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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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| YUNGHUI CHEN, on behalf of herself and all others similarly situated,<br><br>PLAINTIFFS,<br><br>v.<br><br>WESTERN DIGITAL CORPORATION AND WESTERN DIGITAL TECHNOLOGIES, INC.,<br><br>DEFENDANTS. | Case No. 8:19-cv-00909-JVS-DFM<br><br>**PLAINTIFF'S AMENDED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**<br><br>Date: July 1, 2019<br>Time: 1: 30 p.m.<br>Courtroom: 10 C<br>Judge: James V. Selna<br><br>Complaint Date: May 14, 2019<br>Trial Date: |

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## I. INTRODUCTION

On behalf of herself and approximately 1,370 similarly situated female employees of Defendants Western Digital Corporation Inc. and Western Digital Technologies Inc. (collectively "Western Digital"), Plaintiff Yunghui Chen ("Plaintiff") moves for preliminary approval of this class, collective action, and PAGA settlement (the "Settlement") of claims related to gender discrimination in employment. Reached prior to the initiation of formal litigation, the Settlement represents a victory for current and future female employees at Western Digital. In addition to a **$7,750,000** non-reversionary fund, the Settlement provides for two years of extensive programmatic relief to be monitored by Plaintiff's Counsel.

The proposed settlement is the product of over two years of arm's length negotiations over a tolling agreement, substantial pre-suit discovery, mediation, and dueling expert statistical analyses of class-wide data. Before pursuing material settlement discussions, Plaintiff and Western Digital (the "Parties") engaged in a fulsome investigation, including an exchange of data and documents pertaining to Plaintiff, the proposed classes, and the claims. This voluntary interchange enabled the Parties to conduct meaningful and intense negotiations with a keen eye towards the strengths and weaknesses of their positions and the value of the claims pled. Both parties completed expert statistical analyses of class-wide data that informed their views of the case and ultimately helped set the parameters for settlement talks. All negotiations were conducted at arm's length and were facilitated by a highly-experienced and nationally-esteemed employment mediator, David Rotman of Gregorio, Haldeman & Rotman in San Francisco, California. The Parties agreed in principle to certain salient terms of the Settlement only after months of protracted negotiations and a full day of mediation conducted by Mr. Rotman, and spent close to two years intensely negotiating over the final terms.

The Settlement is an extraordinary outcome for women at Western Digital. The non-reversionary $7.75 Million Settlement fund represents great value for the Classes, resulting in an average recovery of at least approximately $3,615 per class member, and the comprehensive programmatic relief commits Western Digital to concrete measures designed to ensure accountability and equal opportunity for women. The fact that the Parties were able to reach such a favorable settlement without years of risky and expensive litigation is a testament to both Western Digital and the Plaintiff; and, the early resolution of this matter, itself, presents substantial benefits to the Class Members and promotes judicial economy.

The Settlement is the best possible outcome of this matter given the substantial risks and delays associated with litigation. Accordingly, the Settlement demonstrably "falls within the range of possible approval." *Harris v. Vector Marketing Co.*, No. C–08–5198 EMC, 2011 WL 1627973, at *9 (N.D. Cal. Apr. 29, 2011). The Court should therefore authorize notice to the Class Members and submit the Settlement to them for their feedback and approval.

In order to effectuate the Settlement, Plaintiff respectfully moves the Court to:

(i) Certify the proposed Rule 23 Settlement Class, including

  (a) A Nationwide subclass for pay, promotion, and placement discrimination claims brought under Title VII;

  (b) A California subclass for pay, promotion, and placement discrimination claims and related claims under California law;

(ii) Appoint the Plaintiff as Class Representative and Plaintiff's Counsel as Class Counsel;

(iii) Conditionally certify the EPA Collective Action under 29 U.S.C. § 216(b);

(iv) Preliminarily approve the Settlement;

(v) Approve the Notice of Settlement for mailing to the Class Members; and;

(vi) Schedule a Final Fairness Hearing.

## II. BACKGROUND

### A. Western Digital Technologies Inc. & Western Digital Corporation

Western Digital Corporation is a computer data storage company and one of the largest hard disk manufacturers in the world. It employs over 5,000 employees in the United States, with approximately 1,400 at its former headquarters in Irvine, California. In the U.S., it operates largely through Western Digital Technologies Inc. ("WDT"), HGST, and SanDisk.[1] Western Digital Technologies Inc., along with its subsidiaries, Western Digital (Fremont), LLC, and Western Digital Media, LLC, operates many of Western Digital Corporation's U.S. engineering, research, and development functions and offer many of its products and services.

### B. Plaintiff, The Classes, And the Collective

Plaintiff Yunghui Chen was employed at Western Digital for more than ten years, concluding in September 2016. She has been pursuing this case for more than two and a half years. As stated in the civil Complaint, Doc. No. 1, she seeks to represent current and former female WDT (and subsidiary) employees through class, collective, and PAGA representative claims related to gender discrimination in pay, promotions, and job placement.

The Settlement class consists of two mutually exclusive subclasses – a California Sub-Class and a Nationwide Sub-Class, as well as a group of "Collective Action Plaintiffs" that overlaps with both subclasses. The "Nationwide Sub-Class" comprises:

> [W] omen directly employed by Western Digital Technologies, Inc., Western Digital (Fremont), LLC, and/or Western Digital Media, LLC in a Covered Position[2] as regular employees in the United States at any time from November 1, 2013 through the date of the Order Granting Preliminary Approval,

[1] Western Digital Corporation and Western Digital Technologies Inc. are collectively referred to herein as "Western Digital" or "the Company."

[2] The Settlement defines "Covered Position" as an indirect labor position at the Senior Manager level or below. Settlement §1.8.

> (excluding those who became employed by Western Digital Corporation or an affiliated entity as a result of or in connection with an acquisition on or after May 1, 2016), who do not opt out of the monetary relief provisions of the Settlement, and excluding any member of the California Sub-class.

Settlement § 1.17.

The "California Sub-Class" comprises:

> [W] omen directly employed by Western Digital Technologies, Inc., Western Digital (Fremont), LLC, and/or Western Digital Media, LLC in California in a Covered Position at any time from November 1, 2012 through the date of the Order Granting Preliminary Approval, (excluding those who became employed by Western Digital Corporation or an affiliated entity as a result of or in connection with an acquisition on or after May 1, 2016), who do not opt out of the monetary relief provisions of the Settlement.

Settlement § 1.3. The Settlement defines "Collective Action Plaintiffs" identically to the Class Action Sub-Class, except that it does not exclude members of the California Sub-Class. Settlement § 1.6. Thus, any individual who is a collective action is also a member of one of the two sub-classes. To date, there are approximately 1,370 class members.

### C. The Allegations

On behalf of the Classes and the Collective, Plaintiff alleges that Western Digital systemically failed to pay women equally to men and discriminated against women in pay, promotions, and placement, in violation of the federal Equal Pay Act ("EPA"), 29 U.S.C. § 206(d); the California Equal Pay Act ("CEPA"), Cal. Lab. Code § 1197.5; Title VII, 42 U.S.C. §§ 2000e *et seq.*; and the California Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code § 12940 *et seq*. Complaint ¶¶ 72–112. Plaintiff also asserts derivative claims under the California Unfair Competition Law, Cal Bus. & Prof. Code § 17200 *et seq*. and the California Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2698 *et seq.*, for violations of the California Equal Pay Act on behalf of the Classes. *Id* ¶¶ 113–26. These allegations are based on common systems of compensation and promotion that result in unjustified, widespread, and uniform disparities in compensation, promotion, and placement. *Id.* ¶¶ 18-23.

Western Digital has consistently denied any wrongdoing and has denied all of Plaintiff's individual and class allegations; it maintains that Plaintiff's individual and representative claims lack factual and legal merit. Western Digital further maintains that, absent a settlement, Plaintiff would not be able to certify a class action under Federal Rule of Civil Procedure 23 or a collective action on the EPA claims under 29 U.S.C. § 216(b).

**D. Pre-Suit Discovery, Negotiations, and Settlement**

Plaintiff initiated this case by dual-filing a class Charge of Discrimination with the United States Equal Employment Opportunity Commission ("EEOC") and a Complaint of Discrimination with the California Department of Fair Employment and Housing ("DFEH") on October 7, 2016, Plaintiff. *See* Fuschetti Decl. ¶ 7. In the following months Plaintiff's Counsel and Western Digital's counsel, O'Melveny & Myers LLP, met and conferred regarding exploring a pre-suit resolution of Plaintiff's individual, class, and collective claims prior to litigation, and ultimately agreed to engage in private mediation.

Prior to the April 27, 2017 mediation, the parties engaged in substantial informal discovery. Early in negotiations, Western Digital produced substantial amounts of information concerning Plaintiff. Western Digital then made three comprehensive productions of class-wide data. The final production contained hundreds of pages of relevant documents, including over four years of compensation and other employment information pertaining to class members. *Id. at* ¶ 12. Defendants also provided a written explanation of the data systems and responded to Plaintiff's written questions about the data. The Parties' counsel spent many hours conferring and corresponding on the phone and in writing, until Class Counsel was confident that they had reached a clear understanding of the data and its implications.

Both Parties retained statisticians to analyze the class data. Plaintiff hired Dr. Dwight Steward, a highly-regarded economist with a long track record of performing complex analyses specifically for litigation. *Id.* at ¶ 13. Dr. Steward and his team analyzed the data for disparities in pay and promotions and produced multiple controlled regression models. *Id.* In addition to relying on Dr. Steward's analyses, Plaintiff's counsel analyzed the data internally to gain insights about the class. On April 20, 2017, to prepare for the mediation, the Parties' experts and counsel conferred via phone regarding their respective methodologies.

On April 27, 2017, the Parties participated in a full-day mediation before David Rotman, a most highly-regarded mediator with a track record of resolving challenging and high-stakes disputes, including in the field of employment law. *Id.* at ¶ 14. *See Glass v. UBS Fin. Servs., Inc.*, No. 06-4068, 2007 WL 221862, at *1 (N.D. Cal. Jan. 26, 2007) (citing Mr. Rotman's reputation as "one of the preeminent mediators of employment law claims in the country" and describing him as "a well-respected mediator with substantial experience in employment litigation"). The Parties reached an agreement in principle to settle the case for $7.75 Million and executed a brief Memorandum of Understanding regarding several key terms of the settlement. *Id.*[3]

Following the mediation, the Parties continued to negotiate vigorously over other Settlement terms, including the class definitions, programmatic relief, settlement allocation formula, and scope of the release, among other matters. *Id.* at ¶ 15. On May 14, 2019, the Parties executed the Class Settlement Agreement. *Id.*

## III. KEY TERMS OF THE SETTLEMENT

The Settlement represents an outstanding result for both current and former female employees of Western Digital. The non-reversionary Settlement Fund provides a significant settlement payment to each Class and Collective Member, in addition to class-wide programmatic relief, tailored to the claims and designed to secure equal opportunity for women at Western Digital. The Settlement has the support of Plaintiff, Class Counsel,

[3] After reaching the class MOU, the parties also reached a confidential agreement to resolve Plaintiff's other individual and non-class claims.

and Western Digital.

**A. $7.75 Million Non-Reversionary Total Settlement Fund**

The Settlement provides for Western Digital to make a non-reversionary settlement payment of Seven Million Seven Hundred and Fifty Thousand Dollars ($7,750,000) in settlement of all class and collective claims in the case (the "Fund"). Settlement §§ 1.26, 4.1. This Class Settlement Fund is a common fund from which each participating Class Member will receive an individualized award. The Fund will be allocated based upon a formula that takes into consideration each Class Member's individual rate of pay and length of employment within the applicable Class Period, as well as whether she has previously signed a release of claims. Settlement § 4.3. If the Court approves the requested attorneys' fees, costs, service awards, and other allocations of the Settlement, the net amount remaining in the Fund will be approximately $4,811,667, which will be divided among the class members according to the formula set forth in the settlement. The average pre-tax recovery for each Class Member, if the Court grants Plaintiff's anticipated request for fees and costs, will be approximately $3,615.

**B. Cy Pres**

Under the Settlement, any unused funds, including funds approved for ongoing administration that remain in the fund at the conclusion of administration, and the proceeds of any uncashed checks, will be divided evenly between Legal Aid At Work and the Legal Aid Society of Orange County. Settlement § 7.5. Legal Aid at Work is a nonprofit legal services organization that provides legal advice, representation, and legislative support, particularly with respect to issues of employment law, to low-income, working families in California.[4] It targets gender discrimination through initiatives addressing domestic violence, family issues, girls in sports, and gender equity. *See Gender Equality & LGBT*

[4] *Our Mission and How We Work*, Legal Aid at Work (2018), https://legalaidatwork.org/our-mission-and-how-we-work/.

*Rights*, Legal Aid at Work (2018), https://legalaidatwork.org/our-programs/gender-equality-and-lgbt-rights/.[5] The Legal Aid Society of Orange County provides "civil legal services to seniors and low-income individuals and […] promote[s] equal access to the justice system through advocacy, legal counseling, innovative self-help services, in-depth legal representation, economic development and community education."[6]

### C. Comprehensive Programmatic Relief

Under the Settlement, Western Digital will also undertake sweeping programmatic measures to help eliminate gender disparities and foster equal employment opportunity going forward. As detailed in the Agreement, Defendants will undertake initiatives to (1) evaluate, promote, and compensate women equitably; (2) perform statistical analyses with regard to evaluation, promotion, and compensation; (3) design and execute leadership development initiatives for women; (4) bolster their policies regarding flexible work arrangements and maternity and parental leave; (5) maintain records relevant to this agreement; (6) reinforce their commitment to EEO compliance and enforcement; and (7) enhance their processes for investigation of internal complaints, such as complaints of gender discrimination. Settlement §§ 3.4–3.10. In order to ensure the Company's compliance with the agreement, Western Digital will also appoint a Compliance Monitor who will determine whether the terms and conditions of the agreement have been satisfied. Settlement § 3.2. These extensive and wide-ranging reforms will have a tangible impact on the daily experience of women working at Western Digital.

### D. Released Claims

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[5] *See also Project Survive*, Legal Aid at Work (2018), https://legalaidatwork.org/our-programs/domestic-violence-survivors/; *Work & Family*, Legal Aid at Work (2018), https://legalaidatwork.org/our-programs/work-and-family-program/; *Fair Play For Girls in Sports*, Legal Aid at Work (2018), https://legalaidatwork.org/our-programs/fair-play-for-girls-in-sports/;

[6] *Who We Are*, Legal Aid Society of Orange County (2019), http://dev.www.legal-aid.com/about-us/who-we-are/.

The release is narrowly tailored to the claims asserted in this case. Plaintiff, Class Members, and Collective Members will release any claims against WDC, Western Digital Technologies, Inc., Western Digital (Fremont), LLC, and Western Digital Media, LLC that were brought in this litigation or based on the facts and circumstances in this litigation, including claims for gender-based unequal pay, disparate treatment and pattern and practice discrimination based on gender with respect to all forms of compensation, job code placement, and denial of promotion, and claims for disparate impact discrimination based on gender with respect to all forms of compensation, job code placement, and denial of promotion. *Id.* §§ 1.22, 11.1, 11.2. Nothing in the Settlement bars any claims of the Named Plaintiff, Collective Action Plaintiffs, or the Class Members based on or arising out of events occurring after the last day of the Opt-out Period. *Id.* ¶ 11.3.

**E. Attorneys' Fees and Incurred Expenses**

Class Counsel will apply for reasonable attorneys' fees and reimbursement of their incurred out-of-pocket costs in a combined amount totaling $2,583,333, or 33 1/3% of the $7.75 million Settlement Fund. Settlement § 5.1. The Court need not rule on Class Counsel's fees and costs now; Plaintiff will file a formal application prior to the Final Fairness Hearing. As Plaintiff will explain in detail in the application, $2,583,333 in combined fees and costs is reasonable and well-justified in consideration of the risks Class Counsel has undertaken in pursuing this case on a contingency basis, and the outstanding result achieved on behalf of the Classes and Collective.

While settling this case efficiently, Class Counsel has ably represented the classes' interests, as evidenced by this Agreement. Plaintiff's Counsel has invested over 1,000 hours, and over $500,000 in attorneys and staff time, and incurred costs of approximately $115,000. Plaintiff's Counsel anticipates investing a total of approximately 1200 hours of attorney and staff time and $130,000 in costs through the final approval hearing, and hundreds of additional hours over the course of the two-year consent decree period.

Plaintiff's Counsel's service to the class has included investigating the claims and researching the law, drafting and filing charges with the EEOC, DFEH, and LWDA, conducting informal discovery, drafting the Complaint, analyzing the data with the assistance of their expert, engaging in extensive settlement negotiations, and preparing for and participating in a full day of formal mediation. Fuschetti Decl. ¶ 18. Sanford Heisler Sharp has extended approximately $115,000 in expenses, the majority of which covered the cost of expert statistical analysis of class data and of mediation. Class Counsel will continue to incur substantial time and expenses throughout the next two (2) years as they advise Class and Collective Members regarding the Settlement and monitor Western Digital's compliance with the Settlement's robust programmatic relief provisions. *Id.* ¶ 22.

### F. Service Award

Pursuant to the terms of the Settlement, Plaintiff will seek a service award of $50,000. Settlement § 6.1. The proposed service award represents just 0.65% of the total cash settlement and will not significantly reduce the awards to the Class and Collective Members. The Court need not rule on the service awards now; Plaintiff will file a formal application prior to the Final Fairness Hearing.

The service award is well deserved in light of the risks and burdens Plaintiff undertook in order to be able to step forward on behalf of the class. Plaintiff has been involved at every step of this case and has had a large impact on every aspect of its investigation and resolution. Chen Decl. ¶¶ 5, 14. As the sole named class representative, Plaintiff is also acutely aware that, by initiating this action on a class basis, she is putting her career and livelihood at risk. *Id.* at ¶ 18-19. Plaintiff had already ceased working at Western Digital when the case was initiated, and still accepted the risk that potential employers would refuse to hire her upon learning of the lawsuit. *Id.* ¶ 9.

### G. Other Settlement Terms

Pursuant to the Settlement, $75,000 is allocated for payment of the State of California's share of civil penalties to the California Labor and Workforce Development

Agency. Settlement § 4.2.1. Additionally, the Settlement allocates $50,000 for the fees and costs of the Class Administrator. Settlement § 4.2.2. Class Counsel sought out quotes from three Class Administrators and believes that actual costs of administration will be less than $50,000, resulting in a small increase in the amount of class member payments.

## IV. STANDARD

It is well-settled that "[j]udicial policy favors settlement of class actions, as substantial resources can be saved by avoiding the time, cost, and rigors of formal litigation."[7] *Clesceri v. Beach City Instruments & Protective Servs.*, No. CV-10-38730JST (RZx), 2011 WL 320998, at *7 (C.D. Cal. Jan. 27, 2011). Further: "Courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Illoldi v. Koi NY LLC*, No: 1:15-cv-6838, 2016 WL 3099372, at *4 (S.D.N.Y. May 31, 2016). *See also, e.g., California v. eBay, Inc.*, No. 5:12-cv-5874-EJD, 2014 WL 4273888, at *6 (N.D. Cal. Aug. 29, 2014) (suggesting that where parties are in an adequate position to evaluate a settlement, resolution at an early juncture favors settlement approval).

The procedure for deciding whether to approve a proposed Rule 23 class action settlement is generally a two-step process involving a preliminary approval stage and a final fairness hearing. *In re Wireless Facilities, Inc. Sec. Litig.*, 253 F.R.D. 630, 634 (S.D. Cal. 2008). At the first stage, the Court makes a preliminary determination as to whether certification of a settlement class is warranted and whether the proposed settlement is fair, reasonable, and adequate. *See id*. Then, the court approves the "form and manner of notice and sets a final fairness hearing, where it will make a final determination of the class settlement." *Id.*

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[7] *See also, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the "the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *Officers for Justice v. Civil Service Comm. of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (asserting that "[v]oluntary conciliation and settlement are the preferred means of dispute resolution").

Under Federal Rules of Civil Procedure 23(e), preliminary approval is appropriate if the parties demonstrate that the Court will likely be able to "(i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. Proc. R. 23(e)(1)(B). At the preliminary approval stage, the court need only "determine whether the proposed settlement is within the range of possible approval," *Murillo v. Pac. Gas & Elec. Co.*, 266 F.R.D. 468, 479 (E.D. Cal. 2010), while giving "proper deference to the private consensual decision of the parties," *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). At this juncture, "[t]he court is really only concerned with whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies. . . . The court is assisted in its inquiry where [. . .] the stipulation and settlement appear to be, for the most part, the result of vigorous, arms-length bargaining." *Murillo*, 266 F.R.D. at 479. "[T]he settlement need only be potentially fair, as the Court will make a final determination of its adequacy at the hearing on final approval, after such time as any party has had a chance to object and/or opt out." *La Parne v. Monex Deposit Co.*, No. SACV 08-0302, 2010 WL 4916606, at *2 (C.D. Cal. Nov. 29, 2010).

As courts and commentators have stated, preliminary approval essentially amounts to a determination that there is "probable cause" to believe that the settlement may be fair, sufficient to warrant submitting the agreement to the Class Members for their input. *See, e.g.*, *Illoldi*, 2016 WL 3099372, at *1 ("The preliminary determination of fairness is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness."). The class members then vote on the settlement by deciding whether to opt-out or object to its terms.

## V. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT

In order to effectuate the Settlement, the Parties have stipulated to the certification of two Rule 23 subclasses: the "Nationwide Sub-Class" and "California Sub-Class" specified above. As the proposed Classes satisfy all the requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy – preliminary certification is appropriate.

**A. The Class Is Sufficiently Numerous to Make Joinder Impracticable**

The Rule 23 Class totals approximately 1,370 members. This number is more than sufficient to establish numerosity under Rule 23(a). *See Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 533 (C.D. Cal. 2011).

**B. Questions of Law or Fact Are Common to The Class**

Commonality is construed permissively, and just one common question will satisfy Rule 23(a)(2). *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019. "[C]ommonality only requires a single significant question of law or fact," *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012), where that question is capable of "generat[ing] common answers apt to drive the resolution of the litigation," *Dukes*, 131 S.Ct. at 2551.

On behalf of the Classes, Plaintiff alleges that: (1) Western Digital systemically pays Class Members less than their male colleagues who perform substantially similar work, in violation of the state and federal Equal Pay Acts, Title VII, and FEHA; (2) Class Members have been denied promotions and promoted at a slower rate than equally or less qualified men in violation of Title VII and FEHA; and (3) Class Members have been disproportionately placed into lower paying positions compared to equally or less qualified men in violation of Title VII and FEHA.

The resolution of these claims presents a series of common questions more than capable of satisfying the *Dukes* standard. These shared questions include: (1) whether Western Digital treated women differently than men in the application of its compensation, promotion, and/or placement policies and procedures; (2) whether Western Digital's compensation, promotion, and/or placement policies and procedures have an adverse impact on women; and (3) if adverse impact is shown, and whether Western Digital satisfies its affirmative defenses to maintain such discriminatory policies and procedures.

Statistical analysis of class data indicates the existence of common injuries stemming from pay, promotion, and placement discrimination. After controlling for a range of potential non-discriminatory factors, Dr. Steward found statistically significant pay disparities between class members and their male counterparts, strongly suggesting systematic injuries, endemic to the Classes. The standard deviations associated with these disparities are well above the recognized two-standard-deviations that establishes prima facie proof of a pattern or practice of discrimination. Such pronounced disparities may, in themselves, be sufficient to establish class-wide liability. *See, e.g., Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 307-308, 309 n.14 (1977) (holding that gross statistical disparities, typically those "greater than two or three standard deviations," "alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination"); *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015) (finding that decertification constituted an abuse of discretion when plaintiff's allegations of systematic discrimination were supported by statistical evidence significant to 2 standard deviations).

These questions are likely to generate common answers which are determinative of the litigation at hand. *See Ellis v. Costco Wholesale Corp*., 285 F.R.D. 492, 506-533 (N.D. Cal. 2012) (finding commonality and certifying Rule 23 class where plaintiffs alleged their employer engaged in a pattern or practice of gender discrimination in the promotion of female employees to management positions).[8]

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[8] *See also Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243, 257–67 (S.D.N.Y. 2010) (commonality established where all class members bring common claims that Novartis discriminated against female sales employees with respect to wages, promotion and pregnancy"); *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207, 2010 WL 3119374, at *1 (S.D.N.Y. Aug. 5, 2010).

### C. Class Representative's Claims Are Typical of The Classes

"Courts evaluate the typicality requirement of Rule 23(a)(3) by considering whether the named representative and the class members have similar injuries and whether those injuries arise from the same course of conduct." *Tapia v. Zale Del., Inc.*, No. 13-CV-1565-BAS (PCL), 2016 WL 1385181, *9 (S.D. Cal. Apr. 6, 2016) (citing *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). This standard does not require uniformity. "The Ninth Circuit interprets typicality permissively," and "representative claims are typical if they are 'reasonably co-extensive with those of absent class members,' though they 'need not be substantially identical.'" *Hofmann v. Dutch LLC*, 2016 U.S. Dist. LEXIS 55628, at *7 (S.D. Cal. Apr. 26, 2016) (citing *Hanlon*, 150 F.3d at 1020); *see also Ellis*, 285 F.R.D. at 517 n.16 ("[E]ven post-*Dukes*, class members need not be identical with no distinctions in their personal employment history. . . Were that the standard, Rule 23 would cease to exist altogether.").

Plaintiff's claims and those of the Classes arise from the same course of conduct: Defendants' discriminatory policies and systems that resulted in female employees being systematically denied pay, promotions, and placement equal to that of comparable male employees. Western Digital's company-wide policies, practices, and procedures concerning pay levelling, stock and bonus distribution, promotions (such as a tap-on-the-shoulder selection process and failure to post open positions), and placement practices are the root of the reduced pay and advancement opportunities that both Plaintiff and the Class Members experienced. As no defenses to the class-wide pay, promotion, and placement claims are unique to Plaintiff, her claims are typical.[9]

[9] *See Ellis*, 285 F.R.D. at 533-535; *Velez*, 2010 WL 4877852 at *9 (plaintiffs found to be typical where they alleged that they and all class members were discriminated against on the basis of their gender); *Hnot v. Willis Group Holdings Ltd*., 228 F.R.D. 476 (S.D.N.Y. 2005) (typicality satisfied where plaintiffs allege suffering from similar discriminatory practices as the other class members).

### D. Plaintiff and Her Counsel Will Fairly and Adequately Protect the Classes' Interests, Satisfying Rule 23(a)(4) And Rule 23(g)

Rule 23(a)(4) requires that class representatives "fairly and adequately protect the interests of the class." To determine this, courts undertake a two-part inquiry: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Manouchehri v. Styles for Less, Inc.*, 2016 WL 3387473, at *3 (S.D. Cal. June 20, 2016) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019). Rule 23(g) requires the Court to consider proposed class counsel's prior experience, knowledge, and ability to properly represent the Classes.

Plaintiff easily satisfies Rule 23(a)(4). No conflicts of interest exist between Plaintiff and Class Members. Plaintiff and Class Members share the same common goal: rooting out systemic gender discrimination at Western Digital and equalizing pay, promotion, and placement opportunities for women at the company. *Manouchehri*, 2016 WL 3387473 at *3. As a long-term employee who dedicated her career to Western Digital, Plaintiff is committed both to remedying the impacts of discrimination and to preventing future discrimination. Plaintiff has vigorously prosecuted this case on behalf of the Classes and will continue to do so. *See supra* III(F); Chen Decl. ¶¶ 5, 14. Her efforts have achieved not only a highly favorable monetary result for the Classes, but comprehensive structural reforms that will benefit all female employees at Western Digital.

Class Counsel are two preeminent plaintiffs' firms experienced in complex class litigation, especially gender discrimination cases. *See* Sanford Decl. ¶ 7 and Medina Decl. ¶ 5. Sanford Heisler Sharp, a nationwide civil rights firm specializing in employment matters, has served as lead or co-lead counsel in approximately fifty class and collective actions, covering class members in most of the states in the country. Sanford Decl. ¶ 7. It has consistently achieved outstanding class results, including the largest jury verdict in a Title VII discrimination class action in U.S. history, and been recognized repeatedly for its zealous and high-caliber advocacy.[10] *Id.* at ¶ 10-13. Medina Orthwein LLP is a civil rights litigation firm founded by two prominent civil rights attorneys, Felicia Medina and Jennifer Orthwein. The Firm focuses on employment and corrections cases with a unique emphasis on advocating for plaintiffs with intersectional identities. Medina Decl. ¶ 5. Felicia Medina, who received her law degree from Yale Law School in 2006, has been named a Law360 "Rising Star," a Law360 "Minority Powerbroker," and a San Francisco SuperLawyer Rising Star. *Id.* In 2016, she was honored as one of the National LGBT Bar Association's "Best LGBT Lawyers under 40." *Id.* As discussed above, Plaintiff's Counsel have pursued this case zealously and are prepared to continue to advocate for the class. *See supra* II(D) & III(E). Accordingly, both Rule 23(a)(4) and Rule 23(g) are satisfied.

**E. The Requirements of Rule 23(b)(2) Are Satisfied**

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Aho v. Americredit Fin. Servs.*, 277 F.R.D. 609, 615 (S.D. Cal. 2011) (citing *Dukes*, 131 S.Ct. at 2558). In a (b)(2) class, "notice to absent class members and an opportunity to opt out of the class is not required." *Id.* at 614.

In this case, Plaintiff maintains that Western Digital uses uniform pay, promotion, and placement policies and practices, in concert with a discriminatory culture promoted by Western Digital's senior management. Consequently, the programmatic relief negotiated by the Parties to address those policies and practices will "provide relief to each member of the

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[10] *See e.g. Velez*, 2010 WL 4877852 at *10 ("Here, Class Counsel, Sanford Wittels & Heisler LLP [Sanford Heisler's former name], has just the sort of established record contemplated by the Rules."); *Bellifemine*, 2010 WL 3119374, at *4 (recognizing Sanford Heisler as having "an established record of competent and successful prosecution of large . . . class actions").

class." *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014). Thus, the programmatic relief portion of the Settlement qualifies for certification under Rule 23(b)(2).

### F. Class Certification is Also Appropriate Under Rule 23(b)(3)

#### 1. Common Issues Predominate

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Grayson v. 7-Eleven, Inc.*, No. 09–CV–1353 MMA (WMc), 2011 WL 2414378, at *4 (S.D. Cal. 2011) (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997)). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Norris-Wilson v. Delta-T Group, Inc.*, 270 F.R.D. 596, 606-07 (S.D. Cal. 2010) (citing *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001)). Here, common issues predominate because "[r]esolution of Plaintiff'[s] challenge to [alleged discriminatory employment] practices will resolve significant issues with respect to the class as a whole, and this dwarfs individualized issues as to particular employment decisions." *Ellis*, 285 F.R.D. at 538; *In re Wells Fargo Home Mortg. Overtime Pay Litig*., 571 F.3d 953, 958 (9th Cir. 2009) ("[U]niform corporate policies will often bear heavily on questions of predominance and superiority").[11]

#### 2. A Class Action is the Superior Means of Adjudication

In considering whether a class action is the superior approach for resolving the controversy:

> [C]ourts will [**first**] look at whether or not the class members have interests in individually controlling the prosecution or defense of separate actions;

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[11] *See also, e.g., Lopez v. G.A.T. Airline Ground Support, Inc.*, No. 98cv2268–IEG(BGS), 2010 WL 3633177, at *8 (S.D. Cal. Sept. 13, 2010) (finding predominance in employment class action alleging claims "based upon company policies […] consistently applied" to class members).

> **second**, the courts consider the extent and nature of any litigation concerning the controversy already begun by or against class members; **third**, the courts assess the desirability or undesirability of concentrating the litigation of the claims in the particular forum; **finally**, the courts consider the likely difficulties in managing a class action.

*Ching v. Siemens Indus*., No. C 11-4838 MEJ, 2013 U.S. Dist. LEXIS 169279, at *5 (N.D. Cal. Nov. 26, 2013) (emphasis added).

Here, class treatment is superior to other methods of adjudication. Plaintiff has already engaged in extensive investigation to develop the class claims. Requiring each individual Class Member to conduct duplicative discovery and to separately litigate her own action would be highly inefficient and an affront to judicial economy. Moreover, given the risks of suing one's employer and the relatively low sums involved, it would be impracticable for most Class Members to pursue individual actions. Indeed, as in other cases in which classes have been certified, "[g]iven the class's common questions affecting the class as a whole at the liability stages of this matter, and given class members' ability to opt out of the monetary relief class or to pursue their claims for relief in [this action], class members have a diminished interest in individually controlling the common portions of this action." *Ellis*, 285 F.R.D. at 539–540.[12] Finally, the Central District is an acceptable location for this case because Plaintiff resides and worked for Western Digital there.

## VI. THE COURT SHOULD CONDITIONALLY CERTIFY THE EPA COLLECTIVE ACTION UNDER 29 U.S.C. § 216(b)

For settlement purposes, the Parties stipulate to certification of an EPA Collective Action comprised of all women below the level of "Senior Director" who were or are employed by Western Digital Technologies, Inc., Western Digital (Fremont), LLC, and/or

[12] The Court need not reach the issue of whether the case, if tried, would present manageability issues. *See, e.g. Amchem Prods., Inc.*, 521 U.S. at 610 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems[...]").

Western Digital Media, LLC in the United States between November 1, 2013 and date of Order Granting Preliminary Approval in an "indirect labor" position (excluding those who became employed by Western Digital Corporation or an affiliated entity as a result of or in connection with an acquisition on or after May 1, 2016). Plaintiff alleges violations of the Equal Pay Act, 29 U.S.C. § 206(d) and thus seeks conditional certification under Section 216(b).

Claims under the EPA are not subject to Rule 23's certification process, but rather are subject to the collective action process under the FLSA. Instead, "[d]etermining whether a suit may be maintained as an FLSA collective action is within the discretion of the district court." *Hensley v. Eppendorf N. Am., Inc.*, 2014 WL 2566144, at *2 (S.D. Cal. June 6, 2014). The Ninth Circuit has adopted a two-step approach for collective action certification under Rule 216(b). *See Campbell v. City of Los Angeles*, No. 15-56990, 2018 WL 4354379, at *11–12 (9th Cir., Sept. 13, 2018). The standard for approval at the first stage is "a lenient one that typically results in certification." *Hensley*, 2014 WL 2566144, at *6; *Leuthold v. Destination Am.*, 224 F.R.D. 462, 467 (N.D. Cal. 2004) ("[T]he [i]nitial determination is usually made under a fairly lenient standard and typically results in conditional class certification."). A plaintiff must "provide little more than substantial allegations, supported by declarations or discovery, that the putative class members were together the victims of a single decision, policy, or plan." *Id.* This requires merely "some factual basis beyond the mere averments in [his] complaint for the class allegations." *Id.* Importantly, the "showing required here is considerably less stringent than the showing required under Federal Rule of Civil Procedure 23." *Id.*

Here, the EPA Collective Action easily hurdles the low bar for conditional certification; as the considerably more stringent Rule 23 is satisfied, certification of a Section 216(b) collective action follows as a matter of course. Accordingly, conditional or step one certification is appropriate. If the Court grants this request, Collective Action Plaintiffs will receive notice of this Settlement and their options. Collective Action

Plaintiffs will release their claims under the EPA by cashing their rewards checks. Courts in California have approved this opt-in process in cases under the EPA. *Wellens et. al. v. Daiichi Sankyo, Inc.*, No. C 13-00581 WHO (DMR) (N.D. Cal. Feb. 11, 2016).

## VII. <u>THE COURT SHOULD PRELIMINARILY APPROVE THE PROPOSED CLASS SETTLEMENT</u>

A proposed settlement warrants approval if it is "fundamentally fair, adequate, and reasonable." *Hanlon*, 150 F.3d at 1026. Under Rule 23, preliminary approval is appropriate if the Court *will likely* be able to "(i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed R. Civ. Proc. 23(e)(1). "Closer scrutiny [of a class action settlement] is reserved for the final approval hearing." *Harris*, 2011 WL 1627973, at *7.

### A. The Proposed Settlement was the Product of Vigorous, Arm's-Length, Informed Negotiations by Experienced Counsel and Is Not Collusive

The arms-length bargaining process, undertaken by experienced Counsel who have zealously pursued the interests of the class, favors approval. *See* Fed. R. Civ. Proc. 23(e)(2)(A)&(B).

As discussed, *supra* pp 16:21-17:10, Plaintiff is represented by experienced counsel who, along with Plaintiff, have zealously pursued the interests of the class, and achieved an excellent result. The fact that both sides are represented by experienced and well-informed counsel who recommend the settlement supports granting approval. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (finding that "the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight.").

The Settlement is unquestionably the result of arms-length negotiations. The parties engaged in vigorous negotiations that included extensive class-wide discovery and expert analysis. *See supra* II(D). As a result of the extensive investigation and in-depth analysis of the Plaintiff's claims, the Parties negotiated the Settlement with complete knowledge of the strengths, weaknesses, and potential damages in the case. *See, e.g.*, *Bond v. Ferguson Enters., Inc.*, No. 1:09-cv-01662 OWW MJS, 2011 WL 284962, at *6 (E.D. Cal. Jan. 25, 2011) (granting preliminary approval where an agreement was reached through mediation after "extensive investigation and discovery allowing [both parties] to assess the strengths and weaknesses of the case."). The resultant Settlement lacks any of the features that the Ninth Circuit considers indicative of collusion. It (1) is non-reversionary; (2) awards counsel a standard fee of 33 and 1/3 percent; and (3) it remains wholly within the Court's discretion whether to award the requested fee/costs out of the Fund. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). Finally, that the Settlement was reached with "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Carter v. Anderson Merchandisers, LP*, 2010 WL 1946784, at *7 (N.D. Cal. May 11, 2010) (internal citations omitted).

### B. The Settlement Provides Equitable Relief to the Class

The Settlement treats class members equitably with respect to each other and does not grant preferential treatment to Plaintiff or any other class member. *See* Fed. R. Civ. Proc. R. 23(e)(2)(D). Settlement shares are calculated to reflect differences in income and tenure. Each Nationwide Sub-Class Member will be assigned a proportionate share of the Class Settlement Fund based on her gross pre-tax income for work in a covered position during the applicable class damages period for claims under the Equal Pay Act; California Sub-Class Members will be assigned shares based on the same proportion, with an additional year weighted at half the value as one year in the Nationwide Sub-Class damages period due to the availability of an additional year of restitution damages under the California UCL.[13]

### C. The Proposed Settlement Falls Within the Range of Reasonableness

In assessing whether a settlement is reasonable, a court is instructed to consider whether the relief obtained is adequate, taking into account: (i) the costs, risks, and delay of

[13] Class members receive less if they have signed a settlement containing a general release. Settlement § 4.3.1.

trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3). The determination of a "reasonable" settlement is not susceptible to a mathematical equation yielding a particular sum. *Rodriguez v. West Publ'g Corp*., 563 F.3d 948, 965 (9th Cir. 2009). Rather, settlements may fall within a range of possible approval. *See Harris*, 2011 WL 1627973, at *7. The Ninth Circuit has advised that "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits," and, "[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Service Com.*, 688 F.2d at 625. Here, the substantial class-wide recovery, in a gender discrimination class action, is adequate and approvable.

**1. The Proposed Settlement Provides Good, Class-wide Relief Through A Reasonable Distribution Method**

The Settlement provides for a non-reversionary cash settlement payment to the Class of $7.75 million, which covers distributions to Class Members, attorneys' fees, litigation costs, service awards, and expenses associated with the Settlement. The average Class Member will receive at least $3,615, automatically, without any action on their part. The method of distribution of class payments, through the mail, using an address trace search to find any addresses for returned mailings, provides an adequate mechanism for distributing these payments. Settlement §7.1; *see* Fed. R. Civ. Proc. R.23(e)(2)(C). In addition, Class Members currently employed by Western Digital will receive benefits from the programmatic relief, which will materially advance the goal of equal opportunities for female Western Digital employees. In exchange for these benefits, class members are subject to a narrowly-tailored release, limited to claims of pay discrimination, and disparate treatment, and disparate impact arising from the operative facts alleged in the Complaint. Settlement § 11.1.

**2. The Settlement is Reasonable in Light of the Risks, Expense, and Delay of Continued Litigation**

This robust recovery and narrowly tailored release are an excellent deal for the class in light in light of the risks, expense, and delay associated with continued litigation and trial.

Although Plaintiff believes her claims have merit, she also recognizes that the class would face significant legal, factual, and procedural obstacles to recovering damages. Western Digital strongly disputes that it discriminated against female employees through its pay, promotion, and placement policies and practices and has presented evidence in defense of the claims. Absent this Settlement, Defendants would have contested the propriety of class treatment both in response to a motion for certification and through any trial. Substantial disputes also remain as to both merits issues and the certifiability of the Classes. Disputes pertaining to certification stem from the constant evolution of Rule 23 jurisprudence in light of the Supreme Court's ruling in *Dukes v. Wal-Mart*, as well as from recent lower-court decisions interpreting it. Such uncertainty favors approval. *Rodriguez*, 563 F.3d at 964, 967.

Moreover, "[e]ven if Plaintiff… were to prevail, they would be required to expend considerable additional time and resources, potentially outweighing any additional recovery obtained through successful litigation." *Bond*, 2011 WL 284962, at *6. The factual and legal issues in this action are complex. The trial of Plaintiff's class claims – which collectively involve the claims of over one thousand Class Members – would require substantial preparation and ultimately the presentation of dozens of witnesses and multiple experts. *Gripenstraw v. Blazin' Wings, Inc.*, 2013 WL 6798926, at *11 (E.D. Cal. Dec. 19, 2013) (recognizing the risk and expense of further litigation involving the "examination of numerous witnesses, by both parties, either through depositions or trial testimony, often both"). In contrast to the delay that would result from trial and appeals, the proposed Settlement yields a certain, substantial, and prompt recovery for the Classes.

### 3. Class Counsel's Attorneys' Fees Request is Reasonable

The settlement permits class counsel to seek attorneys' fees up to 33 and 1/3 percent of the Fund, a percentage frequently approved by Courts in the Ninth Circuit. Plaintiff anticipates seeking less than the maximum available fees. She will instead seek *combined* fees and costs incurred of 33.3% of the $7.75 million Fund. A portion of the requested award will constitute reimbursement for Counsel's out-of-pocket reasonable litigation expenses of $130,000 in expert fees, mediation costs, travel, and other necessary layouts, further reducing the percentage fee to below 32%. The requested fee of less than 32 percent is well within the range approved by the Ninth circuit in typical cases.

"The Ninth Circuit has established a 25% 'benchmark' for common fund cases." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). "The exact percentage [of fees] awarded [in a class action] . . . depend[s] on the facts of the case, *and in most common fund cases, the award exceeds that benchmark percentage*." *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 448 (E.D. Cal. 2013) (citations omitted, emphasis added). While endorsing the 25% benchmark, California courts recognize that most fee awards are approximately 33% of the common fund. *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 WL 163293, at *4–5 (S.D. Cal. Jan. 14, 2013) (citing *Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557 n.13 (2009)). As a result, fee awards of 33 1/3 % or more are regularly approved in this Circuit. *E.g. In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of one-third of $12 million fund); *Singer v. Becton Dickinson & Co.*, No. 08-CV-821 - IEG (BLM), 2010 WL 2196104, at *8 (S.D. Cal. Jun. 1, 2010) (ruling that an award of 33.33% fees in employment class action "falls within the typical range of 20% to 50% awarded in similar cases"); *In re Heritage Bond Litig.*, 02-ML-1475-DT(RCx), 2005 WL 1594403, at *8 (C.D. Cal. June 10, 2005) (awarding fees totaling one-third of $27,783,000 fund).[14]

**4. The Relief to Plaintiff is Reasonable and Appropriate**

In addition to sharing in the Class Settlement Fund on the same terms as all other Class Members, Plaintiff will apply for a service award of $50,000.[15] This service award is also reasonable and appropriate and does not provide cause to reject the Settlement at the preliminary approval stage.

"[T]he Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable." *See, e.g.*, *Harris*, 2011 WL 1627973, at *9. In assessing service awards, Courts consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonable fears of workplace retaliation." *In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at *16 (N.D. Cal. Sept. 2, 2015).

A service award of $50,000 is within the range of reasonableness. Courts in the Ninth Circuit and elsewhere have awarded similar or higher amounts in both employment cases and other contexts. *See, e.g.*, *Wright v. Stern*, 553 F. Supp. 2d 337, 342 (S.D.N.Y. 2008) ($50,000 awards to each of 11 named plaintiffs in an employment discrimination action).[16]

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[14] *See, e.g.*, *Stuart v. RadioShack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645, at *6–7 (N.D. Cal. Aug. 9, 2010) (awarding one-third fee in employment class action); *Carlson v. C.H. Robinson Worldwide, Inc.*, No. CIV 02–3789 JNE/JJG, 2006 WL 2671105, at *8 (D. Minn. 2006) (awarding fee of 35.5% in sex discrimination class action).

[15] Pursuant to Rule 23(e)(2), the Court must consider any agreement made in connection with the proposed settlement. As Plaintiff's confidential settlement of individual claims was reached to resolve only her non-class claims, it provides no obstacle to final approval.

[16] *See also In re High-Tech Employee Antitrust Litig.*, (granting service awards totaling $140,000 and $100,000 for related matters); *Liberte Capital Group v. Capwill*, 2007 WL 2492461, at *1 (N.D. Ohio Aug. 29, 2007) (granting service awards of $97,134 and $95,172 to two class representatives); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding four $300,000 service awards in a Title VII case);

Moreover, at only 0.65%, the requested service award is a fraction of the overall Settlement.[17] As set forth above, *supra* III(F), Plaintiff was indispensable to securing this result for the class, expended substantial time and resources, and incurred substantial risk in doing so. Chen Decl. ¶¶ 5, 14, 18, 19. Under established case law, she is entitled to reasonable recognition for single-handedly pursuing this matter on behalf of absent class members.

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

To the extent that the Court considers the status of discovery, this factor supports preliminary approval. Formal discovery is not a prerequisite, and courts approve settlements reached prior to the formal commencement of a lawsuit.[18] Rather, courts consider whether the parties have gathered "sufficient information to make an informed decision about the settlement." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Settlements reached at an early interval should be approved where factors such as an informal exchange of information enable a sufficient evaluation of the merits of a case prior to settlement. *Bellinghausen v. Tractor Supply Co.,* 306 F.R.D. 245, 257 (N.D. Cal. 2015) (holding that the critical question is not when the case is resolved but "whether the parties carefully investigated the claims before reaching a resolution.").[19] Here, the Parties engaged in a pre-filing investigation and exchange of information similar to full-fledged class discovery and sufficient to allow them to calculate damages and to weigh the strengths and weaknesses of

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[17] *E.g., In re High-Tech Emple. Antitrust Litig*., at *16–18 (finding that awards of $80,000 and up were acceptable as compared to average class member recovery of approximately $5,800, resulting in a ratio of 14-21 to 1); *Lemus v. H&R Block Enters. LLC*, No. C 09-3179 SI, 2012 WL 3638550, at *5-6 (N.D. Cal. Aug. 22, 2012) (approving $15,000 service awards where the average class recovery was about $1,200).

[18] *Riker v. Gibbons*, 3:08-cv-115-LRH-VPC, 2010 U.S. Dist. LEXIS 120841, at *14 (D. Nev. Oct. 28, 2010) ("absence of extensive formal discovery is immaterial").

[19] *See, e.g., Cotton v. Hinton*, 559 F.2d 1326, 1332 (5th Cir. 1977) (approving settlement, despite "very little formal discovery […] and […] no voluminous record[...]"); *Glass*, 2007 WL 221862, at *1 (approving settlement reached early in proceedings based on informal discovery prior to mediation).

the claims. *See supra* II(D). Where parties' negotiations include "extensive discussion and examination of the parties' respective positions on the legal and factual issues raised by the class action" and result in "a meaningful settlement agreement," courts favor approval. *Palacios v. Newman Grain Inc*., No. 1:14-cv-1804-DAD-SAB, 2016 WL 8730677 **21-22 (E.D. Cal. May 27, 2016). Requiring any more would elevate form over substance and penalize the Parties and Classes for the efficient resolution of the case.

### D. The Proposed Class Notice is Appropriate and Should be Approved

Pursuant to Rule 23(e), the Court must "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). The notice provided members of a class certified under Rule 23(b)(3) must be "the best notice practicable under the circumstances" and must "clearly and concisely state in plain, easily understood language" the nature of the action, the class definition, a general statement of the class claims and issues, that a class member may enter an appearance through counsel if desired, the right and manner of exclusion or objection, and the binding effect of class judgment. Fed. R. Civ. P. 23(c)(2)(B).

The proposed Notice of Class Action Lawsuit (the "Notice") for distribution to Class Members meets this bar. Fuschetti Decl. Settlement, Ex. A. It explains in plain and concise language (i) the nature of the lawsuit; (ii) the Class definition and claims; (iii) the settlement amount and how the parties intend to divide it; (iv) the attorneys' fees and costs and service award requested by Plaintiff and Class Counsel; (v) the rights of Class Members to opt-out or object to the Settlement's terms and the process by which they can do so; (vi) the binding effect of the Settlement on Class Members who do not request exclusion; (vii) and the particulars of the final fairness hearing. *See* Rule 23(c)(2)(B).

The Parties' proposed plan for directing notice to the Classes is also reasonable and sufficient. Using last-known addresses provided by Defendants, the third-party Claims Administrator will send the Notice by First Class United States Mail to all Class Members. Settlement § 9.2.2. The Claims Administrator will perform address searches (skip traces) to obtain the correct address of any Class Member whose Notice is returned as undeliverable and will attempt re-mailings where new addresses are secured. *Id.* at 10.2.3.

**E. Preliminary Approval Is Appropriate Under the EPA**

The EPA is part of the Federal Fair Labor Standards Act ("FLSA") and incorporates its enforcement mechanisms. An opt-in collective action settlement under the FLSA/EPA does not involve the rights of absent class members and is not subject to Rule 23(e). Nonetheless, courts review the settlement to ensure that it is fair and reasonable. *See, e.g.*, 29 U.S.C. §§ 216(b), 256; *Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143(ENV)(RER), 2011 WL 754862 (E.D.N.Y. Feb. 18, 2011). "The standard for approval of an FLSA settlement is lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as does a Rule 23 settlement." *Willix*, 2011 WL 754862, at *5; s*ee also Gamble v. Boyd Gaming Corp.*, 2015 WL 4874276, at *4 n.2 ("District courts are not constrained by the mandates for the proposed settlement of Rule 23 class actions."). An FLSA settlement need only reflect a reasonable compromise of disputed issues. *Lynn's Food Store, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982).

In this case, as the Settlement meets the stricter Rule 23(e) standard, it also passes muster under the EPA. *Bona fide* disputes exist regarding Plaintiff's EPA collective action claims covering both liability and damages, and, absent settlement, whether certification of a collective action is appropriate. *See, e.g. Lee v. Timberland Co.*, No. C 07-2367 JF, 2008 WL 2492295 at *2 (N.D. Cal. June 18, 2008). Under the circumstances, Plaintiff maintains that there is little question that the Settlement represents a fair and reasonable compromise of contested claims. *See, e.g., Campanelli v. Hershey Co.*, No. C 08-1862 BZ, 2011 WL 3583597, at *1 (N.D. Cal 2011) ("substantial" payments achieved through arm's length negotiations). Moreover, unlike many cases, since each Collective Action Plaintiff is also a Rule 23 Class Member, each employee will receive (i) a notice which meets the more stringent requirements of Rule 23 and due process and (ii) an opportunity to weigh in on the Settlement by appearing at the final fairness hearing.

**F. The Court Should Schedule a Fairness Hearing**

Because the Settlement meets the requirements for preliminary approval, the Court should set a final fairness hearing to decide whether to grant final approval of the Settlement and grant Plaintiff's application for service awards and Class Counsel's motion for attorneys' fees and costs. *See* Fed. R. Civ. P. 23(e)(2). The Settlement directs that Western Digital provide a comprehensive class and collective action list to the Class Administrator no later than sixty (60) days after the date of entry of the order granting Preliminary Approval, and notice will go out no later than seventy-five (75) days after the date of entry of the order granting Preliminary Approval. Class Members will then have sixty (60) days to opt-out or object. Accordingly, Plaintiff requests that a final fairness hearing be set for a mutually convenient date after the notice period.

## VIII. CONCLUSION

For the reasons set forth above and in the accompanying papers, Plaintiff respectfully requests that the Court grant Plaintiff's Motion.

Dated: May 29, 2019

Respectfully submitted,

/s/ David Sanford

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