

1 David Mara, Esq. (SBN 230498)
2 Jamie Serb, Esq. (SBN 289601)
3 Tony Roberts, Esq. (SBN 315595)
4 **MARA LAW FIRM, PC**
5 2650 Camino Del Rio North, Suite 205
6 San Diego, California 92108
7 Tel: (619) 234-2833; Fax: (619) 234-4048
8 Attorneys for Amanda Gonzalez and
9 Audriana Gonzalez
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMANDA GONZALEZ and
AUDRIANA GONZALEZ on behalf
of themselves, all others similarly
situated and on behalf of the general
public,

Plaintiffs,

v.

BURLINGTON COAT FACTORY
WAREHOUSE CORPORATION
and DOES 1-100,

Defendants.

CASE NO. 5:18-cv-00666-JGB-SP

Honorable Jesus G. Bernal

**NOTICE OF ENTRY OF ORDER
GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: August 24, 2020
Time: 9:00 a.m.
Courtroom: 1

Filed: February 27, 2018
FAC Filed: October 31, 2018
Trial Date: None

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 NOTICE IS HEREBY GIVEN that on August 21, 2020, the Court issued an
3 Order Granting Preliminary Approval of Class Action Settlement in the above-
4 captioned matter. A true and correct copy of the Order is attached as Exhibit 1.

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6 Dated: August 24, 2020

MARA LAW FIRM, PC

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9 David Mara, Esq.

Tony Roberts, Esq.

10 Representing Plaintiffs and the Class
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Exhibit 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **EDCV 18-666 JGB (SPx)**Date **August 21, 2020**Title ***Amanda Gonzalez, et al. v. Burlington Coat Factory Warehouse Corporation***Present: The Honorable **JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE****MAYNOR GALVEZ**

Deputy Clerk

Not Reported

Court Reporter

Attorney(s) Present for Plaintiff(s):

None Present

Attorney(s) Present for Defendant(s):

None Present

Proceedings: Order (1) GRANTING Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 39); and (2) VACATING the August 24, 2020 Hearing (IN CHAMBERS)

Before the Court is Amanda Gonzalez and Audriana Gonzalez's ("Plaintiffs") motion for preliminary approval of class action settlement. ("Motion," Dkt. No. 39.) The Court finds this matter appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of the matter, the Court GRANTS the Motion.

I. BACKGROUND

Plaintiffs commenced the action in California Superior Court for the County of San Bernardino on February 27, 2018 against Burlington Coat Factory Warehouse Corporation ("Defendant"). (Dkt. No. 1.) Defendant removed the action on April 2, 2018, and Plaintiffs filed a first amended complaint on October 1, 2018. ("FAC," Dkt. No. 17.) The FAC asserts the following ten causes of action: (1) failure to pay all straight time wages; (2) failure to pay all overtime wages; (3) failure to provide meal periods in violation of Cal. Lab. Code § 226.7 and IWC Wage Order No. 9; (4) failure to authorize and permit rest periods in violation of Cal. Lab. Code § 226.7 and IWC Wage Order No. 9; (5) failure to authorize and permit recovery periods in violation of Cal. Lab. Code § 226.7; (6) knowing and intentional failure to comply with itemized employee wage statement provisions in violation of Cal. Lab. Code §§ 226, 1174, 1175; (7) failure to pay all wages due at time of termination of employment in violation of Cal. Lab. Code §§ 201-203; (8) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §

17200 et seq.; (9) failure to produce personnel records in violation of Cal. Lab. Code § 1198.5; and (10) failure to produce wage records in violation of Cal. Lab. Code § 226(f). (FAC.)

Plaintiffs filed the Motion on July 27, 2020. (Mot.) In support of the Motion, Plaintiffs attached a declaration and related exhibits. (“Mara Declaration,” Dkt. No. 39-1; “Agreement,” id., Ex. 1; “Class Notice,” id., Ex. A; “Administration Bid,” id., Ex. 2) The Motion is not opposed. The Agreement attaches a proposed second amended complaint, which adds PAGA claims as the eleventh cause of action.¹ (Agreement, Ex. B.)

II. LEGAL STANDARD

Approval of a class action settlement requires certification of a settlement class. La Fleur v. Med. Mgmt. Int’l, Inc., 2014 WL 2967475, at *2–3 (C.D. Cal. June 25, 2014) (internal quotation marks omitted). A court may certify a class if the plaintiff demonstrates the class meets the requirements of Federal Rules of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b).² See Fed. R. Civ. P. 23; see also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). Rule 23(a) contains four prerequisites to class certification: (1) the class must be so numerous that joinder is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims of the class representative must be typical of the other class members; and (4) the representative parties must fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a). Rule 23(b) requires one of the following: (1) prosecuting the claims of class members separately would create a risk of inconsistent or prejudicial outcomes; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or declaratory relief benefitting the whole class is appropriate; or (3) common questions of law or fact predominate so that a class action is superior to another method of adjudication. Fed. R. Civ. P. 23(b).

¹ The Agreement includes as an attachment a second amended complaint. (Agreement, Ex. B.) As part of the settlement, Plaintiffs wish to file a second amended complaint adding PAGA claims. The class defined in the proposed SAC matches the class in the proposed settlement. Federal Rule of Civil Procedure 15(a)(2) permits a plaintiff to amend its pleading with the opposing party’s written consent. Where the parties have agreed to file an amended complaint as part of the class settlement, judges have granted leave to amend, subject to the terms of settlement. See McCabe v. Six Continents Hotels, Inc., 2015 WL 3990915, at *1 (N.D. Cal. June 30, 2015) (collecting cases). Because provisions of the settlement agreement require the Court to consider content exclusively pled in the second amended complaint, the Court finds it necessary to grant Plaintiffs’ implicit request to amend the complaint at this time. In the event that the proposed settlement is not finally approved by the Court, or in the event that the agreement becomes null and void pursuant to its terms, the second amended complaint will be dismissed. In that event, the FAC will be the operative pleading.

² All references to “Rule” in this Order refer to the Federal Rules of Civil Procedure unless otherwise noted.

Class action settlements must be approved by the court. See Fed. R. Civ. P. 23(e). At the preliminary approval stage, the Court “must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms.” Id. “The settlement need only be potentially fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval.” Acosta v. Trans Union, LLC, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (emphasis in original). To determine whether a settlement agreement is potentially fair, a court considers the following factors: the strength of the plaintiff’s 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. Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003).

III. CONDITIONAL CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS

The Agreement defines the class as follows:

All current and/or former non-exempt, nonunion, hourly employees provided as temporary workers by Lyneer Staffing Solutions who worked one or more shifts in a workweek at Burlington’s distribution centers located in California at any time between February 27, 2014 and [August 22, 2020 or the Date of Preliminary Approval of this settlement, inclusive, whichever is earliest].

(Agreement ¶ 3; Mot. at 1.) The Court first addresses the Rule 23(a) requirements and then turns to the Rule 23(b) requirements.

A. Requirements of Rule 23(a)

1. Numerosity

A class satisfies the prerequisite of numerosity if it is so large that joinder of all class members is impracticable. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). To be impracticable, joinder must be difficult or inconvenient, but need not be impossible. Keegan v. Am. Honda Motor Co., 284 F.R.D. 504, 522 (C.D. Cal. 2012). There is no numerical cutoff for sufficient numerosity. Id. However, 40 or more members will generally satisfy the numerosity requirement. Id. A plaintiff has the burden to establish that this requirement is satisfied. United Steel, Paper & Forestry, Rubber, Mfg. Energy v. Conoco Phillips Co., 593 F.3d 802, 806 (9th Cir. 2010). Here, Plaintiffs estimate 5,776 individuals fall within the class definition. (Mot. at 13.) Accordingly, the Court concludes that the numerosity requirement is satisfied.

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2. Commonality

The commonality requirement is satisfied when plaintiffs assert claims that “depend upon a common contention . . . capable of classwide resolution—which means that a 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). Here, common questions include whether Burlington is a joint employer and whether Burlington’s uniform policies deprived the Class Members of wages, meal periods, or rest breaks. (Mot. at 14.) Class Members’ claims therefore turn on the same factual and legal questions. Accordingly, Plaintiffs have established commonality.

3. Typicality

“The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class.” Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). “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 plaintiff, and whether other class members have been injured by the same course of conduct.” Wolin v. Jaguar Land Rover No. Am., 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting Hanon, 976 F.2d at 508). Because typicality is a permissive standard, the claims of the named plaintiff need not be identical to those of the other class members. Hanlon, 150 F.3d at 1020. Here, each Class Member’s claim arises from the same underlying conduct: Defendant’s alleged failure to use a lawful disclosure form. Accordingly, the Court is satisfied that Plaintiffs have met the typicality requirement.

4. Adequacy

In determining whether a proposed class representative will adequately protect the interests of the class, the court should ask whether the proposed class representative and her counsel have any conflicts of interest with any class member and whether the proposed class representative and her counsel will prosecute the action vigorously on behalf of the class. Johnson v. General Mills, Inc., 275 F.R.D. 282, 288 (C.D. Cal. 2011).

Plaintiffs maintain there is no conflict of interest between themselves and members of the proposed settlement class, as their respective interests in this litigation are aligned. (Mot. at 14-15.) Plaintiffs are also represented by competent counsel with experience in class actions and who do not have a conflict of interest with the class. (Id.; Mara Decl. ¶¶ 2-8, 16-17, 20.) Thus, Plaintiffs do not have a conflict of interest with the class that might prevent them from vigorously representing the interests of class members who suffered the alleged violations. Accordingly, the Court concludes both Plaintiffs and Class Counsel will adequately represent the interests of the proposed class.

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B. Requirements of Rule 23(b)

“In addition to satisfying Rule 23(a)’s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).” Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997). Here, Plaintiffs assert the Agreement satisfies the requirements of Rule 23(b)(3). (Mot. at 15.)

Rule 23(b)(3) requires (1) issues common to the whole class to predominate over individual issues and (2) that a class action be a superior method of adjudication for the controversy. See Fed. R. Civ. P. 23(b)(3). As to predominance, the “inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” Hanlon, 150 F.3d at 1022 (quoting Amchem, 521 U.S. at 623). “[T]he examination must rest on ‘legal or factual questions that qualify each class member’s case as a genuine controversy, questions that preexist any settlement.’” Id. (same). A class should not be certified if the issues of the case require separate adjudication of each individual class member’s claims. Id.

Here, adjudication by representation is warranted because questions common to the settlement class represent a significant aspect of the case and can be resolved for all members of each class in a single adjudication. Specifically, Plaintiffs contend that common issues predominate because the claims of both Plaintiffs and the proposed class stem from Defendant’s common policies related to temporary workers. (Mot. at 16.) The Court is satisfied that the common questions predominate.

A class action must also be superior to other methods of adjudication for resolving the controversy. Fed. R. Civ. P. 23(b)(3). To determine superiority, a court’s inquiry is guided by the following pertinent factors:

- (A) the class members’ interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)–(D). However, “[confronted] with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.” Amchem, 521 U.S. at 620.

Here, Plaintiffs note the class mechanism provides an effective mechanism for vindicating the claims of class members because it would not be economical for individuals to pursue their claims, and the costs of litigation would dwarf potential recovery. (Mot. at 16-17.) Accordingly, the Court concludes the superiority requirement is satisfied.

IV. SETTLEMENT AGREEMENT

A. Settlement Summary

Below is an overview of the financial terms of the Agreement:

- Gross settlement amount: \$3,000,000
- Attorneys' fees: \$750,000
- Costs not to exceed: \$50,000
- LWDA share of PAGA penalties: \$225,000
- Total service award for two class representatives: \$15,000
- Administration costs not to exceed: \$45,000
- Estimated net settlement after deduction of payroll taxes³: \$1,843,194.68

The \$3,000,000 gross settlement amount is non-reversionary, so no amount will be returned to Defendant. (Mot. at 1.) Any checks issued to Participating Class Members shall remain valid and negotiable for 180 days from the date of issuance. The parties agreed that the funds from any uncashed checks will be sent to a cy pres beneficiary. (Agreement ¶¶ 11, 78, 95.) United Way of California is the designated cy pres beneficiary. (Id. ¶ 37.)

B. Financial Terms

1. Participating Class Members

"Participating Class Member" is defined as any Class Member who does not opt out of the Settlement or who opts out but subsequently rescinds the opt-out in a timely manner. (Agreement ¶ 34.) One-Third (1/3) of each Settlement Payment is intended to settle each Class Member's claims for alleged unpaid wages. (Class Notice at 6.) This wage portion will be reduced by applicable payroll tax withholdings. (Id.) The Settlement Administrator will issue an IRS Form W-2 to each Participating Class Member with respect to the wage portion of his/her Settlement Payment. (Id.; see also Agreement ¶ 61.) Two-Thirds (2/3) of the Settlement Payment is intended to settle each Class Member's claims for interest and penalties. (Class Notice at 6.) This non-wage portion will not be reduced by payroll tax withholding and deductions. (Id.) The Settlement Administrator will issue to each Participating Class Member an IRS Form 1099 with respect to this non-wage portion of his/her Settlement Payment. (Id. at 6-7.) All PAGA Group Payments will be allocated entirely to penalties and reported on IRS 1099 Forms. (Id.; see also Agreement ¶ 61.)

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2. Payment and Distribution of Funds

³ Of the \$1,915,000, one-third, or \$638,296.50 is attributable to wages. This amount is multiplied by 11.25% to arrive at the estimated employer payroll taxes of \$71,805.32. Subtracting \$71,805.32 in payroll taxes from \$1,915,000 results in the \$1,843,194.68 net settlement amount. (Mara Decl. ¶ 34.)

Subject to final approval, Defendant will fund the gross settlement amount within ten days of the settlement effective date. (Agreement ¶¶ 43, 95.) The Settlement Administrator shall pay each Participating Class Member a pro rata portion of the Net Settlement Amount based on the number of weeks he or she worked as a Class Member. (Agreement ¶ 54.) That pro rata portion shall be determined by dividing the total number of weeks worked as a Class Member by all members of the Class into the amount of the Net Settlement Amount to arrive at an amount per week; then, for each eligible Class Member, multiplying that amount times the number of weeks the Settlement Administrator determines that such individual was working as a Class Member. (*Id.*) Participating Class Members who are sent Settlement Payments and PAGA Group Members who are sent PAGA Group Payments shall have 180 calendar days after mailing by the Settlement Administrator to cash their checks and will be so advised of such deadline. (Agreement ¶ 78.) They will receive reminder postcards if the checks are not redeemed or deposited within 90 days after mailing. (*Id.* ¶ 78(a).) Remaining funds go to the cy pres beneficiary. (*Id.* ¶ 78(b).)

3. Class Representatives

The Agreement provides for an incentive payment of \$7,500 to each Plaintiff for their efforts in prosecuting the action and the stigma they now face for doing so. (Mot. at 15; Agreement ¶ 54(e)(ii).) Plaintiffs also agree to a more general release than the Class Members. (Agreement ¶¶ 79-84.)

4. LWDA Payment

Subject to Court approval, the Joint Stipulation allocates \$300,000 of the gross settlement to PAGA penalties ("PAGA Payment"). Seventy-five percent (75%) (\$225,000) of the PAGA Payment shall be paid to the LWDA, and twenty-five percent (25%) (\$75,000) of the PAGA Payment will become part of the net settlement amount distributed to PAGA Group Members. (Agreement ¶¶ 31-32, 54(e)(iii)-(iv).)

5. Settlement Administration Costs

The Parties request that the Court appoint CPT Group, Inc. ("CPT") as the settlement administrator. The Agreement allocates \$45,000 to administer the settlement. If the final cost of administration is less than the \$45,000 cap, the remainder will become part of the net settlement amount, distributable to Participating Class Members. (Agreement ¶¶ 41, 54(v).)

6. Attorneys' Fees and Costs

The Agreement provides that Class Counsel may apply for attorneys' fees not to exceed 25% of the Gross Settlement Amount, or \$750,000, and actual litigation costs incurred, up to \$50,000. (Agreement ¶ 54(e)(i).)

7. Injunctive Relief

The Agreement does not appear to include any injunctive relief.

8. Release

In exchange for Burlington's promise to make the payments provided in the Agreement:

[t]he releases agreed upon and made part of the settlement by Participating Class Members ("Settlement Class Released Claims") shall include a release of Releasees⁴ . . . of the Settlement Class Released Claims. Settlement Class Released Claims are any and all wage and hour claims that accrued during or prior to the Class Period and that were or could have been asserted in the instant Action based on the allegations in any pleading in the Action, including the Second Amended Complaint, whether such claims were asserted or not, including but not limited to any and all claims for straight time, overtime, minimum wage, meal and rest breaks, recovery periods, wage statements, waiting time penalties, unfair competition, failure to produce personnel or wage records, and claims under the California Labor Code Private Attorneys General Act, Labor Code §§ 2699, et seq. ("PAGA"), as well as any and all state or federal claims that are derivative or directly related to the foregoing claims, including any claims for wages, penalties, premium pay, punitive damages, and interest, and/or under the common law, such as conversion and unjust enrichment, and any claims under the California Business & Professions Code. All Participating Class Members shall be bound by the release unless they formally opt-out. The PAGA Group shall bound by the release as to any PAGA claims even if they have formally opted-out of the Class.

(Agreement ¶ 85.) The release covers facts that were alleged or could have been alleged in Plaintiffs' complaint and PAGA letter, and as such the release is tied to the facts contained therein. Only Plaintiffs have agreed to a general release of all claims, including a waiver under Cal. Civil Code § 1542. (Agreement ¶¶ 79-84.)

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⁴ "Releasees" means each and all of Burlington Coat Factory Warehouse Corporation, Lyneer Staffing Solutions (as defined above), and each of their respective predecessors, successors and assigns, their current and former direct and indirect parents, affiliates, subsidiaries, divisions, and related business entities, and their current and former officers, directors, shareholders, employees, agents, representatives and employee benefit programs, including the trustees, administrators, fiduciaries and insurers of such programs. (Agreement ¶ 37.)

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9. Notice

CPT will mail notice packets to Class Members and keep track of requests for exclusion from the settlement. (Agreement ¶ 54(g).) CPT will also maintain a website which has information about the settlement and links to the settlement documents. (Id. ¶ 58.) After CPT receives the Class Data from Defendant, (id. ¶ 65), CPT will update the addresses for the Class Members/PAGA Group Members using the National Change of Address database and other available resources, (id. ¶ 67). Any returned envelopes from the initial mailing with forwarding addresses will be used by CPT to locate Class Members/PAGA Group Members and re-mail the Class Notice to the correct or updated address. (Id.) CPT will use all appropriate tracing methods, including skip tracing, to ensure that the Class Notices are received by Class Members/PAGA Group Members. (Id.) And, CPT will take all reasonable measures, including tracing, to deliver notices returned as undeliverable. (Id. ¶¶ 67, 68.) The response deadline for opt-outs and objections is sixty (60) days following the mailing of Class Notice. (Id. ¶ 39, 95 (setting out the timeline for completion of settlement).)

V. PRELIMINARY APPROVAL OF THE SETTLEMENT

“[Rule 23] requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable.” Hanlon, 150 F.3d at 1026. To determine whether a settlement agreement meets these standards, the court considers a number of factors, including “the strength of the plaintiff’s case, the risk, expense, complexity, and likely duration of further litigation, the risk of maintaining class action status throughout 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.” Stanton, 327 F.3d at 959 (internal citations omitted). The settlement may not be a product of collusion among the negotiating parties. In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (citing Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1290 (9th Cir. 1992)).

“At the preliminary approval stage, some of the factors cannot be fully assessed. Accordingly, a full fairness analysis is unnecessary.” Litty v. Merrill Lynch & Co., 2015 WL 4698475, at *8 (C.D. Cal. Apr. 27, 2015). Rather, the court need only decide whether the settlement is potentially fair, Acosta, 243 F.R.D. at 386, in light of the strong judicial policy in favor of settlement of class actions. Class Plaintiffs, 955 F.2d at 1276. “[T]he court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” Hanlon, 15 F.3d at 1027.

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A. Extent of Discovery and Stage of the Proceedings

For a court to approve a proposed settlement, “[t]he parties must . . . have engaged in sufficient investigation of the facts to enable the court to intelligently make an appraisal of the settlement.” Acosta, 243 F.R.D. at 396 (internal quotation marks omitted). Here, Plaintiffs note that the matter was settled after discovery that resulted in hundreds of pages of documents and hundreds of thousands of lines of data. (Mot. at 19.) Plaintiffs reviewed information and data including policies and best practices, meal period and rest break policies, contracts between Burlington and Lyneer Staffing Solutions, Lyneer Staffing Solutions’ time records, attendance records, and pay records, as well as personnel files. (Id.) Plaintiffs hired an expert to analyze the timekeeping and payroll data. Because Plaintiffs conducted significant investigation, the Court finds each side has a clear idea of the strengths and weaknesses of its respective cases, and concludes that the extent of discovery and the stage of proceedings weigh in favor of preliminary approval.

1. Amount Offered in Settlement

In determining whether the amount offered in settlement is fair, a court compares the settlement amount to the parties’ estimates of the maximum amount of damages recoverable in a successful litigation. In re Mego, 213 F.3d at 459.

The gross settlement amount is \$3,000,000. The likely exposure of the core claims for unpaid wages, meal and rest period violations and PAGA penalties associated therewith was evaluated at \$6,715,546. (Mot. at 27.) The gross settlement amount is 44% of the total exposure of the core claims. (Id. at 28.) Of course, the net settlement amount is significantly less, about 27% of the total exposure of the core claims.

Although the settlement amount represents a small fraction of the maximum value of this litigation, “[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.” In re Mego, 213 F.3d at 459 (quoting Officers for Justice v. Civil Serv. Comm’n, 688 F.2d 615, 628 (9th Cir. 1982)). In In re Mego, the Ninth Circuit considered the difficulties in proving the case and determined the settlement amount, which was one-sixth of the potential recovery, was fair and adequate. Id. Given the difficulties posed to each individual of pursuing his or her claim, the Court finds the settlement amount is potentially fair.

2. Strength of Case and Risk, Expense, Complexity, and Likely Duration of Litigation

Plaintiffs state the case hinges on the multi-factor test for employment in Borello, rather than the streamlined ABC test in Dynamex, because Defendant is at most a co-employer and did not classify Class members as independent contractors. (Mot. at 20 (citing S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations, 48 Cal. 3d 341 (1989); Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903 (2018).) Given uncertain and complicated application of those

factors to determine Defendant's employer status, Plaintiffs argue the risks of proceeding to certification and trial are significant. (Mot. at 20-22.) Plaintiffs also comment on the risk of continued litigation and Defendant's likely challenges to class certification. (Id.)

The Court believes the risk, expense, and likely duration of further litigation weigh in favor of preliminary approval. Without the Agreement, the parties would be required to litigate class certification, as well as the ultimate merits of the case—a process which the Court acknowledges is long and expensive. Overall, these factors weigh in favor of preliminary approval.

3. Experience and Views of Counsel

"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004) (internal citation and quotation marks omitted). Here, the parties reached settlement after review of their claims and defenses, and Plaintiffs' Counsel recommends approval of the Agreement. (Mara Decl.) The Court finds this factor weighs in favor of preliminary approval.

4. Collusion Between the Parties

"To determine whether there has been any collusion between the parties, courts must evaluate whether 'fees and relief provisions clearly suggest the possibility that class interests gave way to self interests,' thereby raising the possibility that the settlement agreement is the result of overt misconduct by the negotiators or improper incentives for certain class members at the expense of others." Litty, 2015 WL 4698475, at *10 (quoting Staton, 327 F.3d at 961).

As an initial matter, the Court notes that settlement negotiations were conducted at arms-length. (Agreement ¶ 106.) The parties engaged in a mediation session with an experienced and respected mediator. (Mara Decl. ¶ 39.) The use of a mediator experienced in the settlement process tends to establish that the settlement process was not collusive. See, e.g., Satchell v. Fed Ex. Corp., 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007). The Court thus turns to the financial terms of the Settlement Agreement.

A court may grant a modest incentive award to class representatives, both as an inducement to participate in the suit and as compensation for the time spent in litigation activities. See In re Mego, 213 F.3d at 463 (finding the district court did not abuse its discretion in awarding an incentive award to the class representatives). Plaintiffs request an incentive fee award of \$7,500 each for their service, involvement, and risk in connection with being a class representative and for a more general release of claims. (Agreement ¶ 40.) The incentive payment is in addition to the individual payment allocated to Plaintiffs under the Agreement. (Id.)

Plaintiffs provide no concrete information about their role in the mediation, time spent participating in the litigation, or information regarding whether they were guaranteed to receive benefits. The Court therefore finds the requested service awards only potentially reasonable and may not grant them in full should it finally approve the settlement. For final fairness approval, the Court advises Plaintiffs to provide greater detail. See Clesceri v. Beach City Investigations & Protective Servs., Inc., 2011 WL 320998, at *2, 9, 12 (C.D. Cal. Jan. 27, 2011) (preliminarily approving an incentive award of \$3,000 each to the two named plaintiffs when the gross settlement amount was \$100,000); Vanwagoner v. Siemens Indus., Inc., 2014 WL 1922731, at *2 (E.D. Cal. May 14, 2014) (preliminarily approving \$5,000 as an incentive award when the maximum settlement amount was \$225,000).

Generally, courts in the Ninth Circuit find that a benchmark of 25% of the common fund is a reasonable fee award. Hanlon, 150 F.3d at 1029 (“This circuit has established 25% of the common fund as a benchmark award for attorney fees.”); Paul, Johnson, Alston & Hunt v. Gaulty, 866 F.3d 258, 272 (9th Cir. 1989) (the 25% benchmark can be adjusted in either direction “to account for any unusual circumstances[,]” but the justification for adjustment must be apparent); Monterrubio v. Best Buy Stores, L.P., 291 F.R.D. 443, 455 (E.D. Cal. 2013) (citing Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990)) (“In applying this method, courts typically set a benchmark of 25% of the fund as a reasonable fee award, and justify any increase or decrease from this amount based on circumstances in the record.”).

The Court, in its discretion, may award attorneys’ fees in a class action by applying either the lodestar method or the percentage-of-the-fund method. Fischel v. Equitable Life Assurance Soc’y of U.S., 307 F.3d 997, 1006 (9th Cir. 2002). The Court determines the lodestar amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. McGrath v. Cnty. of Nev., 67 F.3d 248, 252 (9th Cir. 1995). The hourly rates used to calculate the lodestar must be “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). Next, the Court must decide whether to adjust the “presumptively reasonable” lodestar figure based upon the factors listed in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69–70 (9th Cir. 1975), abrogated on other grounds by City of Burlington v. Dague, 505 U.S. 557 (1992), that have not been subsumed in the lodestar calculation. See Caudle v. Bristow Optical Co., Inc., 224 F.3d 1014, 1028–29 (9th Cir. 2000).⁵

⁵ In Kerr, the Ninth Circuit adopted the 12-factor test articulated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) which identified the following factors for determining reasonable fees: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the case, (11)

Here, Plaintiffs' Counsel plans to petition for attorneys' fees not to exceed 25% of the gross settlement amount, and specifies a cost limit of \$50,000. (Agreement ¶ 32.) Plaintiffs do not offer a lodestar crosscheck. The Court finds 25% is a potentially reasonable award. The cost limit is also potentially reasonable, although it appears to be on the high end of cost limits allowed in similar class actions. The Court may need to adjust the amounts at the final approval stage, depending on the extent and organization of documentation of fees and costs and depending on analysis of similar fee and cost awards.

5. Remaining Factors

In addition to the factors discussed above, the Court may consider the risk of maintaining class action status throughout the trial, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. Staton, 327 F.3d at 959 (internal citations omitted). At this stage, the Court cannot fully analyze the remaining factors. For example, there is no governmental participant in this action. Additionally, the Settlement Class members have yet to receive notice of the Agreement and have not had an opportunity to comment or object to its terms. The Court directs Plaintiffs, in the motion for final approval, to provide briefing on these issues.

On balance the factors support preliminary approval of the Agreement. The Agreement is potentially fair, adequate, and reasonable.

VI. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiffs' Motion for Preliminary Approval. The Court ORDERS as follows:

1. The Settlement Agreement is preliminarily approved as potentially fair, reasonable, and adequate. However, in their motion for final approval, Plaintiffs shall address each of the concerns raised above.
2. The following Settlement Class is certified for settlement purposes only:

All current and/or former non-exempt, non-union, hourly employees provided as temporary workers by Lyneer Staffing Solutions who worked one or more shifts in a workweek at Burlington's distribution centers located in California at any time between February 27, 2014, and the Date of Preliminary Approval of this Settlement

the nature and length of the professional relationship with the client, and (12) awards in similar cases. Kerr, 526 F.2d at 70.

3. The Court appoints David Mara Jamie Serb, and Tony Roberts, of the Mara Law Firm, to serve as counsel on behalf of the Settlement Class for purposes of settlement only.
4. Plaintiffs Amanda Gonzalez and Audriana Gonzalez are appointed as the representatives of the Settlement Class for purposes of settlement only.
5. The Court appoints CPT Group, Inc. as the settlement administrator.
6. The Class Notice form is approved.
7. The Court grants Plaintiffs leave to file the Second Amended Complaint attached to the Agreement as Exhibit B.
8. The Court authorizes distribution of Class Notice to the Settlement Class members by first-class regular mail and pursuant to the Agreement.
9. The hearing date for the Final Fairness Hearing is hereby set for **Monday, March 1, 2021** at 9:00 a.m. in Courtroom 1 of the United States District Court for the Central District of California, Eastern Division located at 3470 12th Street, Riverside, California 92501.

IT IS SO ORDERED.

Case Name: Amanda Gonzalez and Audriana Gonzalez V. Burlington
Coat Factory Warehouse Corporation
Court: Central District of California
Case Number: 5:18-cv-00666-JGB-SP

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of: San Diego, State of California.

I am over the age of 18 and not a party to the within action; my business address is:
2650 Camino Del Rio N., Suite 205, San Diego CA 92108

On August 25, 2020, I served the foregoing document(s) described as:

**NOTICE OF ENTRY OF ORDER GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT**

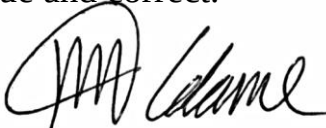
On interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

RICK SHACKELFORD
shackelfordr@gtlaw.com
RYAN C. BYKERK
bykerkr@gtlaw.com
GREENBERG TRAURIG, LLP
1840 Century Park East, Suite 1900
Los Angeles, CA 90067-2121
Tel: 310-586-7700; Fax: 310-586-7800

[XX] (BY E-MAIL) On, August 25, 2020, I caused the documents to be sent to the persons at the electronic notification addresses of the parties named above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[XX] (DECLARATION) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: August 25, 2020


Mathew Adame