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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

OSCAR DIAZ, an individual, JACE O'GUINN,
an individual, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

UNITED PARCEL SERVICE, INC., an Ohio
Corporation,

Defendant.

**Case No.: 1:22-cv-00246-ADA-CBD
CLASS AND PAGA REPRESENTATIVE
ACTION**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' [UNOPPOSED] MOTION
FOR PRELIMINARY APPROVAL OF
CLASS AND REPRESENTATIVE
ACTION SETTLEMENT**

Date: April 10, 2023

Time: 10:30 a.m.

District Judge: Hon. Ana De Alba

Magistrate Judge: Hon. Christopher D.
Baker

Complaint Filed: February 25, 2022

Trial Date: None

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I. INTRODUCTION

Plaintiffs Oscar Diaz and Jace O’Guinn (“Plaintiffs”) seek preliminary approval under Federal Rule 23(e)¹ of a \$1,375,000 non-reversionary Settlement on behalf of approximately 6,495 current and former Part-Time Supervisors who took vacation under Defendant United Parcel Service, Inc.’s (“UPS”) vacation policy while employed by UPS in California during the settlement class period, and whose vacation pay was less than their straight-time daily paid hours in the prior Vacation Year. The Settlement Class Period is from April 19, 2018 to the preliminary approval. This is a non-reversionary cash settlement, and all Class Members who do not opt out will receive a payment, without a requirement to submit a claim form.

At issue in this case is a version of Defendant’s vacation policy which Plaintiffs allege states that employees accrue paid vacation time based on their straight-time daily paid hours in the prior Vacation Year. However, UPS pays vacation wages to class members based on their guaranteed daily paid hours (5.5 hours), even when employees work more. It is Plaintiffs’ position that the written vacation policy was a term of Plaintiffs and class members’ employment, and Plaintiffs and class members reasonably relied to their detriment on promises and representations made to them by UPS, relating to the accrual and payment of vacation pay, as provided in UPS’s written vacation policy. It is Plaintiffs’ further position that UPS breached the parties’ agreement by not paying vacation pay to Plaintiffs and the class based on their actual hours worked and paid. Plaintiffs also alleged derivative claims for inaccurate wage statements, and for waiting time penalties, on the basis that accrued vacation pay represents wages, and thus cannot be forfeited. *See Suastez v. Plastic Dress-UP Co.*, 31 Cal.3d 774, 784 (1982). Plaintiffs also alleged causes of action for violation of UCL and PAGA, based on UPS’s underpayment of vacation wages. UPS has consistently denied any liability under its vacation policy and has recently clarified the policy to reiterate that employees in Plaintiffs’ position – i.e. part time supervisors – are paid vacation based on their guaranteed pay.

This case was resolved with the assistance of an experienced mediator, David A. Rotman, Esq.

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28

¹ Because as part of this filing, Plaintiffs seek class certification for settlement purposes, this Motion, as encompassing preliminary approval factors as well as certification factors, slightly exceeds (by less than two pages) the 20-page limit stated in the District Court’s standing order.

1 of Mediated Negotiations. Plaintiffs argue UPS's maximum potential liability for their direct unpaid
2 vacation wages is \$2,434,639.95, and \$16,767,87540 for all their claims, including derivative wage
3 statement and waiting time penalty claims. UPS believes that it would have prevailed on all of
4 Plaintiffs' claims if the case litigated.

5 The \$1,375,000 Gross Settlement Amount represents over 56% of UPS's maximum potential
6 liability for underpaid vacation wages, and over 8% of UPS's maximum potential liability for all of
7 Plaintiffs' claims, including derivative claims. Plaintiffs believe this is an excellent result, especially
8 considering UPS's argument that it has always been the company's policy, understood by Class
9 Members, that vacation wages are paid based on the guaranteed (scheduled) daily hours, and not based
10 on hours actually worked and paid, and considering that vacation benefits are just that – benefits -
11 and there is no legal requirement in California to provide them.

12 Plaintiffs seek an order: (1) preliminarily approving the proposed Settlement; (2) approving
13 the form and content of the Class Notice; (3) directing that Class Notice be given to Class Members;
14 (4) provisionally certifying the Settlement Class and appointing Plaintiffs as Class Representatives
15 and Plaintiffs' counsel as Class Counsel; (5) preliminarily approving Settlement administration
16 services to be provided by the Settlement Administrator, and; (6) scheduling a Fairness Hearing.

17 II. FACTUAL AND PROCEDURAL BACKGROUND

18 UPS provides packaging and shipping services. Both Plaintiffs have been employed by UPS
19 as Part Time Supervisors ("PTS") during the relevant time period. Plaintiffs' duties include(d)
20 unloading and sorting packages, and facilitating the unloading and sorting of packages from trucks.
21 Declaration of David R. Markham ("Markham Decl."), ¶2. Under UPS's policy, PTS employees, such
22 as Plaintiffs, are generally expected to work 5.5 hours per day and are paid weekly. They are
23 guaranteed 27.5 hours of pay per week. However, class members regularly work in excess of 5.5
24 hours per day and 27.5 hours per week, especially during UPS's "peak season" which encompasses
25 the holiday season. *Id.*, ¶4.

26 UPS has promulgated a paid vacation policy applicable to Plaintiffs and other PTS employees
27 during the class period. Markham Decl., ¶5. Under this policy, "the number of vacation hours that a
28 part-time hourly paid employee receives for each vacation day is **based on the employee's average**

1 **straight-time daily paid hours for the prior Vacation Year.”** *Id.* at Ex. 2. (emphasis added).
2 Despite Plaintiffs’ job title as Part-Time Supervisors, Plaintiffs’ regularly scheduled hours were
3 significantly more than 5.5 hours a day and 27.5 hours a week, especially during UPS’s “peak season”.

4 Plaintiff allege that UPS did not follow its written vacation policy, and instead, paid Class
5 Members vacation pay of only 27.5 hours of pay for each week of vacation taken. A 10% class sample
6 analysis performed by Plaintiffs’ expert showed that during the class period, class members worked
7 on average 30 minutes more per day than the scheduled 5.5 hours (i.e. they worked 6.05 total straight
8 time hours per day), but received vacation pay of only 27.5 hours per week. Markham Decl., ¶6.

9 On April 19, 2022, Plaintiffs filed a complaint for breach of contract, promissory estoppel,
10 violations of sections 201-203, 226(a) and 1174 of the California Labor Code, and UCL, and amended
11 it and on June 27, 2022 to add a cause of action under PAGA. Markham Decl., ¶3.

12 Defendant disputes all of these allegations and asserted a wide variety of defenses, which were
13 critical in Plaintiffs’ evaluation of the settlement value of this case. *Id.*, ¶7. UPS further contends that
14 at all times it complied with this policy and practice of paying vacation based on the guaranteed rate
15 of pay and that the policy Plaintiffs challenge was beneficial to some putative class members at some
16 times during the alleged liability period .

17 **III. VIGOROUS PROSECUTION OF THIS ACTION**

18 Class Counsel has vigorously advanced Plaintiffs’ position and thoroughly investigated Class
19 Members’ claims. Prior to attending the mediation, the Parties engaged in informal discovery.
20 Plaintiff reviewed UPS’s policies and Plaintiffs’ employment records. Plaintiffs’ expert analyzed a
21 10% class sample of time and payroll records, and prepared a damages model. Markham Decl., ¶8.

22 The parties carefully investigated the claims and facts alleged in this action and have made a
23 thorough study of the legal principles applicable to the claims asserted against UPS. As a result of
24 Class Counsel’s investigation of the claims in this action, the expert’s damages analysis, a careful
25 review of the applicable policy and operative documents, and an informal exchange of discovery and
26 information, the parties had a clear understanding of their respective claims and defenses. *Id.*, ¶9.

27 The parties settled this case with the assistance of an experienced mediator, David A. Rotman,
28 Esq. The mediation took place on January 18, 2023. At the conclusion of the mediation session, the

1 parties reached the settlement in principle and executed a Memorandum of Understanding. *Id.*, ¶10
2 After additional weeks of arms'-length negotiations, the parties finalized the terms of the settlement
3 agreement. Markham Declaration, **Ex. 1** (executed settlement agreement).²

4 **IV. SETTLEMENT TERMS**

5 **A. Settlement Relief**

6 The monetary relief will be provided to the Settlement Class Members who are defined as:

7 All current and former Part-Time Supervisors, including employees with
8 similar job titles and/or duties, who worked for Defendant within the State
9 of California during the Settlement Class Period, defined as from April 19,
10 2018 and through the date of the Preliminary Settlement Approval, and
11 who at least once during the Settlement Class Period took paid vacation
under UPS's vacation policy, and whose average straight-time daily paid
hours exceeded 5.5 hours per day for the prior Vacation Year, but whose
vacation pay was limited to 5.5 hours per day, or 27.5 hours per week of
vacation in the Vacation Year.

12 Settlement Agreement, §I (5).

13 The Settlement Class does not include any person who submits a timely and valid opt-out
14 request. *Id.*, §III (12). The Settlement Class Period is from April 19, 2018 through the date of
15 preliminary approval of the Settlement. *Id.*, §I (6).

16 The Gross Settlement Amount is \$1,375,000. *Id.*, § I (17). This amount includes payments to
17 Class Members, attorneys' fees and costs, \$68,750 allocated as PAGA penalties, of which 25% (or
18 \$17,187.50) shall be paid to the class and 75% (or \$51,562.50) shall be paid to the LWDA, the Class
19 Representatives' Service Awards, administration costs, and the employer's portion of the payroll
20 taxes. *Id.*

21 **1. Net Settlement Amount.**

22 From the Gross Settlement Amount, administration costs, attorneys' fees and costs, the
23 LWDA's share of PAGA penalties, the employer's portion of the payroll taxes, the Service Awards
24 to the Class Representatives - as the Court awards and in the proposed amount discussed below - will
25 first be deducted, to result in a Net Settlement Amount, which is approximately \$783,704.17, minus
26 the employer's share of payroll taxes applicable to the portion of the settlement payment attributable
27

28 ² The Settlement Agreement was submitted to the LWDA concurrent to the filing of this motion, and
proof of submission is attached as **Exhibit 5** to Markham Declaration.

1 to wages. *See* Settlement Agreement, §III (16).

2 **2. Settlement Formula and Distribution**

3 In recognition that the maximum potential exposure of Defendant for claims under Labor
4 Code 203 represents approximately 75% of the maximum potential exposure of Defendant for all
5 claims released under this Settlement, 75% of the Net Settlement Amount will be distributed to Class
6 Members who are also members of the Waiting Time Penalties Subclass based on the number of
7 workweeks they worked at any time from and after April 19, 2019 through preliminary approval, in
8 proportion to the aggregate number of workweeks worked by all members of the Waiting Time
9 Penalties Subclass. *Id.*, § I (43)(44); § III (19). Class Members who do not opt out of the Settlement
10 will receive Individual Settlement Payments from the Net Settlement Amount. Each Class Member's
11 Individual Settlement Payment shall be determined first based on their share of Waiting Time
12 Penalties for members of the Waiting Time Penalties Sub-Class.

13 The remaining 25% of the Net Settlement Amount will be distributed to Participating Class
14 Members on a pro rata basis based upon the number of workweeks during which the employee worked
15 in proportion to the aggregate number of workweeks by all Settlement Class Members, as follows:

$$\begin{array}{ccccc} \text{Workweeks Worked by Class Member} & \times & \text{Net Settlement} & = & \text{Class Member's} \\ & & \text{Amount} & & \text{Payment} \\ \hline \text{Total Workweeks Worked by all} & & & & \\ \text{Class Members} & & & & \text{Id.} \end{array}$$

18 This is a non-reversion cash Settlement and Class Members need not submit a claim form to
19 receive a payment. *Id.*, §III (16)(19). Class Members who do not opt out of the Settlement will release
20 UPS from all claims that relate to the causes of action asserted in this action – or that those that could
21 have been asserted in this action based on the facts alleged in Plaintiffs' operative Complaint. *Id.* §I
22 (36).

23 Settlement checks will be valid and negotiable for 180 calendar days. *Id.*, §III (23). After that
24 time, the Parties propose that the funds represented by uncashed checks be tendered to the Controller
25 of the State of California to be held pursuant to the Unclaimed Property Law, California Civil Code
26 § 1500 *et seq.*, for the benefit of those Class Members who did not cash their checks, until such time
27 that they claim their property, in compliance with Code of Civil Procedure section 384(b), and subject
28 to the Court's approval. *Id.* In no event will any of the funds revert to Defendant. *Id.*

1 All Settlement payments are subject to taxation, and will be reported to the IRS and state tax
2 authorities. Twenty percent (20%) of each Class Member's Individual Settlement Payment will be
3 allocated as wages, forty percent (40%) as penalties and forty percent (40%) as interest, with
4 withholding to apply only to the portion allocated to wages. *Id.*, §III (17). The payments made to the
5 Waiting Time Penalties subclass will be allocated 100% as statutory penalties. *Id.* Settlement Class
6 Members shall seek their own tax advice regarding this Agreement. *Id.*, §III (4).

7 **3. Settlement Amount Calculations (Kullar analysis)**

8 The Settlement Amount of \$1,375,000 derives from underpaid vacation wages and derivative
9 waiting time and inaccurate wage statement claims. Markham Decl., ¶11. UPS produced time records
10 and payroll data for a 10% sample of class members. Plaintiffs also reviewed UPS's vacation policies,
11 and Plaintiffs' personnel file. *Id.*, ¶11. The pre-mediation exchange of information revealed there are
12 6,495 individuals who fit the class definition, including 3,286 former employees. The average hourly
13 rate of class members is \$22.013. *Id.*, ¶11. Plaintiffs' expert reviewed UPS's time and payroll records,
14 so the calculations below are based on the review of actual data, and the extrapolation of the expert's
15 findings across the class. Plaintiffs did not make any assumptions, nor applied any discounts to these
16 calculations:

17 Breach of Contract/Vacation Pay Policy and Promissory Estoppel Claims:³ Per the expert's
18 analysis of a class sample of time and pay records, the expert identified 11,060.01 hours worked in
19 the sample for which class members did not receive vacation time wages. When multiplied by class
20 members' average hourly rate of \$22.013 (= \$243,464), and extrapolated to the whole class, the total
21 unpaid vacation wages amount to **\$2,434,639.95**. Markham Decl., ¶11.

22 Wage Statement Penalties: There are 14,040.34 pay periods within the applicable statute of
23 limitations when accounted for a 5.45% violation rate (*i.e.* 5.45% of all pay periods showed underpaid
24 vacation wages per the expert's analysis), affecting 3,991 employees. When multiplied by \$50 for the
25

26 ³ Plaintiffs' cause of action for promissory estoppel yields the same damages. Plaintiffs argue that
27 Class Members reasonably relied to their detriment on promises and representations made to them by
28 UPS relating to the accrual and payment of vacation pay. As a result, Plaintiffs and Class Members
are entitled to an award of equity in the amount of their vacation pay as earned pursuant to UPS's
written vacation policy, which Plaintiffs' expert calculated at \$2,434,639.95. *Id.*, ¶11.

1 first pay period and \$100 for each subsequent pay period, UPS's total exposure for 226(a) penalties
2 is **\$1,204,484.45**. *Id.*, ¶11.

3 Waiting Time Penalties: Plaintiffs calculated daily wages for 3,286 former employees during
4 the relevant time period, multiplied by the daily pay rate of approximately \$133.17 (6.05 average hour
5 shift length times hourly rate of \$22.013) times 30 days, to arrive at maximum potential exposure of
6 **\$13,128,751**,⁴ before accounting for UPS's defenses. *Id.*, ¶11.

7 Thus, based on the assumptions above, UPS's potential maximum liability for Plaintiffs' direct
8 claims is \$2,434,639.95, and an additional \$14,333,235.40 for Plaintiffs' derivative claims, possible
9 only if Plaintiffs prevailed on their underlying claims, for a total potential maximum exposure of
10 \$16,767,875.40 for all claims. Thus, the Settlement Amount of \$1,375,000 represents over 56%
11 potential maximum liability for Plaintiffs' direct claim for unpaid vacation wages, and 8.2% of UPS's
12 maximum liability for all of Plaintiffs' claims. *Id.*, ¶¶11-12.

13 This is an excellent result given the strength of UPS's defenses, well in range of – or exceeding
14 – settlements commonly approved by California district and state courts. *Id.* See also section V(C)(2)
15 below for a detailed explanation.

16 **4. Attorneys' Fees and Costs**

17 The parties agreed that, subject to approval by the Court, up to \$458,333.33, or one-third of
18 the Settlement Amount, may be allocated to pay attorneys' fees, and up to \$30,000 may be allocated
19 to reimburse Class Counsel for litigation costs. Settlement Agreement, §III (25). Courts in California
20 wage and hour cases, where the common fund is under \$10 million, tend to award attorneys' fees in
21 the 30% - 40% range. *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92 (E.D. Cal. 2010)
22 (citing to five wage and hour class actions where courts approved fee awards ranging from 30 to
23 33%). The trial court has discretion to award attorneys' fees based on either the lodestar/multiplier
24 calculation or the percentage-of-recovery method. *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 503

27 ⁴ This amount represents 78% of UPS's total potential exposure for all of Plaintiffs' claims, excluding
28 PAGA. Markham Decl., ¶11. Hence, the parties allocated 75% of the Net Settlement Amount to
Waiting Time Penalties Subclass. *Id.*, ¶13.

(2016). Class Counsel intends to brief the fee application using both methodologies, as cross checks.⁵ Any portion of the requested attorneys' fees and costs not awarded to Class Counsel shall be part of the Net Settlement Amount and shall be distributed to Settlement Class Members as provided in the Agreement. *Id.*

5. *PAGA Payment to Labor Workforce Development Agency*

The Parties agreed that \$68,750 (or 5%) of the Gross Settlement Amount will be allocated for payment under the PAGA. 75% of this amount (\$51,562.50) will be paid to the LWDA, and 25% (\$17,187.50) to Settlement Class Members. *Id.*, §III (29). This amount is well within or exceeds the range of the PAGA penalties typically awarded as part of class action settlements. *See Bravo v. Gale Triangle, Inc.*, 2017 WL 708766, at *19 (C.D. Cal. Feb. 16, 2017) (\$10,000 as PAGA penalties found reasonable); *Franco v. Ruiz Food Products, Inc.*, 2012 WL 5941801, at *14 (E.D. Cal. Nov. 27, 2012) (approving PAGA penalties of \$10,000 and noting that amount was in line with settlement approval of PAGA awards in other cases.); *Schiller v. David's Bridal, Inc.*, 2012 WL 2117001, at *14 (E.D. Cal. June 11, 2012) (\$7,500 to LWDA reasonable).

Regarding the valuation for Plaintiffs' PAGA claim, although the PAGA statute provides penalties at \$100 per employee per pay period for the initial violation, and \$200 for each employee per pay period for each subsequent violation, UPS will contend that for Plaintiffs to recover for a "subsequent violation," an employer must have notice that it has violated the Labor Code. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207–09 (2008); *see also Trang v. Turbine Engine Components Technologies Corp.*, 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012) ("courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"). Here, UPS was not cited for violations, and therefore, theoretically, \$100 penalty for every pay period applies. Markham Decl., ¶15. However, in practicality, it is unclear the Court would award maximum penalties as there is little guidance as to the standard for determining the amount of appropriate

⁵ In accordance with *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 993 (9th Cir. 2010), Plaintiffs will file their application for attorneys' fees, costs and Plaintiffs' incentive awards at least 14 days prior to the due date for objections.

1 penalties under PAGA. *Amaral, supra*, 163 Cal. App. 4th at 1213 (internal quotations omitted); *see*
2 *also Fleming v. Covidien Inc.*, 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011).

3 Here, there are 14,040.34 pay periods within the applicable statute of limitations when
4 accounted for a 5.45% violation rate (*i.e.* 5.45% of all pay periods showed underpaid vacation wages
5 per the expert’s analysis). When multiplied by \$100 for the first and subsequent pay periods
6 (\$1,404,034.45), and further multiplied by 3 to separately account for penalties for breach of contract,
7 and for derivative 203 and 226 violations, UPS’s total exposure for PAGA penalties is \$4,212,103.35.
8 Markham Decl., ¶15.

9 As such, the PAGA Payment of \$68,750 represents approximately 1.6% of the total maximum
10 PAGA penalties. This result falls within the range of other approved PAGA settlements, as courts
11 frequently approve PAGA awards between 0.2% to 2.2% of the total potential penalties. *See e.g.*,
12 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, at 528 (2018) (awarding PAGA penalties of
13 0.2% of the maximum, or \$5 per pay period); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, at
14 *2, 7 (N.D. Cal. Sept. 28, 2016) (settlement allocating \$10,000 to PAGA penalties where potential
15 value was over \$5.2 million, resulting in 0.2 percent PAGA recovery approved). Markham Decl.,
16 ¶16.

17 These PAGA penalties conform to the courts’ reasoning that “[t]he remedy sought in a PAGA
18 suit consists of civil penalties, not individual or class damages” [*Mendez v. Tween Brands, Inc.*, 2010
19 WL 2650571, at *4 (E.D. Cal. June 30, 2010)], and in PAGA “[u]nlike class actions, these civil
20 penalties are not to compensate unnamed employees because the action is fundamentally a law
21 enforcement action.” *See Ochoa-Hernandez v. CJADERS Foods, Inc.*, 2010 WL 1340777, at *4 (N.D.
22 Cal. Apr. 2, 2010).

23 **6. Settlement Administration Costs**

24 The parties selected Simpluris, Inc. as the Settlement Administrator in this action. Settlement
25 Agreement, §I (41); *see also* Declaration of Eric Springer on behalf of Simpluris, Inc. (“Springer
26 Decl.”), submitted concurrently with this motion. Simpluris, Inc. has years of experience in the field
27 of class action administration. Springer Decl., ¶¶5-6. The costs of the Administrator, estimated at
28 \$38,400, will be deducted from the Gross Settlement Amount. Settlement Agreement, §I (42).

1 **7. *Service Awards***

2 UPS agreed, subject to Court approval, to pay up to \$6,500 from the Gross Settlement Amount
3 to each Plaintiff for their services as Class Representatives. Settlement Agreement, §III (24). Any
4 portion of the requested Service Awards not awarded to the Class Representatives shall be part of the
5 Net Settlement Amount, to be distributed to Settlement Class Members. *Id.*

6 **B. Settlement Administration**

7 Among the customary duties of the Settlement Administrator, Simpluris, Inc. will send the
8 Class Notice to Class Members as provided in this Settlement, determine the eligibility for, and the
9 amounts of, any Individual Settlement Payments under the terms of this Agreement, process and
10 distribute Class Members' payments, and process and mail tax payments to the appropriate state and
11 federal taxing authorities. Springer Decl., ¶¶8-10. Further, Class Members will also be able to contact
12 the Settlement Administrator by telephone or e-mail, or access the settlement website,⁶ if they have
13 any Settlement questions or need assistance. *See* Class Notice, attached as **Exhibit A** to the Settlement
14 Agreement. Also, any opt-outs from the Settlement or objections must be delivered to the Settlement
15 Administrator. Settlement Agreement, §III (12)(13).

16 **C. Proposed Notice Plan**

17 Within 51 calendar days after the preliminary approval of the Settlement, the Settlement
18 Administrator will send the Class Notice to Settlement Class Members via first class mail. *Id.*, §III
19 (7)(8). Before mailing the Notice, the Settlement Administrator will run a check of the Class
20 Members' addresses against those contained in the USPS's National Change of Address database,
21 and take any other appropriate steps to validate the correctness of the addresses provided by UPS. *Id.*
22 If the Notice is returned with a forwarding address, the Administrator will use the forwarding
23 addresses to locate the missing Class Members, and re-mail the Notice to the correct address. *Id.*, §III
24 (9). For Notices remailed after being returned as non-deliverable, Class Members' deadline to opt out
25 from or object to the Settlement will be the later of: (i) 14 calendar days from the date of re-mailing
26 of the Notice or (ii) the remaining notice period. *Id.* The Settlement Administrator will use all

27 _____
28 ⁶ The website will contain settlement-related documents, including the attorney fee motion when filed,
and notice of final judgment.

1 appropriate tracing methods to ensure that the Class Notice is received by all Settlement Class
2 Members. *Id.*

3 The Class Notice will summarize the terms of the Settlement Agreement, advise the Class
4 Members of their estimated individual settlement payment(s), and inform Class Members of their
5 right to object to or exclude themselves from the Settlement within 45 days after the Notice mailing.
6 Ex. A. Because this is the California-only class, and the mailing will occur only in California, 45 days
7 to opt out from or object to the Settlement is sufficient. Markham Decl., ¶17. Further, because Class
8 Members worked as PTSs in California, communicating with their superiors and colleagues on a daily
9 basis in English, and speaking English was a job requirement, English-only notice is sufficient. *Id.*

10 **V. THE SETTLEMENT SATISFIES THE PRELIMINARY APPROVAL CRITERIA**

11 A class action may not be settled without court approval. Fed. R. Civ. P. 23(e). However, there
12 is a strong judicial preference for pre-trial settlement of complex class actions. *Officers for Justice v.*
13 *Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982); *In re Syncor ERISA Litig.*,
14 516 F.3d 1095, 1101 (9th Cir. 2008). In determining whether to preliminarily approve a settlement,
15 the court should evaluate the fairness of the settlement in its entirety. *Hanlon v. Chrysler Corp.*, 150
16 F.3d 1011, 1026 (9th Cir.1998). In contemplating the preliminary approval of a proposed settlement,
17 “[t]he recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.”
18 *Knight v. Red Door Salons, Inc.*, No. 08-01520, 2009 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009).
19 The trial judge exercises discretion in deciding whether to grant preliminary approval of a class action
20 settlement and “great weight is accorded to [the] judge’s views.” *7-Eleven Owners for Fair*
21 *Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1145 (2000).

22 Preliminary approval is the first of three steps of the settlement approval process. Second is the
23 dissemination of a settlement notice to all class members. Third is a final approval hearing, where the
24 evidence concerning the fairness, adequacy, and reasonableness of the settlement may be presented,
25 and class members may be heard regarding the Settlement. *See Manual for Complex Litigation*,
26 Fourth, § 21.632 (2004). The court does not need to perform a final analysis of the settlement’s
27 fairness to preliminarily approve a proposed settlement. Rather, a more detailed assessment is
28 reserved for the final approval hearing, after class notice has been sent and class members have had

1 the opportunity to object to or opt-out of the settlement. *See* Moore’s Federal Practice, 23.165[3] (3d
2 ed. 2005). Generally, there is an initial presumption of fairness when a proposed settlement, which
3 was negotiated at arms’-length by Class counsel, is presented for court approval. 4 Newberg on Class
4 Actions, § 11.41, p. 90 (4th ed. 2002). In approving a settlement where the class has not yet been
5 certified, the court must first determine that a class exists. *Staton v. Boeing Co.*, 327 F.3d 938, 952
6 (9th Cir. 2003), citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 619-20 (1997)
7 (commonality must be shown at a preliminary approval stage, although not necessarily
8 manageability). Then, the Court should examine the settlement as a whole to determine if it is fair,
9 adequate and reasonable. *Id.*, *Hanlon, supra*, 150 F.3d at 1019.

10 **A. The Proposed Class Meets the Qualifications for Certification for Settlement
11 Purposes.⁷**

12 A proposed class may be certified for settlement purposes if it satisfies the requirements of
13 Rule 23(a), namely: “(1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of
14 representation.” *Hanlon*, 150 F.3d at 1019 (citing *Amchem*, 521 U.S. at 613). Then, a plaintiff must
15 satisfy one of the prongs of Rule 23(b). *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052,
16 1062 (C.D. Cal. 2010). For settlement purpose only, the Parties in this case request certification of
17 the Settlement Class under Rule 23(b)(3). The Class meets all standards for conditional certification:

18 **1. An Ascertainable and Numerous Class Exists that can be Determined from Payroll
19 Records**

20 Rule 23(a)(1) requires “the class is so numerous that joinder of all members is impracticable.”
21 Generally, “classes of 40 or more are numerous enough” to satisfy this requirement. *Ikonen v. Hartz
22 Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988).

23 Here, the Class is composed of approximately 6,495 individuals, who can be identified and
24 located from UPS’s personnel and payroll records. UPS will provide the Settlement Administrator
25 with a database with all Class Members’ names and contact information, and further steps will be
26 taken to locate the Class Members for whom the addresses are not current. Settlement Agreement,
27 §III (8)(9). Numerosity is satisfied.

28 ⁷ UPS agrees to certify a class for settlement purposes only, and their agreement to do so shall not be
construed as an admission of the propriety of class certification outside of the settlement context.
Settlement Agreement, §II(2).

1 2. Common Issues of Law and Fact Exist

2 To certify a class, there must be “questions of law or fact common to the class.” Fed. R. Civ.
3 Proc. 23(a)(2).) The Ninth Circuit construes “the requirements of Rule 23(a)(2) . . . permissively.”
4 *Hanlon*, 150 F.3d at 1019. To satisfy commonality, even a single common question is sufficient. *Wal-*
5 *Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2556 (2011). “As a general rule if the defendant’s liability
6 can be determined by facts common to all members of the class, a class will be certified even if the
7 members must individually prove their damages.” *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.4th 1004,
8 1022 (2012). The court only determines whether or not “the theory of recovery advanced by the
9 proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.”
10 *Sav-On Drug Stores*, 34 Cal. 4th 319, 327 (2004).

11 Here, as Class Counsel and Plaintiffs’ concurrently filed declarations further show, there are
12 common questions of law and fact that apply to Class Members across the board. Those common
13 questions predominate over any individual inquiries, in that “determination of [their] truth or falsity
14 will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*
15 *Stores, Inc.*, 131 S.Ct. at 2551. Those questions include: (i) Whether or not Class Members were
16 subject to UPS’s vacation policy; (ii) Whether or not Class Members were paid vacation wages under
17 UPS’s vacation policy; (iii) Whether or not Class Members were provided with all vacation wages
18 due and owing upon separation under Labor Code section 203; (iv) Whether or not Class Members
19 were provided with accurate wage statements as required by Labor Code section 226; and (v) Whether
20 or not UPS engaged in unfair business practices in violation of the UCL. Thus, commonality is met.

21 3. Plaintiffs’ Claims are Typical of the Claims of Class Members

22 Typicality does not mean that the interests of representative plaintiffs must be identical to those
23 of the absent class members. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). They only need
24 to be “reasonably co-extensive with those of absent class members.” *Parsons v. Ryan*, 754 F.3d 657,
25 685 (9th Cir. 2014). Further, the representative plaintiff must be a member of the class he seeks to
26 represent. *La Sala v. American Sav. & Loan Assn.*, 5 Cal.3d 864, 875 (1971). “Typicality refers to
27 the nature of the claims or defense of the class representative, and not to the specific facts from which
28 it arose or the relief sought.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

1 Here, Plaintiffs' claims arise from the same facts and legal theories as the Class Members'
2 claims. Plaintiffs were subject to the same UPS's vacation policy as other Class Members, and
3 Plaintiffs took vacation during their tenure at UPS, and were underpaid vacation wages, just like other
4 members of the Class. *See* Declarations of Plaintiffs. Plaintiffs' claims arise from their employment
5 with UPS in California. Thus, typicality is met.

6 4. Plaintiffs and Class Counsel will Adequately Protect the Interests of the Class

7 Rule 23(a)(4) requires the Class Representative "fairly and adequately represents the interest of
8 the class." The adequacy of representation involves two questions: (1) whether the Representative
9 and her counsel have any conflicts of interest with other class members, and (2) whether the
10 Representative and her counsel will vigorously prosecute the action. *See Staton*, 327 F.3d at 957.

11 Here, Plaintiffs retained counsel with extensive experience in prosecuting wage and hour class
12 actions. Markham Decl., ¶¶23-29; Declaration of Walter L. Haines ("Haines Decl."), ¶3. In addition,
13 Plaintiffs have the same interests as the rest of the Settlement Class, because they have allegedly been
14 injured in substantially the same manner.

15 **B. Rule 23(b)(3) Factors**

16 In addition to Rule 23(a) requirements, "the proposed class must satisfy at least one of the
17 three requirements listed in Rule 23(b)." *Dukes*, 131 S.Ct. at 2548. Here, Plaintiffs seek certification
18 under Rule 23(b)(3), which calls for two separate inquiries: whether issues common to the class
19 "predominate" over issues unique to individual class members, and whether the proposed class action
20 is superior to other methods available for adjudicating the controversy. Rule 23(b)(3).

21 Here, questions of law or fact common to all Settlement Class Members predominate over
22 questions affecting individual members, because Plaintiffs allege that all Settlement Class Members
23 were subject to UPS's vacation policy at issue in this action, and were underpaid vacation wages as a
24 result of UPS's violation of its policy. *See also* Section A(2), *supra*. Adjudication of these common
25 questions in one action will preserve the court's time and resources. "Implicit in the satisfaction of
26 the predominance test is the notion that the adjudication of common issues will help achieve judicial
27 economy." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

28 Next, the court considers whether a class action would be superior to individual suits under

1 Rule 23(b)(3) by weighing: (1) the class members' interests in individually controlling the prosecution
2 or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy
3 already begun by or against class members; and (3) the desirability or undesirability of concentrating
4 the litigation of the claims in the particular forum. A fourth factor—the difficulties of managing the
5 class action—is not considered when certification is used for purposes of settlement. *Amchem, supra*,
6 521 U.S. at 616; *True, supra*, 749 F.Supp.2d at 1062 n. 12.

7 Here, Settlement Class Members' interests are relatively small, so they are unlikely to
8 prosecute separate actions. Further, to the parties' knowledge, this is the only action which alleges
9 underpayment of vacation wages. Finally, this forum is appropriate, as UPS does substantial business,
10 and both Plaintiffs reside, in this judicial district. Because several issues are common to all Class
11 Members, a class action is superior to numerous individual actions, and the maintenance of this action
12 as a class action will save judicial resources and help avoid inconsistent judgments. *See Sav-On Drug*
13 *Stores*, 34 Cal.4th at 326.

14 Thus, the Court should certify Plaintiffs' class claims for the purposes of this Settlement.

15 **C. The Proposed Settlement is Fair, Adequate, and Reasonable**

16 Under Rule 23(e), the district court must determine whether the proposed settlement is
17 “fundamentally fair, adequate, and reasonable.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268,
18 1276 (9th Cir. 1992). At the preliminary approval stage, the Court's view is “limited to the extent
19 necessary to reach a reasoned judgment that the agreement is not the product of fraud” *Officers*
20 *for Justice*, 688 F.2d at 625. Generally, the opinions of counsel should be given considerable weight
21 because of counsel's familiarity with the litigation, and previous experience with cases such as this
22 one. *Id.* At this stage the Court considers whether:

23 (1) the proposed settlement appears to be the product of serious, informed, noncollusive
24 negotiations, (2) has no obvious deficiencies, (3) does not improperly grant preferential
25 treatment to class representatives or segments of the class, and (4) falls with the range of possible
26 approval.

27 *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007) (citing Manual for
28 Complex Litigation, Second, § 30.44 (1985)). This Settlement meets all of these criteria.

29 1. The Settlement is the Product of Serious, Informed and Noncollusive Negotiations

30 This Settlement is the result of extensive and hard-fought negotiations. Markham Decl., ¶10.

1 Plaintiffs' law firm specializes in plaintiffs'-side class and representative action litigation, and UPS
2 is represented by seasoned attorneys at GBG, LLP.

3 Prior to the mediation, Class Counsel thoroughly analyzed and investigated Class Members' claims
4 and potential damages. Markham Decl., ¶¶8-9, 11. The parties engaged in an exchange of data for mediation
5 purposes. Class Counsel engaged an expert to review and analyze the sample of class member time and pay
6 records, and reviewed pertinent policies. *Id.*

7 The investigation of the claims in this case gave both parties a clear view of the strengths and
8 weaknesses of their respective positions. *See Adams v. Inter-Con Sec. Sys., Inc.*, 2007 WL 3225466,
9 at *3 (N.D. Cal. Oct. 30, 2007) (preliminarily approving the settlement agreement after finding it was
10 reached through extensive negotiations and plaintiff counsel's thorough investigation of the claims).
11 Based on their knowledge of this action, Plaintiffs determined that the Settlement would constitute
12 the best outcome for the Class Members. Markham Decl., ¶¶12-14. Likewise, UPS concluded that
13 this action should be settled in the manner and upon the terms and conditions set forth in the
14 Settlement Agreement in order to avoid the expense, inconvenience, and burden of further legal
15 proceedings, and the uncertainties of trial and appeals.

16 The parties participated in a mediation before David Rotman, a private neutral with extensive
17 experience in wage and hour class actions. *Id.*, ¶10. That indicates the settlement was free of collusion.
18 "The assistance of a well-respected mediator with substantial experience in employment
19 litigation...supports approval of the settlement." *Glass v. UBS Fin. Servs.*, 2007 WL 221862, at *5
20 (N.D. Cal. Jan. 26, 2007); *Murillo v. Pac. Gas & Elec. Co.*, 266 F.R.D. 468, 479 (E.D. Cal. 2010).

21 The parties have been cooperative, yet aggressive, and displayed capable and experienced
22 advocacy on both sides. Accordingly, "[t]here is ... every reason to conclude that settlement
23 negotiations were vigorously conducted at arms' length and without any suggestion of undue
24 influence." *In re Wash. Public Power Supply Sys. Sec. Litig.*, 720 F.Supp. 1379, 1392 (D. Ariz. 1989).

25 2. The Settlement has no "Obvious Deficiencies" and Falls within the Approval Range

26 a) *California courts frequently approve class action settlements with similar*
27 *recoveries*

28 "[T]he very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning

1 of highest hopes.” *Officers for Justice*, 688 F.2d at 624 (quoting *Cotton v. Hinton*, 559 F.2d 1326,
2 1330 (5th Cir. 1977)). Thus, when evaluating the amount offered in settlement, the Court should
3 consider “the complete package taken as a whole,” and the amount should “not be judged against a
4 hypothetical or speculative measure of what might have been achieved by the negotiators.” *Id.* at
5 625-28.

6 Courts routinely approve class action settlements where the settlement amount is a lower
7 percentage of the claimed amount of damages. *See Bellinghausen v. Tractor Supply Co.*, 303 F.R.D.
8 611, 623-24 (N.D. Cal. 2014) (finding settlement amount of a wage and hour class action that equaled
9 between 9% and 27% of the total potential liability to be fair, adequate and reasonable given the
10 uncertainty of continued litigation); *Thomas v. Cognizant Technology Solutions U.S. Corp.*, 2013 WL
11 12371622 *6 (C.D. Cal. June 24, 2013) (concluding that settlement between 4 and 5.5% of maximum
12 liability was fair and reasonable); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869, at *8 (N.D. Cal.
13 Oct. 11, 2016). *See, e.g., id.* at *7 (preliminarily approving settlement representing 8.1% of the full
14 verdict value in recognition of the “daunting” risks plaintiffs faced in proving their case); *Balderas v.*
15 *Massage Envy Franchising, LLC*, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (preliminarily
16 approving a settlement representing 5% of the maximum recovery in light of “the strengths of
17 plaintiff’s case and the risks and expense of continued litigation”). Simply put, “the fact that a
18 proposed settlement may only amount to a fraction of the potential recovery does not mean that [it]
19 should be disapproved.” *7-Eleven Owners, supra*, 85 Cal.App.4th at 1150, citing *Linney v. Cellular*
20 *Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

21 Here, the Settlement represents over 56% of the maximum potential exposure for Plaintiffs’
22 breach of contract claim, and over 8% of the maximum potential exposure for all of Plaintiffs’ claims,
23 without any risks, costs, and uncertainty of prolonged litigation. Without accounting for the number
24 of workweeks worked during the relevant time period, a former employee, as a member of the Waiting
25 Time Penalties Subclass, will receive approximately \$175, without any payroll deductions, and all
26 Class Members will receive on average \$30, minus payroll taxes on the portion attributable to wages.
27 This is an excellent result, in light of UPS’s legal and factual defenses, and when considering that
28 Plaintiffs could face difficulties to establish liability and may not prevail at certification or trial.

1 Markham Decl., ¶¶12, 14.

2 b) *This Settlement is Excellent Result Based on Certification and Liability Risks*

3 Although Plaintiffs believe this is a strong case, they recognize several risks to succeeding on
4 the merits and obtaining certification.⁸ Markham Decl., ¶18. First, vacation benefits are optional forms
5 of additional compensation. They are designed to offer an incentive to perform one’s best work, but
6 are not legally required. *Owen v. Macy’s, Inc.*, 175 Cal. App. 4th 462, 468 (2009) (“On its face, Labor
7 Code section 227.3 does not require that an employer provide its employees with any paid vacation
8 at all, contractually or as a matter of policy, as part of the employee compensation package.”)

9 Thus, to the extent UPS had a practice of calculating vacation time and pay based on the PTS
10 employees’ guaranteed pay, there is no law preventing Defendant from doing so. The law only forbids
11 the forfeiture of accrued vacation at termination of employment, not sooner, and there is no evidence
12 UPS failed to comply with this requirement. *See Suastez, supra*, 31 Cal.3d at 784 (1982). Further,
13 UPS would likely allege that Plaintiffs’ breach of contract claim is not viable, because the
14 employment offered to, and accepted by, Class Members was at will, and upon application for
15 employment with UPS, all Class Members agreed and acknowledged in writing that “nothing
16 contained in [the employment] application, its supplement(s), or in any Company handbook, manual,
17 rule, regulation, practice or policy creates an employment contract, express or implied, between [Class
18 Member] and [UPS]” and that upon hire, “[Class Members’s] employment shall be at will.” Markham
19 Decl., Ex. 3 (agreement and acknowledgment signed by Diaz). *See Dore v. Arnold Worldwide, Inc.*,
20 39 Cal. 4th 384, 389 (2006) (holding that at-will provision in an express written agreement, signed by
21 the employee, *cannot* be overcome by proof of an implied contrary understanding). For similar
22 reasons, Plaintiffs would face obstacles proving their promissory estoppel claim, because the written
23 agreement does not support Plaintiffs’ argument that Class Members applied for the position, or
24 accepted a job with UPS, under the condition that UPS provides paid vacation based on the average
25 of the hours paid in prior vacation year. *See* Markham Decl., Ex. 2. Thus, it would be difficult for
26 Plaintiffs to prove reasonable reliance on UPS’s representations regarding vacation pay. Further,

27 _____
28 ⁸ This is not intended to be a comprehensive list of all of UPS’s defenses. This section merely analyzes those which Plaintiffs believe to be most significant to their assessment of settlement value.

1 regarding Plaintiffs' UCL claim, UPS argued that this claim cannot be asserted for a breach of contract
2 claim, and intended to bring a motion to dismiss on that basis. *See Korea Supply Co. v. Lockheed*
3 *Martin Corp.*, 29 Cal. 4th 1134, 1150 (2003).

4 Lastly, effective July 25, 2022, UPS changed its vacation policy to clarify - what UPS
5 maintains has always been the company's practice and Class Members' understanding - that the
6 amount of vacation pay class members will receive is based on their pre-set schedule of 5.5 hours/day
7 or 27.5 hours per week, and not the straight hours paid, effectively limiting Plaintiffs' recovery period.
8 *See* Markham Decl., Ex. 4 (new vacation policy) at UPS-DIAZ-000018.

9 Thus, when considering the probability of lengthy litigation in the absence of a settlement, the
10 risk that Plaintiffs and Class Members might not have been able to succeed at trial, and the risk that a
11 jury could award damages less than \$1,375,000, the settlement amount is reasonable. *In re Mego Fin.*
12 *Corp. Sec. Litig.*, 213 F.3d at 458; *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, 2010 WL 2486346
13 (C.D. Cal. June 15, 2010), at *7.

14 3. The Settlement does not Improperly Grant Preferential Treatment to Class
15 Representative or Segments of the Class

16 Because approximately 75% of UPS's maximum potential exposure in this action is for
17 waiting time penalties, under the Settlement, the members of the waiting time penalties subclass will
18 receive 75% of the net settlement amount. The remaining 25% will be divided among all Settlement
19 Class Members based on the number of workweeks worked during the settlement class period.
20 Settlement Agreement, § III (19).

21 In addition, Plaintiffs will each receive \$6,500 for their time and efforts in representing the
22 Class. *Id.*, §III (24). "Incentive awards [for class representatives] are fairly typical in class actions."
23 *Cellphone Termination Fee Cases*, 186 Cal.App.4th 1380, 1393 (2010), citing *Rodriguez v. West*
24 *Publ'g*, 563 F.3d 948, 958 (9th Cir. 2009). California courts agree that a class representative is entitled
25 to such an award. *Cellphone Termination*, *supra*, 186 Cal.App.4th at 1394. "Since without a named
26 plaintiff there can be no class action, such compensation as may be necessary to induce him to
27 participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-
28 specific expenses, such as long-distance phone calls, which are reimbursable." *Clark v. Am.*

1 *Residential Servs.*, 175 Cal.App.4th 785, 804 (2009), citing *Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d
2 566, 571 (7th Cir. 1992).

3 Here, the incentive awards to Plaintiffs are based on the extent of Plaintiffs' participation in this
4 action, and not conditioned upon Plaintiffs' support of the settlement. *Cf. Radcliffe v. Experian Info.*
5 *Solutions, Inc.*, 715 F.3d 1157, 1165 (2013). Throughout this action, Plaintiffs assisted in investigation
6 of the claims, participated in multiple call conferences with counsel, provided and reviewed
7 documents, and were on standby during mediation. *See* Diaz Decl., ¶¶10-12; O'Guinn Decl., ¶¶10-
8 12.

9 Courts frequently award incentive awards higher than the amounts requested here. *Ross v.*
10 *U.S. Bank Nat'l Ass'n*, 2010 WL 3833922, at *3 (N.D. Cal. Sept. 29, 2010) (approving an award of
11 \$20,000 to each of four named plaintiffs based on their contributions to litigation and the risk that
12 being a class representative would harm their reputation); *see also Ridgeway v. Wal-Mart Stores Inc.*,
13 2017 WL 4071293, at *19 (N.D. Cal., Sept. 14, 2017) (\$15,000 incentive awards for each of the
14 named plaintiffs awarded); *Low v. Trump University, LLC*, 246 F.Supp.3d 1295, 1316 (S.D. Cal.
15 2017) (\$15,000 incentive award approved where plaintiffs "devoted significant amounts of time and
16 energy" to the action); *Ontiveros v. Zamora*, 303 F.R.D. 356, 365–66 (E.D. Cal. 2014) (granting
17 \$15,000 in incentive award). Thus, the proposed service awards are reasonable.

18 4. The Stage of the Proceedings is Sufficiently Advanced to Permit Preliminary Approval
19 of the Settlement

20 "A court is more likely to approve a settlement if most of the discovery is completed because
21 it suggests that the parties arrived at a compromise based on a full understanding of the legal and
22 factual issues surrounding the case." *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221
23 F.R.D. 523 at 527 (C.D. Cal. 2004). However, the settlement can be approved even in the absence of
24 any discovery, if other factors are satisfied. *In re TD Ameritrade Account Holder Litig.*, 2011 WL
25 4079226, at *6 (N.D. Cal. Sept. 13, 2011). The bottom line is that "the parties have sufficient
26 information to make an informed decision about the settlement." *Durham v. Cont'l Cent. Credit, Inc.*,
27 2011 WL 90253, at *3 (S.D. Cal. Jan. 10, 2011), citing *Linney v. Cellular Alaska P'ship*, 151 F.3d at
28 1239.

1 Here, before settling this action, the parties had a sufficient understanding of their respective
2 claims and defenses. The parties engaged in informal discovery prior to mediation. Plaintiffs reviewed
3 UPS's vacation policies, Plaintiffs' employment records, and also time and payroll records for a 10%
4 sample of class members. *See* section III, *supra*; Markham Decl., ¶8. Before mediation, Class Counsel
5 had investigated Plaintiffs' claims, examined documents and data, and engaged an expert to perform
6 damages calculations. *Id.*, ¶¶8-9. At the time the parties engaged in mediation, they knew and
7 understood their respective positions. As a result of the work performed in this case, the real value of
8 the classes' claims was well known, and Class Counsel determined that the Settlement with UPS is
9 fair, reasonable, adequate, and in the best interest of the Class. *Young v. Polo Retail, LLC*, 2007 WL
10 951821, at *4 (N.D. Cal. Mar. 28, 2007).

11 **VI. THE PROPOSED NOTICE TO THE CLASS SHOULD BE APPROVED**

12 If the Court concludes after a preliminary evaluation of the settlement that the relief offered
13 and notice provided are fair and adequate, the Court should order that the class notice be provided.
14 Manual for Complex Litig., Fourth, § 21.632 (2004) at 321. The threshold requirement regarding the
15 sufficiency of the class notice is whether the means proposed for distributing the notice are reasonably
16 calculated to apprise the class of the pendency of the action, the proposed settlement, and the right to
17 opt out or object to the settlement. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *Mullane*
18 *v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

19 Here, the Notice is more than sufficient, because it gives Class Members, in easy to understand
20 and clear language: (1) basic information about the action and the Settlement; (2) an estimate of
21 workweeks Class Members worked during the Class Period, and an explanation how Class Members
22 can dispute this calculation; (3) an explanation how the payout from the Settlement will be calculated
23 for each Class Member, and an estimate of the Class Member's Individual Payment(s); (4) an
24 explanation how Class Members can exercise their right to opt-out from, or object to, the Settlement;
25 (5) an explanation that any claims against UPS that could have been litigated in this Action will be
26 released if the Class Member does not opt out; (6) name of Class Counsel and information regarding
27 attorneys' fees and costs; (7) the date of the Fairness Hearing and an explanation of eligibility to
28 appear at the Fairness Hearing; and (8) contact information where Class Members can obtain

1 additional information. *See* Ex. A (proposed Class Notice).

2 Thus, the Notice plan is fair and adequate and complies with the requirements of Rule 23.

3 **VII. CAFA NOTICE IS REQUIRED**

4 This action falls under 28 USC § 1332 as amended by Class Action Fairness Act of 2005
5 (“CAFA”). As such, notice of settlement under CAFA is required and will be given by UPS within
6 10 days of filing of this motion. 28 USC § 1715(b).

7 **VIII. CONCLUSION**

8 Counsel for the parties thoroughly investigated Plaintiffs’ claims before settling this case. In
9 the judgment of both parties, the proposed Settlement is a fair and reasonable compromise of the
10 issues in dispute in light of the strengths and weaknesses of each party’s case. After weighing the
11 substantial, certain and immediate benefits of this Settlement against the uncertainty of further
12 litigation, the parties believe the proposed Settlement is fair, reasonable and adequate. Plaintiffs’
13 motion should, respectfully, be granted.

14
15 Dated: March 6, 2023

Respectfully submitted,

16 THE MARKHAM LAW FIRM

17 /s/ Maggie Realin

18 David R. Markham

Maggie Realin

19 Lisa Brevard

20 Attorneys for Plaintiffs