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Superior Court of California
County of Los Angeles

MAR 11 2015

Sherri R. Carter, Executive Officer/Clerk
By: Nancy Navarro, Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

JUANA DIAZ, individually and on behalf of all
others similarly situated,

Plaintiff,

v.

FOREVER 21 LOGISTICS, LLC, a Delaware
corporation; and Doe One through and
including Doe Fifty,

Defendants.

Case No.: BC510004

ORDER GRANTING
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT

Date: March 11, 2015
Time: 1:45 p.m.

I. BACKGROUND

This is a wage and hour class action and Fair Labor Standards Act ("FLSA") collective action filed by Plaintiff Juana Diaz, on behalf of herself and similarly situated nonexempt, hourly employees of Defendant Forever 21 Logistics, LLC ("Defendant").

The operative complaint—the Second Amended Complaint filed on 11/7/14—asserts the following causes of action: (1) Labor Code §§510 and 1194, 29 U.S.C. §201 (failure to pay minimum wage and overtime); (2) Labor Code §§226.7 and 512 (failure to provide meal periods and rest periods); (3) Labor Code §226(a), (e) (failure to provide paystubs); (4) Labor Code §§201, 202, and 203 (failure to pay final wages timely); (5) Labor Code §2802 (failure to

1 indemnify or reimburse necessary expenditures); (6) Business & Professions Code §17200, *et*
2 *seq.*; and (7) Labor Code §2699 (civil penalties).

3 Following mediation, the parties entered into a *Settlement Agreement and Joint*
4 *Stipulation* (“settlement agreement”).

5 Now before the Court is the motion for preliminary approval of the settlement
6 agreement.

7 **II. DISCUSSION**

8 **A. SETTLEMENT CLASS DEFINITION**

9 The proposed settlement class is defined as: “[A]ll former and current nonexempt,
10 hourly employees who worked for Forever 21 Logistics, LLC at its Distribution Centers or
11 warehouses in California during the period from May 24, 2009 to the date of preliminary
12 approval who did not waive all wage and hour claims on their behalf in the Class Action
13 Settlement entitled *Lozano et al. v. Forever 21 Logistics, LLC*, Case No. BC413330.” See
14 Settlement Agreement, ¶2. The class “explicitly includes those individuals who are parties in
15 *Aguilar, Silveria, et al. v. Forever 21 Logistics, LLC*, JAMS Reference No. 1220048263,
16 currently pending before JAMS.” *Id.*
17

18 **B. TERMS OF SETTLEMENT AGREEMENT**

19 A copy of the settlement agreement is attached to the Ricasa Declaration as Exhibit 2.
20 Its essential terms are as follows:

- 21 • The gross settlement amount is **\$550,000**.¹ ¶22.
- 22 • The net settlement amount (approximately **\$303,039**) is the gross settlement amount
23 minus the following:
24

25

¹ This amount is non-reversionary. See Motion for Preliminary Approval, 1:9-10.

- Up to \$183,333 for attorney fees;
 - Attorney costs (estimated to be \$7,000);
 - Up to \$5,000 for an enhancement award to the sole class representative;
 - Claims administration costs (estimated to be \$21,300);
 - \$15,000 for PAGA penalties payable to the Labor and Workforce Development Agency; and
 - Employer payroll taxes (estimated to be \$15,328). ¶22(a)-(f).
- To receive a settlement share, a class member must submit a timely and valid claim form.² ¶28(a).
 - Each participating class member's settlement share will be based on his/her number of workweeks in relation to the number of workweeks for the entire class. ¶28(b)(i)-(ii).
 - Unclaimed funds will be redistributed to participating class members. ¶28(b)(ii).
 - For tax purposes, payments to participating class members will be allocated 35% to wages (to be reported on Form W-2) and 65% to interest and penalties (to be reported on Form 1099). ¶28(c).
 - Checks will be valid for 180 days from the date of mailing. ¶28(d).
 - Funds attributable to uncashed checks will be sent to the California Department of Industrial Relations – Industrial Relations Unpaid Wage Fund as unclaimed funds. ¶28(d).

² Defendant specifically bargained for this provision. See Settlement Agreement, ¶28(a) (“Defendant agrees to pay only those Class Members who submit timely and valid Claim Forms”); see also Motion for Preliminary Approval, 11:20-22 (stating that Defendant “insisted on a claims-made process”). In addition, Plaintiffs justify the claim form requirement by arguing that: (1) only those class members who believed they had been wronged would receive settlement shares; (2) it gives class members an opportunity to receive settlement shares that approximate their average potential damages; (3) it does not benefit Defendant because the settlement is non-reversionary; and (4) it satisfies the opt-in requirement for FLSA collective actions. See Motion for Preliminary Approval, 11:17-12:17.

- The claims administrator will be Phoenix Settlement Administrators. ¶13.
- The named Plaintiff and participating class members will release certain claims against Defendant. (See further discussion below)

C. SETTLEMENT STANDARDS AND PROCEDURE

California Rules of Court, rule 3.769(a) provides: “A settlement or compromise of an entire class action, or of a cause of action in a class action, or as to a party, requires the approval of the court after hearing.” “Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion.” See CRC rule 3.769(c).

“In a class action lawsuit, the court undertakes the responsibility to assess fairness in order to prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action. The purpose of the requirement [of court review] is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties.” See Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America (2006) 141 Cal. App.4th 46, 60 (internal quotation marks omitted); see also Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 245 (Court needs to “scrutinize the proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned”) (internal quotation marks omitted).

“The burden is on the proponent of the settlement to show that it is fair and reasonable. However ‘a presumption of fairness exists where: (1) the settlement is reached through arm's-

1 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court
2 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
3 objectors is small.” See Wershba at 245 (citing Dunk v. Ford Motor Co. (1996) 48
4 Cal.App.4th 1794, 1802. Notwithstanding an initial presumption of fairness, “the court should
5 not give rubber-stamp approval.” See Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th
6 116, 130. “Rather, to protect the interests of absent class members, the court must
7 independently and objectively analyze the evidence and circumstances before it in order to
8 determine whether the settlement is in the best interests of those whose claims will be
9 extinguished.” *Id.* In that determination, the court should consider factors such as “the strength
10 of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk
11 of maintaining class action status through trial, the amount offered in settlement, the extent of
12 discovery completed and stage of the proceedings, the experience and views of counsel, the
13 presence of a governmental participant, and the reaction of the class members to the proposed
14 settlement.” *Id.* at 128. “Th[is] list of factors is not exclusive and the court is free to engage in
15 a balancing and weighing of factors depending on the circumstances of each case.” Wershba at
16 245.
17

18 “A settlement need not obtain 100 percent of the damages sought in order to be fair and
19 reasonable. Compromise is inherent and necessary in the settlement process. Thus, even if ‘the
20 relief afforded by the proposed settlement is substantially narrower than it would be if the suits
21 were to be successfully litigated,’ this is no bar to a class settlement because ‘the public interest
22 may indeed be served by a voluntary settlement in which each side gives ground in the interest
23 of avoiding litigation.’” *Id.* at 250.
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1 **D. ANALYSIS OF SETTLEMENT AGREEMENT**

2 **1. Does a presumption of fairness exist?**

- 3 a. Was the settlement reached through arm's-length bargaining? Yes. The
4 settlement agreement is the product of a full-day mediation with the Hon.
5 Alexander H. Williams III. See Ricasa Declaration, ¶18.
- 6 b. Were investigation and discovery sufficient to allow counsel and the court to act
7 intelligently? Yes. Prior to settling, class counsel: researched facts and law;
8 reviewed class data (both independently collected by class counsel and
9 voluntarily provided by Defendant); and engaged in "numerous" discussions with
10 Defendant's counsel. Id., ¶¶10-15.
- 11 c. Is counsel experienced in similar litigation? Yes. Class counsel is experienced in
12 class action litigation, including wage and hour class actions. Id., ¶¶4-5; see also
13 Kim Declaration, ¶¶3-7.
- 14 d. What percentage of the class has objected? This cannot be determined until the
15 fairness hearing. See Weil & Brown, Cal. Practice Guide: Civil Procedure
16 Before Trial (The Rutter Group 2014) ¶ 14:139.18, ("Should the court receive
17 objections to the proposed settlement, it will consider and either sustain or
18 overrule them at the fairness hearing.").

19
20 CONCLUSION: The settlement is entitled to a presumption of fairness.

21 **2. Is the settlement fair, adequate, and reasonable?**

- 22 a. Strength of Plaintiffs' case. "The most important factor is the strength of the case
23 for plaintiffs on the merits, balanced against the amount offered in settlement."
24 See Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 130. Here,
25 class counsel calculated the maximum potential damages on their primary claims

1 to be approximately **\$805,546.77** (\$775,282.48 for the unpaid overtime claim +
2 \$30,264.29 for the meal and rest period claim). See Ricasa Declaration, ¶¶20-21,
3 26. Notwithstanding such calculation, the \$550,000 gross settlement amount
4 appears to be a fair, adequate, and reasonable compromise of Plaintiffs' claims in
5 light of Defendants' potential defenses. For example, as to the overtime claim,
6 Defendant argues that: (1) bonuses were discretionary and thus, did not have to
7 be included in the regular rate of pay; (2) there was no written bonus plan; (3) not
8 all employees received bonuses; and (4) for employees who received bonuses, the
9 amounts varied each time. See Motion for Preliminary Approval, 7:7-14. As to
10 the meal and rest period claim, Defendant contends that: (1) it complied with
11 Brinker v. Superior Court (2012) 53 Cal.4th 1004 because employees were given
12 the opportunity to take (and "often" did take) meal and rest periods; (2) it
13 maintained a legally compliant meal and rest period policy; (3) class members
14 took meal and rest periods according to predetermined schedules; (4) class
15 members' time records reflect that they routinely took meal and rest periods; (5)
16 class members will confirm that they were provided the opportunity to timely
17 take all of their meal and rest periods; and (6) in the rare event that an employee
18 did not timely take a meal period, Defendant automatically paid the one-hour
19 premium to that employee. *Id.*, 7:20-8:3.

- 21 b. Risk, expense, complexity and likely duration of further litigation. Given the
22 nature of the class claims, the case is likely to be expensive and lengthy to try.
23 Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong
24 the litigation as well as any recovery by the class members.
25

- 1 c. Risk of maintaining class action status through trial. Even if a class is certified,
2 there is always a risk of decertification. See Weinstat v. Dentsply Intern., Inc.
3 (2010) 180 Cal.App.4th 1213, 1226 (“Our Supreme Court has recognized that
4 trial courts should retain some flexibility in conducting class actions, which
5 means, under suitable circumstances, entertaining successive motions on
6 certification if the court subsequently discovers that the propriety of a class action
7 is not appropriate.”).
- 8 d. Amount offered in settlement. As indicated above, the gross settlement amount
9 is **\$550,000**. Assuming that the Court approves all of the requested deductions,
10 approximately **\$303,039³** will be available for automatic distribution to
11 participating class members. Assuming full participation, the average settlement
12 share will be approximately **\$101** ($\$303,039 \div 3,000$ class members).
- 13 e. Extent of discovery completed and stage of the proceedings. As discussed above,
14 at the time of the settlement, Plaintiffs had conducted extensive discovery.
- 15 f. Experience and views of counsel. The settlement was negotiated and endorsed
16 by class counsel who, as indicated above, is experienced in class action litigation,
17 including wage and hour cases.
- 18 g. Presence of a governmental participant. This factor is not applicable here.
- 19 h. Reaction of the class members to the proposed settlement. The class members’
20 reactions will not be known until they receive notice and are afforded an
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25 ³ \$550,000 (gross settlement amount) minus \$183,333 (attorney fees), \$7,000 (attorney costs),
\$5,000 (enhancement award), \$21,300 (claims administration costs), \$15,000 (PAGA penalties payable to the
LWDA), and \$15,328 (estimated employer payroll taxes).

1 opportunity to opt out or object. This factor becomes relevant during the fairness
2 hearing.

3 CONCLUSION: The settlement can be preliminarily deemed “fair, adequate, and
4 reasonable.”

5 **3. Scope of release**

6 The named Plaintiff and participating class members will release Defendant and other
7 specified releasees “from any and all of the following claims with respect to acts and omissions
8 during the time period from May 24, 2009 through the date of final approval of the Settlement:

9 (a) failure to pay all wages owed, including overtime wages . . . ; (b) failure to pay all wages
10 owed, including overtime wages to the extent permissible under the federal [FLSA] . . . ; (c)
11 failure to provide compliant meal and rest periods and failure to pay wage premiums for alleged
12 meal and rest break violations . . . ; (d) failure to provide accurate wage statements . . . ; (e)
13 waiting-time penalties . . . ; (f) unfair business practices and/or unfair competition . . . ; (g) failure
14 to reimburse for business expenses . . . ; (h) civil penalties pursuant to [PAGA] . . . that were or
15 could have been based on the facts and legal theories raised in the Second Amended Complaint;
16 (i) any other claims or penalties under the wage and hour laws pleaded in the Second Amended
17 Complaint or that could have been pleaded based on the allegations contained in the Second
18 Amended Complaint; and (j) all damages, penalties, interest and other amounts recoverable
19 pursuant to (a)-(i) to the extent permissible under the California Labor Code, California
20 Industrial Welfare Commission Orders; the California Unfair Competition Law, and the FLSA
21 (excluding FLSA claims, only, by those Class Members who do not submit Claim Forms
22 pursuant to the Settlement) (collectively, ‘Released Claims’).” See Settlement Agreement, ¶42.

23
24 The named Plaintiff will also provide a general release. Id., ¶25.
25

1 The class release appears to be proper. It is limited to claims arising out of the
2 allegations in the operative complaint. Further, the release of FLSA claims is limited to class
3 members who take the affirmative step of submitting claim forms.

4 The named Plaintiff's general release also appears to be proper. The named Plaintiff
5 agreed to it knowingly and with the approval of class counsel. Further, Defendant specifically
6 negotiated the general release in exchange for the enhancement award. Id., ¶25.

7 **4. May conditional class certification be granted?**

8 a. Standards

9 A detailed analysis of the elements required for class certification is not required, but it
10 is advisable to review each element when a class is being conditionally certified. Amchem
11 Products, Inc. v. Winsor (1997) 521 U.S. 591, 620, 622-627. The trial court can appropriately
12 utilize a different standard to determine the propriety of a settlement class as opposed to a
13 litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement
14 cases. Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1807, FN 19. Finally, the Court is
15 under no "ironclad requirement" to conduct an evidentiary hearing to consider whether the
16 prerequisites for class certification have been satisfied. Wershba at 240.

17 b. Analysis

- 18
- 19 i. Numerosity. There are approximately 3,000 class members. See Ricasa
20 Declaration, ¶20. Thus, numerosity has been sufficiently established. See
21 Rose v. City of Hayward (1981) 126 Cal.App.3d 926, 934 (stating that
22 "[n]o set number is required as a matter of law for the maintenance of a
23 class action" and citing examples wherein classes of as little as 10
24
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1 [Bowles v. Superior Court (1955) 44 Cal.2d 574] and 28 [Hebbard v.
2 Colgrove (1972) 28 Cal.App.3d 1017] were upheld).

- 3 ii. Ascertainability. The class is defined above. The class definition is
4 “precise, objective and presently ascertainable.” See Sevidal v. Target
5 Corp. (2010) 189 Cal.App.4th 905, 919. Class members are identifiable
6 from Defendant’s records.
- 7 iii. Community of interest. “The community of interest requirement involves
8 three factors: ‘(1) predominant common questions of law or fact; (2) class
9 representatives with claims or defenses typical of the class; and (3) class
10 representatives who can adequately represent the class.’” Linder v.
11 Thrifty Oil Co. (2000) 23 Cal.4th 429, 435. First, the class members
12 share common questions of law and fact regarding Defendant’s wage and
13 hour policies and practices. Second, the named Plaintiff’s claims are
14 typical of the class in that she worked as a nonexempt, hourly employee
15 for Defendant during the class period, and was allegedly subjected to the
16 same unlawful policies and practices. Lastly, the named Plaintiff can
17 adequately represent the class because her interests in this action appear
18 to be coextensive with the interests of the class.
- 19
20 iv. Adequacy of class counsel. As indicated above, class counsel has shown
21 experience in class action litigation.
- 22 v. Superiority. Given the relatively small size of the individual claims, a
23 class action appears to be superior to separate actions by the class
24 members.
25

1 CONCLUSION: The class may be conditionally certified since the prerequisites of class
2 certification have been satisfied.

3 5. **Is the notice proper?**

4 a. Method of class notice.

5 Notice will be by direct mail. Within 30 days of preliminary approval, Defendant will
6 provide a class list to the claims administrator. See Settlement Agreement, ¶30. Within 50 days
7 of preliminary approval, the claims administrator will send notice packets (consisting of English
8 and Spanish versions of the notice and claim form) to all class members. Id., ¶29. In the event
9 of returned or non-deliverable notice packets, the claims administrator will use reasonable
10 efforts to locate class members and re-send notice packets. Id., ¶30. The claims administrator
11 will also send English and Spanish postcard reminders within 45 days of the initial mailing of
12 notice packets. Id., ¶31. The proposed method of class notice appears to provide the best
13 possible means for giving actual notice to the putative class members.
14

15 b. Content of class notice.

16 The proposed class notice is attached to the settlement agreement as Exhibit A. Such
17 notice appears to be acceptable. It includes information such as: a summary of the litigation; the
18 nature of the settlement; the terms of the settlement agreement; all of the deductions to be made
19 from the gross settlement amount (i.e., attorney fees and costs, the enhancement award, claims
20 administration costs, PAGA penalties payable to the LWDA, and estimated employer payroll
21 taxes); the procedures and deadlines for participating in, opting out of, or objecting to, the
22 settlement; the consequences of participating in, opting out of, or objecting to, the settlement;
23 and the date, time, and place of the final approval hearing. It also states that “[t]he estimated
24 share [that an individual class member] will receive under the Settlement is preprinted on
25

1 [his/her] customized Claim Form accompanying this Notice.”⁴ See Notice, §II.B (emphasis
2 in original).

3 c. Cost of class notice.

4 As indicated above, claims administration costs are currently estimated to be \$21,300.
5 See Settlement Agreement, ¶27. Prior to the time of the final fairness hearing, the claims
6 administrator must submit a declaration attesting to the total costs incurred and anticipated to be
7 incurred to finalize the settlement for approval by the Court.

8
9 **6. Attorney fees and costs**

10 CRC rule 3.769(b) states: “Any agreement, express or implied, that has been entered into
11 with respect to the payment of attorney fees or the submission of an application for the approval
12 of attorney fees must be set forth in full in any application for approval of the dismissal or
13 settlement of an action that has been certified as a class action.”

14 Ultimately, the award of attorney fees is made by the court at the fairness hearing, using
15 the lodestar method with a multiplier, if appropriate. PLCM Group, Inc. v. Drexler (2000) 22
16 Cal.4th 1084, 1095-1096; Ramos v. Countrywide Home Loans, Inc. (2000) 82 Cal.App.4th 615,
17 625-626; Ketchum III v. Moses (2000) 24 Cal.4th 1122, 1132-1136. Despite any agreement by
18 the parties to the contrary, “the court ha[s] an independent right and responsibility to review the
19 attorney fee provision of the settlement agreement and award only so much as it determined
20 reasonable.” Garabedian v. Los Angeles Cellular Telephone Company (2004) 118 Cal.App.4th
21 123, 128.

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25 ⁴ The parties need to ensure that this will be done. The sample claim form attached as Exhibit B to the
settlement agreement reflects the employee’s start and end dates and total number of workweeks only.

1 The question of class counsel's entitlement to up to \$183,333⁵ in attorney fees will be
2 addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees.
3 Class counsel must provide the court with billing information so that it can properly apply the
4 lodestar method, and must indicate what multiplier (if applicable) is being sought.

5 Class counsel should also be prepared to justify the costs sought by detailing how they
6 were incurred.

7 **7. Enhancement Award to Class Representatives**

8 The named Plaintiff requests up to \$5,000 as an enhancement award. See Settlement
9 Agreement, ¶25. In connection with the final fairness hearing, the named Plaintiff must submit
10 a declaration attesting to why she should be entitled to an enhancement award in the proposed
11 amount. The named Plaintiff must explain why she "should be compensated for the expense or
12 risk [s]he has incurred in conferring a benefit on other members of the class." See Clark v.
13 American Residential Services LLC (2009) 175 Cal.App.4th 785, 806. Trial courts should not
14 sanction enhancement awards of thousands of dollars with "nothing more than *pro forma* claims
15 as to 'countless' hours expended, 'potential stigma' and 'potential risk.' Significantly more
16 specificity, in the form of quantification of time and effort expended on the litigation, and in the
17 form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is
18 required in order for the trial court to conclude that an enhancement was 'necessary to induce
19 [the named plaintiff] to participate in the suit" Id. at 806-807 (italics and ellipsis in
20 original).

21
22 The Court will decide the issue of the enhancement award at the time of final approval.

23 ///
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25 ⁵ No information has been provided regarding the fee-splitting agreement and the named Plaintiff's written consent thereto.

1 **III. CONCLUSION AND ORDER**

2 **A. TENTATIVE RULING**

3 Contingent upon class counsel's disclosure of the fee-splitting agreement and the named
4 Plaintiff's written consent thereto, the Court rules as follows:

- 5 (1) Grant preliminary approval of the settlement as fair, adequate, and reasonable;
6 (2) Grant conditional class certification;
7 (3) Appoint Juana Diaz as class representative;
8 (4) Appoint the Law Office of Jonathan Ricasa and Briana Kim, PC as class counsel;
9 (5) Appoint Phoenix Settlement Administrators as claims administrator;
10 (6) Approve the proposed notice plan; and
11 (7) Approve the proposed schedule of settlement proceedings.

12
13 **B. PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS**

- 14 • Preliminary approval hearing: March 11, 2015
15 • Deadline for Defendant to provide class list to claims administrator: April 10, 2015 (30
16 days following preliminary approval⁶)
17 • Deadline for claims administrator to mail notices: April 30, 2015 (50 days following
18 preliminary approval⁷)
19 • Deadline for class members to submit a claim form: July 29, 2015 (90 days following
20 mailing of notices⁸)
21 • Deadline for class members to opt out: July 29, 2015 (90 days following mailing of
22 notices⁹)
23

24
25 ⁶ See Settlement Agreement, ¶30.

⁷ See Settlement Agreement, ¶29.

⁸ See Settlement Agreement, ¶32.

- 1 • Deadline for class members to object: June 15, 2015 (45 days following mailing of
- 2 notices¹⁰)
- 3 • Deadline for class counsel to file motion for final approval: August 28, 2015 (16 court
- 4 days prior to final fairness hearing)
- 5 • Final fairness hearing: September 22, 2015 *at 9:00 am in Dept. 307.*

6
7 Dated: MAR 14 2015

Ann M. Doogue
ANN M. DOOGUE
Judge of the Superior Court

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25 ⁹ See Settlement Agreement, ¶39.

¹⁰ See Settlement Agreement, ¶35. The 45th day falls on 6/14/15, a Sunday.