

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	EDCV 23-1665-GW-SHKx	Date	October 8, 2024
Title	<i>Josue Gutierrez v. Ericsson Inc., et al.</i>		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE
------------------------	--

Javier Gonzalez

None Present

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None Present

None Present

PROCEEDINGS: IN CHAMBERS - FINAL RULING ON PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PAGA SETTLEMENT [54]

Attached hereto is the Court's Final Ruling on Plaintiff's Motion [54]. The Court GRANTS the Motion as follows:

PRELIMINARY CERTIFIES the proposed class under Federal Rule of Civil Procedure 23(b)(3) for purposes of settlement;
GRANTS the Motion for preliminary approval of the Settlement;
APPOINTS Josue Gutierrez as Class Representative;
APPOINTS The Wand Law Firm, P.C. as Class Counsel;
APPROVES the proposed long form notice and concomitant notice plan; and
ORDERS the parties to proceed under the scheduling order delineated in the Court's Ruling.

Initials of Preparer JG

Josue Gutierrez v. Ericsson Inc.; Case No. 5:23-cv-01665-GW-(SHKx)
Final Ruling on Motion for Preliminary Approval of Class Action and PAGA Settlements

Before the Court is Plaintiff Jose Gutierrez’s unopposed Motion for Preliminary Approval of a Class Action, which would fully resolve this wage and hour class action and the representative action under California’s Private Attorney Generals Act. *See* Motion for Preliminary Approval (“Motion”) , Docket No. 54-1. The Court has considered the Motion, the original and revised settlement agreements, and the various declarations and materials submitted in support of it. For the reasons stated herein, the Court **GRANTS** the Motion.

I. Background

A. Case Background

Defendant Ericsson Inc. (“Ericsson”) is a telecommunications company that conducts business in California. *See* Declaration of Aubry Wand (“Wand Decl.”), Docket No. 54-2, ¶ 5. Plaintiff Jose Gutierrez (“Gutierrez”) was employed by Ericsson in a non-exempt position as a Tower Technician from May 2019 to November 2022. *See* Declaration of Josue Gutierrez (“Gutierrez Decl.”), Docket No. 54-7, ¶ 3. Gutierrez was based in Ericsson’s warehouse in Corona, California, where his job duties included interfacing with clients and vendors, operating forklifts and other machinery, taking inventory, and other tasks. *See* Second Amended Complaint (“SAC”), Docket No. 32, ¶¶ 7-8. Additionally, as a Tower Technician/Field Employee, Gutierrez traveled to various cell towers and client and vendor sites throughout Southern California to perform work, such as picking up and dropping off equipment to tower crews and performing tower maintenance and repair. *Id.* ¶ 9.

On June 22, 2023, Gutierrez filed suit against Ericsson in the Superior Court of California, Riverside County, asserting individual, class, and representative action claims premised on various California Labor Code violations. *See* Complaint, Docket No. 1-1. Ericsson removed the action to this Court on August 16, 2023. *See* Notice of Removal, Docket No. 1. Gutierrez amended his complaint on September 7, 2023, asserting nine causes of action for: (1) failure to provide meal periods; (2) failure to provide rest breaks; (3) failure to provide recovery periods; (4) failure to pay overtime wages; (5) failure to pay all wages due to discharged and quitting employees; (6) failure to furnish accurate itemized statements; (7) failure to indemnify employees for necessary expenditures incurred in discharge of duties; (8) unfair and unlawful business practices under

California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; and (9) penalties under the Private Attorneys General Act (“PAGA”), Cal. Labor Code §§ 2698, *et seq.* *See generally* First Amended Complaint (“FAC”), Docket No. 16. Ericsson moved to dismiss the FAC, which the Court granted in part, dismissing certain of Gutierrez’s claims with leave to amend. *See* Docket No. 29.

Gutierrez then filed the SAC asserting the same nine claims. *See generally* SAC. Gutierrez alleged that Ericsson “has implemented common policies and practices that have resulted in systematic violations of California’s Labor Code and the applicable Industrial Welfare Commission (‘IWC’) Wage Order(s) predicated on a facially unlawful, and unlawful as-applied time rounding policy, the failure to provide meal, rest, and recovery periods, and failure to provide compensation for missed and otherwise non-compliant meal, rest, and recovery periods (*i.e.*, premium pay), unpaid overtime wages, failure to pay all wages owed and due to discharged or quitting non-exempt employees, failure to furnish accurate itemized wage statements, and failure to reimburse employees for employment-related expenses.” *Id.* ¶ 2.

Ericsson again moved to dismiss the SAC and on February 23, 2024, the Court dismissed Gutierrez’s UCL claim without leave to amend and without prejudice but otherwise denied the motion. *See* Docket Nos. 40, 43. Thereafter, with seven wage and hour claims and a representative action under PAGA remaining, the parties stipulated to stay the case pending mediation. *See* Docket Nos. 46-49. On July 12, 2024, the parties informed the court that they reached a settlement. *See* Docket No. 50. However, despite agreeing to resolve the litigation, Ericsson denies all liability and makes no admission of any wrongdoing in the proposed settlement. *See* Original Settlement, Docket No. 54-3, ¶ 70.

On September 12, 2024, Gutierrez filed the instant Motion seeking preliminary approval of the pre-certification class action settlement. *See generally* Motion. On September 24, 2024, the Court issued a tentative ruling indicating that it would grant the motion for preliminary approval subject to minor revisions of the Original Settlement terms. *See* Docket No. 56. On September 26, 2024, the Court heard oral argument on the Motion and instructed the parties to proceed with amending the Original Settlement consistent with the guidance of the tentative ruling. *See* Docket No. 58. On October 7, 2024, Gutierrez’s counsel filed the revised settlement and various materials in support of it. *See* Docket No. 59.

B. Terms of the Proposed Settlement¹

For purposes of settlement only, the parties have agreed to certification of the following class: “All persons who worked for Defendant as a non-exempt employee reporting to a California work location during the Class Period.” Settlement, Docket No. 59-1, ¶ 2.² The class period is defined as June 22, 2019 through the date of preliminary approval. *Id.* ¶ 8.

To resolve the matter, Ericsson has agreed to pay an all-in, non-reversionary Gross Settlement Amount of \$1,350,000 as well as the Employer’s Share of Payroll Taxes. *Id.* ¶ 22. Under the terms of the Settlement, the Gross Settlement Amount will be reduced by the following allocations, resulting in the Net Settlement Amount:

- Class Counsel Award. The parties have agreed to a clear-sailing agreement whereby Gutierrez’s counsel may request, and Ericsson will not object to, an award of reasonable attorney fees of up to 30% of the Gross Settlement Amount (\$405,000) and reimbursement for reasonable litigation costs of up to \$25,000. *Id.* ¶ 63(h).
- Class Representative Service Award. Gutierrez may request that the Court award a Class Representative Service Award of up to \$7,500. *Id.* ¶ 63(g).
- PAGA Payments. \$100,000 is allocated to PAGA penalties. *Id.* ¶ 63(j). Accordingly, 75% of this amount (\$75,000) will be paid to the LWDA and 25% (\$25,000) will be paid to PAGA Members. *Id.* Each PAGA Member will receive a proportionate share of the \$25,000 PAGA penalties, based on the number of Compensable Pay Periods worked relative to the total Compensable Pay Periods worked by all PAGA Members and whether the PAGA Member has previously executed a release with Ericsson. *Id.* ¶ 63(b).
- Settlement Administration Costs. The parties have retained Simpluris Inc. (“Simpluris”) to administer the notice and disbursement of settlement checks, the cost of which will not exceed \$6,500. *See* Declaration of Eric Springer (“Springer Decl.”), Docket No. 54-8, ¶ 13. If it is necessary to administer a second round of checks,

¹ For convenience, the Court will hereinafter capitalize certain terms as they are defined by the parties in the Settlement – in addition to those which the Court has defined in this ruling.

² All citations to “Settlement” refer to the revised settlement filed on October 7, 2024 at Docket No. 59-1, which is the operative settlement agreement in this matter. All citations to “Original Settlement” refer to the first proposed settlement at Docket No. 54-3, which the Court ruled needed minor revisions in order to obtain preliminary approval.

administration costs will increase by an additional \$3,000, with a total capped cost of \$9,500. *See* Supplemental Declaration of Aubrey Wand, Docket No. 59, ¶ 10.

After the Net Settlement Amount is determined, it will be divided into two categories: (1) 85% to Class Members who have not previously executed a severance or separation agreement containing a general release with Ericsson; and (2) 15% to the Class Members that have. Settlement ¶ 27. Class Members will then receive a proportionate share of the Net Settlement Amount based on the number of Compensable Workweeks worked relative to the total Compensable Workweeks worked by the Class and whether the Class Member previously executed a release with Ericsson. *Id.* ¶ 63(a). Each Class Member's Individual Settlement Payment will be classified as 33% wages and 67% interest and penalties. *Id.*

Ericsson will fund the Gross Settlement Amount within 30 days of the Effective Date. *Id.* ¶ 62. Checks to the Settlement Class Members and PAGA Members will remain negotiable for ninety days. *Id.* ¶ 63(c). If checks are not cashed within this 90-day timeline, the checks will be voided and an additional round of checks will be administered *pro rata* to the Class Members who originally cashed their checks, but only if the total sum of uncashed checks exceeds \$23,000. *Id.* If the sum of uncashed checks is equal to or less than \$23,000, any unclaimed funds will be distributed to the parties' chosen *cy pres* recipient, Legal Aid at Work.³ *Id.* ¶¶ 15, 63(c). The Settlement also provides that the Court will retain jurisdiction to enforce the terms of the Settlement. *Id.* ¶ 88.

II. Legal Standard

Federal Rule of Civil Procedure 23(e) requires district court approval of a proposed class action settlement. *See* Fed. R. Civ. P. 23(e). Under Ninth Circuit precedent, "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015). However, a "difficult balancing act almost always confronts a district court tasked with approving a class action settlement." *Id.* at 1223. The district court's attention to a proposed class action settlement is critical because "settlement class actions present unique due process concerns for absent class members." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), *overruled on other*

³ According to the Settlement: Legal Aid at Work is "a 501(c)(3) organization that is dedicated to protecting the rights of low-income people throughout California Among other things, Legal Aid at Work operates a Wage Protection Program whereby it represents low-wage workers who are the victims of wage violations, and thus, it has a sufficient nexus with this lawsuit." Settlement ¶ 15.

grounds by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); see also *Allen*, 787 F.3d at 1223 (“the district court has a fiduciary duty to look after the interests of those absent class members”). Where, as here, parties arrive at a settlement before class certification, “courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

Preliminary approval of class action settlements requires a two-step inquiry. See *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 672727, at *12 (N.D. Cal. Feb. 16, 2017). At the first step, courts decide if a class exists. *Staton*, 327 F.3d at 952. “Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

At the second step, courts consider “whether a proposed settlement is fundamentally fair, adequate, and reasonable.” *Hanlon*, 150 F.3d at 1026. If the parties settle before class certification, the Ninth Circuit requires “a more probing inquiry than may normally be required under Rule 23(e).” *Id.* While some courts had previously afforded a presumption of fairness to settlements that were negotiated at arm’s length, had sufficient discovery, were undertaken by experienced counsel, and where only a small fraction of the class objected, such a presumption is no longer appropriate. See *Roes, I-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 (9th Cir. 2019). Instead, courts must “emplo[y] extra caution and more rigorous scrutiny [] when it comes to settlements negotiated prior to class certification.” *Id.*

During the preliminary approval stage, courts “determine whether the settlement falls within the range of possible approval.” *Booth v. Strategic Realty Tr., Inc.*, No. 3:13-cv-04921-JST, 2015 WL 3957746, at *6 (N.D. Cal. June 28, 2015) (internal quotation marks omitted). Courts examine “the settlement taken as a whole, rather than the individual component parts . . . for overall fairness.” *Hanlon*, 150 F.3d at 1026. In the end, courts cannot “delete, modify or substitute certain provisions. The settlement must stand or fall in its entirety.” *Id.* (internal quotation marks and citation omitted).

III. Discussion

A. Class Certification

The parties have stipulated to class certification pursuant to Fed. R. Civ. P. 23 for purposes of settlement. Settlement ¶ 53. Nonetheless, the Court must first consider whether the proposed

class satisfies all four requirements of Rule 23(a) and at least one of the subparagraphs of Rule 23(b).

1. Rule 23(a)

a. Rule 23(a)(1): Numerosity

Rule 23(a)(1) requires a demonstration that “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “In general, courts find the numerosity requirement satisfied when a class includes at least 40 members.” *Rannis v. Recchia*, 380 F. App’x 646, 651 (9th Cir. 2010). Here, the proposed settlement class includes 535 employees. *See* Motion at 18. Finding that the joinder of more than five hundred individual employees would be impracticable, the Court finds that the class satisfies the numerosity requirement of Rule 23(a)(1).

b. Rule 23(a)(2): Commonality

Rule 23(a)(2) requires the existence of “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “Rule 23(a)(2) has been construed permissively” and its requirements “are less rigorous than the companion requirements of Rule 23(b)(3).” *Hanlon*, 150 F.3d at 1019. “All questions of fact and law need not be common to satisfy the rule.” *Id.* To satisfy Rule 23(a)(2), “even a single common question will do.” *Wal-Mart Stores*, 564 U.S. at 359 (internal quotation marks and brackets omitted). The class claims, however, “must depend upon a common contention . . . of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.” *Id.* at 350.

Here, the Court would conclude that there are common questions of law and fact because Ericsson’s policies and practices applied to all similarly situated employees. “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’” *Id.* at 349-50 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)); *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012). As Gutierrez states in the Motion, resolution of common questions of law and facts exist as to whether Ericsson, *inter alia*, implemented a common policy or practice of failing to permit class members to take meal, rest, and recovery periods. *See* Motion at 18-19. These questions will be the same for the entire class because the working conditions were generally the same for all class members and because Ericsson’s allegedly unlawful policies applied to all employees. The Court thus finds that the class satisfies the commonality requirement of Rule 23(a)(2).

c. Rule 23(a)(3): Typicality

Rule 23(a)(3) requires that “the claims or defenses of the representative parties be typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “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). “Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.” *Id.* (citation and internal quotation marks omitted). “The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Id.* (citation and internal quotation marks omitted); *see also Falcon*, 457 U.S. at 156 (indicating that class representatives “must be part of the class and possess the same interest and suffer the same injury as the class members”). The representative plaintiff’s claims need not be identical to those of the class, but rather need only be “reasonably co-extensive with those of absent class members” *Hanlon*, 150 F.3d at 1020.

In practice, the “commonality and typicality requirements of Rule 23(a) tend to merge.” *Falcon*, 457 U.S. at 157 n.13. Because Gutierrez experienced the same injuries as the other class members – including, as discussed above, Ericsson’s failure to provide meal and rest periods – and there are no apparent defenses unique to Gutierrez’s claims, the Court finds that Gutierrez’s claims are sufficiently typical of the class’s claims to satisfy Rule 23(a)(3).

d. Rule 23(a)(4): Adequacy

Representative parties must also “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). Generally speaking, whether or not the class representative satisfies Rule 23’s adequacy requirement “depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (internal quotation marks omitted) (quoting *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) and *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (“To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: ‘(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?’”); *Staton*, 327 F.3d at 957; *Local*

Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001) (“The record indicates clearly that [the class representative] understands his duties and is currently willing and able to perform them. The Rule does not require more.”).

Here, Gutierrez submitted a signed declaration attesting that there are no conflicts between him and the class, that he believes the Settlement is in the best interest of the Class, and that he believes he has represented the interest of the class throughout the litigation. *See* Gutierrez Decl. ¶¶ 4- 6. Furthermore, Gutierrez’s counsel has considerable experience in similar class action litigation. *See* Wand Decl. ¶¶ 31-46. Based on these declarations and the litigation that ensued before settlement negotiations began, the Court is persuaded that Gutierrez understands his duties and is sufficiently motivated to perform them, that there is no apparent conflict with any other class members, and that his counsel appears to have substantial experience in litigating on behalf of classes in other wage and hour cases. Thus, the Court finds that the adequacy requirement of Rule 23(a)(4) is satisfied.

For the foregoing reasons, the Court finds that each of the requirements delineated in Rule 23(a) is satisfied for certifying the proposed class for purposes of settlement.

2. Rule 23(b)(3)

Because Gutierrez seeks to certify a class under Rule 23(b)(3), the Court must analyze whether the proposed class satisfies the predominance and superiority inquiries. *See* Fed R. Civ. P. 23(b). Rule 23(b)(3) provides:

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if: . . .

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (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. Predominance

“The Rule 23(b)(3) predominance inquiry asks the court to make a global determination of whether common questions prevail over individualized ones.” *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). “For purposes of this analysis, an individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.” *Id.* (internal quotation marks and brackets omitted) (quoting *Tyson Foods v. Bouaphakeo*, 577 U.S. 442, 453 (2016)).

Here, there appear to be no questions of law or fact that would affect *only* Gutierrez. Whether Ericsson had a common practice of failing to authorize class members to take meal, rest, and recovery periods and/or a practice of not paying corresponding premium pay would ostensibly affect Gutierrez in the same manner that it would for all class members. Moreover, as Gutierrez states in the motion, the same timekeeping and payroll systems could be used as common evidence to prove such claims. *See* Motion at 20. The fact that some class members may have executed general releases with Ericsson does not necessarily change the predominance of common questions, especially considering that the framework of the Settlement deals with this in its allocation methods. The Court thus finds that the predominance requirement of Rule 23(b)(3) is satisfied.

b. Superiority

Gutierrez stated in the Motion that he is unaware of any class members having commenced other litigation concerning the same subject matter. *See id.* Additionally, each class member’s individual claim is relatively modest, at least in relation to the time and expense that would be required to prosecute each claim. Accordingly, as stated earlier in regard to the numerosity requirement of Rule 23(a)(1), adjudicating the claims of more than five hundred individuals in this single proceeding would certainly be superior to individual actions, especially in the context of a straight-forward settlement such as the one presented here. The Court thus finds that the superiority requirement of Rule 23(b)(3) is satisfied.

Having considered the foregoing, because all requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, the Court concludes that certification of the proposed class is appropriate here. Accordingly, the Court **PRELIMINARY CERTIFIES** the proposed class for purposes of

settlement, **APPOINTS** Gutierrez as Class Representative, and **APPOINTS** The Wand Law Firm, P.C. as Class Counsel.

B. Proposed Settlement

Having preliminarily certified the proposed class and appointed the Class Representative and Class Counsel, the Court turns next to determining whether the proposed settlement is fair, reasonable, and adequate, as required under Rule 23(e)(2).

1. Legal Standard

Federal Rule of Civil Procedure 23(e)(2) requires that a court find any proposed settlement “fair, reasonable, and adequate” before approval. Fed. R. Civ. P. 23(e)(2). It provides:

Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

Id. The Ninth Circuit has also delineated various factors for courts to generally consider in deciding whether a class action settlement is fair, adequate, and reasonable:

- (1) the strength of the plaintiffs’ case;
- (2) the risk, expense, complexity, and likely duration of further litigation;
- (3) the risk of maintaining class action status throughout the trial;
- (4) the amount offered in settlement;

- (5) the extent of discovery completed and the stage of the proceedings;
- (6) the experience and views of counsel;
- (7) the presence of a governmental participant; and
- (8) the reaction of the class members to the proposed settlement.

Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004); *see also In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill*).

In addition, the Ninth Circuit instructs district courts to examine potential red flags indicating collusion. “Collusion may not always be evident on the face of a settlement, and courts therefore must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.” *In re Bluetooth Prod. Liab. Litig.*, 654 F.3d at 947. Subtle signs of collusion include:

- (1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded;
- (2) when the parties negotiate a “clear sailing” arrangement providing for the payment of attorneys’ fees separate and apart from class funds, which carries “the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class;” and
- (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.

Id. (internal quotation marks and citations omitted).

With these various factors in mind, preliminary approval of a class action settlement is “an initial evaluation of the fairness of the proposed settlement made by the court on the basis of written submissions and informal presentation from the settling parties.” *In re High-Tech Emp. Antitrust Litig.*, 2013 WL 6328811, at *1 (N.D. Cal. Oct. 30, 2013) (internal quotation marks omitted). A court need not necessarily conduct a complete analysis of the fairness factors at this time because some of them “cannot be fully assessed until the Court conducts the final approval hearing.” *Lusby v. Gamestop Inc.*, 297 F.R.D. 400, 412 (N.D. Cal. 2013) (internal quotation marks omitted). Instead, at this stage, “[p]reliminary approval of a settlement and notice to the class is appropriate if ‘[1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential

treatment to class representatives or segments of the class, and [4] falls within the range of possible approval.” *Johnson v. Quantum Learning Network, Inc.*, 2016 WL 4529607, at *1 (N.D. Cal. Aug. 30, 2016) (quoting *In re Tableware*, 484 F. Supp. 2d at 1079). The “decision to approve or reject a settlement is committed to the sound discretion of the trial judge.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000), *as amended* (June 19, 2000) (internal quotation marks omitted).

1. Signs of Collusion

The parties engaged in adversarial proceedings on the pleadings, litigating two motions to dismiss that ultimately resulted in Gutierrez’s UCL claim being dismissed without leave to amend. Thereafter, the Settlement was reached after the parties participated in mediation with the assistance of an experienced mediator. *See* Motion at 15-16. The Court would also note that Gutierrez undertook informal class discovery, which included obtaining and analyzing policy documents, examining a random sample of time and payroll records, and speaking with other employees to understand Ericsson’s potential liability. *See id.* at 13. Gutierrez’s counsel also engaged an expert to conduct an analysis of Ericsson’s total exposure. *Id.* The Court is thus persuaded that the proposed Settlement was negotiated at arm’s length and that neither the process nor the result has any apparent indicia of collusion. *See In re Zynga Inc. Sec. Litig.*, No. 12-cv-04007-JSC, 2015 WL 6471171, at *9 (N.D. Cal. Oct. 27, 2015) (“The use of a mediator and the presence of discovery support the conclusion that the Plaintiff was appropriately informed in negotiating a settlement.” (internal quotation omitted)).

The Settlement does, however, contain a clear-sailing agreement for attorney fees whereby Ericsson will not object to Gutierrez’s counsel requesting an attorney fees award of up to 30% of the Gross Settlement Amount (\$405,000). Though the existence of a clear sailing provision “is not a death knell” to the settlement agreement, “the district court has a duty to scrutinize the agreement for signs that the fees requested by counsel are unreasonably high.” *Kim*, 8 F.4th 1170, 1180 (internal quotation marks omitted). Here, the maximum amount of attorney fees to which the parties have agreed represents 30% of the Gross Settlement Amount, which is somewhat higher than the 25% “benchmark” for a reasonable fee award when calculating a percentage of the common fund. *See Bluetooth*, 654 F.3d at 942 (“Because the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar. Applying

this calculation method, courts typically calculate 25% of the fund as the ‘benchmark’ for a reasonable fee award, providing adequate explanation in the record of any ‘special circumstances’ justifying a departure.”). However, there are three considerations that weigh against a finding of collusion: (1) most importantly, in the event the Court awards less than \$405,000 in attorney fees, the difference will not revert back to Ericsson but will instead benefit Class Members by enlarging the Gross Settlement Amount; (2) ultimately the Court decides what the reasonable attorney fees award will be; and (3) there is ample time to receive the reaction of the class to the attorney fees agreement, which is prominently delineated (as it must) in the proposed notice.

For the foregoing reasons, the Court finds that the Settlement was negotiated at arm’s length and that there are no apparent indications of collusion that prevent preliminary approval of the class action settlement.

2. Rule 23(e)(2) Factors

a. *Rule 23(e)(2)(A): Adequate Representation of the Class*

The Court must first consider whether “the class representatives and class counsel have adequately represented the class.” Fed. R. Civ. P. 23(e)(2)(A). For the same reasons discussed *supra* concerning Rule 23(a)(4), the Court is persuaded that Gutierrez and Class Counsel have adequately represented the class.

b. *Rule 23(e)(2)(B): Arms-Length Negotiation*

The Court must next consider whether “the proposal was negotiated at arm’s length.” Fed. R. Civ. P. 23(e)(2)(B). For the same reasons discussed *supra* concerning signs of collusion, the Court is persuaded that the Settlement was reached as a result of arms-length negotiation.

c. *Rule 23(e)(2)(C): Adequate Relief for the Class*

The Court must next consider whether “the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).” Fed. R. Civ. P. 23(e)(2)(C). As analyzed more fulsomely *infra*, the Court finds that the cost, risk, and delay of trial and appeal would weigh in favor of settlement. Weighed against those considerations, the Court also observes that class members do not have to go through an opt-in claims process, the parties have attested that there are no other agreements between them, and that the terms of the agreed upon attorney fees are not

patently improper. Furthermore, the Settlement satisfactorily addresses the Court's earlier concern about a second distribution of checks in the event that a sufficient amount of unclaimed funds remains after the first distribution, rather than automatic payment to the *cy pres* recipient. The Court thus finds that the relief provided for the class in the Settlement is adequate.

d. Rule 23(e)(2)(D): Equitable Treatment of Class Members

The Court must finally consider whether “the proposal treats class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D). The Settlement allocates 85% of the Net Settlement Amount to Class Members who did not previously sign a release with Ericsson and 15% to those who did. In that way, the Settlement on its face seemingly treats class members differently. However, it is reasonable to allocate the settlement funds in this way – similar to the treatment of sub-classes – because the allocation has a direct nexus to legitimate considerations of injury and/or risk of actual recovery. Importantly, within each category of Class Members, the allocation is exactly the same, treating each Class Member equally based on a pro rata share of the number of Compensable Workweeks that employee worked. And in any event, at this preliminary stage, there is still ample time for Class Members to comment on or object to this allocation method or the Settlement generally.

For the foregoing reasons, the Court finds that each of the requirements delineated in Rule 23(e)(2) is satisfied for finding the proposed Settlement fair, adequate, and reasonable.

3. Churchill Factors

a. Strength of the Case; Risk, Expense, Complexity, and Likely Duration of Further Litigation; and Risk of Maintaining a Class Action Status Throughout Trial

Given their relatedness, the Court will analyze the first three *Churchill* factors together. The Motion recounts the various substantive and procedural defenses to both class certification and the merits of the underlying claims that Ericsson has identified, including that Gutierrez will not be able to prove that Ericsson knew or should have known of any alleged off-the-clock work and even if he could, class certification would not be possible on such a claim. *See* Motion at 7-11. As has been stated, Ericsson has vigorously contested that it has any liability or damages and continues to deny all wrongdoing through settlement. Furthermore, Ericsson has purportedly indicated that it would oppose class certification on the grounds that there is variation within the class. *See id.* at 10. Class Counsel attests that Gutierrez agreed to settle the case based on careful evaluation of the facts and the law and the views expressed by the mediator during settlement

negotiations. Wand Decl. ¶¶ 11, 18-23. That said, this case is, in the Court's estimation, a relatively standard wage and hour class action that would be unlikely to present particularly complex or novel questions of law or litigation strategy. However, the risk, expense, and likely duration of further litigation – including discovery, motion practice, trial, and appeal – almost always presents good reason to settle. For all of these reasons, the Court finds that the first three factors weigh in favor of settlement.

b. Amount Offered in the Settlement

Class Counsel engaged an expert who calculated Ericsson's total exposure for the claims at issue in this litigation as \$14,491,277. *See* Wand Decl. ¶¶ 27-28. The Settlement requires Ericsson to make an all-in payment of \$1,350,000, which represents 9.32% of Ericsson's total exposure. The Motion sets forth an estimate that if the Court approved all payments under the Settlement, the Net Settlement Amount would be approximately \$806,000 and the average recovery would be approximately \$1,507 per Class Member. *See* Motion at 12-13. While the overall recovery provided under the Settlement is a fraction of what might be available to class members after a successful trial based on Ericsson's total exposure, the Court has no reason to find that this amount is unreasonable given the risk, cost, and protracted nature of continued litigation, or the amounts for which these wage and hour class actions typically settle. This factor therefore weighs in favor of preliminary certification. And at this preliminary stage, there is still ample time for Class Members to comment on or object to the amount offered in the Settlement.

c. Extent of Discovery Completed and the Stage of the Proceedings

The Court noted *supra* that Gutierrez and Class Counsel engaged in informal class discovery and retained an expert to understand Ericsson's exposure. Furthermore, this Settlement was reached after the parties litigated two dispositive motions to dismiss and thereafter agreed to stay the case to pursue formal mediation. This factor therefore weighs in favor of preliminary certification.

d. Experience and Views of Counsel

As noted earlier, Class Counsel has experience in litigating wage and hour class actions. Wand Decl. ¶¶ 31-46. Furthermore, both Class Counsel (and Gutierrez) have shared their endorsement of the Settlement as fair, adequate, and reasonable. Wand Decl. ¶ 29; Gutierrez Decl. ¶ 4. The Court has no reason to question these positions and this factor therefore weighs in favor of preliminary certification.

e. Presence of a Government Participant

Gutierrez provided notice to the LWDA of his PAGA claim and attests that he will provide the required CAFA notice within 10 days of this Motion. Wand Decl. ¶¶ 13-17; Settlement ¶ 61. Class Counsel attests that, to date, the LWDA has not provided any response to Gutierrez's PAGA claims. Wand Decl. ¶ 16. As such, there is no apparent governmental participation concern that would prevent preliminary certification.

f. Reaction of Class Members to the Proposed Settlement

This factor is inapplicable at the preliminary certification phase because Class Members have not had the opportunity to yet react to the proposed Settlement. The Court will carefully consider the reaction of the Class Members at the juncture of final approval.

For the foregoing reasons, the Court finds that at this preliminary approval juncture, the balance of the *Churchill* factors weighs in favor of settlement, the Settlement is fair, adequate, and reasonable under Rule 23(e)(2), and that there are no apparent signs of collusion that would weigh against settlement.

C. Notice Plan

The Court must next consider the “effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims.” Fed. R. Civ. P. 23(e)(2)(C)(ii). Simpluris states that, upon approval from the Court, it will use information provided from Ericsson to mail the notice to class members at their last known address and, if needed, will update class members' mailing addresses utilizing the National Change of Address Database maintained by the U.S. Postal Service. Springer Decl. ¶¶ 9-10. Simpluris further attests that in the event any notices are returned as non-deliverable, it will re-mail the notice to the forwarding addressing. *Id.* ¶ 11. And in the event the notice is returned as non-deliverable without a forward address affixed thereto, Simpluris will perform an advanced address search (known as a “skip trace”) on the class member's name and previous address to locate a current mailing address. *Id.* Simpluris attests that this notice plan is “anticipated to reach nearly 100% of the Class.” *Id.* The Court has no reason to doubt that these procedures are adequate and will both apprise class members of their status as well as distribute the Settlement funds when the time comes.

The Court has also reviewed the long form notice submitted with the Settlement and, finding no obvious errors, has no reasons to find that this notice would not apprise class members of their claims as required by Rule 23(e). The Settlement satisfactorily addresses the Court's

earlier concern that class members should be provided a 60-day response deadline.

For the foregoing reasons, the Court finds that the proposed notice and distribution plan are sufficient to satisfy Rule 23(e)(2)(ii) at this preliminary approval juncture.

D. Scheduling Order

Event	Date
Preliminary Approval Date	Tuesday, October 8, 2024
Last Day for Class Counsel to File a Motion for Attorney Fees, Noticed for a Hearing on the Same Day as the Final Approval Hearing	Thursday, November 7, 2024
Last Day for Ericsson to Provide the Settlement Administrator with the Class and PAGA Information	Thursday, November 7, 2024
Last Day for the Settlement Administrator to Mail Class Notice to Class Members	Friday, November 22, 2024
Last Day for Class Members to Submit Disputes, Objections, or Request for Exclusion	Tuesday, January 21, 2025
Last Day to File a Motion for Final Approval and Motion for Class Representative Service Award	Thursday, February 29, 2025
Hearing on Motion for Final Approval, Motion for Attorney Fees and Costs, and Motion for Class Representative Service Award	Monday, March 17, 2025

IV. Conclusion

Based on the foregoing discussion, the Court:

- **PRELIMINARY CERTIFIES** the proposed class under Federal Rule of Civil Procedure 23(b)(3) for purposes of settlement;
- **GRANTS** the Motion for preliminary approval of the Settlement;
- **APPOINTS** Josue Gutierrez as Class Representative;
- **APPOINTS** The Wand Law Firm, P.C. as Class Counsel;
- **APPROVES** the proposed long form notice and concomitant notice plan; and
- **ORDERS** the parties to proceed under the scheduling order delineated above.