UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#100(8/27)

CIVIL MINUTES - GENERAL

Case No.	EDCV 20-117 PSG (AFMx)	Date	August 24, 2021
Title	Eric Ayala v. UPS Supply Chain Solutions, Inc. et al		

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 Plaintiffs Eric Ayala ("Ayala") and Adrian Aviles ("Aviles") (collectively, "Plaintiffs"). *See generally* Dkt. # 100, ("*Mot.*"). Defendant UPS Supply Chain Solutions, Inc. ("Defendant") 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** the motion.

I. Background

A. Factual and Procedural History

After two separately filed class actions were removed and consolidated, Plaintiffs filed a consolidated class action complaint on May 1, 2020. *See generally Consolidated Complaint* Dkt. # 41 ("*Compl.*"). Plaintiffs alleged various violations of the California Labor Code for: (1) failure to provide meal and rest periods; (2) failure to indemnify; (3) failure to pay wages at the correct rates; (4) failure to provide proper wage statements; and (5) waiting time penalties. *See generally id.* Plaintiffs also brought a cause of action under § 17200 of the California Business and Profession's Code for unfair business practices and requested civil penalties under California's Private Attorney General Act ("PAGA"). *See generally id.* On May 22, 2020, Defendant answered. *See generally* Dkt. # 46.

The parties then conducted significant discovery, including inspection of hundreds of documents and other relevant materials; hiring three expert witnesses to analyze potential class-wide damages; extensive data collection and analysis; analysis of the defenses and merits; and extensive formal discovery, which included 11 depositions. *Declaration of Kyle Nordrehaug*,

Dkt. # 100-2 ("*Nordrehaug Decl.*"), ¶¶ 15–16; *Declaration of David Spivak*, Dkt. # 100-3 ("*Spivak Decl.*"), ¶ 10; *see also* Dkts. # 43–55. Plaintiffs also filed, and Defendant opposed, a motion to certify the class. *See generally* Dkts. # 56, 73.

In early 2021, while the certification motion was pending, the parties attempted to mediate before mediator Lisa Klerman but were unsuccessful. *Nordrehaug Decl.* ¶ 17; *Spivak Decl.* ¶ 8. The parties engaged in a second mediation session before mediator Lou Marlin and reached an agreement through Mr. Marlin's proposal. *Nordrehaug Decl.* ¶ 17; *Spivak Decl.* ¶ 10. The proposal principally settled the matter on April 23, 2021, and the parties spent several months negotiating the terms of the settlement, which were finalized in the Settlement Agreement ("Settlement") now before the Court for approval. *Nordrehaug Decl.* ¶ 17; *see generally Joint Stipulation of Class Action Settlement*, Dkt. #100-2, Ex. 1 ("*Settlement*").

B. Settlement Terms

The settlement class (the "Class" or "Class Members") is defined as: "All individuals who are or previously were employed by Defendant in California as non-exempt employees during the Class Period." *Settlement* ¶ 1. The Settlement divides the class into two separate periods, the "Class Period" and the "PAGA Settlement Period." *Id.* The "Class Period" is between December 12, 2015 and August 1, 2021, and the "PAGA Settlement Period" is between December 12, 2018 and August 1, 2021. *See id.*

Defendants agreed to pay $1,800,000.00, inclusive of interest, settlement administration fees, payroll taxes, class representative service awards, attorneys' fees, and PAGA civil penalties. *Id.* ¶ 4. The average recovery for each class member will be approximately $400 before payroll taxes. *See id.* As part of the settlement, Defendant also agreed to implement a key policy change—paying its non-exempt hourly employees for time spent going through security checkpoints in its California facilities. *Id.* ¶ 2.

Plaintiffs seek the Court's preliminary approval of the proposed Settlement. *See generally Mot.* Although not clearly requested in the notice of motion or proposed order, Plaintiffs appear to request that the Court: (1) grant preliminary approval of the Settlement; (2) conditionally certify the proposed Class for settlement purposes; (3) appoint Plaintiffs Ayala and Aviles as Class Representatives; (4) appoint Blumenthal Nordrehaug Bhowmik De Blouw LLP and The Spivak Law Firm as Class Counsel; (5) schedule a hearing date for final approval of the settlement and entry of judgment; (6) appoint Phoenix Settlement Administrators as the Settlement Administrator; and (7) approve the proposed notice and opt-out form for the Class Members. *See Settlement* ¶ 9.

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 Hanlon*, 150 F.3d 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). Plaintiffs seek certification under Rule 23(b)(3), *see generally Mot.*, 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 composed of approximately 2,392 individuals, which is sufficiently numerous for settlement purposes. *See Mot.* 20:13–22; *Nordrehaug Decl.* ¶ 26(a); *Spivak Decl.* ¶ 16. Therefore, numerosity is satisfied.

ii. Commonality

To fulfill the commonality requirement, Plaintiffs 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 omitted). 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, Plaintiffs allege that "Defendant engaged in uniform practices" from which the following common questions arose: (1) whether Defendant failed to pay wages for off the clock work while waiting to clear security checkpoints; (2) whether Defendants failed to provide or pay for meal and rest breaks; (3) whether Defendant failed to provide accurate wage statements; and (4) whether Defendant failed to indemnify and reimburse its employees. *Mot.* 21:8–17; *Nordrehaug Decl*. ¶ 26(b); *Spivak Decl.* ¶ 17. Plaintiffs contend that common legal and factual issues would arise in determining the legality of these policies and practices. *See Mot.* 21:8–17. The Court agrees. *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).

Here, Plaintiffs allege that they and the Class Members worked for Defendant, were subjected to Defendant's uniform policies and procedures, and suffered the same violations as a

result of these policies and procedures. *Mot.* 21:19–22:9; *Nordrehaug Decl*. ¶ 26(c); *Spivak Decl.* ¶ 18. Thus, Plaintiffs' claims and the claims of the absent Class Members arise from the same course of conduct by Defendant, involve the same issues, and are based on the same legal theories. *See id.* 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).

Here, Plaintiffs have no apparent conflicts of interest between themselves and the Class Members. *Mot*. 23:1–8; *Nordrehaug Decl*. ¶ 26(d); *Spivak Decl.* ¶ 19. Plaintiffs share common interests with the other Class Members, as they were all employed by Defendant and subject to the same uniform and systematic employment practices, and Plaintiffs and Class Members seek monetary relief under the same set of facts and theories. *Mot.* 21:15–24; *Nordrehaug Decl*. ¶ 26(d); *Spivak Decl.* ¶ 19.

Additionally, Plaintiffs' attorneys appear qualified and committed to representing the Class. They have expended considerable time and effort on this case by conducting discovery, drafting motions, analyzing damages, and negotiating with Defendant. *Mot.* 21:24–28; *Nordrehaug Decl*. ¶ 26(d); *Spivak Decl.* ¶ 19. Plaintiffs' attorneys have extensive experience handling more than 100 wage and hour class actions and have previously served as class counsel in numerous cases. *Mot.* 21:27–28; *Nordrehaug Decl*. ¶¶ 26(d), 27; *Spivak Decl.* ¶ 19. Accordingly, the Court concludes that adequacy 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).

As for predominance, Plaintiffs allege that their theories of liability arose from Defendant's "uniform and systematic employment policies" applicable to the entire Class, and the only individualized questions relate to the extent of damages. *See Mot.* 23:23–24:6; *Nordrehaug Decl*. ¶ 26(e). 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 2,300 Class Members to litigate their claims separately would be inefficient and costly, resulting in duplicative and potentially conflicting proceedings. *See 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

Plaintiffs have met the requirements for class certification under Rule 23. Therefore, the Court **CERTIFIES** the Class for settlement purposes only. The Court also **APPOINTS** Blumenthal Nordrehaug Bhomik De Blouw LLP and The Spivak Law Firm as Class Counsel and **APPOINTS** Plaintiffs Ayala and Aviles 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 many 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 Just. v. Civ. 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*, 697 F.3d at 864). 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

Defendant agreed to pay the Class $1,800,000.00 (the "Gross Settlement Amount" or "Gross Settlement Fund"), inclusive of interest, settlement administration fees, payroll taxes, class representative service awards, attorneys' fees, and PAGA civil penalties. *Settlement* ¶ 4. The remainder of the Gross Settlement Fund after these deductions (the "Net Settlement Fund") shall be paid to Class Members as their Individual Settlement Award, *id.* ¶ 5(A)–(B), which will be approximately $400 per class member before taxes (assuming all class members worked the same number of workweeks), *see id.* ¶ 4. There is no reversion of any portion of the Gross Settlement Fund to Defendant. *See id.* ¶ 5(G).

Each Class Member shall be entitled to a pro rata portion of the Net Settlement Fund based on the number of workweeks employed during the Class Period as a fraction of the total workweeks worked by all Class Members. *Id.* ¶ 5(B). Checks must be cashed within 180

calendar days from the date of mailing. *Id.* ¶ 5(G). Any settlement checks not claimed within 180 days after distribution shall escheat to the State of California Controller's Office to be held in the name of the Class Member who is the payee of the check. *Id.*

The Settlement Administrator will distribute 75% of the PAGA civil penalties to the California Labor and Workforce Development Agency ("LWDA"). *Id.* ¶ 5(C). The PAGA Settlement Class Members will receive a pro rata share of the remaining 25% based on the number of workweeks employed during the PAGA Class Period as a fraction of the total workweeks worked by all PAGA Class Members. *Id.* As with the greater Settlement Class, checks must also be cashed within 180 days of issuance, and any checks not claimed within 180 days will escheat to the State of California Controller's Office to be held in the name of the PAGA Class Member who is the payee of the check. *See id.* ¶ 5(G).

Defendant has also agreed to change its policies to begin compensating non-exempt hourly employees for time spent undergoing security checks at its California facilities, which includes installing time capturing systems at its security checkpoints. *Id.* ¶ 2. Plaintiffs note that these measures "fairly and adequately address the primary concerns that caused them to bring the Lawsuit." *Id.* Plaintiffs agreed not to sue Defendant regarding this practice so long as these remedial measures remain in place. *Id.*

In return, Class Members who do not opt-out will release Defendant and its enumerated agents and shareholders from all the following claims plead in the Consolidated Class Action Complaint arising between December 12, 2015 and September 1, 2021:

> (a) failure to provide meal and rest periods; (b) failure to indemnify expenses; (c) failure to pay all wages at the correct rates of pay; (d) failure to provide proper wage statements; (e) waiting time penalties; and (f) all claims for unfair business practices that could have been premised on the facts, claims, causes of action or legal theories described above.

Id. ¶ 3(A).

Similarly, the PAGA Class Members who do not opt-out will release all claims under PAGA alleged in the "Consolidated Class Action Complaint and/or any notice submitted by Plaintiffs to the LWDA, to the extent that such claims were or could have been pled or could arise out of the facts pled" between December 15, 2015 and September 1, 2021, including:

> (a) failure to provide meal and rest periods; (b) failure to indemnify expenses; (c) failure to pay all wages at the correct rates of pay; (d) failure to provide proper wage statements; and (e) waiting time penalties.

Id. ¶ 3(B).

C. Analysis of Settlement Agreement

i. Fair and Honest Negotiations

In general, evidence that a settlement agreement is arrived at through genuine arms-length bargaining with a mediator 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 actively litigated this case prior to mediation, including engaging in written discovery, taking depositions, filing discovery motions, and exchanging relevant information and documentation. *Nordrehaug Decl.* ¶¶ 15–16; *Spivak Decl.* ¶ 10; *see also* Dkts. # 43–55. Further, Plaintiffs filed, and Defendant opposed, a motion for class certification prior to reaching settlement. *See generally* Dkts. # 56, 73. This suggests that the parties have a clear view of the strengths and weaknesses of their positions in the case.

The parties reached the Settlement after engaging in two adversarial and arms' length mediation sessions conducted first by Ms. Lisa Klerman and then by Mr. Lou Marlin. *Nordrehaug Decl.* ¶ 17; *Spivak Decl.* ¶¶ 8, 10. The negotiations at mediation were adversarial and, although the parties reached an agreement in principle based on Mr. Marlin's proposal, they spent the next several months drafting and negotiating the full Settlement. *Nordrehaug Decl.* ¶ 17.

The time and effort spent on discovery, two mediation sessions, and the fact that the Settlement was premised on a mediator's proposal weigh in favor of preliminary approval of the Settlement, as they suggest that there was no collusion. *See Hanlon*, 150 F.3d at 1029. Nothing

indicates that the negotiations were dishonest or collusive in any way, and the discovery conducted and the filing of an opposed motion to certify the class 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.*, No. 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 negotiations.

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, Plaintiffs estimate that Defendant's *maximum* exposure was approximately $23.13 million for off-the-clock work, meal period violations, rest break violations, wage statement penalties, waiting time penalties, and expense reimbursement. *Mot.* 11:8–18; *Nordrehaug Decl.* ¶ 20; *Spivak Decl.* ¶ 22. This amount is likely unreliable, as Plaintiffs concede that these are "'home run' projections and do not factor in any of the risks involved." *Spivak Decl.* ¶ 22. The PAGA penalty estimation was approximately $7 million, but Plaintiffs note that the penalties could "potentially have zero value" to the extent they were based on meal and rest break claims. *See Mot.* 11:18–22. Moreover, according to Plaintiffs, Defendant's numerous defenses to Plaintiffs' key waiting time and cell phone expense claims presented "significant uncertainty." *Id.* 12:10–14:9. And Plaintiffs acknowledge that this Court's own decision to deny a class certification motion in *Coates v. United Parcel Service, Inc.*, No. CV 18-3012 PSG (AFMx), 2019 WL 8884492, at *7–8 (C.D. Cal. July 2, 2019) significantly weakened their case because the decision was premised on substantially the same facts. *Id.* 14:2–9.

Therefore, considering the significant obstacles Plaintiffs faced and the potential for the PAGA claims to have little or no value, the Gross Settlement amount of $1,800,000.00 appears reasonable even though it is less than 10% of Plaintiffs' admittedly high estimated damages. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (upholding settlement as "fair and reasonable" where the settlement amount was approximately only 10% of the class's own estimates). Moreover, the Settlement confers a benefit on Class Members who would face significant risk of no recovery and ongoing expenses if forced to proceed with litigation. *See Nordrehaug Decl.* ¶22. 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 favors preliminary approval.

In short, given the ongoing risks of litigation and the relative value of the Class's recovery, the Court concludes that the settlement amount is within the range of approval.

iii. 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); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944–45 (9th Cir. 2011) (finding that when a settlement establishes a common fund for the benefit of a class, courts may use either method to gauge the reasonableness of a fee request, but encouraging courts to employ a second method as a cross-check after choosing a primary method).

If employing the percentage-of-the-fund method, the "starting point" or "benchmark" award is 25% 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.

Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award. *Vizcaino*, 290 F.3d at 1050. To determine attorneys' fees under the lodestar method, a court must multiply the reasonable hours expended by a reasonable hourly rate. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294 n.2 (9th Cir. 1994). The court may then enhance the lodestar with a "multiplier," if necessary, to arrive at a reasonable fee. *Id.*

Here, Class Counsel request an award of attorneys' fees not to exceed one-third of the Gross Settlement Fund, or $600,000, plus actual costs and expenses estimated at $145,000. *Settlement* ¶ 6. Plaintiffs do not explicitly or clearly provide briefing using the lodestar or the *Vizcaino* factors to fully support this request. *See generally Mot.*

Because the amount Class Counsel requests is greater than the 25% "benchmark" established in this Court, 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.

iv. Enhancement 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; [and] (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, each Class Representative seeks an enhancement award of $20,000 in addition to his individual settlement payment. *Settlement* ¶ 7. The amount they seek is equal to 2.23% of the Gross Settlement or 1.12% each. This proportion places the requested enhancement awards toward the high end of approved awards. *See, e.g.*, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. CV 13-5693 PSG (GJSx), 2017 WL 4685536, at *11 (C.D. Cal. May 8, 2017) (approving $25,000 incentive award, in part, because the award reflected 0.2% of the total settlement).

Further, the award is significantly disproportionate to the net recovery of other Class Members. The average individual share of the Net Settlement is approximately $400 per Class Member (before payroll taxes and assuming each class member worked the same number of workweeks). *See Settlement* ¶ 4. This means that each named Plaintiffs' incentive award is almost 50 times greater than the average recovery and appears facially unreasonable. *See Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 335 (N.D. Cal. 2014) ("To determine the reasonableness of an incentive payment, courts consider the proportionality between the

incentive payment and the range of class members' settlement awards."). Plaintiffs note that they plan to justify these awards in their final approval papers. *Nordrehaug Decl.* ¶ 30.

Ultimately, the Court will determine the reasonableness of the requested enhancement awards when ruling on Plaintiffs' motion for final approval. Before the final approval hearing, the Court **ORDERS** Plaintiffs to submit a memorandum further justifying their award as a percentage of the total settlement, as well as the great disparity between the proposed award and the average settlement amount for each Class Member.

v. Administration Costs

The Settlement provides that the parties will pay Phoenix Settlement Administration ("Phoenix") up to $30,000 to administer the Settlement. *Settlement* ¶ 4(C)(2). This request is reasonable considering the estimated Class size of 2,392 individuals. *See Holt v. Parsec, Inc.*, No. CV 10-9540-DMG (PJWx), 2012 WL 12882712, at *1–3 (C.D. Cal. Mar. 5, 2012) (approving an estimated $30,000 in administration fees for approximately 1,800 class members); *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).

vi. PAGA Penalties

The parties have agreed to a PAGA penalty of $40,000. *Settlement* ¶ 4(C)(6). Seventy-five percent ($30,000) will go to the LWDA and twenty-five percent ($10,000) will go to the PAGA Settlement Class Members based on their pro rata share of the number of workweeks employed during the PAGA Class Period as a fraction of the total workweeks worked by all PAGA Class Members. *See id.* ¶ 5(C); Cal. Lab. Code § 2699(i) (providing that 75% of civil penalties recovered by aggrieved employees should be distributed to the LWDA). This PAGA allocation represents 2.2% of the $1,800,000.00 gross settlement amount, which is only slightly higher than PAGA claims typically approved by courts. *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%). However, the fact that it is slightly higher than two percent does not raise concerns that Plaintiffs are skirting the "special responsibility to [their] 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." *See O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016). Accordingly, the Court finds that the settlement of the claims for penalties under PAGA is reasonable.

vii. Remaining Funds

The Settlement provides that, 180 days after distribution, any settlement checks not claimed shall escheat to the State of California Controller's Office to be held in the name of the Class Member who is the payee of the check. *Settlement* ¶ 5(G). Courts in this district have approved class action settlements that deal with remaining funds in this manner. *See, e.g.*, *Sequeira Ruiz v. JCP Logistics, Inc*., No. SACV131908JLSANX, 2016 WL 6156211, at *1 (C.D. Cal. Mar. 10, 2016); *Krumbine v. Schneider Nat'l Carriers, Inc.*, No. 10CV4565GHKJEMX, 2013 WL 12209908, at *1 (C.D. Cal. Aug. 6, 2013); *Rooker v. Gen. Mills Operations, LLC*, No. CV 17-467 PA (PLAX), 2018 WL 4962089, at *1 (C.D. Cal. Mar. 26, 2018). Accordingly, the Court is satisfied with the parties' proposal for dealing with any remaining funds.

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)).

Here, Plaintiffs have provided a proposed Notice of Class Action Settlement. *See Settlement*, 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 attorneys' fees and the proposed service award payments for Plaintiffs; (4) the formula for calculation and distribution of the Net Settlement Amount; (5) how to opt out of the Settlement; (6) how to object to the Settlement; (7) the Court's procedure for final approval of the Settlement; and (8) how to obtain additional information regarding this case and the Settlement. *See generally id.*

Plaintiffs propose that:

> [w]ithin thirty (30) calendar days after entry of an order preliminary approving this Settlement, Defendant will provide the Settlement Administrator with the names, last known addresses, telephone numbers, social security numbers, and dates of termination of employment (if any), and the number of workweeks worked by each Settlement Class Member while employed during the Class Period and PAGA Settlement Period (the "Class Data").

Settlement ¶ 10(A). Within ten days after receipt of the Class Data, the Settlement Administrator will mail Class Notices to each Class Member whose address information is known. *Id.* ¶ 10(B). Prior to this mailing, the Settlement Administrator will conduct a National Change of Address check as to each address. *Id.*

Any Class Notices returned to the Settlement Administrator as non-deliverable will be sent to a forwarding address. *Id.* ¶ 10(F). If no forwarding address is provided, the Settlement Administrator will make "reasonable efforts, including utilizing a 'skip trace,' to obtain an updated mailing address." *Id.* If an address is found, the Settlement Administrator will immediately, or no later than three days after discovering the address, send the Notice Packet to that address. *Id.* If the Notice Packet is again returned as undeliverable, no further action is required. *Id.* Any Class Member who wishes to opt-out or object to the Settlement must do so within 45 calendar days of the date of the mailing. *Id.* 10(C).

Having reviewed the plan to notify Class Members laid out in the Settlement, as well as the Notice of Class Action Settlement, the Court finds them satisfactory.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiffs' motion for preliminary approval of class action settlement. The Court **PRELIMINARILY APPROVES** the Settlement, **APPOINTS** Plaintiffs Ayala and Aviles as Class Representatives, **APPOINTS**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 20-117 PSG (AFMx)	Date	August 24, 2021
Title	Eric Ayala v. UPS Supply Chain Solutions, Inc. et al		

Blumenthal Nordrehaug Bhowmik De Blouw LLP and The Spivak Law Firm as Class Counsel, **APPOINTS** Phoenix Settlement Administration as the Settlement Administrator, and **APPROVES** the proposed Class Notice Form. The final approval hearing is set for **January 14, 2022**.

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** Plaintiffs to file:

- A memorandum justifying Class Counsels' 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 Plaintiffs' enhancement awards with respect to the Gross Settlement Amount and the Individual Settlement Payments to Class Members, as well as declarations from Plaintiffs supporting an award.

IT IS SO ORDERED.