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14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**

16
17 **BARBARA FLORES, on behalf of**
18 **herself and those similarly situated,**

19 **Plaintiffs,**

20 **v.**

21 **SWIFT TRANSPORTATION**
22 **COMPANY, et al.,**

23 **Defendants.**

Case No. CV 14-2900- AB-E

**BRIEF IN SUPPORT OF
PLAINTIFFS' UNCONTESTED
NOTICE OF MOTION AND
MOTION FOR COURT
APPROVAL OF THEIR FLSA
SETTLEMENTS**

Hearing Date: May 2, 2016

Time: 10:00 a.m.

**Assigned to: Honorable André
Birotte Jr.**

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1 The Plaintiffs who have opted into this action submit this brief in support of
2 their uncontested motion for approval of the settlement of the Fair Labor Standards
3 Act (“FLSA”) claims raised in this case. Each of the 41 Plaintiffs who have brought
4 claims in this action have signed an individual settlement agreement with Swift
5 resolving his or her FLSA and state wage-and-hour claims in their entirety. Now
6 they respectfully request that the Court approve their settlements, including their
7 individual recoveries, service awards, and the attorneys’ fees and costs. Plaintiffs
8 also request that the Court dismiss the California state law class claims raised in the
9 complaint but not certified for class treatment.

10 **I. PROCEDURAL AND FACTUAL HISTORY**

11 The Named Plaintiff brought this action as a FLSA collective action on behalf
12 of herself and other customer service representatives employed by Swift who were
13 paid a salary but not overtime wages for hours worked more than 40 in a workweek.
14 (“CSRs”) Complaint, Dkt. 1 (filed April 15, 2014). She also brought California state
15 law claims for unpaid wages on behalf of CSRs employed by Swift in California.
16 Dkt. No. 1. Swift denied Plaintiffs’ allegations and raised 29 affirmative defenses.
17 Dkt. 40.

18 Plaintiff moved to certify a FLSA collective action on July 28, 2014, Dkt. No.
19 29. Swift then moved to dismiss the complaint. Dkt. 32. Plaintiff responded to the
20 motion by amending her complaint to address Swift’s objections. Dkt. 36. While the
21 Plaintiffs were moving for FLSA Certification, Swift moved the Court to compel
22 four of the opt-in Plaintiffs to bring their claims individually in arbitration. Dkt. No.
23 41. The Court granted Swift’s motion to compel arbitration as to the four Plaintiffs
24 on October 3, 2014. Dkt. No. 63.

25 On October 30, 2014, the Court granted Plaintiffs’ motion for FLSA
26 certification, ordering notice issued to the entire FLSA class, even those who Swift
27 alleged had signed an arbitration agreement. Dkt. No. 67. Pursuant to the Order,
28 Plaintiff issued notice to the class on November 21, 2014 and mailed a reminder

1 post card to non-responding class members thirty days later. Plaintiff has not moved
2 to certify a California state law class action.

3 Because Court-approved notice was issued to the entire class regardless of
4 who signed an arbitration agreement, the Parties developed a process to avoid filing
5 consents to sue in federal court for CSRs whose claims would have to be brought in
6 arbitration. The process provided that Plaintiffs identify each person seeking to join
7 the action before filing a consent to sue in federal court. Swift then had an
8 opportunity to present signed agreements for anyone seeking to join the action.
9 Plaintiff then had an opportunity to raise any defenses to the enforcement of the
10 agreement. Claims of CSRs who signed an arbitration agreement and did not raise a
11 defense were not filed in federal court. Those CSRs were given the opportunity to
12 bring their claims in arbitration. Claims of CSRs for whom Swift did not present a
13 valid arbitration agreement were filed in this case. Sweeney Decl. ¶ 5.

14 Seventy-four CSRs brought claims in either this action or in an individual
15 arbitration.¹ One hundred twenty-eight CSRs sought to join this action. Swift
16 presented arbitration agreements for 95 of those 128. Of those 95, 33 did not file
17 their claims in this Court but filed individual arbitrations. An additional 41 CSRs
18 filed their claims in this action. Between the claims brought in arbitration and those
19 brought here, 74 CSRs brought claims related to this litigation. The 74 CSRs who
20 brought claims worked in seven different terminals with most working in one of
21 Swift's customer service centers in Memphis, TN, Greer, SC, or Phoenix, AZ.
22 Sweeney Decl. ¶ 6.

23
24 _____
25 ¹ Two additional CSRs, Johnson and Miller, brought their claims in individual
26 arbitrations. Their arbitration hearings were the first two scheduled. Swift settled
27 their claims individually apart from this settlement to allow the parties time to focus
28 on settling the balance of the arbitrations. Because Johnson and Miller's claims were
resolved apart from this settlement, they are not included in the discussion in this
paragraph.

1 **A. The Litigation**

2 Although the Parties litigated the class claims on two tracks—individual
3 arbitrations and federal court collective action—the work overlapped in substantial
4 part. Plaintiffs conducted investigations into each Class Member’s claims, whether
5 their claims were in arbitration or federal court. Because opt-in and arbitration Class
6 Members often worked in the same terminals, they provided crucial facts and were
7 developed as fact witnesses for each other. Sweeney Decl. ¶ 7. Discovery regarding
8 Swift’s wage-and-hour practices, CSR scheduling, CSR job duties, class member
9 supervision, electronic records of hours worked, good faith and willfulness,
10 company depositions, depositions of fact witnesses, depositions of supervisors at
11 Swift’s main terminals where many of the class members worked, exhibit and
12 witness lists and summaries pre-trial briefing, and stipulations of fact all applied to
13 claims brought in arbitration and in federal court. As part of this discovery, the
14 Plaintiffs deposed eleven witnesses including four 30(b)(6) designees and seven
15 managers/supervisors who worked in terminals located in Memphis and Illinois. At
16 the time the case settled, Plaintiffs had scheduled and were prepared to take several
17 additional depositions at locations around the country. Because Plaintiffs worked in
18 different terminals throughout the country, Plaintiffs took discovery in many
19 different locations. Swift also took depositions, deposing four CSRs who worked in
20 terminals located in Illinois, South Carolina, and Tennessee. Sweeney Decl. ¶ 8.

21 Thirty-three class members brought their claims in individual arbitrations
22 before the American Arbitration Association. The Parties selected arbitrators,
23 submitted case management plans, participated in case management conferences,
24 and scheduled merits hearings in 23 arbitrations. The hearings were scheduled to
25 begin in June 2015 and continued into the spring of 2016. In each of the 23 cases,
26 Claimants provided Swift with an explanation of their claims, sought and received
27 discovery, and provided damage calculations under both the FLSA and any
28 applicable state law. In several cases, the Parties noticed and conducted depositions

1 and engaged in motion practice including summary judgment briefing on state law
2 issues. Sweeney Decl. ¶ 9.

3 The Parties litigated the action in federal court as well. In addition to
4 responding to Swift's motions to dismiss and to compel arbitration, Plaintiffs
5 successfully moved for certification of the FLSA collective action. They also
6 engaged in extensive discovery for the opt-in Plaintiffs in the collective action in
7 federal court as well. Plaintiffs served discovery demands on Swift, including
8 interrogatories, requests for documents and ESI, and requests to admit. Swift
9 produced thousands of pages of documents and ESI, including wage records. Also,
10 in order to resolve discovery disputes before upcoming arbitration hearings, CSRs
11 moved to compel documents. In this case, Swift served individual discovery
12 demands on the Plaintiff and each opt-in. While Plaintiffs objected, Swift was
13 permitted to take individualized discovery from all of the Plaintiffs. Dkt. 88.
14 Sweeney Decl. ¶ 10.

15 **B. Settlement**

16 After actively and aggressively litigating this case and 33 individual
17 arbitrations for more than a year, the Parties agreed to mediate the claims of all the
18 opt-in plaintiffs and individual arbitration claimants on the eve of the first arbitration
19 hearing. The parties conducted additional discovery to prepare for the mediation.
20 Using that discovery combined with individual Class Member interviews, Plaintiffs'
21 Counsel developed a damages model that calculated each Class Member's damages
22 on a week-by-week basis. Sweeney Decl. ¶ 11. On August 19, Counsel provided
23 Swift with damage calculations showing \$3,928,912 in Class damages with
24 counsel's fees and costs listed separately. The damages represented the maximum
25 amount each Class Member could recover if he or she prevailed at trial on every
26 issue. Sweeney Decl. ¶ 12.

27 The Parties attended a day-long mediation on September 11, 2015 in Phoenix,
28 Arizona, before a well-respected and experienced mediator, the Honorable Stephen

1 H. Scott from Scott, Skelly & Muchmore, LLC. Although the Parties did not reach a
2 settlement during the mediation, the Parties continued negotiations. Finally, after ten
3 days of additional negotiations, the Parties agreed on a monetary value for the
4 settlement. Over the next few months, the Parties negotiated the non-monetary
5 settlement terms. Sweeney Decl. ¶ 13.

6 Each Class Member's recovery, whether the claims were brought in federal
7 court or in arbitration, was individually calculated at the maximum statutory
8 recovery based on his or her number of weeks worked, hours worked each week,
9 rate of compensation, and any applicable state law damages in addition to FLSA
10 damages. The settlement incorporated the risks for each claim including: 1) the risk
11 that Swift would be successful with its affirmative defense that Plaintiffs were
12 FLSA exempt under one of the white-collar exemptions; 2) the risk that class
13 members would not be able to prove all the overtime hours they claimed to have
14 worked; 3) the risk that Swift would be able to calculate back overtime wages on a
15 half-time basis (thereby reducing back wages and liquidated damages by more than
16 one-third); 4) the risk that class members would not be able to establish a third year
17 of FLSA liability by proving that Swift willfully violated the law; 5) the risk that
18 Swift would be able to avoid liability for liquidated damages; and 6) the risk that
19 class members would not be able to establish the prerequisites for state law claims. The
20 damage calculation also included a multiplier for the value of receiving payment
21 without having to wait for the litigation to take its course. The damages model
22 applied the various risk discounts to determine a fair settlement on behalf of the
23 class members. Attorneys' fees and costs were provided on a separate line from the
24 aggregate Class Member damages. Sweeney Decl. ¶ 14.

25 Ultimately, Swift agreed to pay \$3,587,250 to resolve the claims of the 74
26 class members including the fees and costs associated with the claims. Under the
27 allocation, Class Members recover \$2,345,147.57 in back wages and statutory
28 damages; one-third of the total settlement, \$1,195,750.00, is allocated as attorneys'

1 fees; \$31,352.43 is allocated as costs (although costs of the action actually exceed
2 that amount), and \$15,000 is allocated as service payments for the Named Plaintiff
3 in the federal court case and an arbitration claimant who acted as a class
4 representative throughout the litigation and settlement negotiations. Sweeney Decl.
5 ¶ 15.

6 Each Class Member received an individual settlement agreement that
7 provided the specific amount the Class Member will receive in unpaid wages and
8 liquidated damages, and the specific amount Swift will pay in attorneys' fees and
9 costs apportioned to their claim. The individual Settlement Agreements were
10 accompanied by a letter from Counsel explaining the total amount of the settlement
11 and how the settlement was allocated among Class Members, attorneys' fees and
12 costs, and service payments. Plaintiffs' Counsel has been in communication with all
13 74 Class Members and responded to any of their questions and concerns. All of the
14 Class Members approved their recovery, the settlement terms, and the amount of
15 fees, costs, and service payments. Sweeney Decl. ¶ 16.

16 In return for their recovery, each Class Member agrees to release claims
17 "based on the Company's failure to pay her overtime wages and any related claims
18 regarding wages or classification that were raised in the Complaint in this action."
19 Depending on the state in which the Class Member worked, the agreement also
20 provides specific language for any state wage and hour claims that the Class
21 Member released. The release does not apply to any claims arising after the date the
22 Class Member signs the agreement. Sweeney Decl. ¶ 17.

23 In addition to the class' monetary recovery, Swift changed its pay practices
24 after the Parties' settlement. As of November 1, 2015, Swift reclassified CSRs as
25 non-exempt under the FLSA. As a result Swift now pays CSRs overtime wages
26 when they work more than 40 hours in a workweek. The reclassification to non-
27 exempt employees is a benefit to many of the class members who continue to work
28 for Swift and to their co-workers. Sweeney Decl. ¶ 18.

1 Every one of the 74 Class Members agreed to the settlement and signed an
2 individual settlement agreement. Class members who brought their claims in
3 arbitration have already received their settlement payments and those claims have
4 been dismissed. The opt-in Plaintiffs in this action now ask the Court to approve
5 their settlements. Upon the Court’s approval the claims administrator will distribute
6 the remainder of the settlement fund. Sweeney Decl. ¶ 19.

7 **II. LEGAL STANDARD**

8 The FLSA was designed to protect workers from “substandard wages and
9 oppressive working hours, ‘labor conditions [that are] detrimental to the
10 maintenance of the minimum standard of living necessary for health, efficiency and
11 general well-being of workers.’” *Barrentine v. Arkansas-Best Freight System, Inc.*,
12 450 U.S. 728, 739 (1981) quoting 29 U.S.C. § 202(a). Thus, in order to protect
13 workers, typically a FLSA claim cannot be waived or settled except in two
14 circumstances. *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 706 (1945). The
15 exceptions are (1) that the Secretary of Labor supervises the back wage payments or
16 (2) that the court approves the proposed settlement between the employer and
17 employees. 29 U.S.C. § 215(b); *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d
18 1350, 1353-54 (11th Cir. 1982).²

19 While the Ninth Circuit has not established the criteria that a district court
20 must consider in evaluating an FLSA settlement, most courts have adopted the
21 *Lynn’s Food Stores* standard. See *Otey v. CrowdFlower, Inc.*, 12 Civ. 05524–JST,
22 2014 WL 1477630, at *3 (N.D. Cal. 2014) (collecting cases). Under *Lynn’s Food*
23 *Stores* an FLSA settlement must (1) involve the resolution of a bona fide dispute
24 over an FLSA provision and (2) the settlement must be fair and reasonable.

25
26 ² The Fifth Circuit has found that under some circumstances, private FLSA
27 settlements can bind parties even without court or Department of Labor approval.
28 See *Martin v. Spring Break ‘83 Prods., L.L.C.*, 688 F.3d 247, 255 (5th Cir. 2012)
cert. denied, 133 S. Ct. 795, 184 L. Ed. 2d 583 (U.S. 2012), (citations omitted).

1 *Goodwin v. Citywide Home Loans, Inc.*, 8:14 Civ. 00866-JLS-JCG, Doc. 66, p. 4
2 (C.D. Cal Nov. 2, 2015) (quoting *Lynn’s Food Stores*); *Trinh v. JPMorgan Chase &*
3 *Co.*, 07 Civ. 01666, 2009 WL 532556, at *1 (S.D. Cal. Mar. 03, 2009); *Lee v. The*
4 *Timberland Co.*, C 07-2367, 2008 WL 2492295, at *2 (N.D. Cal. Jun 19, 2008); *Yue*
5 *Zhou v. Wang’s Rest.*, C 05-0279 PVT, 2007 WL 2298046, at *1 (N.D. Cal. Aug. 8,
6 2007). A court’s involvement in the settlement of FLSA claims “has less to do with
7 the due process rights of those to be bound by a settlement, and more to do with the
8 named plaintiffs’ interest in vigorously pursuing the litigation and the district court’s
9 interest in ‘managing collective actions in an orderly fashion.’” *Trauth v. Spearmint*
10 *Rhino Companies Worldwide, Inc.*, EDCV 09-01316-VAP, 2012 WL 4755682, at
11 *5(C.D. Cal. Oct. 5, 2012); accord *Goodwin*, 8:14 Civ. 00866-JLS-JCG at p. 3;
12 *Campanelli v. Hershey Co.*, C 08–1862 BZ, 2011 WL 3583597, at *1 (N.D. Cal.
13 May 4, 2011). “‘If a settlement in an employee FLSA suit does reflect a reasonable
14 compromise over issues . . . that are actually in dispute,’ the district court may
15 ‘approve the settlement in order to promote the policy of encouraging settlement of
16 litigation.’” *Otey v. CrowdFlower, Inc.*, 12 Civ. 05524-JST, 2016 WL 304747, at *3
17 (N.D. Cal. Jan. 26, 2016) quoting *Lynn’s Food Stores*, 679 F.2d at 1354.

18 **A. A Bona Fide Dispute Exists Between the Parties**

19 This litigation included several bona fide disputes ranging from whether Class
20 Members are due overtime wages at all to the correct measure of damages. The
21 issues were actively litigated in arbitrations across the country and in federal court
22 over the course of more than a year. For example, Swift denied that Class Members
23 were due any overtime wages at all and maintained throughout the litigation that
24 CSRs were properly classified as exempt from the FLSA and state law overtime
25 requirements. Dkt. 40, Twelfth and Twentieth Affirmative Defenses. It raised an
26 affirmative statute of limitations defense that could have reduced recovery of FLSA
27 claims from three to two years. Dkt. 40, Second Affirmative Defense. See 29 U.S.C.
28 § 255 (providing for a two-year statute of limitations unless employee can establish

1 employer acted willfully). Also unresolved was whether the fluctuating workweek
2 method of calculating damages (FWW) would apply. While District Courts within
3 the Ninth Circuit have rejected the retroactive application of the FWW in
4 misclassification cases (see, e.g., *Wallace v. Countrywide Home Loans Inc.*, SACV
5 08–1463–JST (MLGx), 2013 WL 1944458 (C.D. Cal. Apr. 29, 2013)), had the
6 FWW been applied it could have reduce recoveries by more than one-third. Swift
7 also raised a good faith defense to paying liquidated damages. Dkt. 40, Ninth
8 Affirmative Defense. Moreover, Class Members had an affirmative burden to
9 establish the overtime hours that they worked and Swift’s knowledge of the work,
10 Dkt. 40, Eleventh Affirmative Defense, and all the prerequisites of their claims
11 under the wage-and-hour laws of Arizona, California, Illinois, and South Carolina.
12 See, e.g., Dkt. 40, Fifteenth and Sixteenth Affirmative Defenses. See, *Goodwin v.*
13 *Citywide Home Loans, Inc.*, 8:14 Civ. 00866-JLS-JCG, Doc. 66, p. 4 (C.D. Cal Nov.
14 2, 2015) (“Given that several Plaintiffs worked remotely and Citywide did not
15 maintain employee time records, Plaintiffs would face obstacles when establishing
16 damages”). There is no question that bona fide disputes exist between the Parties.

17 **B. The Proposed Settlement Is Fair and Reasonable**

18 In determining fairness, courts consider the settlement negotiations between
19 the parties, the settlement amount to be paid to class members, the individual
20 settlement amounts to each class member, the scope of the release, and the litigation
21 risks. *Ambrosino v. Home Depot U.S.A, Inc.*, 11 Civ. 1319 L MDD, 2014 WL
22 3924609, at *1 (S.D. Cal. Aug. 11, 2014); *Goudie v. Cable Commun., Inc.*, 08 Civ.
23 507-AC, 2009 WL 88336, at *1 (D. Or. Jan. 12, 2009). All these factors establish
24 this settlement as fair.

25 **1. The Settlement Is the Result Of Arms’-Length Negotiations**

26 When a settlement is the result of arm’s-length negotiations and with the
27 assistance of a mediator then there is a presumption that the settlement “to be the
28 product of serious, informed, non-collusive negotiations.” *Nen Thio v. Genji, LLC*,

1 14 F. Supp. 3d 1324, 1334 (N.D. Cal. 2014). See also, *Lewis v. Wells Fargo & Co.*,
2 08 Civ. 2670, Doc. 315, p. 4 (N.D. Cal. April 29, 2011) (“The assistance of an
3 experienced mediator in the settlement process confirms that the Settlement is non-
4 collusive”); *Diaz v. Scores Holding Co., Inc.*, 07 Civ. 8718, 2011 WL 6399468, at
5 *2 (S.D. N.Y. Jul.11, 2011) (“In FLSA settlements . . . arm’s length negotiations
6 involving counsel and a mediator raise a presumption that the settlement achieved is
7 procedurally fair, reasonable, adequate, and not a product of collusion.”) Here, the
8 proposed Settlement resulted after significant litigation followed by months of arm’s
9 length negotiations between experienced counsel with the assistance of an
10 experienced mediator after the litigation had proceeded to a stage where both sides
11 could assess their risks and liability and the parties. Accordingly, there is a
12 presumption that the settlement is fair and reasonable. *Lewis v. Wells Fargo & Co.*,
13 08 Civ. 2670, Doc. 315, p. 4 (N.D. Cal. April 29, 2011).

14 **2. Plaintiffs’ Litigation Risks Are Significant**

15 FLSA settlements are fair and reasonable when plaintiffs’ counsel considers
16 the various risks and uses the employees’ individual wage and hour data. *Ambrosino*
17 *v. Home Depot U.S.A, Inc.*, 11 Civ. 1319 L MDD, 2014 WL 3924609, at *2 (S.D.
18 Cal. Aug. 11, 2014); *Hand v. Dionex Corp.*, 06 Civ. 1318-PHX-JAT, 2007 WL
19 3383601, at *1 (D. Ariz. Nov. 13, 2007) (settlement was fair because “the
20 distribution directly relates to each Plaintiff’s length of employment with
21 Defendant.”). As described above, this case involved several bona fide disputes,
22 anyone of which could have substantially reduced the class recovery. The
23 Settlement reflects these litigation risks. *Lewis*, p. 4 (finding a settlement was fair
24 and reasonable in part because the allocation was related to the risks in the case).

25 **3. Plaintiffs’ Recovery Is Fair and Reasonable**

26 Generally, “unless the settlement is clearly inadequate, its acceptance and
27 approval are preferable to lengthy and expensive litigation with uncertain results.”
28 *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal.

1 2004). In this case, each Class Member will recover a significant percentage of their
2 total maximum damages. The average recovery is \$28,771.77, and on average Class
3 Members recover almost 60% of the maximum damages that they could have
4 received if they prevailed at trial on every aspect of their claims. Sweeney Decl. ¶
5 20. The percentage of recovery is well within the range that courts approve. *See*,
6 *Goodwin v. Citywide Home Loans, Inc.*, 8:14 Civ. 00866-JLS-JCG, Doc. 66, pp. 5-6
7 (C.D. Cal. Nov. 2, 2015) (approving recovery of 24% to 51% of maximum); *Ma v.*
8 *Covidien Holding, Inc.*, 12 Civ. 02161-DOC (RNBx), 2014 WL 360196, at *5 (C.D.
9 Cal. 2014) (9.1% of the total value of the action was “within the range of
10 reasonableness”); *Jones v. Agilysys, Inc.*, 12 Civ. 03516 SBA, 2014 WL 2090034, at
11 *2 (N.D. Cal. May 19, 2014) (approving settlement of between 30% to 60% of
12 recoverable damages); *Ambrosino v. Home Depot U.S.A, Inc.*, 11 Civ. 1319 L MDD,
13 2014 WL 3924609, at *2 (S.D. Cal. Aug. 11, 2014) (finding recovery of 47% of
14 maximum damages is a fair compromise). Moreover, the actual amount of
15 recoveries under the settlement range from \$500 to \$93,960. Sweeney Decl. ¶ 21.
16 Such recoveries are well above average recoveries in wage-and-hour actions. *See*,
17 NERA Economic Consulting, “Trends in Wage and Hour Settlements: 2015
18 Update,” [http://www.nera.com/publications/archive/2015/trends-in-wage-and-hour-](http://www.nera.com/publications/archive/2015/trends-in-wage-and-hour-settlements-2015-update.html)
19 [settlements-2015-update.html](http://www.nera.com/publications/archive/2015/trends-in-wage-and-hour-settlements-2015-update.html), (the overall average per plaintiff settlement value in
20 wage-and-hour settlements during the period 2007-2015 was \$1,097).

21 Not only does the settlement recover a significant amount for each Class
22 Member and a large percentage of their total possible claim, it also provides them
23 with a recovery without having to go through a prolonged litigation process and bear
24 the risks of being unsuccessful. Accordingly, the settlement amount is fair and
25 reasonable.

26 **4. The Settlement’s Release Provision Is Proper**

27 Courts also review the scope of the release in evaluating whether the
28 settlement is reasonable. If the release tracks the breadth of the allegations in the

1 action then courts find that the release is proper. *Goodwin v. Citywide Home Loans,*
2 *Inc.*, 8:14 Civ. 00866-JLS-JCG, Doc. 66, p. 6 (C.D. Cal. Nov. 2, 2015); *Ambrosino*
3 *v. Home Depot U.S.A, Inc.*, 11 Civ. 1319 L MDD, 2014 WL 3924609, at *2 (S.D.
4 Cal. Aug. 11, 2014) (finding that the revised release “appropriately track[ed] the
5 breadth of Plaintiffs’ allegations”). Here, the release is narrowly tailored to the
6 claims that were raised or could have been raised in the case. Class Members will
7 release only their claims related to Swift’s failure to pay overtime wages. Further,
8 the release only extends until the date that they signed the settlement agreement.
9 Thus, the release confirms that the settlement is fair and reasonable.

10 **C. The Service Awards to the Named Plaintiff and Arbitration**
11 **Representative Are Fair And Reasonable**

12 The settlement provides for service payments of \$10,000 to the Named
13 Plaintiff Flores and \$5,000 to Gwen Cecil, an arbitration claimant who participated
14 in the prosecution of the claims and the negotiation of settlement. “Incentive awards
15 are fairly typical in class action cases [and] are intended to compensate class
16 representatives for work done on behalf of the class, to make up for financial or
17 reputational risk undertaken in bringing the action, and, sometimes, to recognize
18 their willingness to act as a private attorney general.” *Rodriguez v. W. Publ’g Corp.*,
19 563 F.3d 948, 958-59 (9th Cir. 2009); *Espenscheid v. DirectSat USA, LLC*, 688 F.3d
20 872 (7th Cir. 2012) (incentive awards are appropriate in FLSA collective actions for
21 the same reasons they apply in Rule 23 class actions).

22 Named Plaintiff Flores represented the CSRs by spending considerable time
23 working with Plaintiffs’ counsel educating counsel on CSR’s job duties, scheduling,
24 and compensation, developing and then amending the class action complaint,
25 successfully seeking FLSA class certification, challenging Swift’s efforts to force
26 class members to arbitration, modeling damage calculations, participating in
27 discovery and settlement negotiations, and ultimately concluding a successful
28 settlement for the class. Although trial was not necessary, she provided testimony in

1 support of Plaintiffs’ motion to certify the FLSA class and was prepared to testify at
2 trial. Sweeney Decl. ¶ 22. Flores also bore the risk of retaliation by publicly
3 bringing claims against a major industry player. *Stuart v. Radioshack Corp.*, 07 Civ.
4 4499 EMC, 2010 WL 3155645, at *7 (N.D. Cal. Aug. 9, 2010) (named plaintiffs
5 bear “the risk to the class representative in commencing suit, both financial and
6 otherwise [and] the notoriety and personal difficulties encountered by the class
7 representative.”); see also, *Velez v. Majik Cleaning Service, Inc.*, 03 Civ.
8 8698(SAS)(KNF), 2007 WL 7232783, at *7 (S.D. N.Y. June 25, 2007) (In the
9 employment context in particular, a named plaintiff takes a significant risk to her
10 reputation in the industry).³

11 Although not a named plaintiff, Cecil acted as a class representative in many
12 ways. She cooperated with counsel throughout the litigation with respect to her
13 claims and those of the Class. She was among the first opt-ins to the federal action.
14 Before her claims were sent to arbitration, she spent significant time helping
15 Counsel understand the class claims and develop the motion to certify the FLSA
16 collective action, and she provided supporting testimony for that action. The motion
17 was ultimately successful and ensured that the entire class received notice of the
18 opportunity to join the case. She was deposed and her arbitration was one of the first
19 scheduled for hearing. She provided extraordinary services in the settlement
20 negotiations by making herself available throughout the process to advise Counsel
21 on fact and settlement issues. She was the only Class Member who traveled to
22 Arizona to participate in the mediation with Swift. Sweeney Decl. ¶ 24.

23

24

25 ³ Although Flores had left Swift’s employ when she brought this case, she used her
26 middle name in the caption to avoid the risk of retaliation by future employers who
27 might discover that she brought claims against a former employer through internet
28 searches. Despite the threat, when Swift moved to compel her to file using her first
name, she complied to ensure the collective action went forward. Sweeney Decl. ¶
23.

1 Together, Flores and Cecil's efforts allowed 74 CSRs to recover unpaid
2 overtime wages. Their actions also led to Swift's decision to reclassify CSRs as
3 FLSA non-exempt. As a result, CSRs who work for Swift across the country are
4 now eligible to receive overtime wages.

5 The service payments sought here, \$10,000 and \$5,000, are lower than other
6 awards approved by other federal judges in this Circuit. See, e.g., *Stevens v.*
7 *Safeway, Inc.*, 2:05 Civ. 01988-MMM-SH, Doc. 338, p. 20 (C.D. Cal. Feb. 25,
8 2008) (approving service payments of \$20,000 and \$10,000 in an FLSA collective
9 action settlement); *Graham v. Overland Solutions, Inc.*, 10 Civ. 0672 BEN, 2012
10 WL 4009547, at *8 (S.D. Cal. Sept. 12, 2012) (awarding \$25,000 to each named
11 plaintiff); *Lewis v. Wells Fargo & Co.*, 08 Civ. 2670, Doc. 315, p. 4 (N.D. Cal. April
12 29, 2011) (approving service payments in the amount of \$22,000 and \$20,000);
13 *Glass v. UBS Fin. Services, Inc.*, 06 Civ. 4068 MMC, 2007 WL 221862, at *17
14 (N.D. Cal. Jan. 26, 2007) *aff'd*, 331 Fed. Appx. 452 (9th Cir. 2009 (unpublished)
15 (approving enhancement awards of \$25,000 each for four named plaintiffs in a Rule
16 23 wage and hour settlement); *Curtis-Bauer v. Morgan Stanley & Co. Inc.*, C-06-
17 3903 TEH, 2008 U.S. Dist. LEXIS 91465, at *3 (N.D. Cal. Oct. 22, 2008)
18 (approving a \$25,000 service award to named plaintiff in employment
19 discrimination class action settlement); *Garner v. State Farm Mut. Auto. Ins. Co.*, 08
20 Civ. 1365 CW (EMC), 2010 WL 1687832, at *17 n.8 (N.D. Cal. Apr. 22, 2010)
21 ("Numerous courts in the Ninth Circuit and elsewhere have approved incentive
22 awards of \$20,000 or more") (collecting cases); *Glass v. UBS Fin. Servs., Inc.*, C-
23 06-4068 MMC, 2007 WL 221862, at *16-17 (N.D. Cal. Jan. 26, 2007) *aff'd*, 331 F.
24 App'x 452 (9th Cir. 2009) (approving payments of \$25,000 to each named plaintiff);
25 and *Satchell v. Fed. Express Corp.*, C-03-2659 SI, C-03-28 SI, 2007 WL 1114010,
26 at *5-6 (N.D. Cal. Apr. 13, 2007) (preliminarily approving awards of up to \$30,000
27 each to class representatives and up to \$5,000 each to 18 class members who signed
28 declarations and were deposed). Moreover, the aggregate amount of service

1 awards—\$15,000—is less than 0.5% of the total settlement value of \$3,587,250.
2 Flores’ settlement is approximately one-third of the average Class Member recovery
3 and Cecil’s is less than 18% of the average recovery.

4 Not only are the service awards well within the norm of those regularly
5 awarded, all of the Plaintiffs were informed of the service payments and approved
6 them by signing their settlement agreements without objection.

7 **III. THE COURT SHOULD APPROVE THE AGREED UPON**
8 **ATTORNEYS’ FEES AS REASONABLE**

9 Because the FLSA is a remedial statute designed to protect workers and
10 guarantee that minimum labor standards are applicable across the economy, fair
11 compensation for attorneys who take on such litigation furthers the FLSA’s purpose.
12 *See A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945) (recognizing the FLSA’s
13 objective of ensuring that every employee receives “a fair day’s pay for a fair day’s
14 work”). Courts have recognized that fee awards in cases like this serve the dual
15 purposes of encouraging “private attorneys general” to seek redress for violations
16 and discourage future misconduct of a similar nature. *See Deposit Guar. Nat. Bank,*
17 *Jackson, Miss. v. Roper*, 445 U.S. 326, 338-39 (1980). Section 216(b) of the FLSA
18 provides that where an employee prevails in an action attorneys’ fees under FLSA
19 are mandatory. *Alyeska Pipeline v. Wilderness Society*, 421 U.S. 240, 261, fn. 34
20 (1975); *Yue Zhou v. Wang’s Restaurant*, 05 Civ. 0279 PVT, 2007 WL 2298046, 1
21 (N.D. Cal. Aug. 8, 2007) (“Because a court supervised settlement of FLSA overtime
22 claims is ultimately reduced to a judgment, under the FLSA an award of reasonable
23 fees is mandatory.”)

24 The Court has discretion to approve fees as a percentage of a settlement fund,
25 so long as the award is reasonable. *Elliott v. Rolling Frito-Lay Sales, LP*, 11 Civ.
26 01730 DOC, 2014 WL 2761316, at *9 (C.D. Cal. June 12, 2014); *Campbell v. C.R.*
27 *Eng., Inc.*, 2:13 Civ. 00262, 2015 WL 5773709, at *6 (D. Utah Sept. 30, 2015)

28

1 (applying percentage of the fund method for FLSA collective action). Attorneys’
2 fees of one-third of the settlement fund in this case are reasonable.

3 As per the fee agreement Class Members struck with Plaintiffs’ Counsel,
4 attorneys’ fees are one-third of the total settlement, \$1,195,750. Each Class Member
5 is allocated a prorate share of fees and costs based on the amount of their individual
6 recovery.

7 **A. The Attorneys’ Fees Are Reasonable Because All the**
8 **Plaintiffs Agreed to Them**

9 As a preliminary matter, attorneys’ fees equal to one-third of the settlement
10 fund are reasonable because all the Plaintiffs agreed to pay them when they joined
11 the action and subsequently approved the actual amount fees when they signed their
12 settlement agreements. Not only did each individual settlement include the specific
13 amount of fees and costs attributed to that Class Member, but the settlement
14 agreements were accompanied by a letter from Plaintiffs’ Counsel explaining the
15 allocation of the settlement fund including the amount of fees and costs. All of the
16 Plaintiffs signed and returned their settlement agreements. Sweeney Decl. ¶ 25.
17 *Ambrosino v. Home Depot U.S.A, Inc.*, 11 Civ. 1319 L MDD, 2014 WL 3924609, at
18 *2 (S.D. Cal. Aug. 11, 2014); *Banales v. Autoclaims Direct, Inc.*, 3:11 Civ. 02914,
19 Doc. 63, p. 5 (Dec. 20, 2012) (“the Court notes that each Plaintiff was involved in
20 the settlement process, and each has reviewed and agreed to the settlement terms.”)

21 **B. Fees of One Third of the Settlement Fund Method Are**
22 **Reasonable**

23 Courts regularly find that one-third of a settlement fund is a reasonable fee
24 recovery in FLSA cases. See, e.g., *Goodwin*, pp. 6-7; *Ambrosino v. Home Depot*
25 *U.S.A., Inc.*, 11 Civ. 1319 L(MDD), 2014 WL 3924609, at *2 (S.D. Cal. 2014)
26 (awarding fees of 33.3% in an FLSA settlement); *Boyd v. Bank of Am. Corp.*, 13
27 Civ. 0561-DOC, 2014 WL 6473804, at *12 (C.D. Cal. Nov. 18, 2014) (same);
28 *Rodriguez v. SGLC Inc.*, 2:08 Civ. 1971-MCE-KJN, 2014 WL 229221, at *2 (E.D.

1 Cal. Jan. 17, 2014) (approving attorneys’ fees in the amount of 34% of the
2 settlement). While the Ninth Circuit recognizes a loose benchmark of 25% of a fund
3 as attorneys’ fees for Rule 23 class actions where the settlement involves passive
4 plaintiffs, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir.
5 2015), “in most common fund cases, the award exceeds that benchmark.” *Knight v.*
6 *Red Door Salons, Inc.*, 08-01520 SC, 2009 WL 248367, at *3 (N.D. Cal. Feb. 2,
7 2009); *see also Vandervort v. Balboa Capital Corp.*, 8 F.Supp.3d 1200, 1209 (C.D.
8 Cal. 2014) (“in smaller cases—particularly where the common fund is under \$10
9 million—awards more frequently exceed the benchmark”). Moreover, FLSA
10 collective action settlements are different from Rule 23 classes in that each Plaintiff
11 has joined the action and there are no passive plaintiffs. *Ambrosino v. Home Depot*
12 *U.S.A., Inc.*, 2014 WL 3924609, at *2 (S.D. Cal. 2014) (finding 33.3% attorneys’
13 fees reasonable in an FLSA settlement where “each plaintiff has approved this
14 amount”). Here, all the Plaintiffs agreed to a one-third contingency and reaffirmed
15 the fees in executing their settlement agreements.

16 Courts in this Circuit consider several factors to determine if a percentage fee
17 award is reasonable, including

18 (1) the result obtained; (2) counsel’s efforts, experience, and skill; (3)
19 the complexity of the issues; (4) the risks of non-payment assumed by
20 counsel; (5) the reaction of the class; (6) non-monetary benefits, such
21 as clarification of certain points of law; and (6) comparison with the
22 lodestar.

23 *Khanna v. Intercon Sec. Sys., Inc.*, 2:09 Civ. 2214 KJM EFB, 2014 WL 1379861, at
24 *12 (E.D. Cal. Apr. 8, 2014) order corrected, 2:09 Civ. 2214 KJM EFB, 2015 WL
25 925707 (E.D. Cal. Mar. 3, 2015).

26 The Court should approve the agreed-upon fees because Plaintiffs’ Counsel
27 achieved an excellent result for the Plaintiffs in this case. The Class Members’
28 recoveries average almost 60% of the greatest possible recovery and the average

1 recovery here is far greater than the average FLSA recovery nationwide. Moreover,
2 as a result of this litigation Swift now pays CSRs overtime wages for hours worked
3 over 40 in a workweek. This confers a substantial additional benefit on Plaintiffs
4 currently working as CSRs with Swift. Not only was the result excellent, but
5 Counsel achieved it within less than two years from filing the complaint.

6 Courts throughout the country have recognized Plaintiffs' Counsel's skill and
7 experience in FLSA litigation. See, e.g., *Bredbenner v. Liberty Travel, Inc.*, 09 Civ.
8 1248 MF, 2011 WL 1344745, at *20 (D. N.J. Apr. 8, 2011) ("Based on the Court's
9 experience in supervising this litigation, [Getman & Sweeney] has demonstrated the
10 utmost skill and professionalism in effectively managing these consolidated actions
11 and bringing them to a successful conclusion.") See also, Sweeney Decl. ¶ 26.
12 Counsel expended significant efforts litigating this case and simultaneously
13 litigating 33 individual arbitrations throughout the country. It was only through
14 these efforts that Counsel was able to achieve a favorable settlement for all the Class
15 Members. Sweeney Decl. ¶ 27.

16 This case involved complex factual and legal questions involving not only
17 FLSA issues, but complex procedural issues regarding collective litigation and
18 arbitration. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981)
19 ("FLSA claims typically involve complex mixed questions of fact and law"). In
20 addition to the FLSA claims, Class Members brought individual claims under wage-
21 and-hour laws of four different states. Swift raised 29 affirmative defenses, many
22 raising complex issues of fact and law. The motions for FLSA certification and to
23 compel arbitration raised complex legal issues. The case also involved complex
24 issues regarding the discovery and analysis of electronically stored information for
25 the purpose of determining the hours Class Members worked. Sweeney Decl. ¶ 28.
26 Given the complexity and number of legal and factual questions in the case, these
27 factors strongly support approving the one-third contingency fee agreement.

28

1 The fees sought are reasonable because Plaintiffs’ Counsel took substantial
2 risk in taking on the representation. Plaintiffs’ Counsel did not receive any fees for
3 litigating the case or receive reimbursement for their out of pocket costs. Plaintiffs’
4 counsel alone undertook the financial risk of unsuccessful litigation. Under the
5 terms of the agreement, if Plaintiffs had been unsuccessful, Plaintiffs’ Counsel
6 would not have recovered any fees or costs. Counsel stood to gain nothing in the
7 event the case was unsuccessful and would have lost the firm’s investment in the
8 case, overhead and salaries required to pay attorneys and paralegals with excellent
9 credentials and experience. Any loss in compensation is even more significant
10 because Getman & Sweeney is a relatively small firm, consisting of only six
11 attorneys. Sweeney Decl. ¶ 29. *Boyd v. Bank of Am. Corp.*, 13 Civ. 0561-DOC,
12 2014 WL 6473804, at *10 (C.D. Cal. Nov. 18, 2014) (“Firms of this size face even
13 greater risks in litigating large class actions with no guarantee of payment.”)

14 One-third fee recovery is reasonable because all of the Class Members,
15 whether opt-in Plaintiff or arbitration claimant, agreed to it when they joined the
16 case and reaffirmed that agreement by signing their individual settlement
17 agreements. Thus the unanimous positive reaction from the entire class favors
18 approval. *Ambrosino v. Home Depot U.S.A, Inc.*, 11 Civ. 1319 L MDD, 2014 WL
19 3924609, at *2 (S.D. Cal. Aug. 11, 2014); *Banales v. Autoclaims Direct, Inc.*, 3:11
20 Civ. 02914, Doc. 63, p. 5(Dec. 20, 2012) (“the Court notes that each Plaintiff was
21 involved in the settlement process, and each has reviewed and agreed to the
22 settlement terms.”)

23 The agreed-upon fees are reasonable because Plaintiffs’ Counsel’s efforts
24 produced benefits beyond the monetary recovery. As a result of the litigation, Swift
25 no longer classifies its CSRs as exempt employees. Class Members that continue to
26 work for Swift as CSRs will benefit because they will now receive overtime wages
27 for overtime work. *Boyd v. Bank of Am. Corp.*, 13 Civ. 0561-DOC, 2014 WL
28 6473804, at *9 (C.D. Cal. Nov. 18, 2014) (finding that reclassification as non-

1 exempt employees is a non-monetary benefit). Moreover, CSRs who are not part of
2 this class also will benefit as will society from achieving the goals of the FLSA. 29
3 U.S.C. § 202.

4 Plaintiffs' Counsel's lodestar establishes that fees of one-third of the
5 settlement fund are reasonable. The lodestar is the reasonable hourly rate for the
6 work performed multiplied by the number of hours reasonably expended on the
7 litigation. *Costa v. Commissioner of Social Sec. Admin.*, 690 F.3d 1132, 1136 (9th
8 Cir. 2012). Counsel's lodestar in this case is \$832,284. It is calculated based on
9 Counsel's hourly rates ranging from \$85 for clerical work to \$625 for Dan Getman,
10 an attorney with more than 25 years litigating FLSA claims. Sweeney Decl. ¶ 30.
11 Such rates have been approved as reasonable in this District in wage-and-hour case.
12 *Boyd v. Bank of Am. Corp.*, 13 Civ. 0561-DOC, 2014 WL 6473804, at *11 (C.D.
13 Cal. Nov. 18, 2014) (finding \$600 per hour for partner who graduated from law
14 school in 2000; \$500 for an associate who graduated in 2002; \$450 per hour for an
15 associate who graduated in 2007, \$350 per hour for 2012 law school graduate; and
16 \$150 per hour for paralegals reasonable in wage and hour case); *Elliott v. Rolling*
17 *Frito-Lay Sales, LP*, 11 Civ. 01730 DOC, 2014 WL 2761316, at *10 (C.D. Cal.
18 June 12, 2014) (finding hourly rates between \$700 and \$500 reasonable in a wage-
19 and-hour case). Moreover, Getman & Sweeney's billing rates are regularly approved
20 by federal district courts throughout the country. Sweeney Decl. ¶ 31.

21 The amount of work Counsel expended litigating these claims is reasonable
22 too. To date Plaintiffs' Counsel spent a total of 1,051 attorney hours and 2,422
23 paralegal and clerical hours bringing the action to a successful conclusion, and
24 additional work will be required to carry out the settlement process. As discussed
25 above, this matter involved many complex factual and legal issues under both state
26 and federal laws, litigation of a federal court FLSA collective action and 33
27 individual arbitrations, and sophisticated settlement negotiations. All of Counsel's
28 work was reasonably expended in bringing this case to a successful conclusion.

1 Sweeney Decl. ¶ 32. *Costa v. Commissioner of Social Sec. Admin.*, 690 F.3d 1132,
2 1136 (9th Cir. 2012) (courts should defer to the “winning lawyer’s professional
3 judgment as to how much time he was required to spend on the case.”) *citing*
4 *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008).

5 Fees of one third of the settlement fund, \$1,195,750, represent 1.43% of
6 Plaintiffs’ Counsel’s lodestar of \$834,923. Courts regularly approve lodestar
7 multipliers to reflect the risks in contingency cases. Such an enhancement “mirrors
8 the established practice in the private legal market of rewarding attorneys for taking
9 the risk of nonpayment by paying them a premium over their normal hourly rates for
10 winning contingency cases.” *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051
11 (9th Cir. 2002). For these reasons, courts routinely enhance lodestar amounts based
12 on multipliers ranging from 2 to 4 or even higher. *See Id.* (approving multiplier of
13 3.65); *Boyd v. Bank of Am. Corp.*, 13 Civ. 0561-DOC, 2014 WL 6473804, at *11
14 (C.D. Cal. Nov. 18, 2014) (approving multiplier of 2.58); *Van Vranken v. Atl.*
15 *Richfield Co.*, 901 F.Supp. 294, 298 (N.D. Cal. 1995) (noting that multipliers in the
16 3-4 range are common in class action lodestar awards); *Craft v. Cnty. of San*
17 *Bernardino*, 624 F.Supp.2d 1113, 1125 (C.D. Cal. 2008) (awarding multiplier of 5.2
18 and collecting cases with cross-check multipliers ranging from 4.5 to 19.6).

19 Accordingly, the Court should approve the agreed upon fees of one-third the
20 settlement fund as reasonable.

21 C. Costs

22 The Settlement’s provision for reimbursement of costs is appropriate.
23 “Reasonable costs and expenses incurred by an attorney who creates or preserves a
24 common fund are reimbursed proportionately by those class members who benefit
25 by the settlement.” *In re Media Vision Tech Sec. Litigs.*, 913 F. Supp. at 1362, 1366
26 (N.D. Cal. 1996) (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92
27 (1970)). To be reimbursable, requested costs must be relevant to the litigation and
28 reasonable in amount. *In re Media Vision Tech Sec. Litigs.*, 913 F. Supp at 1366; *cf.*

1 *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177-78 (S.D. Cal. 2007)
2 (holding that costs such as filing fees, photocopy costs, travel expenses, postage,
3 telephone and fax costs, computerized legal research fees, and mediation expenses
4 are relevant and necessary expenses in class action litigation).

5 Plaintiffs' Counsel has already incurred \$31,916 in expenses such as filing
6 fees, service of the complaint, copies, deposition transcripts, travel, FOIA requests,
7 postage, and mediation fees and there will be additional costs—already more than
8 the \$31,352.43 recovered under the settlement agreements. All of these costs were
9 necessary to the prosecution of the litigation and were incurred reasonably, and
10 Counsel anticipates incurring additional costs related to the case. Sweeney Decl. ¶
11 33. Each settlement agreement provided the specific share the Plaintiff was
12 responsible for, and all of the Plaintiffs approved of the counsel's costs.
13 Accordingly, these costs are reimbursable. *Ambrosino v. Home Depot U.S.A, Inc.*,
14 11 Civ. 1319 L MDD, 2014 WL 3924609, at *2 (S.D. Cal. Aug. 11, 2014).

15 **D. Dismissal of the Rule 23 Class Claims Without Prejudice Is Proper**

16 Plaintiffs also move to dismiss the Rule 23 California class claims without
17 prejudice. Federal Rule of Civil Procedure 23(e) states that the “claims, issues, or
18 defenses of a certified class may be [] voluntarily dismissed [] only with the court’s
19 approval.” Fed. R. Civ. P. 23(e). Approval is also necessary to dismiss a class before
20 the class is certified. *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408
21 (9th Cir. 1989); *Luo v. Zynga Inc.*, 13 Civ. 00186 NC, 2014 WL 457742, at *3 (N.D.
22 Cal. Jan. 31, 2014). The Court considers whether the “proposed settlement and
23 dismissal are collusive or prejudicial to absent putative class members.” *Luo v.*
24 *Zynga Inc.*, 13 Civ. 00186 NC, 2014 WL 457742, at *3 (N.D. Cal. Jan. 31, 2014).
25 For that evaluation, the

26 court should inquire into possible prejudice from (1) class
27 members’ possible reliance on the filing of the action if they are
28 likely to know of it either because of publicity or other

1 circumstances, (2) lack of adequate time for class members to
2 file other actions, because of a rapidly approaching statute of
3 limitations, (3) any settlement or concession of class interests
4 made by the class representative or counsel in order to further
5 their own interests.

6 *Luo v. Zynga Inc.*, 13 Civ. 00186 NC, 2014 WL 457742, at *3 (N.D. Cal. Jan. 31,
7 2014) *quoting*, *Diaz*, 876 F.2d at 1408 (citations omitted).

8 As an initial matter, Plaintiffs do not believe the California class will meet the
9 numerosity requirement. Pursuant to the Court’s order regarding FLSA notice, Swift
10 identified 13 potential Class Members including the Named Plaintiff who worked in
11 California during the applicable statute of limitations. At least seven of the 13
12 signed arbitration agreements and would not be eligible to be class members.
13 Sweeney Decl. ¶ 34. Therefore, at most six potential class members exist including
14 the Named Plaintiff. Absent extraordinary circumstance, courts typically find that
15 such a number does not satisfy numerosity. *Gomez v. Rossi Concrete, Inc.*, 270
16 F.R.D. 579, 588 (S.D. Cal. 2010) (“classes of fifteen or less are too small”);
17 *McCowen v. Trimac Transp. Services (W.), Inc.*, 14 Civ. 02694-RS, 2015 WL
18 9311914, at *4 (N.D. Cal. Dec. 23, 2015) (less than 21 class members is too small).
19 Furthermore, each of the potential class members received notice of the opportunity
20 to bring their claims in this action. Although some responded but elected not to join
21 the action, only three did not respond at all. Sweeney Decl. ¶ 35.

22 Turning to the factors in *Diaz*, dismissing the California state class claims
23 here does not prejudice the potential class members. First, there is no evidence that
24 the California class members relied on the Court in certifying the California claims.
25 Ten of the 13 potential class members contacted counsel and considered bringing
26 claims. The three others did not seek to join the case or even contact Plaintiffs’
27 Counsel despite notice of the opportunity to join the litigation. Sweeney Decl. ¶ 36.
28 If those three received notice, they would not have relied on being passive plaintiffs

1 because the Notice did not state that their California claims may be protected under
2 a potential Rule 23 California action. Instead, it clearly stated that in order to
3 preserve their rights they had to opt-in to the case. Non-responding class members
4 were also mailed a postcard that stated:

5 This is a reminder that if you want to participate in the lawsuit,
6 you must return your completed Consent to Sue form no later
7 than 1/20/15

8 Thus, if the three non-responding potential class members received notice, they
9 would not have relied on the action to assert their passive class claims. If they did
10 not receive notice, it is unlikely they would have relied on the action because there
11 was no significant media publicity in this case. Sweeney Decl. ¶¶ 37 - 39. *Luo v.*
12 *Zynga Inc.*, 13 Civ. 00186 NC, 2014 WL 457742, at *4 (N.D. Cal. Jan. 31, 2014)
13 (“The lack of publicity makes it unlikely that similarly situated class members knew
14 of the present lawsuit and relied on it for vindication of their own rights.”)

15 Nor are the three non-responding potential California class members
16 prejudiced by a rapidly approaching statute of limitations. The California statute of
17 limitations is tolled from the time Plaintiffs commenced the case. *Luo v. Zynga Inc.*,
18 13 Civ. 00186 NC, 2014 WL 457742, at *4 (N.D. Cal. Jan. 31, 2014); *Dunn v.*
19 *Teachers Ins. & Annuity Assn. of Am.*, 13 Civ. 05456-HSG, 2016 WL 153266, at *7
20 (N.D. Cal. Jan. 13, 2016). If the three relied on this action and decide to bring their
21 claims, they may seek the benefit of the tolling period.

22 Finally, the claims of the three remaining members are not compromised
23 because Plaintiffs did not settle their claims and the class claims are dismissed
24 without prejudice. *Id.* Plaintiffs’ counsel did not agree to waive their claims in the
25 settlement. Those three class members retain their rights to pursue their California
26 wage and hour claims.

27 Thus, the Court should dismiss the Rule 23 class without prejudice.
28

1 **IV. CONCLUSION**

2 Plaintiffs respectfully request that the Court approve the agreed upon
3 settlement, including the allocations to the Plaintiffs, the service awards, and the
4 attorneys' fees and costs. Plaintiffs also respectfully request that the Court dismiss
5 the Rule 23 class because numerosity is not met and there is no prejudice to the
6 class.

7
8 Dated: March 31, 2016
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10 Respectfully Submitted,

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