fellow employees. Plaintiffs also emphasize that an enhancement compensates for the fear of retaliation suffered by employees who step forward, citing *Gentry,* 42 Cal.4th at 459-461. They have each given many hours of their time to responding to Defendants' discovery requests, and have together participated in days of deposition and mediation. *Id.* Plaintiffs submit that from payments of nearly a million dollars which would not have been made without their service, $5,000 is a very reasonable reward. *Id*

D. The Attorneys Fees Award Included in the Settlement is Just, Reasonable, and Fair.

1. The Court Should Use The Common Fund, Percentage of the Fund Method To Review The Allocation Of Attorneys' Fees.

For well over a century, federal and state courts have recognized that when counsel's efforts result in the creation of a common fund that benefits plaintiffs and unnamed class members, counsel have an equitable right to be compensated from that fund as a whole for their successful efforts in creating it. *See, e.g., Boeing Co. v. Van Gemert***,** 444 U.S. 472, 478 (1980)

(the United States Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund … is entitled to a reasonable attorney's fee from the fund as a whole"); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885) (recognizing common fund doctrines); *Staton*, 327 F.3d at 967 (same). *See also Serrano v. Priest*, 20 Cal.3d 25, 35 (1977).

The common fund doctrine rests on the understanding that, in class action litigation, those who benefited from the fund (the class members) without contributing to those who created it (the attorneys) would be unjustly enriched. *Boeing,* 444 U.S. at 478. Thus, courts have endorsed the method of awarding a percentage of the total fund as a fair way to calculate a reasonable fee when contingency fee litigation has produced a common fund. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 900 FN16, 104 S.Ct. 1541 (1984); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (common fund fee is generally "calculated as a percentage of the recovery").

The percentage of the fund method is appropriate for a number of well-recognized reasons, including that the percentage method accomplishes fee spreading in a manner that comports with the legal marketplace. *See Swedish Hosp. Corp. v. Shalala*, 1 F .3d 1261, 1269 (D.C. Cir. 1993) (citing "the uncertainties and hazards of [this type of] litigation").

Further, when clients do not pay an ongoing hourly fee to their counsel, they typically negotiate an agreement in which counsel's fee is based upon a percentage of any recovery. The percentage of the fund approach mirrors this aspect of the market and, accordingly, reflects the fee that would have been negotiated by the class members in advance, had such negotiations been feasible, given the prospective uncertainties and anticipated risks and burdens of the litigation. *See, e.g., Paul, Johnson, Alston & Hunt*, 886 F.2d at 271 ("it is well settled that the lawyer who creates a common fund is allowed an extra reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit"); *In re Continental Illinois Sec. Litig.*, 962 F .2d 566, 572 (7th Cir. 1992) (in a common fund case, the object "is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible").

The percentage of the common fund approach helps provide highly-qualified attorneys the necessary incentive to bring large, complex class actions, even though by definition it is impossible in such cases to negotiate a specific fee with the unnamed class members in advance. *See generally Paul, Johnson, Alston & Hunt*, 886 F.2d at 268, 271-272 (9th Cir. 1989). Basing the common fund fee award on a percentage of the fund also encourages counsel to spend their time efficiently and to focus on maximizing the size of the class's recovery, rather than their own lodestar hours. *Swedish Hospital*, 1 F.3d at 1269. Finally, the percentage method is far easier for courts to calculate than any alternative method. *Id.; In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (Patel, J.).

Here, plaintiffs submit that the common fund method is appropriate because Plaintiffs' counsel's actions have led to a common fund of $850,000, plus an additional amount of approximately $116,000 already distributed to the class, to be shared by 89 people. Many of those in the class do not have formal attorney-client agreements with Plaintiffs' counsel, and it is appropriate that an award of fees should be shared by each class member who receives benefit from the settlement. The common fund is also appropriate because Plaintiffs' counsel took this case on a contingency basis. *See, e.g., Blum*, 465 U.S. at 900 n.16. Because Plaintiffs and class members did not pay Plaintiffs' counsel during the course of this litigation, Plaintiffs' counsel alone bore the risk that the litigation would be unsuccessful. *Schwartz Dec.* It is therefore appropriate that an award of attorneys fees would mirror the fee that Plaintiffs' counsel might be paid in a contingency arrangement negotiated with individual plaintiffs, and which was, in this case, negotiated with the individual Plaintiffs. *See Schwartz Dec.,* Exhibit 8, Sample Fee Agreement; *see also In re Continental Illinois Sec. Litig.,* 962 F.2d at 572. The opt-ins personally signed fee agreements with Plaintiffs' counsel agreeing to a 1/3 contingency fee (*Schwartz Dec.,* Exh. 8) – counsel has accepted significantly less here.

2. The Court Should Approve An Award Of 25% Of The Gross Recovery.[25]

Plaintiffs also submit the following. In the Ninth Circuit, 25 percent of the common fund is commonly viewed as a "benchmark" for an attorneys' fees award. *See Paul, Johnson, Alston & Hunt*, 886 F.2d at 272. "The Ninth Circuit has repeatedly held that 25% of the gross settlement amount is the benchmark for attorneys' fees awarded under the percentage method and that if the Court departs from that benchmark, the record must indicate the Court's reasons for doing so." *Glass,* 2007 WL 221862, at *14 (*citing Powers v. Eichen,* 229 F.3d 1249, 1256-57 (9th Cir. 2000)).[26] Here, in the interest of obtaining a fair and expeditious settlement for the class, Plaintiffs' counsel agreed to accept less than the 1/3 share they were assured from the named Plaintiffs– the benchmark 25% of the gross recovery, or $241,562.77 fees out of $966,251.08.

Here, the quality of counsel, benefits obtained for the class, complexity of the issues, and risk of nonpayment all warrant at least the standard 25% fee award. *In re Quintus Securities Litigation,* 148 F.Supp.2d 967 (N.D. Cal. 2001). In addition to counsel's superior experience, counsel in the instant case obtained a solid result for Plaintiffs, with compensation for overtime and other wage/hour claims for each week worked by the class members which was not precluded by another settlement. *Schwartz Dec.* Counsel aggressively negotiated this settlement. *Id.*

Moreover, this is a substantial settlement that provides significant value to class members. Plaintiffs' counsel submits that the purported class members worked in a company and in an industry that is in the midst of a major crisis. *Id.* The statute of limitations utilized was the longest available under law. *Id.* The payment of actual and substantial damages to class members is to be

[25] In the instant case, without using the common fund method, Plaintiffs' lodestar fees approach and may (before the matter is fully and finally resolved) equal or exceed the 25% fees awarded from the common fund (*Schwartz Dec.*) – the lodestar fees are currently more than 80% of what is proposed to be awarded using the common fund approach. *Id.* So, by any method, the fee award is just, reasonable, and fair.

[26] Courts in the Ninth Circuit have also awarded attorney fees in amounts greater than the twenty-five percent (25%) "benchmark percentage." *See, e.g., In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 460 (9th Cir.2000) (affirming award of fees equal to one-third of total recovery); *In re CV Therapeutics, Inc., Securities Litigation*, 2007 WL 1033478, *1 (N.D.Cal. April 4, 2007) (Illston, J.) (awarding fee of 30%, plus reimbursement for expenses); *In re Heritage Bond Litigation*, 2005 WL 1594403 (C.D.Cal. 2005) (approving an award of one-third of $27,783,000.00); *In re Public Ser. Co. of New Mexico*, 1992 WL 278452, at *1, *12 (S.D.Cal. July 28, 1992) (awarding one-third); *Antonopulos v. North American Thoroughbreds, Inc.*, 1991 WL 427893, at *1, *4 (S.D.Cal. May 6, 1991) (awarding one-third); *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747, at *1, *10 (S.D.Cal. Aug.30, 1990) (awarding 30% attorneys' fee plus expenses); *In re Immunex Sec. Litig.*, 864 F.Supp. 142 (W.D. Wash. 1994) (awarding fee of 30%: $3.9 million fee, $14 million fund).

contrasted with other cases in which requests for attorneys fees have been denied or reduced. For example, in *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323 (9th Cir. 1999), class counsel requested almost $3,000,000 in fees, despite not securing *any* actual damages payable to class members. Here, the significant payments that Plaintiffs receive support the approval of Plaintiffs' attorneys' fees request. The class members in the instant case are on average recovering a greater amount (approximately $7,600 total, and nearly $6,300 now) than class members in recent wage/hour settlements approved by, among others, Judges Wilken, Armstrong, and Hamilton of this Court. *See supra* (*citing Gerlach*, 05-cv-00585-CW (average of $2,142 each); *Stanfield,* 06-cv-3892-SBA (average of $3,135 each); *Rosenburg,* 06-cv-00430-PJH (under $4,500 each)).

Also, in contrast to *Kakani*, 2007 WL 1793774, this is not a "claims made" settlement. Each dollar that is allocated to be distributed to class members will end up either in class members' hands or, as a last resort, in a *cy pres* fund. *Settlement,* at Section XVII. Counsel's percentage of the common fund, at the 25% benchmark, is based on a percentage of *actual payout by Samsonite*, not some fictitious amount that will never actually be distributed.

Further, Plaintiffs' counsel has not concealed the fees it would be requesting as a part of this settlement. The fee distribution is outlined clearly in the settlement agreement, which will be available for all class members to review. *Settlement,* at Exhibit F.

Finally, Plaintiffs' counsel have undertaken and continued to litigate this matter aggressively, despite a serious risk of nonpayment. *Schwartz Dec.* Plaintiffs' counsel funded this case and prosecuted it on a contingency basis, even after another settlement eliminated the bulk of the class members' claims, and even after SCS filed for Chapter 11 bankruptcy. *Id.* If Plaintiffs' counsel had not undertaken this risk, Plaintiffs' counsel submits that there is a very real chance that the class could have ended up with nothing. Plaintiffs' counsel notes that Courts recognize that Plaintiffs' counsel must be compensated for taking such a risk.

IV. CONCLUSION

For the foregoing reasons, the class should be certified and settlement agreement should be given preliminary approval at this time.

Dated: November 20, 2009

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