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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

GONZALO ESTRADA; AURELIA
MARTINEZ, on behalf of themselves and all
individuals similarly situated,

Plaintiffs,

v.

BASHAS', INC.,

Defendant

Case No. CIV 02-0591- DJH

**MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS
SETTLEMENT, FOR APPROVAL OF
CLASS NOTICE AND NOTICE
PLAN, AND FOR SETTING OF
FINAL APPROVAL SCHEDULE**

HEARING REQUESTED

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1 **I. INTRODUCTION**

2 This employment discrimination class action, filed in April 2002, alleges that
3 defendant Bashas' Inc. violated Title VII and Section 1981 when it used lower pay scales to
4 pay its Hispanic Food City hourly workers from 1998 to 2007. (ECF No. 1 ¶¶ 4, 16, 28.) In
5 May 2013, after many years of litigation, this Court granted certification of a class of over
6 12,000 Hispanic Food City workers challenging the discriminatory pay policy. *Parra v.*
7 *Bashas' Inc. (Bashas' III)*, 291 F.R.D. 360, 403 (D. Ariz. 2013).¹

8 The parties have now reached a settlement of the case. Plaintiffs submit the proposed
9 settlement for this Court's preliminary approval as required by Federal Rule of Civil
10 Procedure Rule 23(e).² Plaintiffs further request by this motion that the Court approve the
11 class notice and notice plan, and set a schedule for the final approval hearing.

12 **II. CASE BACKGROUND**

13 **A. Relevant Factual Allegations**

14 Defendant operates approximately 130 grocery stores in Arizona under three trade
15 names. "Bashas'" grocery stores provide a conventional supermarket format. "A.J.'s Fine
16 Foods" are gourmet stores with an extensive wine collection and specialty goods and
17 services. (ECF No. 301 at 3.) The "Food City" stores cater to Hispanic customers.

18 Although each store format is marketed toward a different audience, Plaintiffs allege
19 that the hourly job positions available at each location are virtually identical. For example,
20 each store, regardless of format, has grocery clerks, bakery clerks, produce clerks, and meat
21 cutters. Moreover, "the job requirements for the employees at the stores are practically
22 indistinguishable," whether the employee works at A.J.'s Fine Foods, Bashas', or Food City.
23 *Parra v. Bashas' Inc. (Bashas' II)*, 536 F.3d 975, 977 (9th Cir. 2008).

24 _____
25 ¹ In 2014, the Court re-named the case, originally known as *Parra v. Bashas' Inc.*, to reflect
the identity of the lead named Plaintiff, Gonzalo Estrada. (ECF No. 317 at 1.)

26 ² Plaintiffs have requested a hearing on the motion for preliminary approval because the case
27 was recently reassigned to this Court, which is not familiar with the history of the case.

1 While the jobs responsibilities are consistent across store formats, the employee
2 demographics are not. The Bashas' and A.J.'s Fine Foods stores are staffed predominantly
3 by white employees, while the Food City employees are disproportionately Hispanic. *Id.*
4 During the relevant class period, Hispanic workers comprised approximately 75 percent of
5 the hourly workforce in Food City stores, but only about 15 percent of the Bashas' and A.J.'s
6 Fine Foods hourly workforce. *Id.*

7 This case challenges a pay policy under which Food City workers were paid less than
8 workers at Bashas' and A.J.'s Fine Foods, as documented in the company's written pay
9 scales. The company president personally set, reviewed, and modified the company's
10 written pay scales every year. Each hourly job on the scales was divided into pay steps,
11 which corresponded to the number of hours worked in the job classification. There was a
12 pay rate set for each job step. Defendant used these written pay scales to set pay for its
13 hourly workers. *See Parra v. Bashas, Inc. (Bashas' I)*, 2005 WL 6182338, at *1 (D. Ariz.
14 Aug. 29, 2005). From at least 1998 until at least 2003, Bashas' used separate pay scales for
15 the three store formats. *Bashas' II*, 536 F.3d at 979.

16 The pay scale that Defendant used for Food City set *lower* wages for many of Food
17 City's predominantly Hispanic workers than for their counterparts in the same positions at
18 Bashas' and A.J.'s Fine Foods.³ *Id.* When the first Food City opened in 1994, Defendant
19 placed the Food City employees on a lower pay scale than the scale used at Bashas' stores.
20 *Bashas' I*, 2005 WL 6182338, at *2. As the Food City line expanded, Defendant converted
21 some existing Bashas' stores into Food City stores. *See id.* at *1. When such conversions
22 occurred, Defendant continued to pay the incumbent employees the Bashas' pay rates, but
23 new employees, who were primarily Hispanic, were paid at the lower Food City scale. *Id.*

24 In 2001, the employer began to raise some of the pay steps for Food City workers to
25 bring them in line with workers at the Bashas' and A.J.'s stores. *See id.*, at *2. In 2002,

26 _____
27 ³ Not every job at Food City had a lower pay scale. For example, in all formats, courtesy
28 clerks (i.e. baggers) were paid minimum wage. (ECF No. 228.)

1 additional pay rates were raised but the pay scales remained lower at Food City for numerous
2 jobs or pay steps within jobs. By 2003, the written pay scales were equalized for most, but
3 not all, jobs at Food City. *Bashas' II*, 536 F.3d at 977. For those employees whose pay rates
4 were raised, the pay scale adjustments affected only *future* paychecks, and did not address
5 past under-compensation. *Id.*

6 Despite the phased-in modification of the policy, approximately 2200 Hispanic Food
7 City employees held jobs that still were subject to the lower pay scale in 2001. In 2002, the
8 number of lower-paid Hispanic Food City workers was still more than 840. By 2003, more
9 than 750 Hispanic workers were still paid based upon lower pay rates than their counterparts
10 at Bashas'. (ECF No. 228, Exs. 1-9) (2001 - 2003 Pay Scale Differences). Those disparities
11 continued into 2004, and were not entirely eliminated until 2007.

12 The result of these pay disparities was significant. For example, in 1999, an
13 experienced (Step 4) grocery clerk at Food City was paid \$.82 less per hour than a Step 4
14 grocery clerk with the same experience at Bashas' or A.J.'s. (ECF No. 161, Ex. 12) (1999
15 Pay Scales). Over the period of a year, this amounted to a difference of \$1640 for a full-time
16 worker (assuming 2,000 hours worked per year). *See Bashas' II*, 536 F.3d at 977 ("The[]
17 hourly disparities translate to annual salary differences of around \$300 per year to almost
18 \$6,000 per year.").

19 **B. Procedural Background**

20 Plaintiff José Parra filed a charge of discrimination with the Equal Employment
21 Opportunity Commission in September 2001, on behalf of himself and all other similarly
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1 situated Hispanic Food City workers.⁴ (*See* ECF No. 1 ¶ 18.) Plaintiff Gonzalo Estrada filed
2 a class charge with the EEOC in November 2001.⁵ (*See id.*)

3 Parra and Estrada filed this class action on April 4, 2002. *Id.* Plaintiffs filed a first
4 amended complaint, adding Aurelia Martinez as a named plaintiff, on March 11, 2004.⁶
5 (ECF No. 116.) The amended complaint alleged that Defendant's pay policies and practices
6 discriminated against Hispanic Food City workers in violation of Section 1981 and Title VII
7 of the Civil Rights Act of 1964. (*Id.* ¶¶ 4, 17.) The amended complaint also alleged that
8 Food City workers were subject to working conditions that were inferior to those provided to
9 their counterparts in the other formats. (*Id.* ¶ 18.) Plaintiffs challenged these policies and
10 practices under both the disparate treatment and disparate impact theories.

11 Plaintiffs moved for class certification in September 2004. (ECF No. 159.) Plaintiffs
12 sought to certify two claims: unequal pay and disparate working conditions. In 2005, the
13 Court certified a class challenging disparate working conditions. *Bashas' I*, 2005 WL
14 6182338, at *20. The Court declined to certify the unequal pay claim, concluding that since
15 the pay scales were "now almost identical," Rule 23(a)(2) commonality was lacking among
16 class members. *Id.* at *16. Plaintiffs filed a motion for reconsideration, which the Court
17 denied on March 29, 2006. (ECF Nos. 225, 234.)

18 Plaintiffs obtained interlocutory review of the class certification order. On July 29,
19 2008, the Ninth Circuit reversed, holding that the district court had "abused its discretion in
20 failing to find commonality existed in the original class definition." *Bashas' II*, 536 F.3d at

21 _____
22 ⁴ Plaintiff José Parra was a journeyman meat cutter for Food City beginning in 1996. (ECF
23 No. 168 ¶ 3.) Parra ultimately chose not to serve as a named Plaintiff in the case.

24 ⁵ Estrada was employed from April 1999 to July 2002 in a Food City store as a deli clerk
25 and later in the meat department. (ECF No. 176 ¶ 1.) He learned in 2001 that his pay was
26 less than comparable employees at Bashas'. (*Id.* ¶ 9.)

27 ⁶ Plaintiff Aurelia Martinez was employed at Food City between July 1991 and January
28 2012, and worked as a tortilleria clerk. (*See* ECF No. 163 ¶ 2; Declaration of Martinez in
Support of Motion for Service Awards ¶ 4, filed concurrently.)

1 979. Concluding that Plaintiffs had satisfied Rule 23(a)(2), the Court of Appeals remanded
2 for “consideration of the remaining class certification factors in accordance with this
3 opinion.” *Id.* at 980.

4 The Ninth Circuit then remanded the case to this Court.⁷ However, this Court did not
5 decide the issue for several years, due to two external proceedings. First, Bashas’ filed a
6 voluntary Chapter 11 bankruptcy petition in July 2009, which resulted in an automatic stay
7 of the proceedings until August 2010. (ECF Nos. 288, 293.) Second, in December 2010, the
8 Court deferred resolution of the remanded certification motion pending the Supreme Court’s
9 decision in *Wal-Mart Stores, Inc. v. Dukes*. (ECF No. 295 at 2.)

10 The Supreme Court decided *Wal-Mart* on June 20, 2011. 131 S. Ct. 2541 (2011). At
11 this Court’s direction, the parties then filed supplemental briefs explaining the impact of the
12 *Wal-Mart* decision in September 2011. (ECF Nos. 301, 302, 303, 304.) In May 2013, the
13 Court issued an order certifying Plaintiffs’ pay claim pursuant to Rule 23(b)(3) and
14 decertifying Plaintiffs’ working conditions claim. *Bashas’ III*, 291 F.R.D. at 403. Judge
15 Broomfield wrote a thorough 103-page order concluding that the unequal pay claim could be
16 certified even under the more challenging framework set forth in *Wal-Mart*. *Id.* at 373-76.
17 The Court noted that Bashas’ could not “now distance itself from three significant
18 concessions it made earlier in this litigation”—namely, that:

19 (1) Food City Stores have a higher percentage of Hispanic employees compared to
20 Bashas’ or A.J.’s stores, (2) the pay scales at Bashas’ and A.J.’s stores were
21 higher than those at Food City during the period 1998-2000, and (3) Hispanic
employee hourly rates were lower in similar jobs.

22 *Bashas’ III*, 291 F.R.D. at 374 (internal quotation marks, citations, and alterations omitted).

23 The Court concluded that “Bashas’ wage scales, in combination with these concessions,
24 provide the ‘convincing proof of a companywide discriminatory pay . . . policy’ missing
25 from [*Wal-Mart*].” *Id.* (quoting *Wal-Mart*, 131 S. Ct. at 2556).

26 _____
27 ⁷ Bashas’ filed a petition for a writ of *certiorari* with the United States Supreme Court,
which the Court denied on January 26, 2009. (See ECF No. 276.)

1 The Court concluded that the working conditions claim could not be certified after
 2 *Wal-Mart* because (1) “in contrast to their pay claim, plaintiffs have not explained how
 3 continued class certification of the working conditions claim has ‘the capacity to generate
 4 common *answers* apt to drive the resolution of this litigation,’” *id.* at 401 (quoting *Wal-Mart*,
 5 131 S. Ct. at 2551 (internal alteration omitted)), and (2) Plaintiffs’ anecdotal evidence on this
 6 claim was insufficient to satisfy *Wal-Mart*, *id.* at 401-02. In June 2013, Bashas’ filed a
 7 motion for reconsideration, which the Court denied in April 2014. (ECF Nos. 309, 317); *see*
 8 *also Estrada v. Bashas’ Inc.*, 2014 WL 1319189, at *6 (D. Ariz. Apr. 1, 2014).

9 The certified class is defined as follows:

10 All Hispanic workers currently and formerly employed by defendant Bashas’ in an
 11 hourly position at any Food City retail store between April 4, 1998 and July 1, 2007,
 12 who have been subject to the challenged pay policies and practices. The Class does
 13 not include any member who worked for Food City for less than eight (8) hours
 during the Class Period or any person who was first hired for an hourly position at
 Food City after January 2, 2005.

14 *Id.*⁸ The court approved class notice on May 2, 2014. (ECF No. 320.)

15 **III. SETTLEMENT HISTORY AND TERMS**

16 **A. Settlement Negotiations**

17 The parties attempted to settle this case in March 2010, while the company was still in
 18 Chapter 11 bankruptcy. The mediation was unsuccessful. Larkin Decl. ¶ 5.

19 Following the Court’s order denying reconsideration of its class certification order in
 20 April 2014, the parties agreed to undertake another effort to settle the case. Larkin Decl. ¶ 6.
 21 Several factors encouraged settlement efforts. First, the certification order had finally
 22 resolved that the equal pay claim would be part of the case. Second, since Bashas’ had
 23 phased out the differential pay scales in 2007, injunctive relief was no longer necessary for
 24 that claim, and the extent of Bashas’ potential back pay liability to the class was fixed (with
 25 _____

26 ⁸ There are currently approximately 12,000 class members. However, at least 20% of the
 27 class worked in positions in which there was no difference in the pay scales. Larkin Decl. ¶
 14.

1 only interest and attorneys' fees continuing to accrue). Third, since the Court decertified the
2 working conditions claim, the parties no longer had to agree on complex and potentially
3 expensive injunctive relief for that claim. *Id.* ¶ 7. The parties jointly requested a stay of the
4 Court's order directing the mailing of class notice to allow time to explore settlement; the
5 Court granted the stay. (ECF Nos. 321, 322.)

6 On June 24, 2014, the parties attended a formal mediation session with Tod F.
7 Schleier, a respected and experienced local mediator. Larkin Decl. ¶ 10. The negotiations
8 were conducted at arms' length, and the parties focused on resolving class relief before
9 addressing relief for the named Plaintiffs or attorneys' fees. *Id.* ¶ 11. The mediation was
10 successful, and the parties signed a memorandum of understanding, setting forth the essential
11 terms of the agreement. *Id.*

12 **B. The Terms of the Proposed Settlement**

13 The key settlement terms are summarized below. (The full settlement agreement is
14 Exhibit 1 to the Declaration of Jocelyn D. Larkin in support of this motion.)

15 *Settlement Class Definition* – The settlement class definition is the same as the class
16 definition approved by the Court in connection with class certification. Larkin Decl., Ex. 1
17 (“Agreement”) §§ 1.2.4.1; 2.5.

18 *Gross Settlement Fund* – Bashas' will pay \$6.5 million to resolve claims for class
19 damages, administrative expenses, service awards to the named plaintiffs Gonzalo Estrada
20 and Aurelia Martinez, and attorneys' fees and costs. *Id.* § 3.1. Bashas' will deposit the full
21 amount in a Qualified Settlement Fund (or an escrow account if the Court has not yet ruled
22 on final approval) on February 16, 2015. *Id.* § 3.2. There is *no* reversion of any funds to the
23 employer. *Id.* § 3.5.

24 *Administrative Cost Fund* – From the Gross Settlement Fund, the agreement allocates
25 \$400,000 as an Administrative Cost Fund. *Id.* §§ 5.6, 5.8. The parties negotiated this
26 amount because locating class members in this case presents unique challenges, resulting
27 from the very long duration of the case. The class period opens in 1998 and, according to

1 Bashas', approximately 90% of the class members are no longer employed at Food City. It
2 is likely that some class members will have moved from the address that they used while
3 employed at Food City. It is also likely that some class members have moved or returned to
4 Mexico or other countries in Central America. Moreover, mailing claim checks to class
5 members in Mexico requires several additional administrative steps to ensure that they are
6 received. A final challenge is that many class members are monolingual Spanish speakers,
7 requiring all communications to be in both English and Spanish. After considering these
8 challenges and researching options for distributing checks in Mexico, Plaintiffs earmarked
9 this sum as the amount necessary to ensure that as many class members as possible are
10 located and that they receive their claim share. Larkin Decl. ¶ 13.

11 *Distribution Plan* – The Net Settlement Fund represents the amount available for
12 distribution to class members who meet the eligibility requirements.⁹ Agreement §§ 2.21,
13 4.2.1. The agreement provides that shares will be calculated using the employer's payroll
14 records; class members will not be required to submit any additional paperwork or
15 documentation. *See id.* § 4.1.

16 An individual's share of the settlement will be calculated based upon the difference
17 between his or her actual hours worked and hourly rates received at Food City, with the same
18 number of hours at the hourly rates paid at Bashas' and A.J.'s Fine Foods for the same time
19 period. *Id.* Five percent (5%) simple interest will be added to the wage loss to reach an
20 Individual Loss Calculation. *Id.* § 4.1.1.6. Using all Individual Loss Calculations, pro rata
21 shares of the Net Settlement Fund will be calculated. *Id.* § 4.1.1.8. The agreement includes
22 a mechanism by which a class member who does not qualify for a settlement share may
23 dispute that determination. *Id.* § 4.2.3.

24 ⁹ A Settlement Class Member is eligible for a share of the Net Settlement Fund if he or she:
25 1) is Hispanic; 2) was hired by Bashas' before January 2, 2005; 3) worked at a Food City
26 store for more than eight hours during the Class Period; and 4) worked in an hourly job
27 position for which the pay scale was lower at Food City than at Bashas' and/or A.J.'s Fine
28 Foods during any part of the Class Period. Agreement § 4.2.1. He or she must also have an
Individual Loss Calculation larger than zero. *Id.* § 4.2.2.

1 The Class Administrator will, after making required tax withholdings, mail checks
 2 and tax forms to eligible class members entitled to an Individual Settlement Share.¹⁰ *Id.* §
 3 4.3. Class members will have 180 days to cash the check. *Id.* § 4.3.4. The Class
 4 Administrator will trace and re-mail any checks returned as undeliverable. *Id.* § 8.3.5. Class
 5 members who are not entitled to an Individual Settlement Share because they had no wage
 6 loss will receive a letter explaining why they are not receiving a check. *Id.* § 4.35.

7 *Contingent Second Distribution and Cy Pres* – After the first distribution, the parties
 8 will confer with the Class Administrator to determine the feasibility of a supplemental
 9 distribution of any Residual Settlement Funds, taking into account such factors as the
 10 administrative costs of a second distribution, the average size of second distribution checks,
 11 and the likelihood that the second checks will be cashed. *Id.* § 4.4.2. The parties may also
 12 consider using the residual funds for more advanced methods for tracing lost class members.
 13 *Id.* § 4.4.2.5.

14 After efforts to distribute the settlement funds as described above are completed, any
 15 remainder, including any funds remaining in the Administrative Costs Fund, will be paid to
 16 the University of Arizona Law School Immigrant Workers’ Clinic, the ASU Alumni Law
 17 Group, and Community Legal Services of Arizona. *Id.* §§ 3.5, 4.4.5.

18 *Service Awards to Named Plaintiffs* – Named Plaintiffs Gonzalo Estrada and Aurelia
 19 Martinez are entitled to a share of the Settlement Fund, calculated in the same manner as
 20 other class members. *Id.* § 9.1. In addition, the named Plaintiffs may apply for a service
 21 payment of up to \$10,000 to compensate them for the services that they provided to the class
 22 over the past decade, to be paid from the Gross Settlement Fund. *Id.* § 9.2. The named
 23 Plaintiffs have filed that application and have confirmed that their support of this settlement
 24 is not contingent upon the service award. *See* Declarations of Martinez and Estrada in
 25 Support of Motion for Service Awards, filed concurrently.

26
 27 ¹⁰ Bashas’ is required to pay the employer’s share of payroll taxes. Agreement § 6.6.

1 *Attorneys' Fees and Costs* – Under the agreement, Plaintiffs may apply to the Court
2 for an award of reasonable attorneys' fees and costs to be paid from the Settlement Fund. *Id.*
3 §10.1. Approval of the class settlement is *not* conditioned on the award of attorneys' fees
4 and costs; the attorneys' fees provisions are expressly severable from the remaining
5 provisions. *Id.* §10.2. Concurrent with this motion, Plaintiffs have filed a motion for an
6 award of attorneys' fees and costs.

7 *Release of Claims* – As part of the agreement, the named Plaintiffs and the settlement
8 class members will release the claims for relief alleged in the case. *Id.* §7.

9 **IV. ARGUMENT**

10 **A. Legal Standards for Preliminary Settlement Approval**

11 Strong judicial policy favors settlements, “particularly where complex class action
12 litigation is concerned.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.
13 1992). Under Rule 23(e) of the Federal Rules of Civil Procedure, “[t]he claims, issues, or
14 defenses of a certified class may be settled . . . only with the court’s approval.” Fed. R. Civ.
15 P. 23(e). Review of a class settlement proceeds in two steps. First, “counsel submit the
16 proposed terms of settlement and the judge makes a preliminary fairness evaluation.”
17 Manual for Complex Litigation (Fourth) § 21.632. Second, after notice is given to the class,
18 the court holds a final fairness hearing. *Id.* § 21.634.

19 Any proposed settlement must be “fundamentally fair, adequate, and reasonable.”
20 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). In assessing a proposed
21 settlement at the final fairness hearing, the district court must balance various factors,
22 including: (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and
23 likely duration of further litigation; (3) the risk of maintaining class action status throughout
24 the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the
25 stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a
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1 governmental participant; and (8) the reaction of the class members to the proposed
2 settlement. *Id.*¹¹

3 At the *preliminary* approval stage, however, the Court must only “consider whether
4 the proposed settlement ‘appears to be the product of serious, informed, non-collusive
5 negotiations, has no obvious-deficiency, does not improperly grant preferential treatment to
6 class representatives or segments of the class and falls within the range of possible
7 approval.’” *Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 363 (D. Ariz. 2009) (quoting *In*
8 *re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)). The
9 settlement in this case meets that standard.

10 **B. The Proposed Settlement Falls Within the Range of Possible Approval, Does**
11 **Not Grant Preferential Treatment to Segments of the Class, and Shows No**
12 **Obvious Deficiencies**

13 The terms of the proposed settlement are highly favorable to the class and strongly
14 support preliminary approval. Larkin Decl. ¶ 15.

- 15 • Most fundamentally, the monetary settlement fund will compensate class members
16 for a large percent of their wage losses and accrued interest resulting from the
17 differential pay scales. Larkin Decl. ¶ 16. While Plaintiffs had developed
18 different methods for analyzing class member wage loss and accrued interest, they
19 believe the most likely result at trial (if they proved liability) would have been
20 damages plus pre-judgment interest between \$5 and \$6 million. In this case, the
21 amount available for distribution to the class after fees, costs, and administrative
22 expenses is approximately \$4.275 million, or 71 - 85% of the class losses. *Id.*
- 23 • The formula for determining a class member’s share is identical for all class
24 members and is calculated based upon their *actual* losses. As a result, the
25 distribution plan does not favor one segment of the class over another. Larkin

26 ¹¹ “It is the settlement taken as a whole, rather than the individual component parts, that must
27 be examined for overall fairness.” *Hanlon*, 150 F.3d at 1026 (citing *Officers for Justice v.*
28 *Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982)).

Decl. ¶ 17. *Cf. Tijero v. Aaron Bros., Inc.*, 2013 WL 60464, at *10 (N.D. Cal. Jan. 2, 2013) (preliminary approval denied in part because plaintiffs failed to demonstrate that settlement did not provide “preferential treatment to certain segments of the class”).¹²

- The process for distributing the fund will maximize the likelihood that class members will receive their share of the fund. Class members need not provide documentation or submit a complicated claim form. The shares are determined based upon the employer’s payroll records. The settlement allocates ample funds to locate class members who may have moved within the United States or out of the country. Larkin Decl. ¶ 18.
- A contingent second distribution will ensure that, as much as is practically possible, settlement funds will go to class members. Larkin Decl. ¶ 19.
- Any residual funds will not revert to the employer, but will instead be distributed *cy pres* to the University of Arizona Law School Immigrant Workers’ Clinic, the ASU Alumni Law Group, and Community Legal Services of Arizona. Larkin Decl. ¶¶ 20, 21. The proposed *cy pres* recipients bear a “driving nexus” to the underlying cause of action and share the same geographic service area as the case. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011); *see also id.* at 1039 (distribution must be guided by the objectives of the underlying statute and the interests of the class members, and must not benefit a group too remote from the class).
- The request for attorneys’ fees is consistent with the 25% common fund benchmark in the Ninth Circuit and particularly reasonable in light of the very long duration of the contentious litigation. *See, e.g. Vizcaino v. Microsoft Corp.*,

¹² The size of an individual’s share will depend on the position he or she held, the difference in the pay scale for that position, and the number of hours worked in the position. For class members with a loss, the awards will range from less than \$50 to several thousand dollars. Larkin Decl. ¶ 17.

1 290 F.3d 1043, 1048-50 (9th Cir. 2002). The class settlement is not conditioned
 2 on an award of attorneys' fees. Agreement § 10.2. Plaintiffs' request for
 3 attorneys' fees and costs is addressed in detail in a separate motion.

- 4 • The scope of the class release is limited to the claims raised in the case. Larkin
 5 Decl. ¶ 23. *Cf. Kakani v. Oracle Corp.*, 2007 WL 1793774, at *6 (N.D. Cal. June
 6 19, 2007).
- 7 • The named Plaintiffs fully support the proposed settlement. *See* Declarations of
 8 Martinez and Estrada in Support of Motion for Service Awards.

9 Taken together, the settlement provides the certified class with a fair resolution of its claims.

10 **C. The Proposed Settlement was the Product of Serious, Informed, Non-**
 11 **Collusive Negotiations by Experienced Counsel**

12 The process through which the proposed settlement was reached also favors
 13 preliminary approval. The settlement was negotiated at arm's length by experienced
 14 counsel, with the assistance of an independent mediator, after extensive formal and informal
 15 discovery.

16 Plaintiffs were represented by Jocelyn D. Larkin and Elizabeth Lawrence, who are
 17 experts in complex employment litigation. *See* Larkin and Lawrence Decls. in Support of
 18 Motion for an Award of Attorneys' Fees and Costs (Larkin Decl. ¶¶ 5 - 18; Lawrence Decl.
 19 ¶¶ 5 - 9). Their settlement positions were informed by extensive information gathered
 20 through discovery and motion practice. Lawrence Decl. ¶¶ 25 – 29 (summarizing discovery
 21 history). Class Counsel also had the benefit of extensive analysis of the employer's payroll
 22 data, conducted by their retained statistician, Dr. Richard Drogin. *Id.* ¶ 32; *see Vasquez v.*
 23 *Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009) (granting
 24 preliminary approval where the parties “conducted extensive investigation and discovery
 25 allowing them to assess the strengths and weaknesses of the case”).

26 The parties reached the proposed settlement after a full-day mediation with Tod
 27 Schleier, a well-respected neutral mediator with extensive employment law experience.

1 ““The assistance of an experienced mediator in the settlement process confirms that the
 2 settlement is non-collusive.”” *Carter v. Anderson Merchandisers, LP*, 2010 WL 1946784, at
 3 *7 (C.D. Cal. May 11, 2010) (quoting *Satchell v. Fed. Express Corp.*, 2007 WL 1114010, at
 4 *4 (N.D. Cal. Apr. 13, 2007)).

5 **D. The Proposed Settlement is Reasonable in Light of the Risks, Expense, and**
 6 **Delay Inherent in Continued Litigation**

7 While Plaintiffs feel that they have a very strong case and are likely to win at trial,
 8 further delay associated with pre-trial litigation, trial, and another appeal poses the greatest
 9 risk to the class. First, with each passing year, class members become increasingly difficult
 10 to locate. In addition, the employer operates in a highly competitive industry and was in
 11 Chapter 11 bankruptcy less than five years ago. As a result, Plaintiffs cannot assume the
 12 long-term solvency of the defendant. Finally, because the disputed pay scales are no longer
 13 in effect, past wage losses are fixed. Continuing litigation would result in higher attorneys’
 14 fees and expense while bringing little additional benefit to the class, especially in light of the
 15 risk of losing entirely. Larkin Decl. ¶ 24. Given that the settlement provides a large measure
 16 of the outcome achievable with a liability determination, it is the judgment of Class Counsel
 17 that settlement is appropriate. *Id.*

18 **V. THE PROPOSED NOTICE AND NOTICE PLAN SHOULD BE APPROVED**

19 The Court should also approve the proposed notice and notice plan. Under Rule 23 of
 20 the Federal Rules of Civil Procedure, the Court must “direct notice in a reasonable manner to
 21 all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). Notice is
 22 satisfactory if it “generally describes the terms of the settlement in sufficient detail to alert
 23 those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill*
 24 *Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (internal quotation marks
 25 omitted).

1 The proposed notice and notice plan are satisfactory. Under the proposed settlement
 2 agreement, the Class Administrator will mail a notice packet to class members by First Class
 3 U.S. Mail. Agreement § 8.3.3. All notice materials will be in both English and Spanish. *Id.*
 4 § 5.3. The administrator will take reasonable steps to determine the most recent address of
 5 each class member. *Id.* § 8.3. The proposed Notice, attached as Exhibit 2 to the Declaration
 6 of Jocelyn D. Larkin, describes: (1) the nature of the action; (2) the identities of class
 7 counsel; (3) the terms of the proposed settlement; (4) the relief to which the class members
 8 will be entitled; (5) how administrative costs, attorneys' fees, and potential service payments
 9 will be handled; (6) the procedures and deadline for submitting objections, and/or requests to
 10 opt-out; and (7) the date, time, and place of the final approval hearing.¹³ Under the proposed
 11 notice plan, class members will have 120 days to opt out or submit objections. Agreement
 12 §§ 8.3.7, 8.3.8.

13 Class members will be able to obtain additional information by accessing the case
 14 website as well as by calling the Class Administrator, which will have bilingual staff to
 15 respond to inquiries. *Id.* § 5.4.

16 VI. THE COURT SHOULD SET A FINAL APPROVAL SCHEDULE

17 Finally, the Court should set a final approval schedule. The parties propose:

18 Deadline for Class Administrator to mail Class Notice	28 days after preliminary approval order
19 Deadline for Class Members to postmark objections or opt-outs	120 days from original mailing of class notice
20 Deadline for Class Counsel to file motion for final settlement approval and to respond to objections	35 days prior to final approval hearing
21 Hearing on Final Approval, Attorneys' Fees and Costs, and Service Payment Motions	180 days after the preliminary approval order

22
 23
 24
 25
 26 ¹³ Plaintiffs are having a Spanish translation of the Class Action Notice prepared. The
 27 translated notice will be submitted prior to the hearing on preliminary approval. Larkin
 Decl. ¶ 25.

1 **VII. CONCLUSION**

2 The parties have presented the Court with a very favorable resolution of this
3 long-running litigation. Because the settlement meets the standards for preliminary
4 approval, the Court should approve it, authorize notice to the class, and schedule the
5 final Fairness Hearing.

6 Respectfully submitted,

7 Dated: August 27, 2014

s/ Jocelyn D. Larkin

Jocelyn D. Larkin
THE IMPACT FUND

9 Dated: August 27, 2014

s/Elizabeth A. Lawrence

Elizabeth A. Lawrence
DAVIS, COWELL & BOWE, LLP

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12 *Attorneys for Plaintiffs and the Certified Class*
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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2014, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal and a Notice of Electronic Filing was electronically transmitted from the court to the e-mail addresses on file.

/s/ Jocelyn D. Larkin

Jocelyn D. Larkin