UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#41(6/29 hrg off)

CIVIL MINUTES - GENERAL

Case No.	EDCV 18-2551 PSG (Ex)	Date	June 25, 2020
Title	Silvia Valdivia de Cabrera v. Swift Beef Company		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): The Court GRANTS the motion for preliminary approval

Before the Court is a motion for preliminary approval of class action settlement filed by Plaintiff Silvia Valdivia De Cabrera ("Plaintiff"). *See* Dkt. # 41 ("*Mot.*"). Defendant Swift Beef Company does not oppose the motion. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving papers, the Court **GRANTS** Plaintiff's motion.

I. Background

On November 2, 2018 Plaintiff initiated this putative wage and hour class action by filing a lawsuit in Riverside County Superior Court. *See* Dkt. # 1-1 ("*Compl.*"). Plaintiff brought claims against Swift Beef Company; JBS USA, LLC; JBS Holdings, Inc.; JBS USA; JBS USA Inc.; Swift & Company Inc.; Pilgrims' Pride Corporation; JBS USA Food Company; and JBS USA Food Company Holdings. *See id.* On December 5, 2018, the action was removed to this Court. *See* Dkt. # 1. On January 15, 2019, the Court granted the parties' joint stipulation to dismiss without prejudice all defendants other than Swift Beef Company. *See* Dkt. # 23. On February 5, 2019, Plaintiff filed a First Amended Complaint ("FAC") bringing claims for: (1) failure to provide meal periods; (2) failure to provide rest periods; (3) failure to pay overtime wages; (4) failure to pay minimum wages; (5) failure to maintain required records; (6) failure to provide accurate wage statements; (7) unfair competition; (8) enforcement of the Private Attorneys General Act of 2004, Cal. Labor Code §§ 2698 et seq., ("PAGA"). *See* Dkt. # 26 ("*FAC*"). On February 18, 2019, Swift Beef Company filed an answer to the FAC, asserting thirty affirmative defenses. *See* Dkt. # 27.

On March 13, 2019, plaintiff Eddie Duron also filed a putative wage and hour class action in Riverside County Superior Court. *See Eddie Duron v. JBS USA Food Company Holdings*,

5:19-cv-00702-PSG-E ("*Duron Action*"), Dkt. # 1-1. Duron brought claims for: (1) violations of the Fair Credit Reporting Act; (2) violation of the Investigative Consumer Reporting Agencies Act; (3) violation of the Consumer Credit Reporting Agencies Act; (4) failure to provide meal periods; (5) failure to provide rest periods; (6) failure to pay hourly wages; (7) failure to provide accurate written wage statements; (8) failure to timely pay all final wages; (9) unfair competition. *See id.* On April 17, 2019, the action was removed to this Court, and on April 23, 2019, a notice of related cases relating the actions was filed. *See Duron Action*, Dkts. # 1, 10. On November 4, 2019, the parties submitted a joint stipulation to sever the credit reporting claims for remand, and to stay the remaining claims pending settlement. *See Duron Action*, Dkt. # 44. On November 7, 2019, the Court approved the joint stipulation, and administratively closed the case, and stated that the case may be reopened by application of any party. *See Duron Action*, Dkt. # 45.

Plaintiff and Defendant Swift Beef Company and Defendant JBS USA Food Company Holdings (referred to collectively as "Defendant") engaged in arms' length negotiations and subsequently signed a long form Settlement Agreement.[1] *See Declaration of Andranik Tsarukyan*, Dkt. # 41-1 ("*Tsarukyan Decl.*"), ¶ 8. The settlement class (the "Class") is defined as:

> "[a]ll current and former non-exempt employees employed by Swift Beef Company and JBS USA Food Company Holdings in the State of California at any time from November 2, 2014 to the date the Court grants Preliminary Approval of the Settlement Agreement."

Id., Ex. 1 ("*Settlement Agreement*"), ¶ I.4.

Plaintiff now asks the Court to (1) grant preliminary approval of the Settlement Agreement; (2) conditionally certify the proposed Class; (3) appoint Plaintiff Silvia Valdivia De Cabrera and Eddie Duron as Class Representatives; (4) appoint Remedy Law Group LLP and Setareh Law Group as Class Counsel; (5) appoint Phoenix Settlement Administrators as the

[1] The Settlement Agreement designates Eddie Duron as a class representative and seeks an enhancement payment of up to $7,500 for his time and efforts. Counsel for Plaintiff Silvia Valdivia De Cabrera have entered into a written fee sharing agreement with counsel for Eddie Duron in which Setareh Law Group will receive 32.5 percent of the total fee awarded and Remedy Law Group LLP will receive 67.5 percent of the fee awarded. Both Plaintiff Silvia Valdivia De Cabrera and Eddie Duron have approved the agreement in writing. *See Tsarukyan Decl.* ¶ 6.

Settlement Administrator; (6) approve the proposed notice; (7) schedule a final approval and fairness hearing for final approval of the settlement and entry of judgment. *See generally Mot*.

II. Class Certification for Settlement Purposes

When parties settle an action prior to class certification, the court is obligated to "peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). Preliminary approval of a class settlement is generally a two-step process. First, the court must assess whether a class exists. *Id.* (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Second, the court must determine "whether [the] proposed settlement is fundamentally fair, adequate, and reasonable." *Id.* (citing *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1998)) (internal quotation marks omitted). The decision to approve or reject a settlement is within the Court's discretion. *Hanlon*, 150 F.3d at 1026.

A. Legal Standard

Parties seeking certification of a settlement-only class must still satisfy the Federal Rule of Civil Procedure 23 standards. *See id.* at 1019–24. Under Rule 23, a plaintiff must satisfy the four prerequisites of Rule 23(a) *and* demonstrate that the action is maintainable under Rule 23(b). *See Amchem*, 521 U.S. at 613–14. The four prerequisites of Rule 23(a) are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a). Plaintiff seeks certification under Rule 23(b)(3), *see Mot.* 7:23–12:25, which requires that "questions of law or fact common to class members 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." Fed R. Civ. P. 23(b)(3).

B. Discussion

i. Numerosity

The first requirement for maintaining a class action under Rule 23(a) is that the class is "so numerous that joinder of all members would be impracticable." Fed. R. Civ. P. 23(a)(1). Courts generally presume numerosity when there are at least forty members in the proposed class. *See Charlebois v. Angels Baseball, LP*, No. SACV 10-0853 DOC (ANx), 2011 WL 2610122, at *4 (C.D. Cal. June 30, 2011).

Here, the Class is comprised of approximately 1,138 individuals (as of the date data was compiled in May 2019). *See Tsarukyan Decl.* ¶ 34. Numerosity is satisfied.

ii. Commonality

To fulfill the commonality requirement, Plaintiff must establish questions of law or fact common to the class as a whole. *See* Fed. R. Civ. P. 23(a)(2). The class claims must depend on a common contention that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id*. (internal quotation marks omitted) (emphasis removed). For the purposes of Rule 23(a)(2), even a single common question satisfies the requirement. *See id*. at 359; *Abdullah v. U.S. Sec. Assocs*., 731 F.3d 952, 957 (9th Cir. 2013) (citing *Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 589 (9th Cir. 2012)).

Here, Plaintiff identifies several questions of fact and law common to the Class. Plaintiff states that all Class Members have a common interest in determining whether Defendant improperly rounded time worked, failed to provide proper meal periods and rest breaks, and violated other provisions of the California Labor Code. *See Tsarukyan Decl.* ¶ 36. No unique defenses are applicable to Plaintiff that do not also exist for other Class Members. *See id.* Plaintiff determined from review of documentation, that these policies and practices are either identical or sufficiently similar, to raise the same questions of liability, and applied to all Class Members. *See id.* ¶ 37. By challenging Defendant's policies, Plaintiff presents common questions that will likely generate common answers that can be resolved on a class-wide basis. *See Dukes*, 564 U.S. at 350. Accordingly, the commonality requirement is satisfied.

iii. Typicality

Typicality requires a showing that the named plaintiffs are members of the class they represent and that their claims are "reasonably co-extensive with those of absent class members," but not necessarily "substantially identical." *Hanlon*, 150 F.3d at 1020; *see* Fed. R. Civ. P. 23(a)(3). The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon v. Dataproducts Corp*., 976

F.2d 497, 508 (9th Cir. 1992)) (internal quotation marks omitted). The typicality and commonality requirements somewhat overlap. *See Gen. Tel. Co. Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Plaintiff was an employee of Defendant during the class period, like every other Class Member, and was subject to the same policies and practices. *See Tsarukyan Decl.* ¶ 35. Plaintiff alleges that these policies and practices violated various provisions of the Labor Code, and Plaintiff experienced these violations like other Class Members. *See id.* The same is true for Duron. Accordingly, the typicality requirement is satisfied.

iv. Adequacy

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit has indicated that "[t]he proper resolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

Plaintiff has no apparent conflicts of interest between herself and Class Members. *See Tsarukyan Decl.* ¶ 38. Plaintiff has demonstrated, through her participation in this action, her willingness to serve as a representative for the Class, and has agreed to place the Class's interests above her own. *See id*. Eddie Duron has also demonstrated his willingness to serve as representative through his participation in the action. The similarity of the claims asserted by Class Members and Plaintiff and Duron do not suggest any divergent interests held by Plaintiff or by Duron. Lastly, Plaintiff's counsel appear qualified and committed to representing the Class, and have litigated the action thus far. Plaintiff's counsel have served as lead class counsel in multiple wage and hour class action cases. *See id.* ¶¶ 21–25. Plaintiff's counsel has no known conflicts of interest with absent Class Members. *See id.* ¶ 38. Accordingly, the adequacy requirement is satisfied.

v. Predominance and Superiority

Having concluded that the Class satisfies the Rule 23(a) factors, the Court now turns to Rule 23(b)(3). Rule 23(b)(3) provides that a class may be certified where common questions of law or fact predominate over individual questions and a class action is the superior method for adjudicating the controversy as a whole. The predominance aspect specifically "tests whether

proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "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." *Hanlon*, 150 F.3d at 1022 (internal quotation marks omitted).

Plaintiff alleges that Defendant implemented largely uniform policies and practices for non-exempt employees that resulted in violations of California law, including failure to permit adequate meal periods and rest breaks and failure to provide adequate wage statements. *See Tsarukyan Decl.* ¶ 36. Claims based on this type of commonly applied policy are generally sufficient for purposes of satisfying the requirements of Rule 23(b)(3). *See, e.g.*, *Wright v. Linkus Enters., Inc.*, 259 F.R.D. 468, 473 (E.D. Cal. 2009) (finding predominance, "despite the existence of minor factual differences between individual class members," where the case involved "alleged policies that required class members to work without compensation, meal and rest periods, and/or reimbursement for expenses"); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 527 F. Supp. 2d 1053, 1065–68 (N.D. Cal. 2007) ("Plaintiffs have submitted evidence of [] uniform policies . . . such as training, recruiting and job descriptions. Accordingly, plaintiffs have made a strong showing that, as a general matter, common questions . . . predominate over individual variations."). As such, the Court concludes that common questions of law and fact similarly predominate here.

As for superiority, requiring more than 1,000 class members to litigate their claims separately would be inefficient and costly, and permitting class treatment enables the Court to manage the litigation in a manner that is efficient and limits expense for litigants. *See Tsarukyan Decl.* ¶ 39; *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) ("Numerous individual actions would be expensive and time-consuming and would create the danger of conflicting decisions as to persons similarly situated."). Class Members could face difficulty finding legal representation and could lose the incentive to bring their claims if forced to do so in isolation. *See In re Napster, Inc. Copyright Litig.*, No. C 04-1671 MHP, 2005 WL 1287611, at *8 (N.D. Cal. June 1, 2005) (finding superiority in part because "many small composers individually lack the time, resources, and legal sophistication to enforce their copyrights"). A class action would thus be the superior method for adjudicating this action.

In short, the Court concludes that both the predominance and superiority requirements of Rule 23(b)(3) are satisfied.

C. Conclusion

Plaintiff has met the requirements for class certification under Rule 23. Therefore, the Court **CERTIFIES** the Class for settlement purposes only. The Court also **APPOINTS** Remedy Law Group LLP and Setareh Law Group as Class Counsel and **APPOINTS** Plaintiff Silvia Valdivia De Cabrera and Eddie Duron as Class Representatives.

III. Preliminary Approval of the Proposed Class Action Settlement

The next step is to determine whether the settlement reached is "fair, reasonable, and adequate" under Rule 23(e). *See* Fed. R. Civ. P. 23(e)(2).

A. Legal Standard

The approval of a class action settlement is a two-step process under Rule 23(e) in which the court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted. *See In re Am. Apparel, Inc. S'holder Litig.*, No. CV 10-6352 MMM (CGx), 2014 WL 10212865, at *5 (C.D. Cal. July 28, 2014). "At the preliminary approval stage, a court determines whether a proposed settlement is within the range of possible approval and whether or not notice should be sent to class members." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010) (internal quotation marks omitted). Preliminary approval amounts to a finding that the terms of the proposed settlement warrant consideration by members of the class and a full examination at a final approval hearing. *See Manual for Complex Litigation* (Fourth) § 13.14 (2004).

Preliminary approval is appropriate if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Ma v. Covidien Holding, Inc.*, No. SACV 12-2161 DOC, 2014 WL 360196, at *4 (C.D. Cal. Jan. 31, 2014); *see also Eddings v. Health Net, Inc.*, No. CV 10-1744 JST (RZx), 2013 WL 169895, at *2 (C.D. Cal. Jan. 16, 2013).

After notice is given to the class, preliminary approval is followed by a review of the fairness of the settlement at a final fairness hearing, and, if appropriate, a finding that it is "fair, reasonable, and adequate." Fed R. Civ. P. 23(e)(2); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1027. In making this determination, the district court must

> "balance a number of factors: the strength of the plaintiffs' case; the risk, expense complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement."

Hanlon, 150 F.3d at 1026; *see also Staton*, 327 F.3d at 959; *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that the list of factors is "by no means an exhaustive list").

The district court must approve or reject the settlement as a whole. *See Hanlon*, 150 F.3d at 1026 ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness."). The Court may not delete, modify, or rewrite particular provisions of the settlement. *See Dennis v. Kellogg Co*., 697 F.3d 858, 868 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1026.

Where the parties negotiate a settlement agreement before the class has been certified, "settlement approval 'requires a higher standard of fairness' and 'a more probing inquiry than may normally be required under Rule 23(e).'" *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048–49 (9th Cir. 2019) (quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012)). Specifically, "such [settlement] agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair," and this "more exacting review is warranted to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the unnamed plaintiffs who class counsel had a duty to represent." *Id.* (internal quotations omitted). Courts must especially scrutinize "subtle signs of collusion," such as a reversionary clause, a clear sailing agreement, or a disproportionately large attorneys' fees award. *Id.*

B. Overview of the Settlement Agreement

Under the terms of the Settlement Agreement, Swift Beef Company and JBS USA Food Company Holdings will pay a gross, non-reversionary settlement amount of $750,000 (the "Gross Settlement Amount"). *See Settlement Agreement* ¶¶ I.18, III.1. This amount includes: (1) all payments to participating Class Members; (2) Class Counsel's fees (estimated to be no greater than $249,999.99) and costs (not to exceed $10,000); (3) incentive awards for the Class

Representatives (estimated to be $7,500 each); (4) administrative expenses (estimated to be no greater than $15,000); (5) required tax withholdings; and (6) PAGA penalties of $7,500, of which $5,625 will be paid to the LWDA and $1,875 will be distributed to PAGA Employees. *Id.* ¶¶ I.18, III.6. No portion of the Gross Settlement Amount will revert to Defendant. *Id.* ¶ I.18. The remainder of the Gross Settlement Amount after the deduction of Class Counsel's fees and expenses, incentive awards, administrative expenses, the PAGA payment, and required tax withholdings (the "Net Settlement Amount") shall be paid to Class Members. *Id.* ¶¶ I.19, I.21. Plaintiff estimates the Net Settlement Amount to be $460,000. *Mot.* 4:13–23. The Net Settlement Amount does not include employer's payroll taxes, which shall be paid separately and in addition to the Gross Settlement Amount by Defendant. *Settlement Agreement* ¶¶ I.18, I.21. For taxation purposes, the amounts distributed to Class Members will be characterized as twenty percent alleged unpaid wages and eighty percent alleged unpaid penalties and interest. *Id.* ¶ III.6.d.

Each Class Member that does not opt out will receive a proportionate share of the Net Settlement Amount that is equal to: (i) the number of weeks he or she worked during the Released Period based on data provided by Defendant, divided by (ii) the total number of weeks worked by all participating Class Members based on the same data, (iii) which is then multiplied by the Net Settlement Amount. *Id.* ¶ III.6.a. Class Members will not be required to submit a claim form to receive their shares. *Id.* ¶ I.19. If any Class Member opts out of the Settlement, his or her share will be added to the Net Settlement Amount. *Id.* The average individual settlement share is estimated to be $404, after all deductions but before tax withholdings. *See Mot.* 4:20–23. Any settlement checks that are mailed to the Class Members and remain uncashed after 180 days of the date of issuance will be cancelled, and the moneys will be paid to the State Controller's Office Unclaimed property division as unclaimed property. *Settlement Agreement* ¶ III.9.j.

In return, participating Class Members will release Defendant[2] from all Released Claims, defined as including:

> "any and all claims, liabilities, demands, causes of actions, rights, and obligations for (1) failure to provide meal periods; (2) failure to provide rest periods; (3) failure to pay overtime wages; (4) failure to pay minimum wages; (5) failure to maintain required

[2]The Released Parties include: Swift Beef Company, JBS USA, LLC, JBS USA Holdings, Inc., JBS USA, JBS USA, Inc., Swift & Company, Inc., Pilgrim's Pride Corporation, JBS USA Food Company, and JBS USA Food Company Holdings. *See Settlement Agreement* ¶ 31.

> records; (6) failure to provide accurate wage statements; (7) failure to pay wages upon separation of employment; (8) any related claims, including for unfair business practices in violation of California's Business and Professions Code, Section 17200, and (9) any and all claims under federal or state law, statutory, constitutional, contractual or common law claims that were or could have been pled based upon the factual allegations contained in the Litigation, except those under the Fair Credit Reporting Act, Investigative Consumer Reporting Agencies Act, or Consumer Credit Reporting Agencies Act."

Id. ¶¶ III.1, III.10, I.29. The Released Claims shall extend from November 2, 2014 through the date the Court grants Preliminary Approval. *Id.* ¶ I.29. Class Members will also release, in exchange for the PAGA payment, all claims under the PAGA, including those that are or reasonably could have been asserted. *Id.* ¶ I.30. The PAGA Released Claims shall extend from November 30, 2017 through the date the Court grants Preliminary Approval. *Id.*

In exchange for the incentive award, Plaintiff and Duron agree to a broader general release of "all claims, demands, rights, liabilities, demands for arbitration, and causes of action" asserted or that might have been asserted. *Id.* ¶ III.11. They also waive all rights afforded under California Civil Code § 1542. *Id.* Plaintiff and Duron also agree that they will not seek or accept employment with Defendant. *Id.*

C. Analysis of the Settlement Agreement

i. Fair and Honest Negotiations

In general, evidence that a settlement agreement is arrived at through genuine arms-length bargaining supports a conclusion that the settlement is fair. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."); *Sarabi v. Weltman, Weinberg & Reis Co., L.P.A.*, No. CV 10-1777 AJB (NLSx), 2012 WL 3809123, at *1 (S.D. Cal. Sept. 4, 2012) (holding that a settlement should be granted preliminary approval after the parties engaged in extensive negotiations); *Aarons v. BMW of N. Am., LLC*, No. CV 11-7667 PSG (CWx), 2014 WL 4090564, at *10 (C.D. Cal. Apr. 29, 2014) (declining to apply a presumption but considering the arms-length nature of the negotiations as evidence of reasonableness).

Here, the evidence supports the conclusion that the settlement is fair and honest. The parties have conducted investigation of the facts and law during the prosecution of this litigation. *See Tsarukyan Decl.* ¶ 6. This investigation and informal discovery has included interviews of

witnesses, production and review of class-wide data, and numerous communications between the parties to identify and assess the issues. *See id*. The parties have also investigated the applicable law as applied to the facts discovered regarding Plaintiff's claims and potential defenses. *See id.*

The parties engaged in vigorous arm's length negotiations. *See id.* ¶ 8. The parties evaluated theories of potential exposure for the underlying claims as well as Plaintiff's claims for interest and penalties, and the parties assessed appropriate discounts based on Defendant's contentions and defenses. *See id*. Subsequently, the parties entered into the Settlement Agreement. *See id*.

The time and effort spent on arm's length settlement negotiations, as stated in Plaintiff's counsel's declaration, weigh in favor of preliminary approval of the Settlement. There is no indication that the negotiations were dishonest or collusive in any way, and the discovery conducted in this case suggests that the parties were well informed and had sufficient information to assess the merits of their claims. *See Glass v. UBS Fin. Servs., Inc*., CV 06-4068 MMC, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007) (reasoning that the parties' having undertaken informal discovery prior to settling supports approving the class action settlement). The Court is therefore satisfied that the Settlement is the product of fair and honest negotiation.

ii. Settlement Amount

To evaluate whether a settlement falls within the range of possible approval, "courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007).

Here, Plaintiff has presented estimates of Defendant's maximum liability. With the assistance of an expert, Plaintiff calculated the total maximum amount of damages on each of the claims as follows: Unpaid wages: $2,986; Rest periods: $695,889; Meal periods: $740,804; Late pay penalties under Labor Code § 203: $1,992,696; Wage statement violations: $1,519,250; PAGA penalties: $3,236,500. *See Tsarukyan Decl.* ¶ 18. Based on these amounts, and including PAGA penalties, the maximum liability is estimated to be approximately $8,188,125, and the Gross Settlement Amount of $750,000 is about 9.2% of that amount. *See Tsarukyan Decl.* ¶ 18. Excluding PAGA, the amount is estimated to be $4,951,625, and the settlement amount approximately 15% of that amount. *Id.* Plaintiff then took into consideration the particular risks associated with the rest break claim and the likelihood that a significant portion of late pay penalties would be excluded, for a total closer to $2,500,000, and the settlement amount is approximately 30% of that estimated recovery amount. *Id.* Finally, Plaintiff estimated the

"current fair value" of the case by accounting for the "risk" associated with each claim[3], for a total estimate of $665,000, excluding PAGA; the Gross Settlement Amount is greater than this amount. *Id.*; *Mot.* 16:18–23.

Based on Plaintiff's estimates, the settlement amount of approximately 9.2 percent to 30 percent of the total estimated damages is, while low, within the range of reasonableness. Courts have concluded that ranges within 20–30 percent of the estimated damages are within the range of possible approval. *See Brown v. CVS Pharmacy, Inc.*, No. CV 15-7631 PSG (PJWx), 2017 WL 3494297, at *4 (C.D. Cal. Apr. 24, 2017) (approving settlement that represented 27 percent of possible recovery); *Glass*, 2007 WL 221862, at *4 (approving a settlement in overtime wage case that constituted 25 to 35 percent of the estimated actual loss to the class); *see also Rigo v. Kason Indus., Inc.*, No. CV 11-0064 MMA (DHBx), 2013 WL 3761400, at *5 (S.D. Cal. July 16, 2013) ("[D]istrict courts have found that settlements for substantially less than the plaintiff's claimed damages were fair and reasonable, especially when taking into account the uncertainties involved with the litigation."). Plaintiff has extensively detailed the risks associated with various claims, for instance: the risk that Plaintiff would be unable to establish liability for allegedly unpaid straight time or overtime wages; the risk that the challenged employment policies might not support class certification or a class-wide liability finding; and the risk of lengthy appellate litigation. *See Tsarukyan Decl.* ¶ 16; *Mot.* 15:11–23.

Furthermore, the Settlement confers a substantial benefit on Class Members who could face significant risk of no recovery and ongoing litigation expenses if forced to proceed with litigation. *See Tsarukyan Decl.* ¶¶ 16, 19. Defendant contests liability as well as the propriety of class certification. *See id.* ¶ 16. Given that "the risk of continued litigation balanced against the certainty and immediacy of recovery from the Settlement" is a relevant factor, *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D. Cal. 2010) (citing *In re Mego*, 213 F.3d at 458), this reality also favors preliminary approval.

In short, given the ongoing risks of litigation, in addition to the relative value of the recovery, the Court concludes that the settlement amount is within the range of approval.

[3] For instance, Plaintiff estimates certification probabilities of 20 percent–30 percent depending on the claim, assumptions that approximate the average rate at which cases were certified in California based on data available through California Courts website. *See Tsarukyan Decl.* ¶¶ 18–19. For example, Plaintiff estimated the exposure for meal break violations of $740,804, and assumed certification probability of 30 percent and merits success of 40 percent for a total of $88,896.48. *Id.* ¶ 18.

iii. PAGA Penalties

The parties have agreed to a PAGA penalty of $7,500. *Settlement Agreement* ¶¶ I.24, III.6. Seventy-five percent of that amount, $5,625, will go to the LWDA and twenty-five percent, $1,875, will be distributed to participating PAGA Employees. *Id.*; *see also* Cal. Lab. Code § 2699(i) (providing that 75 percent of civil penalties recovered by aggrieved employees should be distributed to the LWDA). PAGA Employees are all current and former non-exempt employees employed by Defendant in California at any time from November 30, 2017 to the date the Court grants Preliminary Approval. *Settlement Agreement* ¶ I.22. The PAGA amount to be paid to each PAGA Employee is calculated based on the number of weeks he or she was employed by Defendant during the period November 30, 2017 through the date the Court grants Preliminary Approval. *Id.* ¶ III.6. The amount to be paid per workweek employed by a PAGA Employee will be calculated on a pro rata basis by dividing the value of the portion of the PAGA Fund that will be paid to each PAGA Employee by the total number of weeks employed by all PAGA Employees during the relevant period. *Id.* ¶ III.6.

The portion of the PAGA allocation that will be distributed to the LWDA represents a small percentage of the Gross Settlement Amount (.75 percent); and the total PAGA payment is a small percentage of the theoretical recovery on the PAGA claim. *See Tsarukyan Decl.* ¶ 18; *Mot.* 18. However, other courts have approved PAGA claims within the range of zero to two percent of the settlement amount. *See, e.g.*, *In re M.L. Stern Overtime Litig.*, No. CV 07-0118 BTM (JMAx), 2009 WL 995864, at *1 (S.D. Cal. Apr. 13, 2009) (approving PAGA settlement of 2 percent); *Hopson v. Hanesbrands, Inc.*, No. CV 08-0844 EDL, 2008 WL 3385452, at *1 (S.D. Cal. Apr. 13, 2009) (approving a PAGA settlement of 0.3 percent); *see also Mot.* 20:2–22 (citing *Dearaujo v. Regis Corp.*, No. 2:14-cv-01408-KJM-AC (E.D. Cal. June 29, 2016), 2016 WL 3549473 at *3 ($1.95 million settlement allocating $10,000 to PAGA penalties); *Garcia v. Gordon Trucking, Inc.*, No. 1:10–CV–0324 AWI SKO (E.D. Cal. Oct. 31, 2012), 2012 WL 5364575 at *7 ($3.9 million settlement allocating $10,000 to PAGA penalties)). Plaintiff also argues that the fair compensation otherwise provided to Class Members through the Settlement vindicates the rights of class Members as employees and may have a deterrent effect on the defendant employers, an objective of PAGA. *See Mot.* 18:18–19:6. The Court is mindful that the agreed-upon allocation to the LWDA not raise concerns that Plaintiff is skirting the "special responsibility to [his] fellow aggrieved workers" or using the PAGA claim "merely as a bargaining chip, wherein the rights of individuals . . . may be waived for little additional consideration in order to induce the employer to agree to a settlement." *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016). Ultimately, the Court finds this settlement of the claims for penalties under PAGA reasonable.

iv. Attorneys' Fees and Costs

When approving attorneys' fees in common fund cases, courts in the Ninth Circuit have discretion to apply the percentage-of-the-fund method or the lodestar method to determine reasonable attorneys' fees. *See Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000). If employing the percentage-of-the-fund method, the "starting point" or "benchmark" award is 25 percent of the total settlement value. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). A court may exceed the benchmark but must explain its reasons for so doing. *See Powers*, 229 F.3d at 1255–57.

Here, Class Counsel seeks $249,999.99 in fees, which amounts to 33.3 percent of the Gross Settlement Amount of $750,000, and $10,000 in costs. *Settlement Agreement* ¶ III.7; *Tsarukyan Decl.* ¶ 11(n). Because the amount Class Counsel requests is greater than the 25 percent "benchmark" established in this Circuit, the Court **ORDERS** Class Counsel to submit a brief justifying the upward departure from the benchmark under the *Vizcaino* factors in its motion. *See Vizcaino*, 290 F.3d at 1048–50 (examining (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of the work; (4) the contingent nature of the fee and the financial burden carried by plaintiffs; and (5) awards made in similar cases). Class Counsel is further instructed to provide the requested hourly rate and hours expended in this case so that the Court can calculate the lodestar value and use it to cross-check the reasonableness of the fees and costs award. In its motion, Class Counsel should explain whether a multiplier should be applied and, if so, why the proposed multiplier is appropriate in this case. Finally, Class Counsel must submit a detailed summary of its costs and expenses for the Court's consideration.

v. Service Awards

"Incentive awards are fairly typical in class action cases." *Rodriguez*, 563 F.3d at 958. When considering requests for incentive awards, courts consider five principal factors:

> (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

See Van Vranken v. Atl. Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995). Further, courts also typically examine the propriety of an incentive award by comparing it to the total amount other class members will receive. *See Staton*, 327 F.3d at 975.

Here, Plaintiff Silvia Valdivia De Cabrera and Eddie Duron seek an incentive award of $7,500 each. *Settlement Agreement* ¶ III.7.a. Plaintiff argues that the amount of the award is reasonable given the risks undertaken by Plaintiff and Eddie Duron in filing this lawsuit and the *Duron* lawsuit against their employers, and states that Plaintiff has been actively involved in the litigation and has worked diligently with counsel. *See Mot.* 22:21–27; *Tsarukyan Decl.* ¶ 31. The incentive award seems high in relation to the potential recovery for each Class Member. Assuming an average individual settlement share of $404, *see Mot.* 4:20–23, each of Plaintiff's and Duron's service award is more than *eighteen* times the average individual recovery.

Ultimately, the Court will determine the reasonableness of the requested enhancement awards when ruling on Plaintiff's motion for final approval. Before the final approval hearing, the Court **ORDERS** Plaintiff to submit a memorandum further justifying the significant disparity between the requested service award and the average settlement amount for each Class Member, and in proportion to the Gross Settlement Amount. Plaintiff and Duron should also submit declarations supporting the incentive award, including a detailed description of their efforts.

vi. Administration Costs

The Settlement Agreement provides that the parties will pay to the third-party administrator, Phoenix Class Action Administration Solutions, costs of no more than $15,000. *Settlement Agreement* ¶¶ III.7.d, III.8. This request is reasonable considering the estimated class size of approximately 1,138 Class Members. *See Tsarukyan Decl.* ¶ 34; *see also Ching v. Siemens Indus.*, No. 11–cv–04838–MEJ, 2014 WL 2926210, at *2 (N.D. Cal. June 27, 2014) (approving an estimated $15,000 claims administrator fee for sixty-eight claims); *Ozga v. U.S. Remodelers, Inc.*, No. C 09–05112 JSW, 2010 WL 3186971, at *2 (N.D. Cal. Aug. 9, 2010) (granting $10,000 to the claims administrator for 156 claims).

D. Notice to Class Members

Before the final approval hearing, the court requires adequate notice of the settlement be given to all class members. Federal Rule of Civil Procedure 23 provides:

> For any class certified under Rule 23(b)(3) . . . the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. . . . The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)).

Plaintiff has provided a proposed Notice of Class Action Settlement. *See Settlement Agreement*, Ex. A ("*Notice*"). It sets forth in clear language: (1) the nature of the action and the essential terms of the Settlement; (2) the meaning and nature of the Class; (3) Class Counsel's application for attorney fees and the proposed service award payments for Plaintiff and Duron; (4) the calculation and distribution of the Net Settlement Amount; (5) how to opt out of the Settlement; (6) how to dispute the total number of workweeks worked during the claim period; (7) how to object to the Settlement; (8) information concerning the release; (9) the Court's procedure for final approval of the Settlement; and (10) how to obtain additional information regarding this case and the Settlement. *See generally id.*

Within forty-five days after the entry of the Preliminary Approval Order, Defendant shall deliver to the Settlement Administrator the following information about each Class Member in an Excel spreadsheet or other electronic database: (1) first and last name; (2) last known mailing address; (3) social security number; and (4) dates of employment for each Class Member. *Settlement Agreement* ¶ III.9.b. The Settlement Administrator will conduct a search on the National Change of Address database for the address of all former employee Class Members prior to mailing. *Id.* The Class data shall not be disclosed or divulged and shall be held in strictest confidence. *Id.*

Within fourteen days after receipt of the Class data, the Settlement Administrator will mail the Notice to all identified Class Members via first-class regular U.S. Mail, using the mailing address provided by Defendant and the results of the search on the National Change of

Address database. *Id*. If a Notice is returned because of an incorrect address, within seven days from the receipt of the returned Notice the Settlement Administrator will conduct a search for a more current address for the Class Member and promptly re-mail the Notice to the Class Member. *Id.* The Settlement Administrator will use the National Change of Address Database and skip traces to attempt to find the correct address. *Id.* In addition, the Settlement Administrator will take such reasonable steps to trace the mailing address of a Class Member for whom the Notice is returned by the U.S. Postal Service as undeliverable. *Id.* It will be presumed that if an envelope containing the Class Notice re-mailing has not been returned within thirty days of the mailing, the Class Member received the Notice. *Id.* If any Exclusion Form received is incomplete or deficient, the Settlement Administrator shall send a letter informing the Class Member of the deficiency and allow fourteen days to cure the deficiency. *Id.*

Members of the Class who wish to object to the Settlement must do so in writing, signed, dated, and mailed to the Settlement Administrator postmarked no later than the Response Deadline, which is forty-five days from the initial mailing of the Notice (in the case of a re-mailed Notice, forty-five days from the original distribution or fourteen days from the date of re-mailing, whichever is greater). *Id.* Members of the Class who wish to opt-out of the Settlement also have until the Response Deadline to send a written request to do so. *Id.*

Having reviewed the Notice Packet, the Court finds it satisfactory.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff's motion for preliminary approval of class action settlement. The Court **PRELIMINARILY APPROVES** the Settlement, **APPOINTS** Phoenix Class Action Administration Solutions as the Settlement Administrator, and **APPROVES** the proposed Class Notice. The final approval hearing is set for **November 16, 2020 at 1:30 PM**.

At least thirty days before the final approval hearing and in addition to the motion for final approval of class action settlement, the Court **ORDERS** Plaintiff to file:

- A memorandum justifying Class Counsel's award of attorneys' fees and costs that includes declarations supporting the reasonableness of each attorney's requested hourly rate, itemized billing statements showing hours worked, hourly rates, expenses incurred thus far, and expenses to be incurred in the future. The memorandum should explain in detail why an upward departure from the benchmark percentage rate is warranted. The

memo should also explain whether a multiplier should be applied to the lodestar value for the attorneys' fees and, if so, why the proposed multiplier is appropriate in this case; and

- A memorandum justifying the significant disparity between Plaintiff's and Duron's service award and the average settlement amount for each Class Member, and in proportion to the Gross Settlement Amount.

IT IS SO ORDERED.