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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Terry Coyle, individually and on behalf of all similarly situated individuals, Plaintiff, -v- Flowers Foods, Inc., and Holsum Bakery, Inc., Defendants.	Case No. CV-15-01372-PHX-DLR **PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND SUPPORTING MEMORANDUM** (Assigned to the Hon. Douglas L. Rayes)

Plaintiff Terry Coyle, individually and on behalf of the Opt-In Plaintiffs and putative Class members, by and through his attorneys, submits this Unopposed Motion for Final Approval of Class Action Settlement. In support of this Motion, the Parties state as follows:

1. Plaintiff Terry Coyle is a current distributor for Holsum Bakery, Inc. On July 20, 2015, Plaintiff filed this Action against Defendants on behalf of himself and a putative class of Distributors with Holsum Bakery in Arizona, alleging violations of Arizona Wage and Labor Laws ("Arizona Wage Laws"), A.R.S. § 23-350, *et seq.* and Arizona Common Law. Dkt. 1. On February 4, 2016, Plaintiff filed an Amended Complaint alleging violations of the Federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, on behalf of a putative Collective Action Class. Dkt. 72. Plaintiff's claims are premised on the allegation that Flowers Foods and Holsum Bakery improperly classifies Distributors as independent contractors rather than employees. Plaintiff seeks damages on behalf of himself and the Class for unpaid overtime under the FLSA and damages for unlawful wage deductions under the Arizona Wage Laws.

2. On August 30, 2016, this Court granted conditional certification of Plaintiff's FLSA claims under 29 U.S.C. § 216(b). Dkt. 205. The FLSA Collective Class is defined as:

> All persons who are or have performed work as Distributors for Defendants under a "Distributor Agreement" with Holsum Bakery, Inc. or a similar written contract that they entered into during the period commencing three years prior to the commencement of this action through the close of the Court-determined opt-in period and who file a consent to join this action pursuant to 29 U.S.C. § 216(b).

Dkt. 205 at 3. Notice of the FLSA Collective Action was sent on or about September 28, 2016. Currently, there are thirty-one Opt-In Plaintiffs in the FLSA Collective Action.

3. During and following conditional certification, the Parties engaged in extensive written and oral discovery, exchanging over 1 million pages of documents, and negotiated and litigated numerous critical discovery issues. Plaintiff took several affirmative depositions, including an extensive 30(b)(6) deposition, and defended the

depositions of Plaintiff Coyle as well as seven FLSA Opt-In Plaintiffs, and responded to discovery on behalf of all thirty-one FLSA Opt-In Plaintiffs.

4. Toward the end of discovery and just prior to class certification briefing, the Parties engaged in negotiations in an attempt to settle the matter, conducting multiple mediation sessions with the assistance of a highly-qualified mediator over a five-month period.

5. On August 10, 2017, the Parties reached a comprehensive settlement agreement of the Class and Collective Action claims (the "Settlement"). The Settlement provides for 100% reimbursement to Plaintiff and participating Class Members for Defendants' alleged unauthorized deduction of administration fees; for 100% of alleged FLSA damages for the FLSA Opt-In Plaintiffs; and for meaningful changes to the Distributor program that strengthens Distributors' relationship with Holsum Bakery.

6. On October 12, 2017, the Court granted preliminary approval of the Settlement, appointed Atticus Administration as the Settlement Administrator, and ordered dissemination of the Class Notices. Dkt. 389.

7. Pursuant to the Court's Order, Atticus mailed 203 notices to Class Members. As the date of this filing, there have been no objections to the Settlement. 25 Class Members have requested to opt-out of the Settlement. Atticus Decl. ¶ 11-12. The Court-approved Notice Plan is the best practicable under the circumstances and was reasonably calculated to reach substantially all Class Members.

8. The Parties view the proposed Settlement as a desirable alternative to the uncertainty, expense, and delay that would result from further litigation. At the same time, the Plaintiff believes the Settlement is in the best interests of all members of the Class and Collective Action, and should be approved by the Court as fair, reasonable, and adequate in all respects. As discussed more fully in the Memorandum below, the Settlement unquestionably satisfies the Ninth Circuit's fairness, adequacy, and reasonableness test.

9. As such, the Parties herein ask the Court to grant final approval to the

Settlement.

10. With this Motion for Final Approval of Class and Collective Action Settlement, the Parties also submit a Proposed Order approving the Settlement and adjudging it to be fair, reasonable, and adequate.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, named Plaintiff Terry Coyle ("Plaintiff") submits this memorandum in support of his motion for final approval of the Settlement reached with Defendant Flowers Foods, Inc. ("Flowers Foods") and Holsum Bakery, Inc. ("Holsum") (collectively, "Defendants"), and preliminarily approved by the Court in its Order entered October 12, 2017. Dkt. 389. Plaintiff filed this collective and class action lawsuit alleging that Flowers Foods and Holsum misclassified him and other Distributors in Arizona as independent contractors under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* and the Arizona Wage and Labor Laws, A.R.S. §§ 23-350 *et seq.* Plaintiff respectfully asks the Court to grant final approval of the Settlement on the basis that it is fair, reasonable, and adequate.

After more than two years of hard-fought litigation with experienced counsel on both sides involving significant written discovery, document production, and depositions; numerous discovery disputes and hearings involving the same; and two extensive in-person mediation sessions, the Parties have reached a settlement. This Settlement provides not only monetary relief to participating Class Members but also significant non-monetary relief in the form of meaningful changes to the independent distributor program under which the Class Members operate that will strengthen their relationship with Holsum going forward.

Specifically, the Settlement creates a $1,170,286.33 settlement fund, allocated between Arizona Wage Laws damages in the amount of $327,905.09, and individual FLSA overtime damages in the amount of $829,881.33. This allocation fully compensates each Class Member for all deductions made during the recovery period that

Plaintiff alleges violated the Arizona Wage Laws. It also fully compensates each participating FLSA Opt-In Plaintiff[1] for 100% of the alleged unpaid overtime owed.

In addition, the Settlement includes substantial non-monetary terms that enhance the independent distributor model. These include, for example, the creation of a Distributor Advocate, who will oversee an internal, alternative dispute-resolution process for Distributors; a Distributor Review Panel, which provides for an internal review process for resolution of contract-related disputes; formalizing Distributors' rights to have discussions with appropriate management personnel within their accounts who have the authority to engage in such discussions regarding items such as product placement and days of service; and a process through which Distributors can raise issues such as non-profitable accounts with the Company, among other things. Importantly, a material term of the Settlement is that all current Distributors will sign a new Distributor Agreement with Holsum that contains significant enhancements to the distribution model. This new Distributor Agreement contains an arbitration provision, which Settlement Class Members had an opportunity to opt-out of at their discretion. This provision will allow Distributors to resolve applicable disputes with the Company, with the Company bearing the costs and fees typically associated with arbitration.

As discussed more fully below, the Settlement complies with Ninth Circuit authority on the fairness and adequacy of class action settlements. The relief provided to the Class Members under the proposed Settlement fairly compensates participating members in the form of both monetary and non-monetary relief beyond that which they would be entitled to in this litigation if they prevailed. The Settlement also eliminates the burdens and risks associated with a trial and possible appeals of this complicated class action. Following Notice to the Class, no objections to the Settlement have been filed. The experienced counsel for the Parties are aware of the strengths and weaknesses of their respective claims and defenses and have assessed the reasonableness of the

[1] There are currently thirty-one FLSA opt-in Plaintiffs. Seven others who had previously opted in had their claims dismissed for failure to participate in discovery.

Settlement's terms in light of these strengths and weaknesses. Counsel fully endorses the proposed Settlement and asks the Court to grant final approval of it.

II. FACTUAL BACKGROUND

Defendant Flowers Foods is a corporation headquartered in Thomasville, Georgia. Flowers Foods has numerous wholly-owned subsidiaries, including Holsum. Am. Compl. at ¶¶ 10, 17 (Dkt 72). Holsum contracts with Distributors,[2] either individually or via their own corporations (like Plaintiff here), who purchase distribution rights to sell and distribute products to customers within a defined territory. *Id.* at ¶ 2. Distributors are classified as independent contractors under this Distributor Agreement. The dispute in this case arises from Flowers' classification of these Distributors as independent contractors. *Id.* at ¶ 4.

Plaintiff alleges that Distributors' job responsibilities and the reality of Distributors' working relationship with Defendants overwhelmingly demonstrates that they are employees of Defendants under the FLSA and Arizona law. For example, Plaintiff alleges that Distributors are required to arrive at specified warehouses at specified times to stock their delivery vehicles with Defendants' products. *Id.* at ¶ 25. Plaintiff also alleges that Distributors are then responsible for delivering these products to customers at times and places specified by Defendants. *Id.* at ¶ 26. Moreover, Plaintiff asserts that he and other Distributors had no ownership or entrepreneurial influence over their day-to-day activities, including sale prices, shelf space within retailer locations, orders, product selection, schedules, delivery locations and the like. *Id.* at ¶ 37. Defendants deny these allegations, contend Distributors are responsible for controlling the manner; method and means of performance; contend Distributors have an ownership interest in their distributorships and various entrepreneurial opportunities to increase their profits and equity; and contend that Distributors have discretion over production

[2] The term "Distributors" used throughout refers to Holsum Distributors in Arizona who were contracted with Holsum at some point during the Covered Period (July 20, 2014 to August 10, 2017).

selection, orders, price, shelf space, service times and the like, although the amount of discretion they have may vary depending on the type of account at issue.

Because of their classification as independent contractors, Distributors bear responsibility for their own business-related expenses, such as the cost of vehicles and other equipment and insurance. *Id.* at ¶ 47. Some of these expenses were deducted from Distributors' weekly settlement checks. *Id.* at ¶ 5. The primary deduction at issue in this lawsuit is the "administrative fees" that were deducted. *Id.* at ¶ 5. Because they were classified as independent contractors, Distributors were also not paid overtime for hours worked over forty in a workweek. *Id.* at ¶ 46; 48. Accordingly, Plaintiff seeks to recover overtime wages for all hours worked over forty per week during the relevant period for each FLSA Opt-In Plaintiff and reimbursement for the "administrative fees" that Plaintiff contends were unlawfully deducted from the weekly settlement checks of all Class Members. At all times, Defendants have denied Plaintiff's allegations, denied that they violated the law, and denied that Plaintiff or the individuals he seeks to represent are entitled to the damages they claim.

III. PROCEDURAL BACKGROUND

A. Litigation History

Plaintiff, a current distributor with Holsum who operates his distributorship under the name "TRC Distributing," filed this Class Action Complaint on July 20, 2015 alleging violations of the Arizona Wage Laws. Dkt 1. The Complaint was amended to include a claim for violations of the federal FLSA. Dkt. 72. On August 30, 2016, after extensive briefing and some preliminary discovery, this Court granted Plaintiff's motion for conditional certification under the FLSA. Dkt 205. The FLSA Collective Action Class was defined as "all persons who are or have performed work as Distributors for Defendants under a 'Distributor Agreement' with Holsum Bakery, Inc. or a similar written contract that they entered into during the period commencing three years prior to the commencement of this action through the close of the Court-determined opt-in period and who file a consent to join this action pursuant to 29 U.S.C. § 216(b)." Dkt 115.

Plaintiff submitted a proposed Notice of FLSA Collective Action, which the Court approved. Dkt. 210. There are currently thirty-one Opt-In Plaintiffs to the FLSA Collective Action. The Court dismissed seven other opt-in Plaintiffs (Ali, Brannick, Harris, Kimzey, Lewis, Murphy, and Vierck) for failure to participate in discovery. Dkts. 370, 375.

Following conditional certification, the Parties engaged in comprehensive discovery involving extensive document productions, seven FLSA Opt-In witness depositions, and several affirmative depositions, including a 30(b)(6) deposition involving multiple topics and numerous witnesses. Throughout the course of discovery, the Parties also briefed and argued several discovery issues relating to discoverability of certain information, scope issues, and privilege. Extensive electronically-stored information ("ESI") was also searched and produced. In total, Defendants produced more than 100,000 documents, consisting of more than 1.1 million pages. All thirty-one Opt-In Plaintiffs also responded to written discovery and document requests, producing significant information.

By order dated April 17, 2017, this Court extended the discovery deadline and stayed briefing pending settlement discussions. Dkt. 354. The Parties subsequently engaged in lengthy settlement negotiations spanning five months, with the assistance of mediator Carole Katz, who has specialized experience in the independent contractor business model. This included two in-person sessions and several sessions via telephone. *See* Wanta Decl. ¶ 5-6. Had the Parties not reached a resolution, Plaintiff was prepared to file a Motion for Class Certification, which Defendants would have opposed, and Defendants were prepared to file a Motion for Decertification, which Plaintiff would have opposed. Both Parties would have also likely moved, in whole or in part, for summary judgment.

B. The Settlement Agreement

After extensive arms-length negotiations with the assistance of a highly-qualified mediator, the Parties reached an agreement in principle to settle this case on August 10,

2017. The key terms of the Settlement Agreement are set forth below.

1. Monetary Terms

The Settlement provides significant monetary relief to participating Class Members. Under the Settlement Agreement, Defendants will establish a settlement fund of $1,170,286.33 to resolve the class claims of all Settlement Class Members and FLSA claims of the thirty-one Opt-In Plaintiffs. The settlement fund provides full reimbursement to Plaintiff and participating Class Members for Defendants' alleged unauthorized deduction of administrative fees; and full compensation for alleged FLSA damages for the FLSA Opt-In Plaintiffs. The settlement fund is not intended to pay for liquidated or punitive damages, but the fund is non-reversionary so the money allocated to Distributors who choose to exclude themselves from the Settlement will be reallocated to the Settlement Class thereby increasing their shares beyond the original calculations.

The settlement fund does not include attorneys' fees and costs, which Defendants have agreed to pay separate from the relief to the Class. The $1,170,286.33 settlement fund will be allocated as follows:

1. Service Award in the amount of $12,500 for the Named Plaintiff will be deducted first, pending approval from this Court;
2. An amount of $327,905.00 will be allocated among all Settlement Class Members in the amount of each Class Members' actual deductions for "administrative fees" during the recovery period. These deductions are referred to as the "Arizona Wage Laws Damages."
3. An amount of $829,881.33 will be allocated among FLSA Opt-In Plaintiffs in the amount of each Opt-In Plaintiffs' estimated unpaid overtime during the recovery period. Together, the Opt-In Plaintiffs' FLSA Damages are referred to as the "FLSA Damages."

The amount calculated for each Settlement Class member and FLSA Opt-In Plaintiff are specified in the Settlement Agreement in Exhibits 9 and 10. Dkt. 381-12; Dkt. 381-13.

In return for the above consideration, Defendants will receive a general release of claims from named Plaintiff and a release of all claims that were asserted or could have been asserted in the action from all Settlement Class Members. Any Settlement Class Member who is not an FLSA Opt-In will not waive their FLSA claims.

2. Non-Monetary Terms

The Settlement Agreement also includes significant non-monetary terms and changes to the independent distributor model used at Holsum, which were also negotiated at arms' length and provide material benefits to the Class. Plaintiff believes these terms will strengthen the relationship between Defendants and Distributors and address the appropriate classification of Distributors that is at issue in this case. These changes include: (1) requiring current Distributor Class Members to sign a new Distributor Agreement, which contains several enhancements to the model and an efficient dispute-resolution procedure; (2) creation of a Distributor Advocate position; (3) implementation of a Distributor Review Panel; and (4) additional enhancements to the business model, all of which are discussed more fully below.

a. New Distributor Agreement

As part of the Settlement, Settlement Class Members who are current Distributors will be required to sign a new Distributor Agreement. The new Distributor Agreement contains several enhancements to the model, including (for example):

1) removal of Holsum's right of first refusal in a Distributor's sale of his or her distribution rights;
2) a non-profitable accounts provision, providing a mechanism for the Distributor to discuss potential alternative distribution for such accounts in appropriate circumstances;
3) removal of the non-compete provision;
4) an alternative dispute resolution mechanism (*i.e.* arbitration agreement with a class action waiver) under which the Company pays for all customary filing fees and costs and under which the participating Distributor, if he/she

prevails, can receive the same kind of monetary relief as could be awarded in Court;[3] and

5) removal of several other existing provisions regarding limitation of damages to make it clear that no such limitations would apply in arbitration.

Defendants will also begin offering this enhanced Distributor Agreement to new Distributors who contract with Holsum in the future.

Class Counsel also held two meetings with Distributors to discuss their rights under the Settlement Agreement and the impact of the proposed changes to the Distributor Agreement. Wanta Decl. ¶ 12. The pros/cons of arbitration are also clearly discussed in both the Class Notice and in an Arbitration Agreement Opt-Out Form that has been sent to Class Members with the Notice. As of March 13, 2018, 17 Distributors opted out of arbitration. Atticus Decl. ¶ 10. The remainder of the Settlement Class Members agreed to arbitration and will receive an additional payment of $1,000 from Defendants separate from the Settlement Fund.

b. Distributor Review Panel

Second, Holsum will establish and use a Distributor Review Panel at Holsum, which will operate in accordance with Exhibit 6 of the Settlement Agreement. The Distributor Review Panel is an internal dispute-resolution process whereby an independent distributor may appeal to an internal review panel for resolution of contract-related disputes, such as whether a breach of contract notice was properly issued, whether the distributor failed to comply with good industry practice, etc. The Panel will be charged with analyzing the dispute between the complainant-distributor and Holsum and rendering a decision based on its findings. The Panel will be composed of three (3)

[3] Settlement Class Members will have the right to opt out of this arbitration agreement. Settlement Class Members who do not opt out of arbitration will receive an additional $1,000 payment from the Settlement Administrator directly, outside of the Settlement Payment outlined above.

Distributors who are not from the complainant-distributor's warehouse; a sales manager or director of sales who is not involved with overseeing the bakery's business relationship with the complainant-distributor; and a representative from the corporate distributor relations department who has not been involved in advising the Company on the matter under review by the Panel. The Panel program provides an efficient and fair process for resolving Independent Distributor disputes internally. The Panel's decision is determined by a majority secret ballot vote and a written decision will be rendered.

c. Distributor Advocate

Holsum will also appoint and use a "Distributor Advocate," as discussed more fully in Exhibit 7 to the Settlement Agreement, to assist Holsum Distributors. The Distributor Advocate oversees the internal, alternative dispute resolution process for Independent Distributors. The individual holding this position has a reporting line independent of local bakery operations and reports to the Chief Compliance Officer. The Distributor Advocate is responsible for addressing distributor issues that cannot be resolved at the local level. At the request of an Independent Distributor who has been unable to resolve a dispute with bakery management, the Distributor Advocate will be responsible for reviewing the dispute and working with the Distributor and bakery management to reach an amicable resolution. Where practicable, the Advocate will operate in accordance with the International Ombudsman Association Standards of Practice and such organization's Code of Ethics.[4]

d. Other Enhancements to the Model

The Parties also negotiated several additional non-monetary terms and enhancements to the distributor model under which Class Members with Holsum operate. These changes are set forth in detail in Exhibit 5 and include, among other things:

[4] For example, Defendants will not maintain confidentiality as suggested by the International Ombudsman Association because the distributor's identity must be shared with management in order to understand the situation and each party's business interests.

- Holsum's agreement to provide whatever territory sales history or other information to Distributors who may be interested in selling their territories to a third-party request to assist in the sale;
- amplification and clearer communication of stale policy requirements to Distributors;
- Distributor partnership meetings to allow for more information sharing; and
- Additional sales management training on the Distributor Agreement.

These enhancements provide tangible benefits to the Class members and represent material changes to the relationship between Distributors and Holsum. These changes provide additional, material consideration that support the terms of the Settlement Agreement, including the release of claims described therein.

IV. THE NOTICE PLAN

In its preliminary approval order, the Court approved the Parties' Notice Plan, appointed Atticus Administration as the Settlement Administrator, and scheduled a fairness hearing for March 23, 2018. Dkt. 389. The Court directed that notice of the Settlement be given to potential Settlement Class Members no later than 55 days before the fairness hearing; and that any person falling within the definition of the Settlement Class have an opportunity to object to the Settlement by the date listed in the Settlement Agreement. The Court also directed the Settlement Administrator to send the CAFA Notices, which were timely mailed.

The Class Notice explained the nature of the action and the terms of the Settlement including: the total settlement amount; the attorney's fees to be requested; how Class Members' settlement payments will be calculated; the estimated amount of each Class Members' settlement share and the procedure for challenging the calculation; that the Class claims will be released; and how the Class Member may collect his portion of the Settlement, object to the Settlement, and opt-out of the Settlement. The Notice also contained information regarding the arbitration provision, and a form that Distributors could use to opt-out of arbitration. *See* Dkt. 381-4; Dkt. 381-3.

On or about November 10, 2017, Atticus Administration sent the Court-approved Notices to the 203 Class Members designated to received notice. Atticus Decl. ¶ 4. Prior to sending the Class Notice and Arbitration Opt-Out Form, Atticus reviewed and skip-traced the class data list via Experian and the National Change of Address databank to verify the accuracy of the addresses. *Id.* As a result of Atticus's efforts, of the 203 Notices mailed, 11 were returned as undeliverable and sent to Experian for skip tracing. Atticus Decl. ¶ 5. Updated addresses were received for five Class Members and Class notices were successfully re-mailed to the updated addresses. *Id.* Two Class Notices were re-mailed upon a re-mail request. *Id.* One Class Notice returned to Atticus as undeliverable after being re-mailed. *Id.* Updated addresses could not be found for seven Class members. *Id.* In total, 96.5% of the Settlement Class were successfully noticed through mail. *Id.*

Atticus also established a Settlement Phone Line, which Class Members could call to update addresses, ask questions about the Settlement, and request re-mailing of the Notice. Atticus Decl. ¶ 6. Atticus received approximately eleven calls to this number. *Id.* Atticus also created a Settlement Informational Website, where Class Members could obtain information about the case and download a PDF of the Class Notice and Arbitration Opt-Out Form. Atticus Decl. ¶ 7. Finally, Atticus created a dedicated Settlement email address, which Class Members could email to ask questions, request re-mailings, or update addresses. Atticus received approximately two emails to this email address. Atticus Decl. ¶ 8.

On December 22, 2017, Atticus mailed remainder postcards to the 200 Class Members who had not yet responded. Atticus Decl. ¶ 9. As of March 13, 2018, Atticus received 17 valid Arbitration Opt-Out Forms. Atticus Decl. ¶ 10. As of the date of this filing, there have been no objections to the Settlement, timely or otherwise. Atticus Decl. ¶ 12. As of the date of this filing, 25 class members have excluded themselves from the Settlement. Atticus Decl. ¶ 11.

The Court-approved Notice Plan is the best practicable under the circumstances

and was reasonably calculated to reach substantially all Class members. The Claims Administrator has complied fully with the Court-approved procedures. The Notice Plan executed in this case satisfies the requirements of Federal Rule of Civil Procedure 23(e), the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, and due process for the reasons set forth by Plaintiff and accepted by the Court in its preliminary approval order.

V. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

Where the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement. *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). In deciding whether to certify a settlement class, the court considers the usual Rule 23 factors. *See id.* at 953. Provisional class certification is appropriate here and Defendants consent to certification solely for the purposes of settlement.

Accordingly, for settlement purposes only,[5] Plaintiff requests that the Court provisionally certify the following Settlement Class pursuant to Rule 23 of the Federal Rules of Civil Procedure:

> All persons who are or have performed work as "Distributors" for Defendants in the State of Arizona under a "Distributor agreement" or a similar written contract between July 20, 2014 and August 10, 2017.

Plaintiff believes the Settlement Class meets the requirements of Rule 23(a), which provides that: one or more members of a Class may sue or be sued as representative parties on behalf of all only if: (1) the Class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the Class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Class, and (4) the representative parties will fairly and adequately protect the interests of the Class. The Class must also meet one of the requirements of Rule

[5] Defendants agree to class certification only for settlement purposes and without prejudice to their right to oppose class certification if the Settlement is not ultimately approved.

23(b). Here, Plaintiff believes the Settlement Class meets the requirements of 23(b)(3) because questions of law or fact common to the members of the Class predominate over any individual questions, and a class action is a superior method of resolving this dispute. Accordingly, the Court should certify this Class for settlement purposes only.

A. The Class Satisfies the Numerosity Requirement.

Rule 23(a)(1) requires that the Class be so numerous that joinder of all members is impracticable. The Class here consists of approximately 203 current and former Distributors of Holsum. Courts in the Ninth Circuit have certified Classes containing far fewer individuals. *See, e.g., McCulloch v. Baker Hughes Inteq Drilling Fluids, Inc.*, No. 1:16-cv-00157, 2017 WL 2257130, at *7 (E.D. Cal. May 23, 2017) ("A potential Class consisting of at least forty members will generally be treated as satisfying the numerosity requirement."); *Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 365 (D. Ariz. 2009) (finding a Class of forty or more satisfied the numerosity requirement). Accordingly, because it is impracticable to join all individuals in a single action, the Court should find that the numerosity requirement is met.

B. The Class Satisfies the Commonality Requirement.

Rule 23(a)(2) requires the party seeking certification to show that there are questions of law or fact common to the Class. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This means that the Class members' claims "must depend on a common contention … of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Here, Plaintiff believes the primary questions central to class-wide resolution are whether Defendants improperly classified Distributors as independent contractors and whether Defendants took improper deductions from Plaintiff's and other Distributors' weekly settlement checks in violation of Arizona law. Courts in the Ninth Circuit have found that the question of whether workers are properly classified as employees or independent contractors is by itself a factual and legal issue that satisfies the

commonality requirement of Rule 23(a). *Cifuentes v. CEVA Logistics U.S., Inc.*, No. 16-cv-01957, 2017 WL 2537247, at *2 (S.D. Cal June. 12, 2017) (citing *Norris-Wilson v. Delta-T Grp, Inc.*, 270 F.R.D. 596, 604 (S.D. Cal. 2010)); *see also McCulloch*, 2017 WL 2257130, at *7 (finding question of misclassification satisfied the commonality requirement). In addition, with respect to the deductions taken from Plaintiffs' weekly settlement checks, there is undisputed evidence in the record that Defendants uniformly deducted the administrative fee from Distributors' weekly settlement checks, also satisfying the commonality requirement.

C. Plaintiff Meets the Typicality Requirement.

Under Rule 23(a)(3), the claims or defenses of the representative parties must be typical of the claims or defenses of the Class. Typicality requires that the representative plaintiff possess the same interest and suffer the same injury as the Class members. *Cifuentes*, 2017 WL 2537247, at *2. Plaintiff believes that the claims of Plaintiff Coyle arise from the same factual and legal basis as those of the putative Class members. Plaintiff believes the facts show that all members of the putative Class, including Plaintiff Coyle, work as "Distributors" for Holsum, signed substantially the same "Distributor Agreement," were subject to the same policies and requirements, and had the same standardized deduction taken out of their settlements on a weekly basis. Plaintiff believes this is more than sufficient to show that Plaintiff Coyle's claims are reasonably co-extensive with the claims of the absent Class members, and the Court should therefore find that the typicality requirement is met. *See id.*

D. Plaintiff Satisfies the Adequacy Requirement.

Finally, Rule 23(a)(4) requires the representative parties will fairly and adequately protect the interest of the Class. The Ninth Circuit requires: (1) that the named representatives must appear able to prosecute the action vigorously through qualified counsel; and (2) the representatives must not have antagonistic or conflicting interests with the unnamed members of the Class. *McCulloch*, 2017 WL 2257130, at *8 (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

Here, Plaintiff Coyle has suffered the same injury and shares the same interests as the putative Class members. Plaintiff Coyle has kept abreast of the litigation, assisted in discovery, and willingly agreed to submit to a full deposition. Accordingly, the Court should find that he is and has been an adequate representative of the Class.

In addition, Counsel in this case have demonstrated that they are qualified and experienced advocates and have been able to vigorously conduct the litigation on behalf of the Class. Shawn Wanta of Baillon Thome Jozwiak & Wanta LLP, Susan Ellingstad of Lockridge Grindal Nauen PLLP, and Gordon Rudd of Zimmerman Reed LLP, all have extensive and particular experience in national wage and hour class action and litigation and independent contractor misclassification litigation and have served as Class Counsel. *See* Exhibits A-C attached to Declaration of Shawn Wanta. They are each "qualified, experienced and able to vigorously conduct the proposed litigation on behalf of the class." *In re Quintus Secs. Litig.*, 148 F. Supp. 2d 967, 972 (N.D. Cal. 2001). With the litany of experience in class action and other complex litigation that Plaintiff's Counsel bring, coupled with their zealous prosecution of Plaintiff's claims to date, there can be no question that they are adequate to represent the Settlement Class here.

Counsel have already expended considerable time and effort in researching the legal and factual issues relevant to this litigation, have conducted substantial discovery, and already obtained conditional certification of an FLSA collective action in this case. For these reasons, the Court should find that Plaintiff and Counsel are adequate representatives of the proposed Class, and that Plaintiff has met the requirements of Rule 23(a).

E. The Class Satisfies the Criteria of Rule 23(b).

Rule 23(b)(3) requires the Court to find that: (1) the questions of law or fact common to Class members predominate over any questions affecting only individual members; and (2) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Plaintiff believes both requirements are met in this case.

1. Common Questions Predominate.

The predominance inquiry tests whether the proposed Class is sufficiently cohesive to warrant adjudication by representation. *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). "This analysis requires that common questions of law and fact present a significant aspect of the case and that they can be resolved for all members of the Class in a single adjudication. The relevant inquiry is whether issues subject to generalized proof predominate over those issues that are subject only to individualized proof." *Campbell v. First Investors Corp.*, No. 11-cv-0548, 2012 WL 5373423, at *3 (S.D. Cal. Oct. 29, 2012).

Plaintiff believes the overriding common question here is whether Defendants improperly classified Distributors as independent contractors rather than employees. It was this issue that drove the filing of this lawsuit. *See McCulloch*, 2017 WL 2257130, at *9; *Campbell*, 2012 WL 5373423, at *3. Courts have found that judicial economy favors resolving this issue once, rather than litigating it multiple times in individual lawsuits. *Campbell*, 2012 WL 5373423, at *3.

The merits of Plaintiff's misclassification claim hinge on an analysis of the economic realities test. In the Ninth Circuit, courts primarily consider: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit and loss depending upon his managerial skill; and (3) the alleged employees investment in equipment or materials required for his task, or his employment of helpers. *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979).

Here, Defendants uniformly classified Distributors as "independent contractors" and entered into similar "Distributor Agreements" with each Distributor, which Plaintiff believes set forth the common terms, standards, and practices to which Distributors must adhere. In addition, as Plaintiff has described above and at length in its briefs in support of its motion for conditional certification, *see* Dkt. Nos. 115, 172, Plaintiff, though discovery in this case, has identified what Plaintiff believes are numerous common

policies and standards to which Distributors were required to adhere, and which Plaintiff believes allowed Defendants to control nearly every aspect of each Distributor's day-to-day operation. Plaintiff also believes the evidence shows that the control exercised by Defendants greatly limited the Distributors' ownership or entrepreneurial influence over their day-to-day activities, such that Distributors had very little opportunity for profit and loss. Plaintiff believes the evidence shows that Defendants controlled sale prices, promotions, and shelf space in all major and chain accounts, and retained the right to change orders placed by Distributors. Plaintiff also believes the evidence shows that Holsum's managers continuously monitored Distributors' orders as well as their activity in the field by conducting "market checks" to check for out-of-stock conditions, out-of-code product, the proper arrangement and selection of product on the shelves, and the quantity of product in the back room. Finally, Plaintiff asserts that Defendants maintained the authority to discipline Distributors if they did not comply with stated expectations.[6] Accordingly, Plaintiff asserts that the misclassification question is subject to class-wide resolution, and predominates over any individual issues that may be present. *See Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-cv-00824, 2015 WL 1292444, at *16 (D. Ariz. Mar. 23, 2015) (certifying Class of delivery drivers).

In addition, Plaintiff believes the evidence shows that common issues predominate with respect to Plaintiff's claims under A.R.S. § 23-352, which makes it unlawful for an employer to make deductions unless: (1) the employer is required or empowered to do so by state or federal law; (2) the employer has written authorization from the employee; or (3) there is a reasonable good faith dispute as to the amount of wages due. Plaintiff believes that the question of whether Defendants had written authorization or a good faith reason to deduct standardized fees from Distributors' settlement is also amenable to

[6] As outlined above, Defendants deny these allegations.

class-wide resolution. *See Collinge*, 2015 WL 1292444 at *17.[7] The Court should therefore find that common questions predominate in this case for purposes of settlement.

2. A Class Action Is the Superior Method for the Fair and Efficient Adjudication of this Controversy.

The second requirement of Rule 23(b)(3) is that the class action "be superior to other available methods for the fair and efficient adjudication of the controversy." To determine the issue of "superiority," Rule 23(b)(3) enumerates the following factors for courts to consider: (A) the interest of members of the Class in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by members of the Class; (C) the desirability … of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a Class action. Plaintiff believes that each of these factors counsels in favor of certifying the Class.

a. The Individual Class Members' Interest in Controlling the Litigation

Here, Plaintiff believes there is little interest or incentive for Class Members to individually control the prosecution of separate actions. *See McCulloch*, 2017 WL 2257130, at *9. While the Class members' claims are not insignificant, the costs of prosecuting these claims individually would still be overwhelming. In addition, Plaintiff believes that it is highly unlikely that the substantive non-monetary relief would be obtainable for an individual class member. Therefore, no one member of the Class would have a materially greater interest in controlling the litigation.

b. Extent and Nature of Litigation Already Commenced by Class Members

Plaintiff is unaware of other actions by Class Members against Defendants asserting similar claims as here. This factor also weighs in favor of certification.

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[7] Defendants, of course, deny that the questions of misclassification or the propriety of deductions are subject to class-wide resolution, and a full Class certification motion would have been hotly contested. However, courts in the Ninth Circuit tend to view the predominance inquiry leniently for purposes of certifying a settlement Class. *See Cifuentes*, 2017 WL 2537247, at *3; *McCulloch*, 2017 WL 2257130, at *9; *Campbell*, 2012 WL 5373423, at *4.

c. The Desirability of Concentrating the Litigation in a Particular Forum.

A class action is also superior here because concentrating this litigation in one forum prevents against the risk of inconsistent outcomes and will "reduce litigation costs and promote greater efficiency." *Negrete v. Allianz Life Ins. Co. of North America*, 238 F.R.D. 482, 493 (C.D. Cal. 2006).

d. This Case is Manageable as a Class Action.

Finally, the manageability requirement is relaxed when a Class is certified for settlement as concerns with managing a trial are eliminated. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). It is far more efficient to litigate this matter on a class-wide basis rather than in multiple individual lawsuits. In addition, certification will allow Class members to opt-out of the Settlement and preserve their right to seek damages independently, which protects their due process rights. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). For these reasons, the superiority requirement is satisfied.

In short, Class treatment here will facilitate the favorable resolution of all Class Members' claims. Given the substantial number of Class Members and the multitude of common issues that Plaintiff believes exist, as outlined above, the Class device is also the most efficient and fair means of adjudicating these claims. Class treatment in the settlement context is superior to multiple individual suits or piecemeal litigation because it greatly conserves judicial resources and promotes consistency and efficiency of adjudication.

VI. THE SETTLEMENT AGREEMENT WARRANTS FINAL APPROVAL

Before granting final approval of a class action settlement, a district court must determine whether the settlement agreement meets the settlement requirements of Federal Rule of Civil Procedure 23(e). Rule 23(e) requires a district court to determine whether a proposed class action settlement is "fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). The factors that assist the court's

fairness assessment will naturally vary from case to case, but courts generally must weigh:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

In re Bluetooth Headset Prods. Liability Litig., 654 F.3d 935, 946 (9th Cir. 2011) (citations omitted). Furthermore, district courts must ensure that the settlement is not the product of collusion among the negotiating parties. *Juvera v. Salcido*, No. CV-11-2119, 2013 WL 6628039, at *9 (D. Ariz. Dec. 17, 2013) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)). Finally, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement. *Id.* (citing *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 667 (E.D. Cal. 2008)). These settlement factors are non-exclusive, and each need not be discussed if they are irrelevant to a particular case. *McCulloch v. Baker Hughes Inteq Drilling Fluids, Inc.*, No. 1:16-cv-00157, 2017 WL 5665848, at *3 (E.D. Cal. Nov. 27, 2017). The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions. *Id.* (citing *Class Plaintiff v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). Here, the Parties can show that each of these factors is satisfied, and the Court should grant final approval of the settlement.

A. The Strength of Plaintiff's Case.

First, the strength of Plaintiff's case relative to the risks of continued litigation suggest that final approval of the Settlement Agreement is warranted. "There is not particular formula" by which courts must assess the strength of Plaintiff's case, and the court "is not required to render specific findings on the strength of all claims." *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1130 (N.D. Cal. 2015), *aff'd*, No. 15-15858, 2017 WL 3601250 (9th Cir. Aug. 22, 2017). Instead, the court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a

reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm Mutual Auto. Ins. Co.*, No. 08–CV–1365–CW, 2010 WL 1687832, at *9 (N.D. Cal. April 22, 2010).

Plaintiff asserts two claims in this case. First, Plaintiff asserts that because Plaintiff and FLSA Opt-In Plaintiffs are employees for purposes of the FLSA, they are entitled to overtime premium pay equaling one and one-half times their regular pay rate for hours worked over 40 per week. *See* 29 U.S.C. § 207(a)(1). Second, Plaintiff claims that because Distributors are employees for purposes of the Arizona Wage Laws, they are entitled to reimbursement for certain alleged unauthorized deductions from their pay. *See* A.R.S. §§ 23-350 *et seq.* Plaintiff believes he obtained substantial evidence that Class Members were misclassified as employees under the tests applicable to both the federal and state law claims, and that he would prevail at trial on the question of whether Distributors were improperly classified as independent contractors.

However, Defendants have continued to deny their liability, and have asserted numerous defenses in the case. Thus, the threat of continued litigation concerning both class certification and the ultimate merits weigh in favor of settlement. *In re Google*, 87 F. Supp. 3d at 1131–1132; *McCulloch*, 2017 WL 5665848, at *4. These risks are serious enough hurdles that Plaintiff recognizes the value in obtaining a recovery now, rather than risking continued litigation. *See In re Google*, 87 F. Supp. 3d at 1131. Therefore, the strength of Plaintiff's case, combined with the risk of continued litigation, weigh in favor the Settlement

B. Risks, Expenses, Complexity, and Likely Duration of Further Litigation.

Approval of a settlement is "preferable to lengthy and expensive litigation with uncertain results." *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004). As discussed previously, while Plaintiffs are confident in the strength of their claims, there are risks associated with continuing litigation given Defendants' denial of liability and vigorous pursuit of numerous defenses. In addition, although the Parties had largely completed factual discovery, there would have been

substantial costs associated with briefing on class certification and decertification of the FLSA collective action, summary judgment motions, expert discovery, and trial. In addition, given some of the claims and defenses at issue, an appeal by either or both Parties from these motions or at trial would be highly likely. Beyond liability, there is a significant question of whether Plaintiff can meet his burden of recovering punitive or liquidated damages on behalf of the Class because Defendants contend they acted in good faith and would have contested any liquidated or exemplary damages under the FLSA or Arizona Wage Laws. Thus, the risks, expenses, complexity, and likely duration of further litigation weigh in favor of final approval of the Settlement.

C. Maintenance of Class Status through Trial.

As discussed previously, the Parties had not yet moved for class certification at the time they reached an agreement in this case. While Defendants do not oppose class certification for purposes of settlement, the Parties anticipated that class certification would have been hotly contested. Accordingly, this factor weighs in favor of approval of the Settlement. *See Edher Flores v. ADT LLC*, No. 1:16-cv-0029, 2018 WL 1062854, at *9 (E.D. Cal. Feb. 27, 2018).

D. Amount Offered in Settlement.

The Settlement reached in this case creates a $1.17 million settlement fund, which provides $327,905.00 in damages for the Arizona Wage Law claims, and $829,881.33 for the FLSA overtime claims. These amounts represent 100% of Class Members' actual damages that they could recover at trial. The Settlement does not provide compensation for liquidated damages available under the FLSA, which would double overtime damages but require that Defendants fail to establish good faith. *See* 29 U.S.C. § 260. Here, however, Flowers and Holsum vigorously contend that they acted in good faith and did not violate the FLSA and would contest liquidated damages. The Settlement also does not provide treble damages available under the Arizona Wage Laws, but such damages require Plaintiff to provide Defendants acted unreasonably and in bad faith. *See Swanson v. Image Bank, Inc.*, 43 F.3d 174, 183 (Ariz. Ct. App. 2002). Again, Flowers and Holsum

would contest treble damages in this case. Accordingly, compensating Plaintiffs for 100% of their actual damages under the FLSA and Arizona Wage Laws represents a reasonable and fair compromise of the claims at issue in this case. Furthermore, the Settlement provides substantial non-monetary relief that would not have been obtainable through trial. These reforms, as described above, will greatly enhance the independent distributor model at Holsum. Accordingly, the Court should find that the Settlement amount, combined with its non-monetary provisions, weighs in favor of final approval.

E. Extent of Discovery Completed and Stage of the Proceedings.

The current stage of proceedings and the extent of discovery completed weigh in favor of settlement because the Parties "had a good grasp on the merits of their case before settlement talks began." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 967 (9th Cir. 2009). Over the course of two years of litigation, the Parties engaged in comprehensive written and oral discovery. After extensive negotiations regarding the scope of discovery and privilege issues, Defendants produced more than 100,000 documents, consisting of more than 1.1 million pages. After the Court conditionally certified a class of Distributors, all thirty-one current[8] FLSA Opt-In Plaintiffs as well as Named Plaintiff Coyle responded to discovery and produced significant information to Defendants. Plaintiffs took numerous affirmative depositions, including a 30(b)(6) deposition involving 48 topics and eleven witness. Defendants also took the depositions of Named Plaintiff Coyle as well as seven other Opt-In Plaintiffs.

The extent of discovery completed shows that the Parties have a deep and broad understanding of the issues involved in this case and a firm grasp of the merits of the case. The Parties were on the brink of exchanging motions for class certification and decertification when settlement talks began. The extent of discovery completed and stage of the proceedings means that the Parties were able to make informed decisions regarding

[8] This excludes the seven opt-in Plaintiffs who did not comply with discovery and were dismissed from the case.

settlement. *See Edher Flores*, 2018 WL 1062854, at *10; *McCulloch*, 2017 WL 5665848, at *5. Thus, this factor supports approval of the Settlement.

F. Views of Counsel and Circumstances Surrounding the Settlement Negotiations Support Approval.

Courts afford significant weight to the opinion of Counsel that the settlement is in the best interests of the Class where Counsel is recognized and experienced in the area. *See McCulloch*, 2017 WL 5665848, at *5. Here, both Plaintiffs' and Defendants' Counsel are highly experienced in wage and hour class litigation and litigate these cases throughout the country. All Counsel also has extensive experience in the particular subject matter of independent contractor misclassification. Their opinion that the Settlement is in the best interests of the Class members in this lawsuit supports final approval.

Furthermore, the circumstances surrounding the settlement negotiations support the fairness of the Settlement and the absence of any collusion. Here, the Settlement was only reached after protracted negotiations, including multiple all-day in person mediations, as well as additional arm's-length discussions between the Parties, evaluating the strengths and weaknesses of their respective positions. *See Rodriquez v. Kraft Foods Grp., Inc.*, No. 1:14-cv-1137, 2016 WL 5844378, at *9 (E.D. Cal. Oct. 5, 2016). In addition, the mediation was facilitated by a skilled and experienced mediator, with years of experience litigation and mediating employment cases, including misclassification suits such as this one. *See* Dkt. 384-1. Courts have found the presence of a mediator strongly suggests the absence of collusion or bad faith by the parties or counsel. *Mendez v. C-Two Grp., Inc.*, No. 13-cv-05914, 2017 WL 1133371, at *4 (N.D. Cal. Mar. 27, 2017); *Sandoval v. Tharaldson Employee Mgmt.*, No. EDCV-08-000482, 2009 WL 3877203, at *4 (C.D. Cal. Nov. 17, 2009). Finally, the extent of discovery leading up to the negotiations, and the substantial benefit that the settlement conveys to Class members, both in the form of monetary and non-monetary relief, as weighed against the risks of continued litigation, also supports the conclusion that the Settlement was the

result of successful arm's-length negotiations. *See Bower v. Cycle Gear, Inc.*, No. 14-cv-02712, 2016 WL 4439875, at *5 (N.D. Cal. Aug. 23, 2016). Accordingly, final approval is warranted.

G. Reaction of Class Members to the Proposed Settlement.

If no class members object to a proposed class action settlement, courts routinely find that class members' reaction is positive, which favors final approval of the settlement. *See, e.g., Nat'l Rural Telecommunications Corp. v. DirecTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("The absence of a single objection to the Proposed Settlement provides further support for final approval of the proposed settlement."); *In re Apollo Group Inc. Secs. Litig.*, Nos. 04-2147 et al., 2012 WL 1378677, at *3 (D. Ariz. Apr. 20, 2012).

For similar reasons, courts find a positive reaction when no class members object but some opt out. *See, e.g., Dynabursky v. AlliedBarton Sec. Servs., LP*, No. 12-2210, 2016 WL 8921915, at *7 (C.D. Cal. Aug. 15, 2016); *Ford v. CEC Entertainment Inc.*, No. 14-677, 2015 WL 11439033, at *4 (S.D. Cal. Dec. 14, 2015); *Wixon v. Wyndham Resort Devel. Corp.*, No. 07-2361, 2011 WL 3443650, at *5 (N.D. Cal. Aug. 8, 2011). When class members decide against objecting and instead opt out, they are no longer bound by the settlement and instead preserve their right to proceed with their individual claims. *In re Nvidia GPU Litig.*, 539 Fed.Appx. 822, 824 (9th Cir. 2013); *cf. Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (observing that opt-out procedure "fairly protected" absent class members' interests).

Because opt-outs are no longer bound by the class action settlement, they lose their right to object to the settlement or appeal from final approval. *See, e.g., In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1100 (10th Cir. 2001) (holding opt-outs lack standing to appeal class action settlement); *Zamora v. Ryder Integrated Logistics, Inc.*, No. 13-2679, 2014 WL 9872803, at *2 (S.D. Cal. Dec. 23, 2014) (finding opt-outs have "no significant protectable interest" in class action settlement). Thus, when evaluating the reaction of the class, a court should not speculate about how the settlement affects opt-

outs. *See In re Vitamins Antitrust Litig.*, 215 F.3d 26, 28-29 (D.C. Cir. 2000) (holding that district court has duty to review fairness of settlement for class members but not opt-outs).

In the current litigation, no class members objected the proposed Settlement. The absence of any objections indicates a positive reaction to the Settlement. *Cf. Wixon*, 2011 WL 3443650, at *5. While some class members chose to opt out, that choice means they are not bound by the Settlement, but instead are free to pursue individual relief. As a result, their departure is immaterial to whether the Settlement provides fair, reasonable, and adequate relief to the remaining class members. *Cf. Zamora*, 2014 WL 9872803, at *2 (opt-outs have "no significant protectable interest").[9] Under these circumstances, the record establishes class members' positive reaction to the Settlement, which further supports final approval.

VII. THE SETTLEMENT IS ALSO REASONABLE UNDER THE FLSA

The FLSA also requires court approval of a collective action settlement. The district courts throughout the Ninth Circuit tend to follow the Eleventh Circuit's reasoning in *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982), in order to determine whether to approve a settlement under the FLSA. *Villarreal v. Caremark*, No. CV-14-000652, 2016 WL 5938705, at *2 (D. Ariz. May 10, 2016) (citing cases). Namely, a FLSA settlement must reflect "a fair and reasonable compromise over a bona fide dispute." *Id.*

Here, the FLSA Collective Class has alleged that as a result of their misclassification as independent contractors, Defendants did not pay them overtime compensation. Defendants deny their liability to the FLSA Collective Class and deny the

[9] About 11.7% of class members opted out of the class. Even if the Court were to consider the opt-out plaintiffs to be akin to objectors, which they are not under the law, courts routinely uphold class action settlements over that level of objection, so long as the settlement was otherwise fair, reasonable, and adequate. *See, e.g., Thomas v. Albright*, 139 F.3d 227, 232 (D.C. Cir. 1998) (15%); *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 886, 891-92 (7th Cir. 1985) (15%); *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 624 (N.D. Cal. 1979) (16%).

amount claimed as overtime damages. Accordingly, the Settlement represents a resolution of a bona fide dispute over the entitlement to overtime under the FLSA. *See Lopez v. Arizona Pub Serv. Co.*, No. CV-08-1843, 2010 WL 1403873, at *1 (D. Ariz. Jan 27, 2010). In addition, the Parties move for approval of the Settlement in this case to avoid the risks and uncertainties of further litigation, including a motion for decertification of the FLSA Collective Class, as well as motions for summary judgment, and a trial and appeal of the FLSA claims and defenses. *See Villarreal*, 2016 WL 5938705, at *2 (finding that the uncertainly and delay of litigation supported adequacy of Settlement). Finally, as discussed above, the Settlement fully compensates the FLSA Opt-In Plaintiffs for their actual overtime damages, based on the length of time each Class Member worked, and an and is thus a fair and reasonable compromise. *See Lopez*, 2010 WL 1403873, at *1. Final approval is therefore warranted.

VIII. ATTORNEYS' FEES

Plaintiff filed an Unopposed Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Award on November 21, 2017. Doc. 396 ("Fee and Expense Request"). In that motion, Class Counsel requested that the Court approve the Parties' Agreement for the payment of attorneys' fees, reimbursement of expenses, and payment of a service award to Terry Coyle. Class Counsel set forth the detailed basis for their request including contemporaneous, detailed time records and descriptions of work performed for the Court's *in camera* review.

The Claims Administrator disseminated notice of the proposed settlement in accordance with the Court's preliminary approval order. Dkt. 389. The notice advised class members of the Fee and Expense Request and alerted them of their right to object. The notice set a deadline of January 9, 2018, to object to Class Counsel's Fee and Expense Request and further notified class members of their right to appear in person at the Fairness Hearing scheduled March 23, 2018, with regard to any objection. No Class Member objected to the Settlement generally or to the Fee and Expense Request in particular. *See* Atticus Decl. ¶ 12.

On November 27, 2017, the Court entered an Amended Order granting Plaintiff's Unopposed Motion for Award of Attorneys' Fees, Reimbursement for Expenses, and Payment of Service Award. Doc. 401. Because the motion was initially unopposed only with respect to the named parties, both sides stipulated that entry of this Order neither precluded class members from objecting to the Fee and Expense Request up to the deadline of January 9, 2018, nor from personally appearing at the Court's scheduled Fairness Hearing on March 23, 2018 as set forth in the Class Notice. Doc. 405. The Court entered an order regarding this stipulation on December 13, 2017. Doc. 406.

Because no class member objected to the Fee and Expense Request by the deadline (or since), Class Counsel respectfully request that the Court enter its Order at Docket 401 into the docket as a final order at the Final Fairness Hearing.

IX. CONCLUSION

For the foregoing reasons, the Settlement is a fair, reasonable and adequate result for the members of the Class. Accordingly, Plaintiff respectfully request the Court grant final approval of the Settlement.

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BAILLON THOME JOZWIAK & WANTA LLP

Date: March 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I electronically submitted the attached document to the Clerk's Office using the CM/ECF for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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