

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6



Gabriel Cilluffo, et al.,
Plaintiffs,
v.
Central Refrigerated Services,
Inc., et al.,
Defendants.

ED 12-cv-00886 VAP (OPx)

**Order GRANTING Plaintiffs’
Motion for Final Settlement
Approval
(Doc. No. 274).**

United States District Court
Central District of California

On February 26, 2018, Named Plaintiffs Gabriel Cilluffo, Kevin Shire, and Bryan Ratterree (collectively “Plaintiffs”) filed a motion for final approval of a Settlement Agreement. (Doc. No. 274.) Having considered the papers filed in support of the Motion, the Court GRANTS the Motion as set forth below.

I. BACKGROUND

A. The Action

Named Plaintiffs, Gabriel Cilluffo, Kevin Shire, and Bryan Ratterree (collectively “Plaintiffs” or “Named Plaintiffs”), are long-haul truck drivers who leased trucks from Defendant Central Leasing, Inc. in order to haul freight for Defendant Central Refrigerated Service, Inc.’s customers. On June 1, 2012, the Named Plaintiffs filed a Collective & Class Action

1 Complaint (“Complaint”) against Defendants Central Refrigerated Service,
2 Inc.; Central Leasing, Inc.; Jerry Moyes; and Jon Issacson (collectively,
3 “Defendants”) in the above-captioned case pending in this Court (“Action”).
4 (Doc. No. 1).

5
6 Plaintiffs alleged in their Complaint that the Defendants are liable for the
7 misclassification of the Plaintiffs and other lease operator drivers as
8 independent contractors and failing to pay them the legally required
9 minimum wage for each hour worked per week in violation of the Fair Labor
10 Standards Act (“FLSA”), 29 U.S.C. § 206 *et seq.* The Plaintiffs also alleged
11 that the Defendants violated the federal forced labor statutes, 18 U.S.C. §§
12 1589, 1595.

13
14 On September 24, 2012, the Court stayed the Action, and granted
15 Defendants’ motion to compel arbitration pursuant to the UUAA. (Doc. No.
16 53.) On November 8, 2012, the Court held that the FLSA claim could
17 proceed on a collective basis, but arbitration of Plaintiffs’ forced labor claims
18 must occur individually. (Doc. No. 61 at 4).

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20
21 **B. The Collective Action**

22 The Collective Action consists of a conditionally-certified collective of
23 approximately 1,350 plaintiffs who opted-in to the FLSA collective arbitration
24 between the parties pending before the American Arbitration Association
25 (“AAA”) Case No. 77 160 00126 13 PLT. (Doc. No. 228-2 at ¶¶15-19.) This
26 Collective Action consists of “truckers who leased a truck from Central

1 Leasing, Inc. to drive for Central Refrigerated Service, Inc. on or after June
2 1, 2009.” (Id. at ¶17.) The Arbitrator Patrick Irvine (the “Arbitrator”) denied
3 Defendants’ Motion to Decertify the Conditionally-Certified Class on October
4 26, 2016, dismissed 26 members, and ruled that approximately 1,350
5 plaintiffs were employees under the FLSA and that Defendants had
6 misclassified these plaintiffs as independent contractors. (Id. at ¶¶20-21.)
7 The parties entered into a Memorandum of Understanding to begin
8 settlement negotiations at the end of April, 2017 – just before an arbitration
9 was scheduled to begin in the Collective Action in early May 2017. (Id. at
10 ¶¶22, 35.)

11 12 **C. The Individual Arbitrations**

13
14 The “Individual Arbitrations” refers to the approximately 328 individual
15 drivers (“Individual Plaintiffs”) who have submitted demands to the AAA for
16 individual arbitration against Defendants. (Doc. No. 228-2 at ¶¶23.) The
17 Individual Plaintiffs asserted claims for: “federal common law fraud,” Utah
18 common law fraud and negligent misrepresentation, “unconscionability,”
19 Utah common law unjust enrichment, as well as claims for violation of
20 federal forced labor statutes and “state wage and hour law” (i.e., they
21 alleged violations of state minimum wage and unlawful deduction statutes).
22 (Id. at ¶24.) Twenty nine arbitrators were assigned to hear the claims of the
23 first 300 individual arbitrations. (Id. at ¶¶25.) In July 2016, the parties
24 agreed to fast-track eight “bellwether” arbitrations in front of four arbitrators.
25 (Id. at ¶¶26.) In March 2017, the parties filed motions for summary
26 judgment in all bellwether cases. (Id. at ¶¶27.) Four-day arbitration trials for

1 each of the bellwether cases were scheduled to start in July 2017. (Id. at
2 ¶¶28.)

3 4 **D. Settlement Agreement**

5
6 This Settlement Agreement provides for the settlement of the pending
7 claims against Defendants in Cilluffo, et al. v. Central Refrigerated Service,
8 Inc., et al., Case No. 12-00886-VAP (OPx), as well as the Collective Action
9 and Individual Arbitrations pending before the American Arbitration
10 Association (“AAA”). It is attached as Exhibit 1 to Plaintiffs’ Memorandum In
11 Support of Motion for Final Settlement Approval. (“Settlement Agreement”).
12 Key provisions of the Settlement Agreement are outlined below.

13 14 **1. Monetary Relief to Claimants**

15 The Settlement Agreement provides for a Gross Settlement Amount of
16 no more than a certain lump sum. (Settlement Agreement at ¶ 2.3(A)(i).)
17 The Gross Settlement Amount will be divided between two non-reversionary
18 funds, Fund A and Fund B. (Settlement Agreement at ¶ 2.3(A)(ii) and (iii).)

19 20 **a. Fund A**

21 Fund A Claimants consist of drivers who joined the Collective Action or
22 filed an Individual Arbitration. (See Settlement Agreement at ¶2.1 (N); id. at
23 Exh. E.) The parties estimate that there are approximately 1,356 Fund A
24 Claimants. (Settlement Agreement at ¶2.3(A)(ii).) Fund A Claimants were
25 able to opt out of the settlement if they do not wish to participate, but none
26 have opted out as of February 15, 2018 (Doc. No. 281-3 at 4-5, ¶12.)

1
2 82.5% of the total settlement amount – less the proportionate share of
3 approved attorneys’ fees and expenses, administrative costs and service
4 awards – will be allocated pro rata to Fund A Claimants who do not timely
5 opt out of the settlement. (Settlement Agreement at ¶2.3(A)(ii); Settlement
6 Agreement at ¶ 2.3(B)(i).) Each claimant will receive a payment based on a
7 formula that takes the total number of hours worked multiplied by a damage
8 recovery per hour which is variable based on their average hourly earnings.
9 This formula is “based on Plaintiffs’ counsel’s privileged assessment of the
10 Fair Settlement Value of claims in relation to the average hourly wages paid
11 by Defendants.” (Settlement Agreement at Exh. F.)
12

13 Each Fund A Claimant will received a minimum award. (Id.) All Fund A
14 Claimants who filed individual arbitration claims will receive an additional
15 award. (Id.)
16

17 **b. Fund B**

18 Fund B claimants consist of drivers who were eligible to and did not
19 previously join the Collective Action or file an Individual Arbitration, but who
20 timely opt in to the settlement. The parties estimate that there are
21 approximately 1,955 potential Fund B Claimants. (Settlement Agreement at
22 Exh. G.)
23

24 About 17.5% of the total settlement amount, less the proportionate
25 share of approved attorneys’ fees and costs, administrative costs and
26 service awards, will be allocated to participating Fund B Claimants who

1 timely opt in to the settlement, on a pro rata basis based on the number of
2 months each participating Fund B Claimant worked for Central Refrigerated
3 from June 1, 2009 to the date of the Settlement Agreement. (Settlement
4 Agreement at ¶ 2.3(B)(ii).)¹

5
6 Each participating Fund B claimant will receive a minimum payment.
7 (Settlement Agreement at ¶2.3(B)(ii).)

8 9 **2. Cy Pres Recipient**

10 The unclaimed funds remaining in Fund A one year after distribution
11 from Fund A commences, shall be paid to a cy pres recipient. Since the
12 parties could not come to an agreement on a cy pres recipient, the Court
13 resolves the parties' dispute by selecting the National Employment Law
14 Project as the cy pres recipient. (Settlement Agreement at ¶¶ 2.3(B)(i),
15 2.5(A), and 2.6(B)(i); Doc. No. 258 at 20-22)

16 17 **3. Additional Benefits Offered to Claimants**

18 Defendants have agreed not to pursue collection efforts against
19 participating settlement members with respect to leases involving Central
20 Leasing or in connection with Central Refrigerated's contracts. (Settlement
21 Agreement at ¶ 2.8(D). Central Refrigerated and Central Leasing will also

22 ¹ The settlement administrator has received thirteen untimely and two incom-
23 plete Fund B claim forms. (Doc. No. 295-1 at 3, ¶5.) Plaintiffs' counsel rec-
24 ognizes that "[w]hile these additional claims forms are clearly untimely, the
25 individuals who filed them clearly wished to assert their claims herein and nei-
26 ther Plaintiff's counsel nor Defendants assert any objection to these claims
being considered as valid." (Id. at 4, ¶10.) Plaintiffs' counsel has agreed to
reduce the Fund B attorneys' fees if necessary to allow payment to these
claimants. (Id. at 4, ¶11.) The Court approves of this proposal.

1 release and dismiss with prejudice any counterclaims they have filed, or
2 ever could file, based on any occurrences that took place prior to May 5,
3 2017. (Id.) Upon request, Defendants Central Refrigerated and Central
4 Leasing will timely provide a letter to a background screening company on
5 behalf of a Participating Settlement Member, stating that defaults under the
6 Central Leasing lease have been rescinded. (Settlement Agreement at ¶
7 2.8(I).)

8 9 **4. Release of Claims Against Defendants**

10 The Named Plaintiffs have agreed to release any and all claims against
11 Defendants and all other Released Parties. (Settlement Agreement at ¶
12 2.8(F).) Other participating Settlement Members release all claims against
13 Defendants and other Released Parties that related to the services they
14 provided at issue in the Action. (Settlement Agreement at ¶ 2.8(A).) The
15 Settlement Agreement does not affect the claims by potential Fund A
16 claimants who opt-out of the settlement, or potential Fund B claimants who
17 do not affirmatively opt-in. (Settlement Agreement at ¶¶ 2.9(C), 2.10 (C).

18 19 **5. Attorney's Fees and Costs**

20 Plaintiffs' counsel intended to request attorney's fees in an amount of
21 33% of the Gross Settlement Amount and certain costs. (Settlement
22 Agreement at ¶ 2.3(F).) The Court preliminarily approved this fee amount,
23 but deferred ruling on whether the amount sought was reasonable until after
24 Plaintiffs' counsel submitted copies of contemporaneous time-keeping
25 records for this case. (Doc. No. 258 at 17.) In order to correct a calculation
26 error in the notices sent to certain Fund A Claimants, the Court approved

1 Plaintiff's counsel's proposal to reduce the attorney's fee award. (Doc. No.
2 269.) Attorney's fees and costs are to be proportionally deducted from Fund
3 A and Fund B, but the attorneys' fees to be deducted from Fund A are
4 reduced to correct this calculation error. Plaintiffs' counsel now seeks a fee
5 that equals 30% of the Gross Settlement Fund. Plaintiffs' counsel also
6 seeks reimbursement of certain additional litigation expenses.

7 8 **6. Incentive Awards**

9 Plaintiffs seek approval of "service awards" not more than 2.7% of the
10 Gross Settlement Amount, to be deducted proportionally from Fund A and
11 Fund B. (Settlement Agreement at ¶ 2.3(G).) The three named plaintiffs will
12 receive the highest incentive award, ten plaintiffs who gave all day
13 depositions and acted as representatives in the FLSA Collective action will
14 each receive one fifth of the award proposed for the named plaintiffs, and
15 the 166 plaintiffs who sat for the half-day depositions in the Individual
16 Arbitration awards will receive the smallest incentive awards, amounting to
17 one tenth of the award proposed for the named plaintiffs. (Id.) These
18 service awards are to be deducted proportionally from Fund A and Fund B.
19 (Id.)

20 **7. Notice**

21 The Court approved of the proposed method of service to the
22 Settlement Class Members on November 9, 2017. (Doc. No. 258 at 22-23).
23 On December 7, 2017 the settlement administrator, Settlement Services,
24 Inc., sent notices to the class members by email and first class mail.
25 (Settlement Agreement at ¶¶ 2.5(A), 2.9(A), 2.10(A), 2.12(A); Doc. No. 281-
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1 3 at 4, ¶10.) After identifying an error in calculating the individual award for
2 226 Fund A claimants, Settlement Services Inc. mailed and e-mailed
3 corrective notices on January 30, 2018 pursuant to the Court's January 22,
4 2018 order. (Doc. No. 271; Doc. No. 281-3 at 4, ¶11.) The notice period
5 closed on March 7, 2018. (Doc. No. 281-2 at 14.) Settlement Services Inc.
6 has reported that as of March 21, 2018, it had only received one letter from
7 a class member that could be construed as an objection. (Doc. No. 293-1 at
8 4, ¶11.)

10 II. LEGAL STANDARD

11 Under Rule 23(e) of the Federal Rules of Civil Procedure, "claims,
12 issues, or defenses of a certified class may be settled, voluntarily dismissed,
13 or compromised only with the court's approval." Fed. R. Civ. P. 23(e). A
14 court must engage in a two-step process to approve a proposed class
15 action settlement. First, the court must determine whether the proposed
16 settlement deserves preliminary approval. Nat'l Rural Telecomms. Coop. v.
17 DirecTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004). Second, after notice is
18 given to class members, the Court must determine whether final approval is
19 warranted. Id. A court should approve a settlement pursuant to Rule 23(e)
20 only if the settlement "is fundamentally fair, adequate and reasonable."
21 Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1375 (9th Cir. 1993) (internal
22 quotation marks omitted); accord In re Mego Fin. Corp. Sec. Litig., 213 F.3d
23 454, 458 (9th Cir. 2000) (citing Hanlon v. Chrysler Corp., 150 F.3d 1011,
24 1026 (9th Cir. 1998)).

1 “The Court is not bound to exercise the same oversight of a settlement
2 of a FLSA collective action as it must exercise with a class action under
3 Federal Rule of Civil Procedure 23(e).” Villalobos v. Calandri, No. CV12-
4 2615 PSG (JEMx), 2016 WL 6901695, at *4 (C.D. Cal. Mar. 14, 2016);
5 Millan v. Cascade Water Servs., Inc., 310 F.R.D. 593, 607 (E.D. Cal. 2015)
6 (“[A] Court has a ‘considerably less stringent’ obligation to ensure fairness of
7 the settlement in a FLSA collective action than a Rule 23 action because
8 parties who do not opt in are not bound by the settlement.”). Yet courts in
9 the Ninth Circuit assessing FLSA collective action settlements often look to
10 the same factors used in assessing Rule 23 class action settlements,
11 including “(1) the strength of plaintiffs’ case; (2) the risk, expense,
12 complexity, and likely duration of further litigation; (3) the risk of maintaining
13 class action status throughout the trial; (4) the amount offered in settlement;
14 (5) the extent of discovery completed, and the stage of the proceedings; (6)
15 the experience and views of counsel; (7) the presence of a governmental
16 participant; and (8) the reaction of the class members to the proposed
17 settlement.” Id. (citing Torrisi, 8 F.3d at 1375).

18 19 20 III. DISCUSSION

21 A. Fairness, Adequacy, and Reasonableness of the Settlement

22 1. Strength of Plaintiffs’ Case and the Risk, Expense, Com- 23 plexity, and Likely Duration of Further Litigation

24 As noted in the Court’s Preliminary Approval Order, Plaintiffs’ FLSA
25 Collective Action minimum wage claim appears strong given Plaintiffs’
26 success at the summary judgment stage and the arbitrator’s denial of a

1 motion to decertify the Collective Action before trial. (Doc. No. 258 at 10).²
 2 The complexity of damages, the large number of plaintiffs, and Defendants'
 3 efforts in opposition indicate that significant risks remain for Plaintiffs,
 4 however. (Id. at 10-11). Accordingly, these factors weigh in favor of
 5 approval.

6 7 **2. The Amount Offered in Settlement**

8 In order to determine whether this factor favors approval, the Court must
 9 compare the amount offered in settlement to the maximum possible
 10 recovery. Protective Comm. for Indep. Stockholders of TMT Trailer Ferry,
 11 Inc. v. Anderson, 390 U.S. 414, 424–25 (1968) (“Basic to this process in
 12 every instance [of assessing the merits of compromises between litigants],
 13 of course, is the need to compare the terms of the compromise with the
 14 likely rewards of litigation.”). Depending on the Court’s assessment of the
 15 strength of the case, an appropriate fraction of the maximum recovery may
 16 be approved. Linney v. Cellular Alaska P’ship, 151 F.3d 1234, 1242 (9th
 17 Cir. 1998) (“The fact that a proposed settlement may only amount to a
 18 fraction of the potential recovery does not, in and of itself, mean that the
 19 proposed settlement is grossly inadequate and should be disapproved.”)
 20 (citation omitted.); Millan, 310 F.R.D. at 611 (illustrating the broad range of
 21 settlements for fractions of the estimated maximum recovery that have been

22
 23 ² Given that the evidence has not been fully presented, the Court does not reach
 24 any final conclusions regarding the contested issues of fact and law that underlie
 25 the merits of Plaintiffs’ case. Aguilar v. Wawona Frozen Foods, No. 115CV00093
 26 DAD (EPG), 2017 WL 2214936, at *3 (E.D. Cal. May 19, 2017). Instead, “the
 court is to ‘evaluate objectively the strengths and weaknesses inherent in the
 litigation and the impact of those considerations on the parties’ decisions to reach
 these agreements.” Id. (quoting In re Wash. Pub. Power Supply Sys. Sec. Litig.,
 720 F. Supp. 1379, 1388 (D. Ariz. 1989).)

1 approved by district courts); Bautista v. Harvest Mgmt. Sub LLC, No. CV12-
2 10004 FMO (CWx), 2013 WL 12125768, at *14 (C.D. Cal. Oct. 16, 2013)
3 (same).

4
5 As discussed above, the Settlement Agreement creates two settlements
6 funds, Fund A and Fund B. (See Doc. No. 258 at 10.) The parties have
7 agreed to allocate 82.5% of this amount to Fund A, and 17.5% to Fund B,
8 less the proportionate share of approved attorneys' fees and costs,
9 administrative costs and service awards. (Doc. No. 281 at 11.) Plaintiffs
10 have provided an estimate for the minimum recovery and average recovery
11 that members of Fund A and Fund B should receive if the Settlement
12 Agreement is approved. (Doc. No. 228 at 20-24; Doc. No. 281-2 at 16, 23.)

13
14 As the Court found in its Preliminary Approval Order, the parties'
15 estimates for the minimum recovery and the average recovery for members
16 of Fund A is a fair and adequate recovery based on the estimates of
17 damages and the risks and uncertainties remaining in the litigation. (Doc.
18 No. 258 at 12-13.) Furthermore, since Fund B claimants did not file any
19 claims, it is not possible to determine with precision whether the amount
20 offered in settlement is fair and adequate; however, each Fund B claimant
21 may decline the settlement amount if they determine it to be unsatisfactory.
22 (Id.)

23
24 The Court finds that this factor weighs in favor of granting preliminary
25 approval.
26

3. The Extent of Discovery Completed, and the Stage of the Proceedings

This factor requires the Court to evaluate whether “the parties have sufficient information to make an informed decision about settlement.” Linney v. Cellular Alaska P’ship, 151 F.3d 1234, 1239 (9th Cir. 1998). As discussed in the Court’s Preliminary Approval Order, Plaintiffs have demonstrated that class counsel conducted the following discovery: (1) hundreds of thousands of pages of documents and dozens of gigabytes of data have been exchanged; (2) over two hundred depositions have been conducted; and (3) additional exchanges of data, documents and information in connection with the mediation and settlement process (Doc. No. 258 at 14.) In addition, each party commissioned several experts. (Id.) The Court finds that this factor supports final approval of the Settlement Agreement since the parties possessed sufficient information to make an informed decision about the settlement.

4. Experience and Views of Counsel

Since “[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation,” courts tend to give considerable weight to counsel’s opinion. Rodriguez v. W. Publ’g Corp., 563 F.3d 948, 967 (9th Cir. 2009) (quoting In re Pac. Enters. Sec. Litig., 47 F.3d 373, 378 (9th Cir. 1995); See, e.g., Alberto v. GMRI, Inc., No. CIV. 07-1895 WBS, 2008 WL 4891201, at *10 (E.D.Cal. Nov.12, 2008) (“When approving class action settlements, the court must give considerable weight to class counsel’s opinions due to counsel’s familiarity with the litigation and its previous experience with class action lawsuits.”); but see, Kempen v. Matheson Tri-Gas, Inc., No. 15-CV-

1 00660-HSG, 2017 WL 3670787, at *6 (N.D. Cal. Aug. 25, 2017) (“[T]he
2 Court affords only modest weight to counsel’s views.”); Chun-Hoon v.
3 McKee Foods Corp., 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (“[T]his
4 court is reluctant to put much stock in counsel’s pronouncements, as parties
5 to class actions and their counsel often have pecuniary interests in seeing
6 the settlement approved.”). In the Court’s Preliminary Approval Order, the
7 Court found that all parties are represented by experienced counsel who
8 approve of this settlement. (Doc. No. 258 at 14-15.) The Court now finds
9 that this factor weighs in favor of final approval.

10 11 **5. Presence of a Governmental Participant**

12 There is no governmental participant in this action. Thus, this factor is
13 irrelevant for the purposes of final approval.

14 **6. Reaction of Class Members to the Proposed Settlement**

15 The lack of objections or opt-outs, combined with a high claim rate,
16 weighs strongly in favor of settlement approval. See, e.g., Barcia v.
17 Contain-a-Way, Inc., No. 07-cv-938 IEG, 2009 WL 587844, at *4 (S.D. Cal.
18 Mar. 6, 2009); Thompson v. Costco Wholesale Corp., No. 14-cv-02778 CAB
19 (WVG), 2017 WL 3840342, at *7 (S.D. Cal. Sept. 1, 2017).

20
21 The settlement administrator has sent notices to potential claimants by
22 email and first class mail by December 7, 2017. (Doc. No. 281-3 at 4, ¶10.)
23 As of March 21, 2018, the settlement administrator has received no opt-outs
24 from Fund A Claimants, and 341 opt-in forms from Fund B Claimants. (Doc.
25 No. 295-1 at 3, ¶5.) The settlement administrator received one letter from a
26

1 class member that expresses frustration with the settlement, but is not
2 clearly an objection. (Doc. No. 295-2 at 8.)
3

4 Only two other people have indicated to Plaintiffs' counsel that they may
5 object to the settlement. (*Id.* at 5, ¶13.) The first, Walter Ellis, did not opt-in
6 to the collective action and lost in arbitration against Defendants. (*Id.* at
7 ¶14-15.) For this reason, Ellis is explicitly excluded from the Settlement
8 Class. (Settlement Agreement at ¶1.1 (“[N]ot counting Walter Ellis, who was
9 initially represented by Claimants’ counsel but then chose to proceed with
10 and litigated his case to conclusion *pro se.*”) The second is Randall
11 Pittman, who never worked for any of the Defendants and thus has no
12 claims against any of the Defendants in this litigation. (Doc. No. 281-3 at 5,
13 ¶16.) As non-parties, Ellis and Pittman have no standing to object to the
14 class settlement. Nitsch v. DreamWorks Animation SKG Inc., No. 14-CV-
15 04062-LHK, 2017 WL 2423161, at *12 (N.D. Cal. June 5, 2017). Court thus
16 disregards these potential objections.³
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20 ³ Ellis and Pittman—neither of them attorneys—seem to have made a practice of
21 asserting meritless objections to various class settlements. See, e.g., Krumbine v.
22 Schneider Nat’l Carriers, Inc., No. 10-cv-4565 GHK (JEMx), 2013 WL 12209908,
23 at *4 (C.D. Cal. Aug. 6, 2013) (“The Court disregards and overrules any objection
24 by Mr. Walter Ellis and Mr. Randall Pittman, because: . . . they are not members of
25 the Final Settlement Class on ‘aggrieved employees’ under PAGA for the
26 purposes of this action. and do not have standing to object to the Settlement.”);
Bickley v. Schneider Nat’l Carriers, Inc., No. 4:08-CV-05806-JSW, 2016 WL
6910261, at *2 (N.D. Cal. Oct. 13, 2016) (“The objections filed by Mr. Walter Ellis
and Mr. Randall Pittman are overruled and found to be without merit. Moreover,
the Court finds that Mr. Pittman is not a class member and thus, has no standing
to object to this settlement.”).

1 Where “the overwhelming majority of the class willingly approved the
2 offer and stayed in the class,” there is “at least some objective positive
3 commentary as to its fairness.” Hanlon, 150 F.3d at 1027. This factor,
4 therefore, favors final approval of the settlement.

6 7. Arms-Length Negotiations

7 A settlement that is the product of an arms-length negotiation
8 “conducted by capable and experienced counsel” is presumed to be fair and
9 reasonable. Roe v. SFBSC Management, LLC, No. 14-CV-03616-LB, 2017
10 WL 4073809, at *9 (N.D. Cal. Sept. 14, 2017) (quoting Garner v. State Farm
11 Mut. Auto Ins. Co., 2010 WL 1687832, *13 (N.D. Cal. Apr. 22, 2010);
12 Rodriguez v. W. Publ’g Corp., 563 F.3d 948, 965 (9th Cir. 2009)(“We put a
13 good deal of stock in the product of an arms-length, non-collusive,
14 negotiated resolution.”); Bautista v. Harvest Mgmt. Sub LLC, No. CV12-
15 10004 FMO (CWx), 2013 WL 12125768, at *12 (C.D. Cal. Oct. 16, 2013) (“A
16 settlement reached through the assistance of an experienced mediator
17 supports a determination that the settlement process was not collusive.”);
18 Satchell v. Fed. Express Corp., No. C 03 2878 SI, 2007 WL 1114010, at *4
19 (N.D. Cal. Apr. 13, 2007) (“The assistance of an experienced mediator in
20 the settlement process confirms that the settlement is non-collusive.”)

21
22 As discussed in the Court’s Preliminary Approval Order, the parties
23 employed the assistance of an experienced mediator in the settlement
24 process. (Doc. No. 258 at 9-10.) Accordingly, the Court finds that the
25 Settlement Agreement is the product of a non-collusive arms-length
26 negotiation.

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B. Attorney’s Fee, Incentive Payments for Named Plaintiffs, and Expenses,

1. Attorney’s Fees

The FLSA mandates “a reasonable attorney’s fee to be paid by the defendant, and the costs of the action” if a judgment is awarded to the plaintiff. 29 U.S.C. § 216(b). The Court has an “independent obligation to ensure that the [attorney’s fees] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount.” In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011). “[T]he district court must assume the role of fiduciary for the class plaintiffs when awarding attorneys’ fees from a common fund” since “the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage.” In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1302 (9th Cir. 1994).

In cases such as this one, where the attorney’s fees are calculated using the “percentage of the fund” method, twenty-five percent (25%) is the benchmark used in the Ninth Circuit. In re Bluetooth, 654 F.3d at 942; Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002); Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000). Any departure from that percentage requires adequate explanation in the record of the “special circumstances” involved. In re Bluetooth, 654 F.3d at 942.

Certain factors may justify an upward departure from the benchmark percentage. Hightower v. JPMorgan Chase Bank, N.A., No. CV11-1802

1 PSG (PLAx), 2015 WL 12644569, at *10 (C.D. Cal. Feb. 3, 2015) (“These
2 factors include the quality of the results achieved; the risks of litigation;
3 whether counsel generated benefits beyond the cash settlement; the skill
4 required and the quality of the work; the contingent nature of the fee; the
5 prevailing market rate compared to awards in similar cases; and the
6 financial burden carried by counsel.”)

7
8 At the preliminary approval stage, Plaintiffs indicated that they would
9 seek attorney’s fees in the amount of “33% of the Gross Settlement Amount
10 plus costs and expenses incurred in prosecuting the litigation.” (Doc. No.
11 228 at 14, n.1.) In its Preliminary Approval Order, the Court found that
12 Plaintiff’s counsel’s explanation for the requested upward departure from the
13 benchmark percentage persuasive, and found this factor weighed in favor of
14 granting preliminary approval. (Doc. No. 258 at 17.) Since then, Plaintiffs’
15 counsel propose using a portion of the allotted attorney’s fees to correct a
16 calculation error in some settlement notices rather than reduce the amount
17 promised to any claimant. (Doc. No. 281-3 at 4, ¶11.) In effect, this has
18 reduced the total attorney’s fees to 30% of the Gross Settlement Fund.
19 (Doc. No. 281-2 at 13.) The total amount sought by Plaintiffs’ counsel is 1.5
20 times greater than the lodestar amount calculated by Plaintiff’s counsel.
21 (Doc. No. 281-2 at 32.) This lodestar multiplier is within the low end of the
22 range found acceptable by the Ninth Circuit. Steiner v. Am. Broad. Co., 248
23 F. App’x 780, 783 (9th Cir. 2007) (finding that a 6.85 lodestar multiplier “falls
24 well within the range of multipliers that the courts have allowed”); Vizcaino v.
25 Microsoft Corp., 290 F.3d 1043, Appendix (9th Cir. 2002) (collecting cases).
26 The Court remains impressed by the result achieved in this case and the

1 time and resources invested by Plaintiff’s counsel. Following a review of the
2 contemporaneous time-keeping records for this case, and the hourly rates
3 of the time-keepers, the Court approves of Plaintiffs’ counsels’ fee request to
4 be deducted from Funds A and B, subject to such reduction as necessary to
5 cap the settlement at the agreed-upon maximum amount.

6 7 **2. Incentive Payments for Named Plaintiffs**

8 Incentive awards for class representatives must be “scrutinize[d]
9 carefully . . . so that they do not undermine the adequacy of the class
10 representatives.” Radcliffe v. Experian Info. Sols. Inc., 715 F.3d 1157, 1163
11 (9th Cir. 2013) (“[I]n some cases incentive awards may be proper but . . .
12 awarding them should not become routine practice. . . .”). In determining
13 whether and how much to award class representatives in incentive
14 payments, Plaintiffs must demonstrate the representatives’ actions in
15 protecting the interests of the class, the degree to which those actions
16 benefitted the class, the amount of time and effort the representatives spent
17 pursuing the litigation, and the representatives’ reasonable fear of being
18 retaliated against for their visible participation. Staton v. Boeing Co., 327
19 F.3d 938, 977 (9th Cir. 2003) (citing Cook v. Niedert, 142 F.3d 1004, 1016
20 (7th Cir.1998)). Courts also consider the number of representatives being
21 awarded incentive payments, the proportion of the payments to the
22 settlement amount, and the size of each payment. Staton, 327 F.3d at 977.
23 “Courts may award different fees to representatives based on their different
24 contributions to the case.” Hightower v. JPMorgan Chase Bank, N.A., No.
25 CV11-1802 PSG (PLAx), 2015 WL 12644569, at *11 (C.D. Cal. Feb. 3,
26 2015).

1
2 Here, the Plaintiffs seek approval of “service awards” that total approxi-
3 mately 2.7% of the Gross Settlement Amount), to be deducted proportionally
4 from Fund A and Fund B. (Doc. No. 281-2 at 13.) Under Plaintiffs’ proposal,
5 named plaintiffs receive the highest incentive award, the ten plaintiffs who
6 sat for an all-day deposition and served as representatives in the Collective
7 Action received the award of the named plaintiffs, and the 166 plaintiffs who
8 sat for a half-day deposition in the Individual Arbitrations receives the one-
9 tenth the award of the named plaintiffs. (Id.)

10
11 The Court finds it compelling that the incentive awards sought only
12 make up a small percentage of the total settlement amount. (Doc. No. 281-
13 2 at 21 (“[T]he service awards to the Named Plaintiffs amount to 0.375% of
14 the total settlement fund and the deposition awards amount to 2.3%. All
15 service awards taken together amount to 2.7% of the total settlement fund.”)
16 Plaintiff’s declarations also support the argument that active participation in
17 this case could harm employment prospects. (See, e.g., Doc. No. 251-6 at
18 ¶¶7-11; Doc. No. 251-7 at ¶¶8-9. Doc. No. 251-8 at ¶9; Doc. No. 291 at 4,
19 ¶5; Doc. No. 292 at 7, ¶¶4, 6; id. at 9, ¶6; id. at 10, ¶3; Doc. No. 281-3 at 6,
20 ¶18 (“Plaintiffs’ counsel regularly hears from individuals who call to learn of
21 their rights, but who ultimately do not step forward to assert them, due to
22 fear of long-term consequences in publicly suing one’s employer.”).)

23
24 At the Preliminary Approval stage, the Court expressed skepticism of the
25 difficulty that the various participants had in responding to discovery
26 requests. The Court found Plaintiff’s counsel’s claim that Plaintiffs “had to

1 drop their work and family lives on a moment's notice to respond to
2 discovery requests" to be dubious. (Doc. No. 251-1 at 20.) The Court
3 stated that it was not inclined to grant the incentive awards requested by
4 Plaintiffs, but found that more than a nominal amount for incentive awards
5 was likely appropriate. In addition those advanced at the preliminary
6 approval stage, Plaintiffs have advanced several other arguments in support
7 of the proposed incentive payments.

8
9 First, all evidence on the record supports a finding that the other class
10 members support the proposed incentive awards. Plaintiffs correctly point
11 out that there have been no objections to the incentive awards from any
12 class members. (Doc. No. 281-3 at 4-5, ¶12.) Indeed, Plaintiffs have filed
13 several declarations from other class members in support of the proposed
14 incentive payments. (See, e.g., Doc. No. 291 at 4, ¶5 ("I would not have
15 been willing to be a Named Plaintiff . . . because I feared retaliation from
16 Defendants, I would not want my name attached to a lawsuit against an
17 employer, I believe it would hurt my chances of future employment . . ."); id.
18 at 6, ¶8 ("I believe that this small amount [of requested service awards] is
19 more than well-deserved by the Named Plaintiffs and deponents for all the
20 work they did and the risk of negative publicity they bore on behalf of myself
21 and other settlement class members."); id. at 8, ¶5 ("I was not aware that we
22 were misclassified until I heard about this case, so I appreciate the named
23 plaintiffs realizing there was something wrong with the way we were treated
24 and stepping forward."); id. at 10, ¶6 ("I did not have to travel to a
25 deposition, miss work to attend the deposition, subject myself to hours of
26 grueling questioning by Defendants' attorneys (including some highly

1 personal questions about my family life and finances) the way that the
2 Named Plaintiffs and deponents did, and yet I will benefit greatly from their
3 efforts.”). These class members are not best positioned to fully assess the
4 fairness of the incentive awards in the context of the prevailing law – that is
5 the Court’s role – their opinions lend some support to the requested
6 incentive awards.

7
8 Furthermore, Plaintiffs have also submitted additional declarations that
9 because of the inflexible schedule and amount of travel associated with their
10 profession, trucker plaintiffs face particularly challenging logistics associated
11 with deposition attendance. (Doc. No. 292 at 3-4, ¶¶2, 3; *id.* at 6-7 ¶¶2, 3;
12 *id.* at 11, ¶5.) This also supports incentive awards greater than a nominal
13 sum.

14
15 The Court approves the requested incentive awards for each of the
16 Named Plaintiffs, the requested incentive awards for the 10 people who
17 gave all-day deposition as representatives of the Collective Action, and the
18 requested incentive awards for each of the 166 people who gave half-day
19 depositions in the Individual Arbitration, to be deducted proportionally from
20 Fund A and B.

21 22 **3. Expenses and Administrative Costs**

23 The FLSA provides for recovery of costs beyond attorney’s fees. See 29
24 U.S.C. § 216(b) (“The court in such action shall, in addition to any judgment
25 awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be
26 paid by the defendant, *and costs of the action.*”) (emphasis added).

1
2 Plaintiffs' counsel have incurred certain litigation expenses. (Doc. No.
3 281-2 at 25.) The litigation expenses for which Plaintiffs seek
4 reimbursement include, but are not limited to, expenses for filings and
5 motions, costs associated with court hearings, travel costs related to this
6 litigation, deposition costs, expert witness fees, and computerized legal
7 research costs. (See Doc. No. 276, Attachment B; Doc. No. 277 Attachment
8 A; Doc. No. 279 at Exh. 2.) The Court is concerned about the inclusion of
9 costs attributed to computerized legal research. Before approving of the
10 costs attributed to the use of Westlaw and LEXIS services, the Court
11 requires assurance that these charges are customarily charged to paying
12 clients rather than being subsumed into Plaintiff's counsel's overhead. See
13 Downey Surgical Clinic, Inc. v. Optuminsight, Inc., No. CV09-5457 PSG
14 (JCx), 2016 WL 5938722, at *14 (C.D. Cal. May 16, 2016) (granting
15 reimbursement of computerized research costs where class counsel
16 explained that it was a standard custom and practice to pass through legal
17 research expenses to paying litigation clients, rather than subsuming such
18 expenses in overhead); Matter of Cont'l Illinois Sec. Litig., 962 F.2d 566, 570
19 (7th Cir. 1992), as amended on denial of reh'g (May 22, 1992) (finding that it
20 was clear error not to reimburse class counsel for LEXIS and Westlaw
21 expenses because the "paying, arms' length market" did not subsume these
22 expenses into a lawyer's overhead). Otherwise, the Court is satisfied that
23 counsel's remaining litigation expenses are reasonable.

24
25 Plaintiffs also seek reimbursement of administrative costs as
26 contemplated by paragraphs 2.1(A) and 2.5(B) of the Settlement

1 Agreement. (Doc. No. 281-2 at 25.) The Court determines this cost to be
2 reasonable.

3
4 The court approves the requested reimbursement of Plaintiffs' counsels'
5 requested litigation expenses, to be deducted proportionally from Funds A
6 and B. The Court approves of the requested administrative costs to be
7 deducted proportionally from Funds A and B.

8 9 **C. Release of Claims**

10
11 The Court must examine whether the settlement agreement includes a
12 release of absent class members' claims and whether any such release is
13 overly broad. See Spann v. J.C. Penney Corp., 314 F.R.D. 312, 328 (C.D.
14 Cal. 2016) (balancing "fairness to absent class members and recovery for
15 plaintiffs with defendants' business interest in ending this litigation with
16 finality."); Bond. v. Ferguson Enterprises, Inc., No. 1:09-CV-01662, 2011 WL
17 284962, at *7 (E.D. Cal. Jan. 25, 2011) (rejecting settlement for containing
18 an overly broad settlement release of class members' claims); Goodwin v.
19 Winn Mgmt. Grp. LLC, No. 1:15-CV-00606 DAD EPG, 2017 WL 3173006, at
20 *11 (E.D. Cal. July 26, 2017) (determining release provision to be
21 appropriate since the claims would only be released who affirmatively opted-
22 in and tracked the claims at issue in the lawsuit.).

23
24 As discussed in the Court's Preliminary Approval Order, the releases in
25 the Settlement Agreement only pertain to those Plaintiffs who have
26 affirmatively opted-in to the settlement, and do not affect the claims of Fund

1 A claimants who opt-out or Fund B claimants who do not affirmatively opt-in.
2 (Doc. No. 258 at 20.) Accordingly, the Court approves the release of all the
3 Released Claims against Respondents and/or any of the other released
4 Parties as those term are defined in the Settlement Agreement, which
5 releases shall be fully effective and enforceable upon the occurrence of the
6 Settlement Effective Date.

7 8 **D. Cy Pres Award**

9
10 “[A] *cy pres* remedy must provide the ‘next best distribution’ absent a
11 direct monetary payment to absent class members,” not necessarily the
12 recipient that the court or class members would find ideal. Lane v.
13 Facebook, Inc., 696 F.3d 811, 820-21 (9th Cir. 2012). The Court must
14 examine whether the choice of *cy pres* recipient furthers “(1) the objectives
15 of the underlying statute(s) and (2) the interests of the silent class
16 members.” Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011). It
17 must also account for the geographic distribution of the class.” Id. at 1040.
18

19 Having failed to agree upon a *cy pres* recipient, the parties proposed
20 several potential *cy pres* recipients and delegated the final choice to the
21 Court. (Doc. No. 258 at 20-21.) As detailed in the Court’ Preliminary
22 Approval Order, the Court has found of the options selected by the parties,
23 the National Employment Law Project (“NELP”) most directly serves the
24 underlying purposes of the FLSA, and will also provide silent class members
25 with assistance related to the issues raised by this litigation. (Id. at 21-22.)
26 Accordingly, the Court approves NELP as the *cy pres* recipient to receive

1 any unclaimed funds remaining in Fund A one year after distribution from
2 Fund A commences.

3
4 **E. The Proposed Forms and Method of Notice to Class Members are
5 Fair and Accurate.**

6 “For a proposed settlement under the FLSA, the court must provide
7 potential plaintiffs accurate and timely notice concerning the pendency of
8 the collective action, so that they can make informed decisions about
9 whether or not to participate.” Goodwin v. Winn Mgmt. Grp. LLC, No.
10 115CV00606 DAD (EPG), 2017 WL 3173006, at *13 (E.D. Cal. July 26,
11 2017) (internal quotation marks removed); 29 U.S.C. § 216(b) (“No
12 employee shall be a party plaintiff to any such action unless he gives his
13 consent in writing to become such a party and such consent is filed in the
14 court in which such action is brought.”).

15
16 The Court previously accepted the proposed notice form and
17 administration procedures. (Doc. No. 258 at 22-23.) According to Dan
18 Getman, Plaintiffs’ lead counsel, the settlement administrator disseminated
19 notice pursuant to the Court’s preliminary approval order. (See Doc. No.
20 281-3 at 4-5, ¶¶10-12.) Given Getman’s representations, the Court finds
21 that the notice was reasonable as to its content and the method of
22 communication.
23
24
25
26

IV. CONCLUSION

1
2 For the reasons set forth above, Plaintiffs' Motion for Final settlement
3 Approval is GRANTED.

4
5 The Court approves the Parties' Settlement Agreement as fair,
6 reasonable and adequate. The Court approves the plan of allocation of the
7 settlement funds as described above. The Court ends the tolling of any and
8 all FLSA claims for Plaintiffs and all other putative class members in this
9 case, including for all Fund A Claimants as well as all Potential Fund B
10 Claimants, as of the Settlement Effective Date as set forth in Section 2.4D of
11 the Settlement Agreement.

12
13 The Court also approves the dismissal of this action in its entirety with
14 prejudice, which dismissal shall be effective upon the Settlement Effective
15 Date and the subsequent funding of the settlement as set forth in Section
16 2.14 of the Settlement Agreement.

17
18 The Court also approves the release of all of the Released Claims
19 against respondents and/or any of the other Released Parties as those
20 terms are defined in the Settlement Agreement, which releases shall be fully
21 effective and enforceable upon the occurrence of the Settlement Effective
22 Date.

23
24 Furthermore, the Court shall retain jurisdiction over the Parties, and over
25 the Settlement Agreement, for all purposes, including but not limited to (i)
26 monitor and enforce compliance with the Settlement Agreement, Final

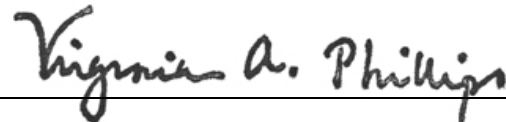
United States District Court
Central District of California

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Approval and/or any related order of this Court; and/or (ii) resolve any disputes over this Settlement Agreement or the administration of the benefits of this Settlement Agreement, including disputes over entitlement to payments sought by Settlement Counsel. The Court shall retain jurisdiction regardless of dismissal.

IT IS SO ORDERED.

Dated 4/3/18



Virginia A. Phillips

Chief United States District Judge