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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHELLE NOURIAN MARTINEZ,
on behalf of herself and all others
similarly situated,

Plaintiff,

vs.

HELZBERG'S DIAMOND SHOPS,
INC. and DOES 1-25, inclusive,

Defendants.

Case No. 5:20-cv-01085-PSG-SHK

**CLASS AND COLLECTIVE
ACTION**

**[PROPOSED] ORDER
GRANTING
PRELIMINARY APPROVAL OF
SETTLEMENT**

Date: April 19, 2021
Time: 1:30 p.m.
Courtroom: 6A (6th Floor)
Judge: Hon. Philip S.
Gutierrez

Before the Court is a motion for preliminary approval of class action settlement filed by Plaintiff Michelle Nourian Martinez ("Plaintiff"). See Dkt. # 30 ("Mot."). Defendant Helzberg's Diamond Shops ("Defendant") does not oppose the motion. The Court finds the matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving papers, the Court GRANTS Plaintiff's motion.

I. BACKGROUND

On May 27, 2020, Plaintiff initiated this putative wage and hour class action by filing a lawsuit in United States District Court, Central District of California. See Dkt. # 1 (“Compl.”). Plaintiff brought claims against Helzberg’s Diamond Shops, Inc. See *id.* On October 7, 2020, Plaintiff filed a First Amended Complaint (“FAC”) bringing claims for: (1) failure to pay minimum, straight time, and overtime wages; (2) failure to provide meal and rest periods; (3) waiting time penalties; (4) failure to provide accurate, itemized wage statements; (5) unfair competition; (8) enforcement of the Private Attorneys General Act of 2004, Cal. Labor Code §§ 2698 *et seq.*, (“PAGA”). See Dkt. # 20 (“FAC”). On September 1, 2020, Defendant filed an answer to the FAC, denying most, if not all, of Plaintiff’s allegations and asserting twenty-five affirmative defenses. See Dkt. # 26.

Plaintiff and Defendant engaged in arms’ length negotiations during a day long mediation with mediator Steven Pearl, Esq. on February 5, 2021. The Parties subsequently signed a long form Settlement Agreement. See Dkt. # 30-1 [Hicks Dec], Ex. 1. The settlement class (the “Class”) is defined as:

“all current and former employees of Defendant who worked as a Store Manager at any time in the State of California from April 6, 2016 through the date of the Court’s order granting preliminary approval of this Settlement Agreement, or ninety (90) days after the execution of this agreement, whichever is earlier.”

Id., Ex. 1 (“Settlement Agreement”), ¶ 2.

Plaintiff now asks the Court to (1) grant preliminary approval of the Settlement Agreement; (2) conditionally certify the proposed Class; (3) schedule a final approval and fairness hearing for final approval of the settlement and entry of judgment; (4) approve the proposed notice; (5) appoint Plaintiff Michelle Nourian Martinez as Class Representative; (6) appoint Hoyer & Hicks as Class Counsel; (7) approve Class Counsel’s request for attorneys’ fees and costs; (8) appoint Simpluris, Inc. as the Settlement Administrator; and

(9) authorize the Settlement Administrator to mail the approved notice to the Class. See generally Mot.

II. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES

When parties settle an action prior to class certification, the court is obligated to “peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). Preliminary approval of a class settlement is generally a two-step process. First, the court must assess whether a class exists. *Id.* (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Second, the court must determine “whether [the] proposed settlement is fundamentally fair, adequate, and reasonable.” *Id.* (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)) (internal quotation marks omitted). The decision to approve or reject a settlement is within the Court’s discretion. *Hanlon*, 150 F.3d at 1026.

A. LEGAL STANDARD

Parties seeking certification of a settlement-only class must still satisfy the Federal Rule of Civil Procedure 23 standards. See *id.* at 1019–24. Under Rule 23, a plaintiff must satisfy the four prerequisites of Rule 23(a) and demonstrate that the action is maintainable under Rule 23(b). See *Amchem*, 521 U.S. at 613–14. The four prerequisites of Rule 23(a) are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. See Fed. R. Civ. P. 23(a). Plaintiff seeks certification under Rule 23(b)(3), see *Mot.* 10:8–13:4, which requires that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed R. Civ. P. 23(b)(3).

1 **B. Discussion**

2 **1. Numerosity**

3 Plaintiff seeks preliminary certification of the proposed class under Rule
4 23 of the Federal Rules of Civil Procedure. The first requirement for maintaining
5 a class action under Rule 23(a) is that the class is “so numerous that joinder of
6 all members would be impracticable.” Fed. R. Civ. P. 23(a)(1). Courts generally
7 presume numerosity when there are at least forty members in the proposed
8 class. See *Charlebois v. Angels Baseball, LP*, No. SACV 10-0853 DOC (ANx),
9 2011 WL 2610122, at *4 (C.D. Cal. June 30, 2011). *Rannis v. Recchia* (N.D.Cal.
10 2010) 380 Fed. Appx. 646, 650-651. (Class size of 20 satisfies numerosity
11 requirement).

12 Here, the Class is comprised of approximately 31 individuals (as of the
13 date of the Mediation in February 2021). See Hicks Decl. ¶ 21. Numerosity is
14 satisfied.

15 **2. Commonality**

16 To fulfill the commonality requirement, Plaintiff must establish questions
17 of law or fact common to the class as a whole. See Fed. R. Civ. P. 23(a)(2). The
18 class claims must depend on a common contention that “is capable of classwide
19 resolution—which means that determination of its truth or falsity will resolve an
20 issue that is central to the validity of each one of the claims in one stroke.” *Wal-*
21 *Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). “What matters to class
22 certification ... is not the raising of common ‘questions’—even in droves—but
23 rather the capacity of a classwide proceeding to generate common answers apt
24 to drive the resolution of the litigation.” *Id.* (internal quotation marks omitted)
25 (emphasis removed). For the purposes of Rule 23(a)(2), even a single common
26 question satisfies the requirement. See *id.* at 359; *Abdullah v. U.S. Sec.*
27 *Assocs.*, 731 F.3d 952, 957 (9th Cir. 2013) (*citing Mazza v. Am. Honda Motor*
28 *Co.*, 666 F.3d 581, 589 (9th Cir. 2012)).

1 Here, Plaintiff identifies several questions of fact and law common to the
2 Class. Plaintiff states that all Class Members have a common interest in
3 determining whether Defendant misclassified Store Managers as exempt
4 employees and therefore improperly failed to pay overtime, failed to provide
5 proper meal periods and rest breaks, and violated other provisions of the
6 California Labor Code. See Hicks Decl. ¶ 22. No unique defenses are applicable
7 to Plaintiff that do not also exist for other Class Members. See *id.* Plaintiff
8 determined from interviews with CMs that Defendant's policies and practices
9 regarding how CMs should be spending their time are either identical or
10 sufficiently similar, to raise the same questions of liability, and applied to all
11 Class Members. See *id.* ¶ 22. By challenging Defendant's policies, Plaintiff
12 presents common questions that will likely generate common answers that can
13 be resolved on a class-wide basis. See *Dukes*, 564 U.S. at 350. Accordingly,
14 the commonality requirement is satisfied.

15 3. Typicality

16 A Typicality requires a showing that the Plaintiff is a member of the class
17 she represents and that her claims are "reasonably co-extensive with those of
18 absent class members," but not necessarily "substantially identical." *Hanlon*,
19 150 F.3d at 1020; see Fed. R. Civ. P. 23(a)(3). The test of typicality "is whether
20 other members have the same or similar injury, whether the action is based on
21 conduct which is not unique to the named plaintiffs, and whether other class
22 members have been injured by the same course of conduct." *Ellis v. Costco*
23 *Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon v.*
24 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)) (internal quotation
25 marks omitted). The typicality and commonality requirements somewhat
26 overlap. See *Gen. Tel. Co. Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

27 Plaintiff was an employee of Defendant during the class period, like every
28 other Class Member, and was subject to the same policies and practices. See

1 *Hicks* Decl. ¶ 23. Plaintiff alleges that these policies and practices violated
 2 various provisions of the Labor Code, and Plaintiff experienced these violations
 3 like other Class Members. See *id.* Accordingly, the typicality requirement is
 4 satisfied.

5 **4. Adequacy**

6 The final requirement of Rule 23(a) is that “the representative parties will
 7 fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4).
 8 The Ninth Circuit has indicated that “[t]he proper resolution of this issue requires
 9 that two questions be addressed: (a) do the named plaintiffs and their counsel
 10 have any conflicts of interest with other class members and (b) will the named
 11 plaintiffs and their counsel prosecute the action vigorously on behalf of the
 12 class?” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

13 Plaintiff has no apparent conflicts of interest between herself and Class
 14 Members. See *Hicks* Decl. ¶ 24. Plaintiff has demonstrated, through her
 15 participation in this action, her willingness to serve as a representative for the
 16 Class, and has agreed to place the Class’s interests above her own. See *id.*
 17 The similarity of the claims asserted by Class Members and Plaintiff do not
 18 suggest any divergent interests held by Plaintiff. Lastly, Plaintiff’s counsel
 19 appear qualified and committed to representing the Class, and have litigated
 20 the action thus far. Plaintiff’s counsel have served as lead class counsel in
 21 multiple wage and hour class action cases. See *id.* ¶¶ 2, 24. Plaintiff’s counsel
 22 has no known conflicts of interest with absent Class Members. See *id.* ¶ 24.
 23 Accordingly, the adequacy requirement is satisfied.

24 **5. Predominance and Superiority**

25 Having concluded that the Class satisfies the Rule 23(a) factors, the Court
 26 now turns to Rule 23(b)(3). Rule 23(b)(3) provides that a class may be certified
 27 where common questions of law or fact predominate over individual questions
 28 and a class action is the superior method for adjudicating the controversy as a

1 whole. The predominance aspect specifically “tests whether proposed classes
2 are sufficiently cohesive to warrant adjudication by representation.” *Amchem*,
3 521 U.S. at 623. “When common questions present a significant aspect of the
4 case and they can be resolved for all members of the class in a single
5 adjudication, there is clear justification for handling the dispute on a
6 representative rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022
7 (internal quotation marks omitted).

8 Plaintiff alleges that Defendant implemented largely uniform policies and
9 practices for Store Managers, whom Plaintiff alleges were misclassified as
10 exempt employees, that resulted in violations of California law, including failure
11 to pay overtime and failure to permit meal and rest periods. See *Hicks Decl.* ¶
12 25. Claims based on this type of commonly applied policy are generally
13 sufficient for purposes of satisfying the requirements of Rule 23(b)(3). See, e.g.,
14 *Wright v. Linkus Enters., Inc.*, 259 F.R.D. 468, 473 (E.D. Cal. 2009) (finding
15 predominance, “despite the existence of minor factual differences between
16 individual class members,” where the case involved “alleged policies that
17 required class members to work without compensation, meal and rest periods,
18 and/or reimbursement for expenses”); *In re Wells Fargo Home Mortg. Overtime*
19 *Pay Litig.*, 527 F. Supp. 2d 1053, 1065–68 (N.D. Cal. 2007) (“Plaintiffs have
20 submitted evidence of [] uniform policies ... such as training, recruiting and job
21 descriptions. Accordingly, plaintiffs have made a strong showing that, as a
22 general matter, common questions ... predominate over individual variations.”).
23 As such, the Court concludes that common questions of law and fact similarly
24 predominate here.

25 As for superiority, requiring 31 class members to litigate their claims
26 separately would be inefficient and costly, and permitting class treatment
27 enables the Court to manage the litigation in a manner that is efficient and limits
28 expense for litigants. See *Hicks Decl.* ¶ 26; *Lerwill v. Inflight Motion Pictures*,
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1 *Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (“Numerous individual actions would be
 2 expensive and time-consuming and would create the danger of conflicting
 3 decisions as to persons similarly situated.”). Class Members could face difficulty
 4 finding legal representation and could lose the incentive to bring their claims if
 5 forced to do so in isolation. *See In re Napster, Inc. Copyright Litig.*, No. C 04-
 6 1671 MHP, 2005 WL 1287611, at *8 (N.D. Cal. June 1, 2005) (finding superiority
 7 in part because “many small composers individually lack the time, resources,
 8 and legal sophistication to enforce their copyrights”). A class action would thus
 9 be the superior method for adjudicating this action.

10 In short, the Court concludes that both the predominance and superiority
 11 requirements of Rule 23(b)(3) are satisfied.

12 **C. Conclusion**

13 Plaintiff has met the requirements for class certification under Rule 23.
 14 Therefore, the Court **CERTIFIES** the Class for settlement purposes only. The
 15 Court also **APPOINTS** Hoyer & Hicks as Class Counsel and **APPOINTS** Plaintiff
 16 Michelle Nourian Martinez as Class Representative.

17 **III. PRELIMINARY APPROVAL OF THE PROPOSED CLASS ACTION** 18 **SETTLEMENT**

19 The next step is to determine whether the settlement reached is “fair,
 20 reasonable, and adequate” under Rule 23(e). *See Fed. R. Civ. P. 23(e)(2).*

21 **A. Legal Standard**

22 The approval of a class action settlement is a two-step process under Rule
 23 23(e) in which the court first determines whether a proposed class action
 24 settlement deserves preliminary approval and then, after notice is given to class
 25 members, whether final approval is warranted. *See In re Am. Apparel, Inc.*
 26 *S’holder Litig.*, No. CV 10-6352 MMM (CGx), 2014 WL 10212865, at *5 (C.D.
 27 Cal. July 28, 2014). “At the preliminary approval stage, a court determines
 28 whether a proposed settlement is within the range of possible approval and
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whether or not notice should be sent to class members.” *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010) (internal quotation marks omitted). Preliminary approval amounts to a finding that the terms of the proposed settlement warrant consideration by members of the class and a full examination at a final approval hearing. See Manual for Complex Litigation (Fourth) § 13.14 (2004).

Preliminary approval is appropriate if “the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.” *Ma v. Covidien Holding, Inc.*, No. SACV 12-2161 DOC, 2014 WL 360196, at *4 (C.D. Cal. Jan. 31, 2014); see also *Eddings v. Health Net, Inc.*, No. CV 10-1744 JST (RZx), 2013 WL 169895, at *2 (C.D. Cal. Jan. 16, 2013).

After notice is given to the class, preliminary approval is followed by a review of the fairness of the settlement at a final fairness hearing, and, if appropriate, a finding that it is “fair, reasonable, and adequate.” Fed R. Civ. P. 23(e)(2); see also *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1027. In making this determination, the district court must

“balance a number of factors: the strength of the plaintiffs’ case; the risk, expense complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.”

Hanlon, 150 F.3d at 1026; see also *Staton*, 327 F.3d at 959; *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that the list of factors is “by no means an exhaustive list”).

The district court must approve or reject the settlement as a whole. See *Hanlon*, 150 F.3d at 1026 (“It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.”). The

1 Court may not delete, modify, or rewrite particular provisions of the settlement.
2 *See Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012); *Hanlon*, 150 F.3d
3 at 1026.

4 Where the parties negotiate a settlement agreement before the class has
5 been certified, “settlement approval ‘requires a higher standard of fairness’ and
6 ‘a more probing inquiry than may normally be required under Rule 23(e).’ ”
7 *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048–49 (9th Cir. 2019)
8 (*quoting Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012)). Specifically,
9 “such [settlement] agreements must withstand an even higher level of scrutiny
10 for evidence of collusion or other conflicts of interest than is ordinarily required
11 under Rule 23(e) before securing the court’s approval as fair,” and this “more
12 exacting review is warranted to ensure that class representatives and their
13 counsel do not secure a disproportionate benefit at the expense of the unnamed
14 plaintiffs who class counsel had a duty to represent.” *Id.* (internal quotations
15 omitted). Courts must especially scrutinize “subtle signs of collusion,” such as
16 a reversionary clause, a clear sailing agreement, or a disproportionately large
17 attorneys’ fees award. *Id.*

18 **B. Overview of the Settlement Agreement**

19 Under the terms of the Settlement Agreement, Helzberg’s Diamond
20 Shops, Inc. will pay a gross, non-reversionary settlement amount of \$475,000
21 (the “Maximum Settlement Amount”). See Settlement Agreement ¶¶ I.18, III.43.
22 This amount includes: (1) all payments to participating Class Members; (2)
23 Class Counsel’s fees (estimated to be no greater than \$158,333.33) and costs
24 (not to exceed \$10,000); (3) incentive awards for the Class Representative
25 (estimated to be \$10,000); (4) administrative expenses (estimated to be no
26 greater than \$3,750); and (5) PAGA penalties of \$10,000, of which \$7,500 will
27 be paid to the LWDA and \$2,500 will be distributed to PAGA Employees. *Id.* at
28 ¶ I.18. No portion of the Maximum Settlement Amount will revert to Defendant.

1 *Id.* at ¶ III.54(b)(iv) (Uncashed Checks). The remainder of the Maximum
2 Settlement Amount after the deduction of Class Counsel’s fees and expenses,
3 incentive awards, administrative expenses, and the PAGA payment (the “Net
4 Settlement Amount”) shall be paid to Class Members. *Id.* at ¶¶ I.19, I.21. Plaintiff
5 estimates the Net Settlement Amount to be \$285,416.67. Mot. 6:15–16. The Net
6 Settlement Amount does not include employer’s payroll taxes, which shall be
7 paid separately and in addition to the Maximum Settlement Amount by
8 Defendant. *Id.* at ¶ I.18. For taxation purposes, the amounts distributed to Class
9 Members will be characterized as twenty-five percent (25%) alleged unpaid
10 wages and seventy-five percent (75%) alleged unpaid penalties and interest. *Id.*
11 at ¶ III.54(b)(ii).

12 Each Class Member that does not opt out will receive a proportionate
13 share of the Net Settlement Amount that is equal to: (i) the number of weeks he
14 or she worked during the Class Period based on data provided by Defendant,
15 divided by (ii) the total number of weeks worked by all Settlement Class
16 Members based on the same data, (iii) which is then multiplied by the Net
17 Settlement Amount. *Id.* at ¶ III.54(b)(i). Class Members will not be required to
18 submit a claim form to receive their shares. *Id.* at ¶¶ I.36, III.53(e)(ii). If any
19 Class Member opts out of the Settlement, his or her share will be added to the
20 Net Settlement Amount. The average individual settlement share is estimated
21 to be \$9,206.99, after all deductions but before tax withholdings. See Mot.
22 20:14–16. Any settlement checks that are mailed to the Class Members and
23 remain uncashed after 180 days of the date of issuance will be cancelled, and
24 the moneys will be paid to the State Controller’s Office Unclaimed property
25 division as unclaimed property. Settlement Agreement ¶ III.54(b)(iv).

26 In return, participating Class Members will release Defendant from all
27 Released Claims, defined as including:
28

1 “all claims and causes of action alleged in the Action and the
2 PAGA Letter, as well as all predicate claims based on the factual
3 or legal theories alleged in the Action and the PAGA Letter, or
4 reasonably could have been alleged based on the facts and legal
5 theories alleged in the Action and the PAGA Letter, including all
6 of the following legal claims: all claims for unpaid wages,
7 including claims for minimum, overtime, and double-time wages,
8 the alleged failure to pay for all time worked, the alleged failure
9 to pay for all hours worked at correct rates, including overtime at
10 the correct rates; all claims for meal period violations, including
11 claims for late, short, interrupted and/or missed meal periods
12 and/or the failure to pay premiums, and the alleged failure to
13 properly record meal periods; all claims for rest break violations,
14 including claims for late, short, interrupted, missed, or otherwise
15 improperly controlled rest breaks and/or the failure to pay
16 premiums; all claims for untimely paid wages; all claims for
17 improper or inaccurate itemized wage statements, including
18 alleged violations of Labor Code Section 226(a)(1)-(9) based on
19 the facts and legal theories contained in the Action and the PAGA
20 Letter, including the allegation that the wage statements lacked
21 the total number of hours worked, and including claims for
injuries suffered therefrom; all claims for the untimely payment of
final wages and associated waiting time penalties under Labor
Code Section 203 based on the allegations in the Action and the
PAGA Letter; any and all claims regarding the alleged failure to
maintain required records in violation of Labor Code §§ 226,
1174 and the applicable IWC Wage Order provisions; all claims
for civil penalties under the Labor Code Private Attorneys
General Act of 2004, Labor Code Section 2699 et seq. (“PAGA”)
premised on the allegations in the Action and the PAGA Letter,
including under Labor Code sections 201, 202, 203, 204, 210,
226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 11197,
1198, and all claims under the Business & Professions Code
(including Section 17200 et seq.) premised on the allegations in
the Action; any other claims or penalties under the wage and
hour laws alleged in the Action and the PAGA Letter under
California and federal law, including the California Labor Code
and the applicable Wage Orders (collectively, the “Released
Claims.”) The period of the Release shall extend to the limits of
the Covered Period. The res judicata effect of the Judgment will
be the same as that of the Release.

22 *Id.* at ¶¶ 1.29, III.45, III.54(b)(i). The Released Claims shall extend from April 6,
23 2016 through the date the Court grants Preliminary Approval, or the date ninety
24 (90) days after the Settlement Agreement is executed, whichever is earliest. *Id.*
25 at ¶¶ I.9, I.29.

26 In exchange for the incentive award, Plaintiff agrees to a termination date
27 of February 27, 2021, and a broader general release of all claims, demands,
28 rights, liabilities, demands for arbitration, and causes of action asserted or that

1 might have been asserted. *Id.* ¶ III.46. She also waives all rights afforded under
2 California Civil Code § 1542. *Id.*

3 **C. Analysis of the Settlement Agreement**

4 **1. Fair and Honest Negotiations**

5 In general, evidence that a settlement agreement is arrived at through
6 genuine arms-length bargaining supports a conclusion that the settlement is
7 fair. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (“We
8 put a good deal of stock in the product of an arms-length, non-collusive,
9 negotiated resolution.”); *Sarabi v. Weltman, Weinberg & Reis Co., L.P.A.*, No.
10 CV 10-1777 AJB (NLSx), 2012 WL 3809123, at *1 (S.D. Cal. Sept. 4, 2012)
11 (holding that a settlement should be granted preliminary approval after the
12 parties engaged in extensive negotiations); *Aarons v. BMW of N. Am., LLC*, No.
13 CV 11-7667 PSG (CWx), 2014 WL 4090564, at *10 (C.D. Cal. Apr. 29, 2014)
14 (declining to apply a presumption but considering the arms-length nature of the
15 negotiations as evidence of reasonableness).

16 Here, the evidence supports the conclusion that the settlement is fair and
17 honest. The Parties have conducted investigation of the facts and law during
18 the prosecution of this litigation. *See Hicks Decl.* ¶ 27. This investigation and
19 informal discovery have included interviews of witnesses, production and review
20 of class-wide data, and numerous communications between the parties to
21 identify and assess the issues. *See id.* The Parties have also investigated the
22 applicable law as applied to the facts discovered regarding Plaintiff’s claims and
23 potential defenses. *See id.*

24 The Parties engaged in vigorous arm’s length negotiations. *See id.* The
25 Parties evaluated theories of potential exposure for the underlying claims as
26 well as Plaintiff’s claims for interest and penalties, and the Parties assessed
27 appropriate discounts based on Defendant’s contentions and defenses. *See id.*
28 Subsequently, the Parties entered into the Settlement Agreement. *See id.*

1 The time and effort spent on arm's length settlement negotiations, as
2 stated in Plaintiff's counsel's declaration, weigh in favor of preliminary approval
3 of the Settlement. There is no indication that the negotiations were dishonest or
4 collusive in any way, and the discovery conducted in this case suggests that the
5 Parties were well informed and had sufficient information to assess the merits
6 of their claims. See *Glass v. UBS Fin. Servs., Inc.*, CV 06-4068 MMC, 2007 WL
7 221862, at *5 (N.D. Cal. Jan. 26, 2007) (reasoning that the parties' having
8 undertaken informal discovery prior to settling supports approving the class
9 action settlement). The Court is therefore satisfied that the Settlement is the
10 product of fair and honest negotiation.

11 **2. Settlement Amount**

12 To evaluate whether a settlement falls within the range of possible
13 approval, "courts primarily consider plaintiffs' expected recovery balanced
14 against the value of the settlement offer." *In re Tableware Antitrust Litig.*, 484 F.
15 Supp. 2d 1078, 1080 (N.D. Cal. 2007).

16 Here, Plaintiff has presented estimates of Defendant's maximum liability.
17 Premised on careful and extensive analysis of the effects of Defendant's
18 policies and practices, and a review of the relevant documents and data,
19 including actual timekeeping data and payroll records and interviews with Class
20 Members, Plaintiff calculated the total maximum amount of damages on each
21 of the claims as follows: Unpaid overtime: \$1,593,720.05; Rest periods:
22 \$450,119.21; Meal periods: \$377,877.85; Waiting time penalties: \$82,244.61;
23 Wage statement violations: \$114,762.50; PAGA penalties: \$1,530,200.00. See
24 Hicks Decl. ¶ 11. Based on these amounts, and including PAGA penalties, the
25 maximum liability is estimated to be approximately \$4,148,924.22, and the
26 Maximum Settlement Amount of \$475,000 is about 11% of that amount. See
27 Hicks Decl. ¶¶ 10-12. Excluding PAGA, the amount is estimated to be
28 \$2,618,724.22, and the settlement amount approximately 18% of that amount.

1 *Id.* Plaintiff then took into consideration the particular risks associated with
2 wage-and-hour class action cases as well as the specific defenses asserted by
3 Defendant, including a class size of just over 30, nearly half of whom provided
4 declarations harmful to certification to the Defendant prior to the mediation. *Id.*
5 at ¶ 13; Mot. 15:14–16:8.

6 Based on Plaintiff's estimates, the settlement amount of approximately 11
7 percent to 18 percent of the total estimated damages is, while low, within the
8 range of reasonableness. Courts have concluded that ranges within 10-20
9 percent of the estimated damages are within the range of possible approval.
10 See *Stovall-Gusman v. W.W. Granger, Inc.*, No. 13–cv–02540–HSG, 2015 WL
11 3776765, at *12 (N.D. Cal. June 17, 2015) (approving a settlement amount in
12 wage and hour action of approximately 10% of what the class might have been
13 awarded had they succeeded at trial, although recognizing the award was on
14 “the low end of the spectrum”); see also *Rigo v. Kason Indus., Inc.*, No. CV 11-
15 0064 MMA (DHBx), 2013 WL 3761400, at *5 (S.D. Cal. July 16, 2013) (“[D]istrict
16 courts have found that settlements for substantially less than the plaintiff's
17 claimed damages were fair and reasonable, especially when taking into account
18 the uncertainties involved with the litigation.”). Plaintiff has extensively detailed
19 the risks associated with various claims, for instance: the risk that the inquiry as
20 to the total amount of overtime worked by the Class Member is potentially highly
21 individualized as to each Class Member; the risk regarding the propriety of class
22 treatment of meal and rest period requirements remains unsettled; the risk
23 regarding the inquiry into the total number of non-compliant meal and rest
24 periods or hours worked by the Class Members is potentially individualized as
25 to each Class Member; the risk of Defendant's potential defenses to the
26 numerosity requirement for certification; the risk that certification would be
27 denied based on declarations obtained by Defendant, and the risk of lengthy
28 appellate litigation. See Hicks Decl. ¶ 28; Mot. 17:4–14:4.

1 Furthermore, the Settlement confers a substantial benefit on Class
2 Members who could face significant risk of no recovery and ongoing litigation
3 expenses if forced to proceed with litigation. See Hicks Decl. ¶ 31. Defendant
4 contests liability as well as the propriety of class certification. See *id.*. Given that
5 “the risk of continued litigation balanced against the certainty and immediacy of
6 recovery from the Settlement” is a relevant factor, *Vasquez v. Coast Valley*
7 *Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D. Cal. 2010) (*citing In re Mego*, 213 F.3d
8 at 458), this reality also favors preliminary approval.

9 In short, given the ongoing risks of litigation, in addition to the relative
10 value of the recovery, the Court concludes that the settlement amount is within
11 the range of approval.

12 **3. PAGA Penalties**

13 The Parties have agreed to a PAGA penalty allocation of \$10,000.
14 Settlement Agreement ¶¶ I.23, III.54(d). Seventy-five percent of that amount,
15 \$7,500, will go to the LWDA and twenty-five percent, \$2,500, will be distributed
16 to the participating Class Members. *Id.* at III.54(d); see also Cal. Lab. Code §
17 2699(i) (providing that 75 percent of civil penalties recovered by aggrieved
18 employees should be distributed to the LWDA).

19 The portion of the PAGA allocation that will be distributed to the LWDA
20 represents a small percentage of the Gross Settlement Amount (2 percent); and
21 the total PAGA payment is a small percentage of the theoretical recovery on the
22 PAGA claim. See Mot. 20:13-16. However, other courts have approved PAGA
23 claims within the range of zero to two percent of the settlement amount. See,
24 e.g., *In re M.L. Stern Overtime Litig.*, No. CV 07-0118 BTM (JMAx), 2009 WL
25 995864, at *1 (S.D. Cal. Apr. 13, 2009) (approving PAGA settlement of 2
26 percent); *Hopson v. Hanesbrands, Inc.*, No. CV 08-0844 EDL, 2008 WL
27 3385452, at *1 (S.D. Cal. Apr. 13, 2009) (approving a PAGA settlement of 0.3
28 percent); see also Mot. 17, fn. 10. Plaintiff also argues that the fair

1 compensation otherwise provided to Class Members through the Settlement
2 vindicates the rights of Class Members as employees and may have a deterrent
3 effect on the defendant employers, an objective of PAGA. See Hicks Decl. ¶56.
4 The Court is mindful that the agreed-upon allocation to the LWDA does not raise
5 concerns that Plaintiff is skirting the “special responsibility to [his] fellow
6 aggrieved workers” or using the PAGA claim “merely as a bargaining chip,
7 wherein the rights of individuals ... may be waived for little additional
8 consideration in order to induce the employer to agree to a settlement.”
9 *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016).
10 Ultimately, the Court finds this settlement of the claims for penalties under
11 PAGA reasonable.

12 **4. Attorneys’ Fees and Costs**

13 When approving attorneys’ fees in common fund cases, courts in the
14 Ninth Circuit have discretion to apply the percentage-of-the-fund method or the
15 lodestar method to determine reasonable attorneys’ fees. See *Powers v.*
16 *Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000). If employing the percentage-of-
17 the-fund method, the “starting point” or “benchmark” award is 25 percent of the
18 total settlement value. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–
19 50 (9th Cir. 2002); *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th
20 Cir. 1993). A court may exceed the benchmark but must explain its reasons for
21 so doing. See *Powers*, 229 F.3d at 1255–57.

22 Here, Class Counsel seeks \$158,333.33 in fees, which amounts to 33.3
23 percent of the Maximum Settlement Amount of \$475,000, and up to \$10,000 in
24 costs. Settlement Agreement ¶ III.54(c)(i); Hicks Decl. ¶ 61. Because the
25 amount Class Counsel requests is greater than the 25 percent “benchmark”
26 established in this Circuit, the Court **ORDERS** Class Counsel to submit a brief
27 justifying the upward departure from the benchmark under the *Vizcaino* factors
28 in its motion. See *Vizcaino*, 290 F.3d at 1048–50 (examining (1) the results

1 achieved; (2) the risk of litigation; (3) the skill required and the quality of the
2 work; (4) the contingent nature of the fee and the financial burden carried by
3 plaintiffs; and (5) awards made in similar cases). Class Counsel is further
4 instructed to provide the requested hourly rate and hours expended in this case
5 so that the Court can calculate the lodestar value and use it to cross-check the
6 reasonableness of the fees and costs award. In its motion, Class Counsel
7 should explain whether a multiplier should be applied and, if so, why the
8 proposed multiplier is appropriate in this case. Finally, Class Counsel must
9 submit a detailed summary of its costs and expenses for the Court's
10 consideration.

11 **5. Service Award**

12 “Incentive awards are fairly typical in class action cases.” *Rodriguez*, 563
13 F.3d at 958. When considering requests for incentive awards, courts consider
14 five principal factors:

15 (1) the risk to the class representative in commencing suit, both
16 financial and otherwise; (2) the notoriety and personal difficulties
17 encountered by the class representative; (3) the amount of time and
18 effort spent by the class representative; (4) the duration of the
litigation; (5) the personal benefit (or lack thereof) enjoyed by the
class representative as a result of the litigation.

19 *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).
20 Further, courts also typically examine the propriety of an incentive award by
21 comparing it to the total amount other class members will receive. *See Staton*,
22 327 F.3d at 975.

23 Here, Plaintiff seeks an incentive award of \$10,000. Settlement
24 Agreement ¶ III.7.a. Plaintiff argues that the amount of the award is reasonable
25 given the risks undertaken by Plaintiff in filing this lawsuit and states that Plaintiff
26 has been actively involved in the litigation and has worked diligently with
27 counsel. Additionally, the Parties agreed that Plaintiff's employment with
28 Defendant will end on February 27, 2021. Settlement Agreement ¶ 111.46. In

1 order to settle this case for the class, Plaintiff had to forego a severance offer
2 provided by Defendant while this action was pending. See Mot. 12:28-13:1
3 Hicks Decl. ¶ 60. A \$10,000 incentive award amounts to 2 percent of the overall
4 settlement and is merely 8% higher than the average individual settlement share
5 of \$9,215.05. See Mot. 20:13–16. This is in contrast to cases where an incentive
6 award is dozens of times more than an average award. *Aguilar v. Wawona*
7 *Frozen Foods*, No. 1:15-cv-00093-DAD-EPG, 2017 WL 2214936, at *8 (E.D.
8 Cal. May 19, 2017) (approving an incentive award of \$7,500 to each class
9 representative where average class recovery was approximately \$500); see
10 also *Davis v. Brown Shoe Co., Inc.*, No. 1:13-cv-01211-LJO-BAM, 2015 WL
11 6697929, at *12 (E.D. Cal. Nov. 3, 2015) (approving \$7,000 incentive award
12 where average class recovery was approximately \$400). Ultimately, the Court
13 finds Plaintiff’s requested \$10,000 incentive award reasonable.

14 **6. Administration Costs**

15 The Settlement Agreement provides that the parties will pay to the
16 proposed third-party administrator, Simpluris, Inc., costs of no more than
17 \$10,000, though Simpluris provided a capped quote of \$3,750 to administer this
18 settlement. Settlement Agreement ¶¶ III.7.d, III.8 Hicks Decl. ¶¶ 15, 19. This
19 request is reasonable considering the estimated class size of approximately 31
20 Class Members. See Hicks Decl. ¶ 19; see also *Ching v. Siemens Indus.*, No.
21 11–cv–04838–MEJ, 2014 WL 2926210, at *2 (N.D. Cal. June 27, 2014)
22 (approving an estimated \$15,000 claims administrator fee for sixty-eight
23 claims); *Ozga v. U.S. Remodelers, Inc.*, No. C 09–05112 JSW, 2010 WL
24 3186971, at *2 (N.D. Cal. Aug. 9, 2010) (granting \$10,000 to the claims
25 administrator for 156 claims).

26 **7. Remaining Funds**

27 The Settlement provides that any settlement checks that are mailed to the
28 Class Members and remain uncashed after 180 days of the date of issuance

1 will be cancelled, and the moneys will be paid to the State Controller's Office
2 Unclaimed property division as unclaimed property. Settlement Agreement ¶
3 III.54(b)(iv). The Court finds this disbursement of unpaid residue reasonable.

4 **D. Notice to Class Members**

5 Named Before the final approval hearing, the court requires adequate
6 notice of the settlement be given to all class members. Federal Rule of Civil
7 Procedure 23 provides:

8 For any class certified under Rule 23(b)(3) ... the court must direct
9 to class members the best notice that is practicable under the
10 circumstances, including individual notice to all members who can
11 be identified through reasonable effort.... The notice must clearly
12 and concisely state in plain, easily understood language: (i) the
13 nature of the action; (ii) the definition of the class certified; (iii) the
14 class claims, issues, or defenses; (iv) that a class member may
15 enter an appearance through an attorney if the member so desires;
16 (v) that the court will exclude from the class any member who
17 requests exclusion; (vi) the time and manner for requesting
18 exclusion; and (vii) the binding effect of a class judgment on
19 members under Rule 23(c)(3).

20 Fed. R. Civ. P. 23(c)(2)(B). "Notice is satisfactory if it 'generally describes the
21 terms of the settlement in sufficient detail to alert those with adverse viewpoints
22 to investigate and to come forward and be heard.' " *Churchill Vill., LLC v. Gen.*
23 *Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (*quoting Mendoza v. Tucson Sch. Dist.*
24 *No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)).

25 Plaintiff has provided a proposed Notice of Class Action Settlement. See
26 Settlement Agreement, Ex. 1 ("Notice"). It sets forth in clear language: (1) the
27 nature of the action and the essential terms of the Settlement; (2) the meaning
28 and nature of the Class; (3) Class Counsel's application for attorney fees and
the proposed service award payments for Plaintiff; (4) the calculation and
distribution of the Net Settlement Amount; (5) how to opt out of the Settlement;
(6) how to dispute the total number of workweeks worked during the claim
period; (7) how to object to the Settlement; (8) information concerning the
release; (9) the Court's procedure for final approval of the Settlement; and (10)

1 how to obtain additional information regarding this case and the Settlement. See
2 *generally id.*

3 Within ten days after the entry of the Preliminary Approval Order,
4 Defendant shall deliver to the Settlement Administrator the following information
5 about each Class Member in an Excel spreadsheet or other electronic
6 database: (1) full name; (2) last known mailing address; (3) personal email
7 address (if available); (4) last known telephone number; (5) Social Security
8 number; and (6) information sufficient to allow the Settlement Administrator to
9 calculate the number of workweeks for all Class Members during the Class
10 Period. Settlement Agreement ¶¶ I.5, III.53(a). The Settlement Administrator will
11 use its best judgment to determine the current mailing address for each Class
12 Member. *Id.* at ¶ III.53(b)(iii). The Class data shall not be disclosed or divulged
13 and shall be held in strictest confidence. *Id.* at ¶ III.53(a).

14 After receipt of the Class data, the Settlement Administrator will mail the
15 Notice to all identified Class Members via first-class regular U.S. Mail, using the
16 mailing address provided by Defendant and the results of its determination of
17 the current mailing address for each Class Member. *Id.* at ¶ III.53(b)(iii). If a
18 Notice is returned because of an incorrect address, the Settlement
19 Administrator will re-mail the Notice to the forwarding address affixed thereto.
20 *Id.* at ¶ III.53(b)(iv). If there is no forwarding address, the Settlement
21 Administrator will promptly conduct a search for a more current address for the
22 Class Member and promptly re-mail the Notice to the Class Member. *Id.* The
23 Settlement Administrator will use standard search techniques such as skip
24 traces to attempt to find the correct address. *Id.* In addition, if any mailed Notices
25 are returned as undeliverable and no forwarding address is provided, the
26 Settlement Administrator will notify Defendant and Defendant will request that
27 the currently employed Class Member provide an updated address to
28 Defendant. *Id.* It will be presumed that if an envelope containing the Class

1 Notice re-mailing has not been returned within forty-five days of the mailing, the
2 Class Member received the Notice. *Id.* at ¶¶ I.32, I.36.

3 Members of the Class who wish to object to the Settlement must do so in
4 writing, signed, dated, and mailed to the Settlement Administrator postmarked
5 no later than the Response Deadline, which is forty-five days from the initial
6 mailing of the Notice (in the case of a re-mailed Notice, fifteen days from the
7 date of the original response deadline). *Id.* at ¶¶ III.53(f)(ii), III.53(b)(iv).
8 Members of the Class who wish to opt-out of the Settlement also have until the
9 Response Deadline to send a written request to do so. *Id.* at ¶ 53(f)(i).

10 Having reviewed the Notice Packet, the Court finds it satisfactory.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the Court **GRANTS** Plaintiff's motion for
13 preliminary approval of class action settlement. The Court **PRELIMINARILY**
14 **APPROVES** the Settlement, **APPOINTS** Simpluris, Inc. as the Settlement
15 Administrator, **APPOINTS** Plaintiff as Class Representative and Hoyer & Hicks
16 as Class Counsel, and **APPROVES** the proposed Class Notice. The final
17 approval hearing is set for **[DATE AND TIME]**.

18 At least thirty days before the final approval hearing and in addition to the
19 motion for final approval of class action settlement, the Court **ORDERS** Plaintiff
20 to file:

- 21 • A memorandum justifying Class Counsel's award of attorneys' fees
22 and costs that includes declarations supporting the reasonableness of
23 each attorney's requested hourly rate, itemized billing statements
24 showing hours worked, hourly rates, expenses incurred thus far, and
25 expenses to be incurred in the future. The memorandum should
26 explain in detail why an upward departure from the benchmark
27 percentage rate is warranted. The memo should also explain whether
28 a multiplier should be applied to the lodestar value for the attorneys'

1 fees and, if so, why the proposed multiplier is appropriate in this case;
2 and

- 3 • A memorandum justifying the disparity between Plaintiff's service
4 award and the average settlement amount for each Class Member, and
5 in proportion to the Maximum Settlement Amount.

6 **IT IS SO ORDERED.**

7
8 Date: _____

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10 UNITED STATES DIST. JUDGE
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