RICHARD D. McCUNE, State Bar No. 132124
rdm@mccunewright.com
DAVID C. WRIGHT, State Bar No. 177468
dcw@mccufnewright.com
MCCUNE WRIGHT AREVALO LLP
3281 East Guasti Road, Suite 100
Ontario, California 91761
Telephone: (909) 557-1250
Facsimile: (909) 557-1275

Edward J. Chong, State Bar No. 201409
edlawla@gmail.com
Law Offices of Edward J. Chong and Associates
3325 Wilshire Blvd., Suite 1250
Los Angeles, California 90010
Telephone: (213) 386-1990
Facsimile: (213) 386-1800

Attorneys for Plaintiffs ELITE LOGISTICS CORPORATION and NGL TRANSPORTATION, LLC and the Putative Class

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ELITE LOGISTICS CORPORATION, NGL TRANSPORTATION, LLC, and on behalf of all others similarly situated,

Plaintiff,

v.

MOL (AMERICA), INC., and DOES 1-10,

Defendant.

MOL (AMERICA) INC. and MITSUI O.S.K. LINES, LTD.,

Counterclaim Plaintiffs,

v.

ELITE LOGISTICS CORPORATION, and ROES 1-10,

Counterclaim Defendant.

Case No.: 2:11-cv-02952 DDP (PLAx)

Judge Assigned: Judge Dean D. Pregerson

Complaint Filed: April 7, 2011
Trial Date: None Set

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AWARD OF ATTORNEY FEES AND COSTS, AND APPROVAL OF CLASS REPRESENTATIVE SERVICE AWARD; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Hearing Date: Monday, April 26, 2021
Hearing Time: 10:00 a.m.
Courtroom: 9C

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 26, 2021, at 10:00 a.m. or as soon as the matter may be heard in the courtroom of the Honorable Dean D. Pregerson, United States Courthouse, 350 W. 1st Street, Los Angeles, CA, Plaintiff NGL Transportation LLC will and hereby does move pursuant to Rule 23 of the Federal Rules of Civil Procedure for an order for an order granting final approval to the class action settlement in this matter, awarding attorneys' fees and costs, and approving the class representative service award.

STATEMENT OF THE ISSUES TO BE DECIDED

By this motion, Plaintiffs move the Court for an Order:

1. Finally approving the settlement in this action;
2. Finally certifying a settlement class;
3. Awarding attorney fees in the amount of $375,000;
4. Awarding reimbursable litigation costs in the amount of $15,953.23; and
5. Finally approving the class representative service award of $5,000.

This Motion is based on the accompanying Memorandum of Points and Authorities, Declarations of David Wright and all exhibits thereto, and Declaration of Arthur Olsen, and the Declaration of Shang-Il Roh previously filed in support of the Motion for Class Certification, all papers and records on file in this matter, and such other matter as the Court may allow.

Dated: April 14, 2021

Respectfully Submitted,

McCune Wright Arevalo, LLP

BY: /s/ David C. Wright
David C. Wright
Attorneys for Plaintiffs and the Putative Class

TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

Page(s)

MEMORANDUM OF POINTS AND AUTHORITIES

I SUMMARY

This is a putative class action alleging that Defendant MOL (America), Inc. ("MOL" or "Defendant") unlawfully levied per diem, detention, or demurrage charges on intermodal motor carriers on weekends and holidays, in violation of California Business & Professions Code section 22928 ("Section 22928"). Plaintiff also alleges that by violating section 22928, Defendant breached its contractual obligations under the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA"); specifically, a provision that required Defendant to comply with all federal, state, and local laws, rules, and regulations. MOL disputes Plaintiff's contentions.

After law and motion practice and discovery into the underlying facts, and a settlement conference before this Court, the parties ultimately agreed to a proposed settlement of this matter, the parties presented a proposed settlement of this matter to which this Honorable Court granted preliminary approval. (Order Granting Preliminary Approval ("Order"), Dkt. No. 223.) Under the Settlement Agreement MOL will pay $700,000 into a Settlement Fund, with no reversion of any residue, and will file a motion seeking dismissal of its counterclaim against Elite. (*See* Notice of Submission of Executed Amended Settlement Agreement, Ex. 1 ("Settlement Agreement" ["SA"]), Dkt No. 222-1.) The settlement payment will be used to provide restitution to class members, pay the ligation costs, costs of notice and claims administration, attorney fees, and a service award to the class representative, NGL Transportation, LLC, for its work on behalf of the class. This Court found, preliminarily, that the classes as defined in the Settlement Agreement meet all of the requirements for certification of a settlement class found in the Federal Rules of Civil Procedure and applicable case law, (Order, Dkt. No. 223, ¶¶ 3, 6), that the proposed settlement falls within the range of reasonableness for potential final approval, (*id.*, ¶ 2), and that the proposed settlement is the product of arm's length negotiations by experienced counsel after extensive litigation and discovery. (*id.*, ¶ 7.) This Court also found that the proposed notice plan to class members satisfied due

process, and ordered that notice of the proposed settlement be served pursuant to it. (*Id.*, ¶ 8.)

The parties have complied with this Court's Order regarding notice, and Plaintiff therefore now presents the matter for final approval. As evidenced by the contemporaneously filed Declaration of David Wright re Notice to Class, the direct notice program approved by this Court has been very successful. Specifically, on February 24, 2021, notice by email was effected to 302 of the 434 class members, for whom email contact information was available. For the remaining 132 class members, notice was effected by U.S. Mail on that same date. Of the 302 email notices sent, 77 were returned as undeliverable. Thereafter, supplemental service by First Class U.S. Mail was effected on these 77 class members. Of the 132 notices that were initially sent by U.S. Mail, 33 were returned as undeliverable. Searches utilizing the California Secretary of State business search portal and, where necessary, the Secretary of State business search portal of the foreign state corresponding to the mailing address of the class members, were conducted for these 33 class members. Of these, 20 of the Class Members were determined to no longer be going concerns based on the following status listed in the Secretary of State records: Withdrawn (1); Suspended (10); Dissolved (6); Forfeited (1); Inactive (1); and Surrender (1); and no record could be located for 7 of the Class Members. (Decl. of David Wright re Notice to Class [hereafter "Notice Decl."] ¶¶ 3-6.) Further, the deadline for opting out of, or objecting to, the proposed settlement was March 26, 2021, (Dkt No. 227) and not a single member of the class has elected to opt out of the proposed settlement being presented for approval to this Court. (Notice Decl. ¶¶ 9-12.)

In sum, the proposed settlement of this class action is a very good result for class members, and class members' reaction to it to date has been very favorable.

II BACKGROUND

A. The Settlement Is a Very Good Result for the Class Members

Under the Settlement Agreement MOL will pay $700,000 into a Settlement Fund, with no reversion of any residue, and will file a motion seeking dismissal of its counterclaim against Elite. (*See* Notice of Submission of Executed Amended Settlement Agreement, Ex. 1 ("Settlement Agreement" ["SA"]), Dkt No. 222-1.) The settlement payment will be used to provide restitution to class members, pay the ligation costs, costs of notice and claims administration, attorney fees, and a service award to the class representative—NGL Transportation, LLC—for its work on behalf of the class.

The manner of distribution of this proposed settlement is especially friendly to the Class members, as it does not require any claims whatsoever to be made. Individual payments will be paid to the Class members according to a formula which divides the net settlement fund by the total improper per diem charges for the relevant period and multiplies the resulting figure by an individual class member's total improper per diem charges. (SA ¶ 8(d)(iii).) Any money that remains after this distribution process will go to Public Citizen, a 501(3)(c) corporation dedicated to protecting consumer rights.

B. Pertinent Procedural History

1. Initiation of Litigation

On April 7, 2011, Plaintiff Elite Logistics filed a class action complaint alleging that Defendant MOL, and intermodal equipment provider, had breached the UIIA and Section 22928 by charging California trucking companies with per diem fees for the use of equipment on weekends and holidays. (Dkt. No. 1.) Plaintiffs brought the action on behalf of themselves and all intermodal motor carriers who were charged and paid unlawful per diem and detention charges in California for weekends and holidays when the ports were closed from April 7, 2007 (*i.e.*, four years prior to the filing of the Complaint, pursuant to the applicable statute of limitations of Plaintiffs' claims), to the present. (FAC ¶ 27.) The FAC seeks relief under the California's Unfair Competition Law ("UCL"), with the violation of Senate Bill 45 and section 22928 operating as

predicates to the "unfair" and "unlawful" prongs of the UCL claim. (FAC ¶¶ 36-41.) The FAC also seeks relief under a common law breach of contract theory, pursuant to the Uniform Intermodal Interchange and Facilities Agreement ("UIIA") which governs the interchange and use of equipment in intermodal interchange service throughout the industry, and provides for the following:

> G. General Terms
>
> 11. Compliance of Law: The Parties shall obey all federal, state and local laws, rules and regulations including those pertaining to the transportation of hazardous material.

(FAC ¶¶ 42-47.) Based on these claims, Plaintiffs, on behalf of themselves and the putative Class, seek damages and restitution for MOL's practice of levying per diem charges for weekends and holidays when the ports were closed from April 7, 2007, to the present, and for injunctive relief enjoining MOL from engaging in this unlawful practice in the future. (FAC at Prayer for Relief.) Defendant MOL denied these allegations.

On March 2, 2015, Defendant MOL and Counterclaim Plaintiff Mitsui O.S.K. Lines, Ltd., filed a counterclaim against Plaintiff Elite Logistics asserting that Elite had engaged in fraud by misrepresenting to MOL the per diem rates that are acceptable to a cargo owner customer with whom MOL has a direct relationship, including a service agreement which covers per diem rates. (Dkt. No. 11.) The parties filed answers to the complaint and counterclaim denying all allegations. (Answer to First Amended Complaint, Dkt. No. 110; Answer to Counterclaim, Dkt. No. 117.)

2. First Motion for Class certification and Motion for Partial Summary Judgement

On November 1, 2012, Plaintiff Elite filed a Motion for Class Certification. (Dkt. No. 35.) At the hearing on that motion, the Court did not rule, but suggested that Plaintiff Elite file a Motion for Partial Summary Judgement to resolve whether Section 22928 prohibits intermodal equipment providers from charging per diem fees to motor carriers for the use of their equipment on weekends and holidays in California.

Pursuant to the Court's direction, on May 7, 2013, Elite filed a Motion for Partial Summary Judgement seeking declaratory and injunctive relief, (Dkt. No. 63). This Court held that Section 22829 *does* prohibit charges on Saturdays, Sundays, and holidays when terminals are closed. (Order on Mot. for Summ. Judgment, Dkt. No. 84).

3. First Amended Complaint and Renewed Motion for Class Certification

On February 24, 2015, Plaintiff Elite Logistics filed a First Amended Complaint, which added Plaintiffs NGL Transportation as a named Plaintiff and class representative. (Dkt No. 110, "First Amended Complaint" ["FAC"].) Thereafter, on April 17, 2015, Plaintiffs filed a Renewed Motion for Class Certification. (Dkt. No. 119.) Thereafter, the Court ultimately denied the motion on February 2, 2016, finding that Plaintiff Elite Logistics was not an adequate class representative as a result of counterclaims filed by Defendant MOL . (*Id*.) The Order was silent as to the adequacy of Plaintiff NGL as a class representative. Therefore, on May 21, 2018, Plaintiff NGL filed a Renewed Motion for Class Certification to enforce Section 22928 (Dkt. No. 184.) Subsequently, Defendant MOL filed its Memorandum in Opposition (Dkt. No. 200.) and on July 30, 2018, the Court took the matter under submission. (Dkt. No. 209.)

C. Per Diem Fee Discovery

As part of discovery in this case, MOL produced an electronic spreadsheet with a substantial number of entries for per diem charges assessed to trucking companies in California from 2007 through early August 2012. (Decl. of David Wright in Support of Mot. for Final Approval ("Wright Decl."), ¶¶ 9-10.) This spreadsheet includes the identity of the trucking companies charged per diem fees and the dates and amount of charges. (*Id*.)

MOL uses an Oracle-based database to store information relating to per diem invoices, and MOL produced as part of discovery an electronic version this database which includes information on all per diem charges assessed to trucking companies in California. The database records the per diem rate and number of free days for each

specific customer. The database spreadsheets may be used to determine how much each trucking company actually paid for per diem invoices for work in California (including any adjustments), how much was paid for weekends, and the dates of the charges. (*Id.*)

Per diem charges issued for Saturdays, Sundays, and holidays during the relevant period were calculated by Plaintiffs' database expert, Arthur Olsen, based on the per diem charge database produced by Defendant MOL. (*Id.*) Mr. Olsen identified 434 trucking companies that had been charged per diem fees on Saturdays, Sundays, and/or holidays. Because Defendant MOL produced information that the terminals at the relevant ports were open on Saturdays, only per diem charges for Sundays and holidays will be reimbursed pursuant to the settlement. Mr. Olsen identified $388,679.58 in per diem charges for Sundays and another $70,806.00 for per diem charges on holidays, for a total of $459,485.58, broken down by individual class member. (Olsen Decl., ¶¶ 11-12.)

III ARGUMENT

A. The Settlement Should Be Finally Approved

Class Counsel believes this is a strong settlement which satisfies all criteria and scrutiny. Further, it is worth noting that the Ninth Circuit has explained that "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution," and that this is "especially true in complex class action litigation." *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th Cir. 1982). "Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable." *Id.*; *see also Hanlon v. Chrysler*, 150 F.3d 1011, 1026 (9th Cir. 1997). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon*, 150 F.3d at 1026.

Perhaps more importantly, in *Officers for Justice*, the Ninth Circuit also first stated the factors the court may consider, among others, in making its determination. Those factors are: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status

throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Id.*; *see also Hanlon*, 150 F.3d at 1026; *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625.

Plaintiff now reviews each of these 12 factors in the order presented in *Officers for Justice*.

1. The Strengths of Plaintiff's Case.

"An important consideration in judging the reasonableness of a settlement is the strength of the plaintiffs' case on the merits balanced against the amount offered in the settlement." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (quoting 5 Moore Federal Practice, § 23.85[2][b] (Matthew Bender 3d. ed.)). "However, in balancing, 'a proposed settlement is not to be judged against a speculative measure of what might have been awarded in a judgment in favor of the class.'" *Id*. In considering the strength of Plaintiff's case, "[t]he Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, [i]t has been held proper to take the bird in hand instead of a prospective flock in the bush." *Id*. (internal quotation omitted). While Plaintiff was able to withstand a motion for arbitration and a motion for summary judgment., there are considerable risks to a continued litigation, as discussed in Class Counsel's declaration. (Wright Dec. ¶ 31.) This litigation has already proceeded for a period of ten years. Although Plaintiff believes the liability in this case is strong, to continue with the case also would nonetheless be very expensive for both sides. Plaintiff NGL Transportation, if successful in its pending certification motion, would likely next face a motion regarding the availability of the

"pass-through" defense on the issue of damages. Following that there would be an expensive trial, and regardless of which party prevailed, there likely would be appellate practice, further delaying any possible actual receipt of money by the class members. The cost of attorneys' fees to both sides from all of this additional activity is already substantial, and it is likely to increase by hundreds of thousands of dollars in additional attorney time and costs if the matter went all the way to verdict. (Wright Dec. ¶ 31.)

Accordingly, this factor favors approval of the settlement.

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." 4 A Conte & H. Newberg, Newberg on Class Actions, § 11:50 at 155 (4th ed. 2002). Here, continued litigation would be risky, complex, lengthy, and expensive. The risks of further litigation have been outlined above. (Wright Decl., ¶ 31.) With regard to expected duration, as noted, an otherwise strong case could last for a very substantial time if the proposed settlement were not approved, and be extremely expensive to both sides. (*Id.*) Plaintiff's Counsel believes the likelihood for certification is strong, but there is always some risk in getting consumer class actions certified, even the ones which have the strongest merits for certification. If the settlement is not approved, Plaintiff would have to proceed with a contested motion for class certification. After an expensive trial, regardless of which party prevailed, there likely would be appellate practice, further delaying the receipt of actual funds by the class members. (*Id.*)

Accordingly, this factor favors approval of the settlement.

3. The Risk of Maintaining Class Action Status throughout the Trial

Although the Court, in granting preliminary approval, provisionally certified the class in this case, the class has not been finally certified, nor has it been certified in an adverse situation. Although Plaintiff believes this case to be a strong one for certification, the outcome of an adverse motion for class certification would be uncertain, as would the

outcome of a motion to decertify the class later down the road, should Defendant file one. Additionally, of course, the Court could exercise its discretion at any time to reevaluate the appropriateness of class certification.

Accordingly, this factor favors approval of the settlement.

4. The Amount Offered in Settlement

"It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Officers for Justice*, 688 F.2d at 628. "Undoubtedly, the amount of the individual shares will be less than what some class members feel they deserve but, conversely, more than the defendants feel those individuals are entitled to. This is precisely the stuff from which negotiated settlements are made." *Id*. The settlement of $700,000 is comprised of a proposed $304,046.77 to be paid as restitution to class members who have incurred a combined maximum total of $459,485.58 in unlawful per diem charges. This payment represents 66% of the maximum possible recovery, should the class have prevailed at trial, which is an excellent result considering the risks and expense of further litigation. (Wright Decl., ¶ 12.) Further, each class member is treated equally under this settlement, receiving a *pro rata* distribution in accordance with the unlawful per diem fees incurred.

Courts in this Circuit have determined that settlements are, of course, reasonable where plaintiffs recover only part of their actual losses. *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) ("[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial.") (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004)); *see also City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1386 (S.D.N.Y. 1972) (a recovery of 3.2 % to 3.7 % of the amount sought is "well within the ball park"), aff'd in part, rev'd on other grounds, 495 F.2d 448 (2d Cir. 1974); *Martel v. Valderamma*, 2015 U.S. Dist. LEXIS 49830 * 17 (C.D. Cal. 2015) (approving a settlement of $75,000 when potential damages were $1.2 million, or about 6%); *In re Toys R US FACTA Litig.*, 295 F.R.D.

438, 453 (C.D. Cal. 2014) (approving settlement with *vouchers* (not cash) potentially worth a maximum of three percent (3%) *if all possible claims were actually made*, or $391.5 million aggregate voucher potential where the class could have recovered $13.05 billion). In this case, as stated, there will not even be any claims process necessary for class members to receive their money, and none of the settlement funds will revert to Defendant.

The proposed settlement is therefore well within the range of suitable.

5. The Extent of Discovery Completed and the Stage of the Proceedings

"[A] settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528. Even though "in the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement" (*Linney*, 151 F.3d at 1239 (citing *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241 (5th Cir. 1982)), in this case substantial discovery was accomplished which has enabled the parties to explore the merits of the case and come to an understanding of its likelihood of success. Specifically, Plaintiff propounded on Defendant, and obtained responses and documents responsive to 2 sets of interrogatories, requests for production, and requests for admissions. (Wright Decl. ¶ 9.) Meanwhile, Defendant has propounded on both Plaintiffs, and obtained responses and documents responsive to interrogatories, requests for production, and requests for admissions. Additionally, Plaintiff has taken the deposition of two of Defendant's corporate representatives designated as most knowledgeable on per diem billing and database issues, and Defendant took Plaintiff's deposition. (Wright Decl., ¶ 9.) Further, Defendant provided Plaintiff's database expert, Arthur Olsen, an analysis of the class per diem data, which Mr. Olsen has been able to verify in determining the class and class damages. (Olsen Decl., ¶¶ 7-12.) The facts of this case have been fully explored and uncovered.

As to the stage of the proceedings, Plaintiff has faced three major challenges to the

merits of their case—a motion for arbitration, a motion for summary judgment, and two contested motions for class certification—which gave Plaintiff the opportunity to examine Defendant's arguments, craft its own, and weigh the strengths and weaknesses of its case, and ultimately reach an informed judgment of the likelihood of success on the merits.

6. The Experience and Views of Counsel

"This circuit has long deferred to the private consensual decision of the parties." *Rodriguez v. W. Publ'g Corp*., 563 F.3d 948, 965 (9th Cir. 2009). Therefore, "'[g]reat weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.'" *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (quoting *In re Paine Webber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997)). "Thus, 'the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'" *Id*. (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).

Class counsel is extremely experienced in consumer class actions and wholly support the settlement. (Wright Decl. ¶¶ 2, 17-19, 31, 34.) The experience of Class Counsel is set forth in the Declaration of David Wright who has 25 years of litigation and trial experience and has been appointed class counsel in numerous state and federal class actions, representing classes of consumers. (*Id*.)

Class Counsel are in favor of the settlement, and believe it is a very good result for class members. (Wright Decl. ¶¶ 32, 34.)

Accordingly, this factor also weighs in favor of approval of the settlement.

7. The Presence of a Government Participant

No government entity is involved in this case. Accordingly, this factor is likely neutral.

8. The Reaction of the Class Members to the Proposed Settlement

"The reactions of the members of a class to a proposed settlement is a proper consideration for the trial court." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528

(quoting 5 Moore's Federal Practice, § 23.85[2][d] (Matthew Bender 3d ed.)). ("In this regard, 'the representatives' views may be important in shaping the agreement and will usually be presented at the fairness hearing; they may be entitled to special weight because the representatives may have a better understanding of the case than most members of the class.'" *Id*. (quoting Manual for Complex Litigation, Third, § 30.44 (1995)).

The reaction of the class members to the settlement to date has been overwhelmingly positive. Here, all but 27 of the 434 class members successfully received the notice ordered by this Court—and it is believed that 100% of the class members that remain going concerns have received notice—and not a single class member has elected to opt out of the settlement or enter an objection to the settlement. (Notice Decl. ¶¶ 4-6, 9-12.)

Accordingly, the very positive response to the proposed settlement by class members to date also supports approval.

B. The Requested Fee Award and Litigation Costs Should Be Approved

Class counsel requests that the Court approve its application for attorneys' fees in the amount of $375,000. (Wright Decl., ¶ 26.) Even after substantial reductions based on billing judgment, Class Counsel have a lodestar in this matter, *to date*, of $467,518. (Wright Decl. ¶¶16-24.) In addition, it is estimated that McCune Wright Arevalo will incur an additional $3,000 in fees to finalize the settlement in the case, including distributing the settlement proceeds to class members and working with class members and defense counsel to implement and conclude the settlement, for a total lodestar of $470,518. (*Id.*, ¶ 25.) Therefore, despite the risk of the case and the excellent result of the case and the time waiting to be paid, the requested fee is actually only 80% of the lodestar incurred by Class Counsel in this case, meaning rather than a positive multiplier as Class Counsel believes would be warranted in this case, instead an approximate

negative multiplier of 0.8 is being applied.[1]

As this Court knows, a lodestar figure is calculated by multiplying the reasonable hours expended by a reasonable hourly rate. (*Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 254.) The Court may then adjust the lodestar using a multiplier. (*Thayer v. Wells Fargo* (2001) 92 Cal.App.4th 819, 833.) Although Class Counsel believes there are a number of very valid reasons for a positive multiplier in this case,[2] in this case Class Counsel, rather than receive a positive multiplier, instead will actually be receiving a negative multiplier of 0.8—20% less than its lodestar—if the requested fee is awarded.

This is despite the fact that under California law it is uncontroversial that, "Multipliers

---

[1] Further, the same hourly rates sought by Class Counsel were approved most recently in federal court just on December 22, 2020, in *Smith v. Bank of Hawaii*, Case No. 1:16-cv-00513-JMS-WRP, (D. Haw. Dec. 22, 2020) Dkt. No. 233. Further, Class Counsel's hourly rates have been approved by numerous other courts. (Wright Decl. ¶ 20.)

[2] One such factor is contingent risk as explained by the California Supreme Court in *Ketchum v. Moses,* 24 Cal.4th 1122, 1133 (2001): "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions." In *Ketchum*, the California Supreme Court went on to explain the rationale behind contingent risk fee enhancements as follows: "The economic rationale for fee enhancement in contingency cases has been explained as follows: "A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans." (Posner, Economic Analysis of Law (4th ed. 1992) pp. 534, 567.) "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 480 (1981); see also *Rules Prof. Conduct, rule 4-200(B)(9)* [***385] [recognizing the contingent nature of attorney representation as an appropriate component in considering whether a fee is reasonable]; ABA Model Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof. Conduct, rule 1.5(a)(8).)

can range from 2 to 4 or even higher." *Wershba*, 91 Cal.App.4th at 255. The Ninth Circuit, and other circuits, are in accord. *Vizcaino v. Microsoft*, 290 F.3d 1043, 1050 (9th Cir. 2002) (3.6x multiplier); *In re Veritas Software Corp. Secs. Litig.* 2005 U.S.Dist.LEXIS 30880, *43 (N.D. Cal. 2005) (4x multiplier); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2nd Cir. 2005) ("`multipliers of between 3 and 4.5 have become common'"); *In re Linerboard Antitrust Litig.* 2004 U.S.Dist.LEXIS 10532, *50 (E.D. Pa. 2004) (noting that "during 2001-2003, the average multiplier approved in common fund class actions was 4.35"); *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 131 (N.D. Ill. 1990) (courts have characterized multipliers of 3 or higher as average in many class actions).

Again, although a positive multiplier here is warranted but not being sought, a review of the factors set out by the Ninth Circuit in *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1976), are as follows: (1) the time and labor required; (2) the novelty and difficulty of the issues litigated; (3) the skill needed to perform properly the legal service; (4) the preclusion of other employment due to the acceptance of work; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount at issue and the results obtained; (9) the experience, reputation, and ability of the attorney or attorneys; (10) the "undesirability" of the case; (11) the length and nature of the professional relationship between the attorney and the client; and (12) awards in similar cases.

Here, as to the first factor, the Declaration David Wright set forth the work performed by class counsel on all aspects of this case. Class counsel performed considerable work, overcoming a motion to compel arbitration, a motion for summary judgment, a motion for class certification that was denied, and a renewed motion for class certification that was filed on behalf of a new class representative, propounding and responding to written discovery, taking the deposition of two of Defendant's Persons Most Knowledgeable on per diem database and per diem charge policies, and defending Plaintiff's deposition. (Wright Decl., ¶ 9.)

As to the second factor, the case involved several difficult legal issues, including whether Defendant could assert a pass-through defense at trial to offset damages. Accordingly, as to the third factor, this case required a high level of skill. As to the fourth factor, McCune Wright Arevalo, LLP, turned down work they could have taken in order to pursue this case. As to the fifth factor, the customary fee in the Ninth Circuit in a successful case would apply a positive multiplier to the lodestar, yet in this case not even the full lodestar is being sought. As to the sixth factor, the fee was contingent, and accordingly Class Counsel took considerable risk in litigating this case. As to the seventh factor, no time limitations were imposed by the client or other circumstances. As to the eighth factor, the total amount of unlawful per diem charges, and the amount that Plaintiff's counsel believes it would have received had it prevailed at trial, is $459,485.58. The result obtained—$700,000, of which $304,046.77 is requested to be distributed to the class members—represents a recovery of 66% of the class members' maximum possible damages after payment of fees, costs, and the incentive award. As to the ninth factor, the experience, reputation, and ability of the attorneys which have represented the class in this case are set forth in the Declaration of David Wright. Class Counsel has considerable experience in consumer class action litigation, and specifically in overdraft fee class action cases. As to the tenth factor, this was not an undesirable case; however, it did present the real risk of total loss for class counsel. As to the eleventh factor, Class Counsel and Plaintiffs have enjoyed a very productive working relationship, involving substantial communication, with positive results. As to the twelfth factor, as stated above with factor five, in a successful case as such a positive multiplier would be expected on the lodestar yet in this case the lodestar would be reduced by approximately 20%.

In sum, although Class Counsel has a lodestar of $470,518 in this matter, Class Counsel seeks fees only of $375,000, an approximate 20% reduction of the lodestar to date.

With regard to costs, as detailed in the accompanying Declaration of David

Wright, Class Counsel seeks reimbursement of $15,453.23 in incurred costs. (Wright Decl. ¶¶ 28.) For costs associated with administration of the settlement, Class Counsel estimates that additional costs in processing the checks to the class members will total approximately $500. (*Id.* ¶ 29.) Therefore, Class Counsel is requesting reimbursement of $15,953.23 in litigation and settlement administration costs.

C. The Proposed *Cy Pres* Recipient Should Be Approved

In the motion for preliminary approval of class action settlement, and in the settlement agreement, counsel for Plaintiff stated that they would nominate Public Citizen, a non-profit which represents the interests of consumers against corporations, including financial institutions to be the *cy pres* recipient in this case. Public Citizen has been involved in litigation in California, and consistently engages in advocating for consumer rights, including with regard to financial institutions. It intends to use the money from the *cy pres* in this matter, if approved by the Court, to support its research and advocacy supporting strong protections for consumers, including consumers in California.[3]

D. The Class Representative's Service Award Should Be Approved

The Settlement Agreement states the class representative may seek up to $5,000 as a service award, and this is the amount which was disseminated in the notice to class members from which no class member elected to opt out or object to, the proposed class representative seeks a service award only of $5,000. This is well within the range of reasonableness and should be approved. *Singer v. Becton Dickinson & Co.*, No. 08-CV-821 - IEG (BLM), 2009 U.S. Dist. LEXIS 114547, at *13 (S.D. Cal. Dec. 9, 2009) ("[T]he $25,000.00 service enhancement award to Plaintiff Singer appears to be reasonable in light of his efforts on behalf of the Settlement Group Members."); *In re*

[3] Neither plaintiff, nor plaintiff's counsel, nor Defendant, nor defense counsel will benefit financially in any way from the *cy pres* award. Class Counsel supports Public Citizen, but has no control over how Public Citizen spends its money. Additionally, Class Counsel is on a list of firms used by it for litigation. (Wright Decl., ¶ 33.)

High-Tech Emple. Antitrust Litig., 2014 U.S. Dist. LEXIS 184827, at *13 (N.D. Cal. May 16, 2014) ($20,000 service awards "are fair and reasonable").

Not only was the president of class representative NLG Transportation at all times very enthusiastic and helpful for the case of all class members, he stood up for the rights of class members, notwithstanding his ongoing business in this field. The president of NGL Transportation was very helpful to the case's success, including taking time to provide documents, and engage in numerous discussions with counsel, as well as other services.

E. The Settlement Class Should Be Finally Certified

Plaintiff seeks final certification of the following class:

> All intermodal motor carriers who were charged and paid unlawful per diem charges to Defendants for weekend and holidays when the terminal was closed, in violation of California Business and Professions Code section 22928, from April 7, 2007, to the present. "Class Member" does not include any entity in which Defendants have a controlling interest, and Defendants' officers or directors.

Class certification is proper if the proposed class, the proposed class representative, and the proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Fed. R. Civ. P. 23(a)(1)-(4). In addition to meeting the requirements of Rule 23(a), a plaintiff seeking class certification must also meet at least one of the three provisions of Rule 23(b). When a plaintiff seeks class certification under Rule 23(b)(3), the representative must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem Prods. v. Windsor*, 521 U.S. 591, 615-616 (1997). Because Plaintiff meets all of the Rule 23(a) and 23(b)(3) prerequisites, certification of the proposed Class is proper.

1. The Requirement of Numerosity Is Satisfied

The first prerequisite of class certification is numerosity, which requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). As a general rule, classes of 40 or more suffice. 5-23 Moore's Federal Practice - Civil

§ 3.22[1][b]. In this case, there are 434 class members. (Olsen Decl. ¶ 11.)

2. The Requirement of Commonality Is Satisfied

The second requirement for certification requires that "questions of law or fact common to the class" exist. Fed. R. Civ. P. 23(a)(2). Commonality is demonstrated when the claims of all class members "depend upon a common contention . . . that is capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551 (2011). This requires that the determination of the common question "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "Even a single common question will do." *Id.* at 358. In other words, commonality exists where a question of law linking class members is substantially related to resolution of the litigation even where the individuals may not be identically situated. *Davis v. Astrue*, 250 F.R.D. 476, 486 (N.D. Cal. 2008) ("Rule 23(a)(2) does not mandate that each member of the class be identically situated, only that there be substantial questions of law or fact common to all.") (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 915 (9th Cir. 1964)). The Ninth Circuit has found that commonality is a "limited burden" in that only one common question is required. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012).

The primary legal question regarding the merits in this case was the interpretation of Section 22928, but this has already been resolved by this Court when it ruled on August 29, 2013, that this regulation indeed prohibits shipping companies such as MOL from charging trucking companies per diem fees on weekends and holidays when the terminals are closed. (Dkt. No. 84.) This interpretation applies uniformly to MOL's per diem practice in assessing fees to all class members.

3. The Requirement of Typicality Is Satisfied

Rule 23 next requires that the class representative's claims be typical of those of the class members. Fed. R. Civ. P. 23(a)(3). Like the commonality requirement, the typicality requirement is "permissive" and requires only that the representative's claims

be "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. The typicality requirement looks to whether "the claims of the class representative [are] typical of those of the class, and [is] 'satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997)). Commonality and typicality "tend to merge," such that the factors supporting a finding of commonality also support a finding of typicality. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157, 102 S. Ct. 2364 (1982); *In re United Energy Corp. Solar Power Modules Tax Shelter Investments Sec. Litig.*, 2822 F.R.D. 251, 256 (C.D. Cal. 1988).

Plaintiff NGL has claims that are entirely typical of the claims of the putative Class members because: 1) all were and continued to be assessed per diem charges by MOL in California for weekends and holidays when the ports were closed until after the filing of the instant lawsuit; 2) all are subject to the UIIA in dealings with shipping/container carriers, including MOL; 3) all of the per diem transactions with MOL are subject to California's regulations, including SB 45 as enacted as section 22928; and 4) the claims of Plaintiff NGL (as the proposed class representative) and the putative class are based on the Court's interpretation of the California regulation and MOL's admission that it has

4. The Requirement of Adequate Representation Is Satisfied

The final Rule 23(a) prerequisite requires that the proposed class representative has and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit has adopted a two-factor test to determine whether a plaintiff and his counsel will adequately represent the interests of the class: "(1) do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1995). As with the typicality

requirement, adequacy requires that the interests of the named plaintiffs are aligned with the unnamed class members to ensure that the class representative has an incentive to pursue and protect the claims of the absent class members. *See Amchem*, 521 U.S. at 626 n. 20, 117 S. Ct. 2231 ("The adequacy-of-representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'").

The Settlement Agreement designates the following attorneys as Class Counsel: David C. Wright of McCune Wright Arevalo, LLP, and Edward J. Chong of the Law Offices of Edward J. Chong & Associates. Proposed class counsel have significant class action, litigation, and trial experience. (Wright Decl. ¶¶ 2, 17-19.) Moreover, McCune Wright Arevalo, the law firm representing the putative class, has extensive experience in class actions. (*Id.*) With respect to the adequacy of these lawyers, they have invested considerable time and resources into the prosecution of this action. Class Counsel were able to negotiate an outstanding settlement for the Class.

The interests of Plaintiff NGL Transportation are not antagonistic to those of the other class members; but are wholly aligned because MOL uniformly charged per diem fees to trucking companies in California for the use of their equipment on weekends and holidays when the port gates were closed. Further, Plaintiff understands that it is pursuing this case on behalf of all class members similarly situated and understands its duty to protect the absent class members. Plaintiff has actively participated in the litigation by frequently conferring with class counsel about the case and its status, assisting class counsel by gathering documents and other information, and being prepared and willing to testify at trial on behalf of the class if necessary. (Wright Decl. ¶¶ 13, 32.)

Based on the outstanding results achieved here the Court should appoint these attorneys as Class Counsel for the Class, and determine that Rule 23(a)'s adequacy requirement is satisfied.

5. The Proposed Settlement Meets the Requirements of Rule 23(b)(3)

Once the prerequisites of Rule 23(a) have been met, a plaintiff must also demonstrate that it satisfies the requirements of Rule 23(b), which requires that "the questions of law or fact common to class member predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Both these requirements are satisfied here.

a. Common Questions of Law and Fact Predominate

The predominance requirement questions whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "If common questions 'present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication,' then 'there is clear justification for handling the dispute on a representative rather than on an individual basis,' and the predominance test is satisfied." *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 526, 2012 WL 2250040 (C.D. Cal. June 12, 2012)

As the Supreme Court most recently confirmed:

> When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

Tyson Foods, Inc., 577 U.S. 442, 453 (2016). The primary legal question regarding the merits in this case was the interpretation of Section 22928, but this has already been resolved by this Court when it ruled on August 29, 2013 that this regulation indeed prohibits shipping companies such as MOL from charging trucking companies per diem fees on weekends and holidays when the terminals are closed. (Dkt. No. 84.) This interpretation applies uniformly to MOL's per diem practice in assessing fees to all class members. Furthermore, the primary factual issue in this case has also already been

determined, as MOL has admitted that it assessed per diem charges in violation of Section 22928 to intermodal trucking companies in California. Thus, all putative class members have been damaged in the past in the same way by having paid illegally assessed fees.

b. The Class Action Is the Superior Method of Adjudication

Rule 23(b)(3) also requires a court to consider whether a class action is superior to alternate methods of adjudication. Factors relevant to the inquiry include the interest of members of the class in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the difficulties likely to be encountered in the management of a class action. *See* Fed. R. Civ. P. 23(b)(3). "A consideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190, amended on other grounds on denial of reh'g, 273 F.3d 1266 (9th Cir. 2001).

Here, there is no manageability issue relating to litigating claims of members from different states. Likewise, there is no indication that class members are interested in controlling the prosecution of separate actions and Plaintiff is not aware of any other actions concerning this controversy as against MOL. Concentration in this forum is desirable, not only because it allows efficient adjudication of the claims of all class members, but also because 100 percent of the transactions at issue in this case occurred in California, and likely most of the U.S. west coast business of MOL, a Japanese corporation, occurs in California, which has the most active ports for Asian imports. As Plaintiff's causes of action based on California law appropriately apply to all claims arising from transactions that only occurred in California, there are no conflicts of law issues in this case. *See Keegan*, 284 F.R.D. at 539 (finding defendant's substantial

business in California sufficient to satisfy due process in applying California law to the claims of non-California class members); *Keilholtz v. Lennox Hearth Products, Inc.*, 268 F.R.D. 330, 340 (N.D. Cal. 2010) ("[o]verall, this class action involves a sufficient degree of contact between Defendants' alleged conduct, the claims asserted and California to satisfy due process concerns," in a case where nineteen percent of defendants' sales were made in California, and seventy-six percent of defendants' goods were partly manufactured, assembled, or packaged at plants in California as well as partly in at least one other state); *Parkinson v. Hyundai Motor America*, 258 F.R.D. 580, 598 (C.D. Cal. 2008) ("Plaintiffs make a sufficient state contacts showing under Shutts to establish that application of California law comports with due process. . . . [P]laintiffs allege that defendant conducts substantial business in the state through its fifty California dealerships. Finally, given the volume of California automobile sales and the number of in-state dealerships, plaintiffs claim it is likely that more class members reside in California than any other state.").

IV CONCLUSION

Plaintiff respectfully requests that the Court grant final approval of the settlement in this action, finally certify the settlement class, award attorney fees in the amount of $375,000, award reimbursement of litigation costs in the amount of $15,953.23, and approve the class representative service award of $5,000.

DATED: April 14, 2021 Respectfully submitted,

MCCUNE WRIGHT AREVALO, LLP

BY: /s/ David C. Wright
David C. Wright
Attorneys for Plaintiffs and the Putative Class

CERTIFICATE OF SERVICE

I certify that on April 14, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to all CM/ECF participants in the above-referenced matter.

By: /s/ *David C. Wright*
David C. Wright