FILED
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CENTRAL DISTRICT OF CALIFORNIA
BY: CW DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KRISTINA MCCONVILLE, individual on behalf of herself and on behalf of all other persons similarly situated,

Plaintiff,

v.

RENZENBERGER, INC.,

Defendant.

Case No. CV 17-2972 FMO (JCx)

ORDER RE: MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Having reviewed and considered all the briefing filed with respect to plaintiff's Motion for Preliminary Approval of Class Action Settlement (Dkt. 74, "Motion") and the oral argument presented at the hearing on August 29, 2019, the court concludes as follows.

BACKGROUND

On April 14, 2016, Kristina McConville ("McConville" or "plaintiff") filed a class action complaint in the Sacramento County Superior Court against Renzenberger, Inc. ("Renzenberger" or "defendant"). (See Dkt. 1–3, "State Court Complaint"). On May 17, 2016, defendant removed the case to the Eastern District of California. (See Dkt, 1, Notice of Removal). The parties subsequently stipulated to transfer the case to this district, where a related case, Roderick Wright, et al. v. Renzenberger, Inc., Case No. CV 13-6642 ("Wright"), was pending. (See Dkt. 2, Renzenberger, Inc.'s Notice of Related Cases). The First Amended Complaint ("FAC") asserts

claims for: (1) failure to pay all straight time wages; (2) failure to pay overtime, Cal. Lab. Code §§ 204, 510, 558, 1194 & 1198; (3) failure to provide meal periods, Cal. Lab. Code §§ 226.7 & 512, IWC Wage Order Nos. 9-1998, 9-2000, 9-2001(11), Cal. Code Regs., Tit. 8 § 11090; (4) failure to authorize and permit rest periods, Cal. Lab. Code §§ 226.7, IWC Wage Order Nos. 9-1998, 9-2000, 9-2001(12), Cal Code Regs. Tit. 8 § 11090; (5) failure to comply with itemized employee wage statement provisions, Cal. Lab. Code §§ 226, 1174, 1175; (6) failure to pay all wages due at the termination of employment, Cal. Lab. §§ 201-03; (7) penalties pursuant to the Private Attorneys General Act of 2004 ("PAGA"); and (8) unfair competition, Cal. Bus. & Prof. Code §§ 17200, et seq. (See Dkt. 71, FAC). In September 2019, plaintiff filed the operative Second Amended Complaint ("SAC"), which added a claim under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq. (See Dkt. 81, SAC at ¶¶ 162-70).

After engaging in discovery and participating in a mediation, the parties reached a settlement in September 2018. (See Dkt. 74-1, Declaration of David Mara ("Mara Decl.") at ¶¶ 10-11; Dkt. 58, Notice of Settlement). Plaintiff seeks an order: (1) certifying the proposed class for settlement purposes; (2) preliminarily approving the Settlement Agreement; (3) approving the notice documents and directing dissemination of the class notice; (4) appointing CPT Group, Inc., as the Settlement Administrator; (5) appointing the Turley & Mara Law Firm as class counsel; (6) appointing plaintiff as class representative; and (7) setting a final approval hearing. (See Dkt. 74, Motion at 1; Dkt. 74-6, [Proposed] Preliminary Approval Order at 1-6).

The parties have defined the settlement class as "all persons who are or have been employed by Renzenberger as Drivers in the State of California at any time from April 14, 2012, through the date the Court grants Preliminary Approval ('Class Period')." (Dkt. 82-3, Settlement Agreement at § B). Renzenberger will pay a non-reversionary "Gross Settlement Fund" of $2,450,000, which includes payments to all class members, attorney's fees and costs, a service award for the class representative, expenses for the administration of the settlement, the PAGA payment to the California Labor & Workforce Development Agency ("the LWDA"), employer-owed payroll taxes on the wage portion of the settlement, and pre- and post-judgment interest. (See id. at § H.7).

The "Net Settlement Fund" is the amount remaining after employer-owed taxes and payments to class counsel, the class representative, the settlement administrator, and the LWDA. (See Dkt. 82-3, Settlement Agreement at § H.8). The Net Settlement Fund will be divided into two Payout Funds: (1) the Class Payout Fund; and (2) the FLSA Payout Fund. (Id.). All class members will be paid individual settlement shares out of the Class Payout Fund, but only those members who return a signed FLSA Opt-In Form will receive a settlement payment from the FLSA Payout Fund. (Id.). Under the Settlement Agreement, 90 percent of the Net Settlement Fund will be allocated to the Class Payout Fund, which will be distributed by "dividing the Class Payout Fund by the total of all Class Members' Workweek Figures to arrive at a Per-Workweek Amount[,]" with Workweek Figures calculated by "adding all the calendar days within the inclusive dates of employment [during the Class Period] and dividing that number by seven[,] [with] [a]ny partial workweek . . . rounded up to the nearest full workweek." (Id. at § H.10(b)(ii)). The other ten percent of the Net Settlement Fund will be allocated to the FLSA Payout Fund, which will be distributed according to the same formula used to distribute the Class Payout Fund. (See id. at § H.10(b)(iii)). Any portion of the FLSA Payout Fund that is unclaimed shall be distributed on a pro-rata basis to those class members who returned timely, valid FLSA Opt-In Forms. (See id.).[1] Any checks that remain uncashed after 180 days will be sent to the California Unclaimed Wages Fund. The checks will be deposited in the class member's name so that the class member may claim the funds at a future date. (See id. at § H.18(b)).

Pursuant to the settlement, class counsel will file a motion for attorney's fees of no more than $815,850 of the Gross Settlement Amount and costs and expenses not to exceed $40,000. (See Dkt. 82-3, Settlement Agreement at §§ H.12(a)-(b)). In addition, the motion will seek up to $10,000 in an incentive award for the named plaintiff. (See id. at § H.12(c)).

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[1] Section H.10(b) of the Settlement Agreement contains two subsection (iii)'s. (See Dkt. 82-3, Settlement Agreement at § H.10(b)). The citation in the sentence containing this footnote refers to the latter, § H.10.b(iii), which can be found on page 18 of the Settlement Agreement.

LEGAL STANDARD

"[I]n the context of a case in which the parties reach a settlement agreement prior to 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).

I. CLASS CERTIFICATION.

At the preliminary approval stage, the court "may make either a preliminary determination that the proposed class action satisfies the criteria set out in Rule 23 . . . or render a final decision as to the appropriateness of class certification."[2] Smith v. Wm. Wrigley Jr. Co., 2010 WL 2401149, *3 (S.D. Fla. 2010) (internal citation and footnote omitted); see also Sandoval v. Roadlink USA Pac., Inc., 2011 WL 5443777, *2 (C.D. Cal. 2011) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 117 S.Ct. 2231, 2248 (1997)) ("Parties seeking class certification for settlement purposes must satisfy the requirements of Federal Rule of Civil Procedure 23[.]"). "A court considering such a request should give the Rule 23 certification factors 'undiluted, even heightened, attention in the settlement context.'" Sandoval, 2011 WL 5443777, at *2 (quoting Amchem, 521 U.S. at 620, 117 S.Ct. at 2248). "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, 521 U.S. at 620, 117 S.Ct. at 2248.

A party seeking class certification must first demonstrate that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

"Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345, 131 S.Ct. 2541, 2548 (2011).

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[2] All "Rule" references are to the Federal Rules of Civil Procedure.

Rule 23(b) is satisfied if:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (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)(1)-(3).

The party seeking class certification bears the burden of demonstrating that the proposed class meets the requirements of Rule 23. See Dukes, 564 U.S. at 350, 131 S.Ct. at 2551 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is,

he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.") (emphasis in original). However, courts need not consider the Rule 23(b)(3) issues regarding manageability of the class action, as settlement obviates the need for a manageable trial. See In re Hyundai and Kia Fuel Econ. Litig., 926 F.3d 539, 556-57 (9th Cir. 2019) ("The criteria for class certification are applied differently in litigation classes and settlement classes. In deciding whether to certify a litigation class, a district court must be concerned with manageability at trial. However, such manageability is not a concern in certifying a settlement class where, by definition, there will be no trial.").

II. FAIRNESS OF CLASS ACTION SETTLEMENT.

Rule 23 provides that "[t]he claims, issues, or defenses of a certified class . . . may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). "The primary concern of [Rule 23(e)] is the protection of th[e] class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." Officers for Justice v. Civil Serv. Comm'n of the City & Cty. of S.F., 688 F.2d 615, 624 (9th Cir. 1982). Accordingly, a district court must determine whether a proposed class action settlement is "fundamentally fair, adequate, and reasonable." Staton, 327 F.3d at 959 (internal quotation marks omitted); see Fed. R. Civ. Proc. 23(e). Whether to approve a class action settlement is "committed to the sound discretion of the trial judge." Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992) (internal quotation marks and citation omitted).

"If the [settlement] proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). "[S]ettlement approval that takes place prior to formal class certification requires a higher standard of fairness [given t]he dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court designated class representative[.]" Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). As the Ninth Circuit has observed, "[p]rior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of

interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011).

Approval of a class action settlement requires a two-step process – a preliminary approval followed by a later final approval. See Tijero v. Aaron Bros., Inc., 2013 WL 60464, *6 (N.D. Cal. 2013) ("The decision of whether to approve a proposed class action settlement entails a two-step process."); West v. Circle K Stores, Inc., 2006 WL 1652598, *2 (E.D. Cal. 2006) ("[A]pproval of a class action settlement takes place in two stages."). At the preliminary approval stage, the court "evaluate[s] the terms of the settlement to determine whether they are within a range of possible judicial approval." Wright v. Linkus Enters., Inc., 259 F.R.D. 468, 472 (E.D. Cal. 2009). Although "[c]loser scrutiny is reserved for the final approval hearing[,]" Harris v. Vector Mktg. Corp., 2011 WL 1627973, *7 (N.D. Cal. 2011), "the showing at the preliminary approval stage – given the amount of time, money, and resources involved in, for example, sending out new class notices – should be good enough for final approval." Spann v. J.C. Penney Corp., 314 F.R.D. 312, 319 (C.D. Cal. 2016). "At this stage, the court may grant preliminary approval of a settlement and direct notice to the class if the settlement: (1) 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." Id. (internal quotation marks omitted); see Harris, 2011 WL 1627973, *7 (same); Cordy v. USS-Posco Indus., 2013 WL 4028627, *3 (N.D. Cal. 2013) ("Preliminary approval of a settlement and notice to the proposed class 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.") (internal quotation marks omitted).

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DISCUSSION

I. CLASS CERTIFICATION.

A. Rule 23(a) Requirements.

1. **Numerosity**.

The first prerequisite of class certification requires that the class be "so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). Although impracticability does not hinge only on the number of members in the putative class, joinder is usually impracticable if a class is "large in numbers." See Jordan v. Cty. of Los Angeles, 669 F.2d 1311, 1319 (9th Cir.), vacated on other grounds, 459 U.S. 810 (1982) (class sizes of 39, 64, and 71 are sufficient to satisfy the numerosity requirement). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21." Slaven v. BP Am., Inc., 190 F.R.D. 649, 654 (C.D. Cal. 2000); see Tait v. BSH Home Appliances Corp., 289 F.R.D. 466, 473 (C.D. Cal. 2012) ("A proposed class of at least forty members presumptively satisfies the numerosity requirement.").

Here, the settlement class includes an estimated 3,325 members, (see Dkt. 62, Motion at 15; Dkt. 62-1, Mara Decl. at ¶ 12), which easily exceeds the minimum threshold for numerosity.

2. **Commonality**.

The commonality requirement is satisfied if "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). Commonality requires plaintiffs to demonstrate that their claims "depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 564 U.S. at 350, 131 S.Ct. at 2551; see Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1172 (9th Cir. 2010) (The commonality requirement demands that "class members' situations share a common issue of law or fact, and are sufficiently parallel to insure a vigorous and full presentation of all claims for relief.") (internal quotation marks omitted). "The plaintiff must demonstrate the capacity of classwide proceedings to generate common answers to common questions of law or fact that are apt to drive the resolution of the litigation." Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012) (internal quotation marks omitted). "This does not, however, mean that every

question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single significant question of law or fact." Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952, 957 (9th Cir. 2013) (emphasis and internal quotation marks omitted); see Mazza, 666 F.3d at 589 (characterizing commonality as a "limited burden[,]" stating that it "only requires a single significant question of law or fact"). Proof of commonality under Rule 23(a) is "less rigorous" than the related preponderance standard under Rule 23(b)(3). See Mazza, 666 F.3d at 589; Hanlon, 150 F.3d at 1019. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon, 150 F.3d at 1019.

This case involves common class-wide issues that are apt to drive the resolution of plaintiff's claims. There are significant common questions as to whether Renzenberger's meal- and rest- period policies were legally valid; whether Renzenberger failed to pay all straight and overtime wages owed to class members; and whether Renzenberger failed to provide accurate, itemized wage statements. (See Dkt. 74, Motion at 15; Dkt. 74-1, Mara Decl. at ¶ 16); see, e.g., Clesceri v. Beach City Investigations & Prot. Servs., Inc., 2011 WL 320998, *5 (C.D. Cal. 2011) (finding commonality requirement met for preliminary approval because "the settlement class members did not receive proper rest breaks; [] the settlement class members did not receive proper meal breaks; [] the settlement class members did not receive adequate wage statements in compliance [with California law]").

3. **Typicality**.

"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." Ellis v. Costco Wholesale Corp., 657 F.3d 970, 984 (9th Cir. 2011) (internal quotation marks and citation omitted). To demonstrate typicality, plaintiff's claims must be "reasonably co-extensive with those of absent class members[,]" although "they need not be substantially identical." Hanlon, 150 F.3d at 1020; see Ellis, 657 F.3d at 984 ("Plaintiffs must show that the named parties' claims are typical of the class."). "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." Ellis, 657 F.3d at 984 (internal quotation marks and citation omitted).

Here, the claims of the named plaintiff are typical of the claims of the class. Like the putative class members, plaintiff worked for Renzenberger as a driver in California during the Class Period, and her claims arise from the same factual basis and are based on the same legal theories, i.e., that defendant violated her rights under California law and the FLSA by failing to pay her appropriately and provide legally required meal and rest breaks. (See Dkt. 74-5, Declaration of Kristina McConville ("McConville Decl.") at ¶¶ 3 & 13). Finally, the court is not aware of any facts that would subject the class representative "to unique defenses which threaten to become the focus of the litigation." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks omitted).

4. **Adequacy of Representation.**

"The named Plaintiffs must fairly and adequately protect the interests of the class." Ellis, 657 F.3d at 985 (citing Fed. R. Civ. P. 23(a)(4)). "To determine whether [the] 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?" Id. (internal quotation marks omitted). "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." Id.

The proposed class representative does not appear to have any conflicts of interest with the absent class members. Here, the class representative has no individual claims separate from the class claims. (See, generally, Dkt. 81, SAC); see Barbosa v. Cargill Meat Solutions Corp, 297 F.R.D. 431, 442 (E.D. Cal. 2013) ("[T]there is no apparent conflict of interest between the named Plaintiff['s] claims and those of the other Class Members' – particularly because the named Plaintiff[] ha[s] no separate and individual claims apart from the Class."). As plaintiff states, her "interests are the same as all members of the proposed [c]lass." (See Dkt. 74-5, McConville Decl. at ¶ 13). Plaintiff brought this action as a class action, as opposed to an individual action, because

she "wanted to help [herself] and the other drivers get the money [they] were owed for the hard work [they] did for Renzenberger that [she] thought [they] were not compensated for." (Id. at ¶ 6). In short, "[t]he adequacy-of-representation requirement is met here because Plaintiff[] ha[s] the same interests as the absent Class Members[.]" Barbosa, 297 F.R.D. at 442.

Finally, as noted earlier, adequacy "also factors in competency and conflicts of class counsel." Amchem, 521 U.S. at 626 n. 20, 117 S.Ct. at 2251. Here, the parties request, and the Settlement Agreement provides, that the court appoint the Turley & Mara Law Firm as class counsel. (See Dkt. 74, Motion at 18-19; Dkt. 82-3, Settlement Agreement at § E (describing plaintiff's counsel as "Class Counsel")). Mara states that he and his firm have "prosecuted numerous cases on behalf of employees for California Labor Code violations and thus are experienced and qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the defenses." (Dkt. 74-1, Mara Decl. at ¶ 14). He has been class counsel in numerous other wage and hour class actions. (See id. at ¶¶ 2-3). Similarly, Jamie Serb and Tony Roberts have "been substantially involved in all phases of [] litigation" in a number of wage and hour class actions. (See id. at ¶¶ 4-5). Based on counsel's representations and a review of the firm resume, and having observed their diligence in litigating this case, the court finds that plaintiff's counsel are competent, and there are no issues as to the adequacy of representation. See Barbosa, 297 F.R.D. at 443 ("There is no challenge to the competency of the Class Counsel, and the Court finds that Plaintiffs are represented by experienced and competent counsel who have litigated numerous class action cases.").

B. Rule 23(b) Requirements.

Certification under Rule 23(b)(3) is proper "whenever the actual interests of the parties can be served best by settling their differences in a single action." Hanlon, 150 F.3d at 1022 (internal quotation marks omitted). The rule requires two different inquiries, specifically a determination as to whether: (1) "questions of law or fact common to class members predominate over any questions affecting only individual members[;]" and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); see Spann, 314 F.R.D. at 321-22.

1. **Predominance.**

"The Rule 23(b)(3) predominance inquiry tests whether [the] proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem, 521 U.S. at 623, 117 S.Ct. at 2249. "Rule 23(b)(3) focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." Hanlon, 150 F.3d at 1022 (internal quotation marks and citations omitted); see In re Wells Fargo Home Mortg. Overtime Pay Litig., 571 F.3d 953, 959 (9th Cir. 2009) ("[T]he main concern in the predominance inquiry . . . [is] the balance between individual and common issues."). Additionally, the class damages must be sufficiently traceable to plaintiff's liability case. See Comcast Corp. v. Behrend, 569 U.S. 27, 35, 133 S.Ct. 1426, 1433 (2013).

Here, the court is persuaded that "[a] common nucleus of facts and potential legal remedies dominates this litigation." Hanlon, 150 F.3d at 1022. Predominant questions include whether Renzenberger's meal and rest period policies were valid; whether Renzenberger failed to pay straight and overtime wages; and whether Renzenberger failed to provide accurate, itemized wage statements. (See Dkt. 74, Motion at 17; Dkt. 74-1, Mara Decl. at ¶ 16). The determination of those questions would establish defendant's liability on a class-wide basis. In other words, "despite the existence of minor factual differences between the potential class members," Clesceri, 2011 WL 320998, *7 (internal quotation marks omitted), the answers to these questions would drive the resolution of the litigation, "as the common issues predominate over varying factual predicates[.]" Id. (internal quotation marks omitted); see Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036, 1045 (2016) ("When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.") (internal quotation marks omitted); see also Senne v. Kansas City Royals Baseball Corp., 934 F.3d 918, 938 (9th Cir. 2019) ("[P]redominance in employment cases is rarely defeated on the grounds of differences among

employees so long as liability arises from a common practice or policy of an employer.") (internal quotation marks omitted). Finally, the relief sought applies to all class members and is traceable to plaintiff's liability case. See Comcast, 569 U.S. at 35, 133 S.Ct. at 1433. In short, common questions predominate over all others in this litigation.

2. **Superiority.**

"The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case" and "necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." Hanlon, 150 F.3d at 1023. Rule 23(b)(3) provides a list of four non-exhaustive factors relevant to superiority. See Fed. R. Civ. P. 23(b)(3)(A)-(D).

The first factor considers "the class members' interests in individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(A). "This factor weighs against class certification where each class member has suffered sizeable damages or has an emotional stake in the litigation." Barbosa, 297 F.R.D. at 444. Here, plaintiff does not assert claims for emotional distress, nor is there any indication that the amount of damages any individual class member could recover is significant or substantially greater than the potential recovery of any other class member. (See, generally, Dkt. 81, SAC). The alternative method of resolution – pursuing individual claims for a relatively modest amount of damages – would likely never be brought, as "litigation costs would dwarf potential recovery." Hanlon, 150 F.3d at 1023; see Leyva v. Medline Indus., Inc., 716 F.3d 510, 515 (9th Cir. 2013) ("In light of the small size of the putative class members' potential individual monetary recovery, class certification may be the only feasible means for them to adjudicate their claims. Thus, class certification is also the superior method of adjudication."); Bruno v. Quten Research Inst., LLC, 280 F.R.D. 524, 537 (C.D. Cal. 2011) ("Given the small size of each class member's claim, class treatment is not merely the superior, but the only manner in which to ensure fair and efficient adjudication of the present action."). In short, "there is no evidence that Class members have any interest in controlling prosecution of their claims separately nor would they likely have the resources to do so." Munoz v. PHH Corp., 2013 WL 2146925, *26 (E.D. Cal. 2013).

The second factor to consider is "the extent and nature of any litigation concerning the controversy already begun by or against class members[.]" Fed. R. Civ. P. 23(b)(3)(B). While any class member who wishes to control his or her own litigation may opt out of the class, see Fed. R. Civ. P. 23(c)(2)(B)(v), "other pending litigation is evidence that individuals have an interest in controlling their own litigation." 2 Newberg on Class Actions, § 4:70 at p. 277 (5th ed. 2012) (emphasis omitted). Here, other than the related class action pending before the court, Wright v. Renzenberger, Case No. CV 13-6642, which has settled and received preliminary approval, the parties have not directed the court to, and the court is not aware of, any related pending litigation (See, generally, Dkt. 74, Motion).

The third factor is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," and the fourth factor is "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(C)-(D). As noted above, "[i]n the context of settlement . . . the third and fourth factors are rendered moot and are irrelevant." Barbosa, 297 F.R.D. at 444; see Amchem, 521 U.S. at 620, 117 S.Ct. at 2248 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial.") (citation omitted).

The only factors in play here weigh in favor of class treatment. Further, the filing of separate suits by thousands of other class members "would create an unnecessary burden on judicial resources." Barbosa, 297 F.R.D. at 445. Under the circumstances, the court finds that the superiority requirement is satisfied.

II. FAIRNESS, REASONABLENESS, AND ADEQUACY OF THE PROPOSED SETTLEMENT.

A. The Settlement is the Product of Arm's-Length Negotiations.

"This circuit has long deferred to the private consensual decision of the parties." Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 965 (9th Cir. 2009). The Ninth Circuit has "emphasized" that "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating

parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Id. (internal quotation marks omitted). When the settlement is "the product of an arms-length, non-collusive, negotiated resolution," id., courts afford the parties the presumption that the settlement is fair and reasonable. See Spann, 314 F.R.D. at 324 ("A presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery.") (internal quotation marks and citation omitted); In re Netflix Privacy Litig., 2013 WL 1120801, *4 (N.D. Cal. 2013) ("Courts have afforded a presumption of fairness and reasonableness of a settlement agreement where that agreement was the product of non-collusive arms' length negotiations conducted by capable and experienced counsel.").

Here, after the parties engaged in discovery, which included written discovery that resulted in hundreds of thousands of pages of documents, plaintiff's deposition, Renzenberger's 30(b)(6) deposition, and the deposition of plaintiff's expert, (see Dkt. 74, Motion at 22; Dkt. 74-1, Mara Decl. at ¶ 10), the parties engaged in arms-length negotiations before a private mediator. (See Dkt. 74-1, Mara Decl. at ¶ 11). Plaintiff's counsel retained an expert who analyzed Renzenberger's financial documents, and based upon the expert's analysis and counsel's knowledge of the case, plaintiff's counsel determined that defendant would not have the financial ability to pay the damages if the class subsequently obtained a favorable judgment. (See id. at ¶¶ 11 & 22).

Based on the evidence and record before the court, the court is persuaded that the parties thoroughly investigated and considered their own and the opposing parties' positions. The parties had a sound basis for measuring the terms of the settlement against the risks of continued litigation, and there is no evidence that the settlement is "the product of fraud or overreaching by, or collusion between, the negotiating parties[.]" Rodriguez, 563 F.3d at 965 (quoting Officers for Justice, 688 F.2d at 625).

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B. The Amount Offered in Settlement Falls Within a Range of Possible Judicial Approval and is a Fair and Reasonable Outcome for Class Members.

1. **Recovery for Class Members.**

As described above, the class members will share in a Gross Settlement Amount of $2,450,000. (See Dkt. 82-3, Settlement Agreement at § H.7). Although plaintiff calculated Renzenberger's maximum potential liability to be significant, (see Dkt. 74-1, Mara Decl. at ¶¶ 23-25), plaintiff also considered Renzenberger's financial ability to pay significant damages, particularly given that Renzenberger had been found liable for wage and hour violations in the Wright case, and that any payment to the classes in that case "could result in Renzenberger's insolvency and inability to pay any judgment achieved in this matter." (Id. at ¶¶ 26-27).

Under the circumstances, the court finds the settlement is fair, reasonable, and adequate, particularly when viewed in light of the litigation risks in this case. For example, as plaintiff recognizes, in addition to the possibility of defendant's financial insolvency, she had to consider "the possibility that the Court would not grant certification of the Class, the motion for which was pending in the Court prior to reaching this Settlement[;]" "the possibility that the Court would not grant summary judgment in her favor, or would grant summary judgment in Renzenberger's favor, as cross-motions for summary judgment were also pending before the Court prior to reaching this Settlement." (Dkt. 74-1, Mara Decl. at ¶¶ 26-27). Even assuming these challenges were overcome and class certification was granted and survived a Rule 26(f) appeal, defeating summary judgment, winning the case at trial, and then sustaining the final judgment on appeal would have been very difficult. In short, given the significant risks and delay of continued litigation in this case, the court is persuaded that the benefits to the class fall within the range of reasonableness. See, e.g., In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000) (ruling that "the Settlement amount of almost $2 million was roughly one-sixth of the potential recovery, which, given the difficulties in proving the case, [was] fair and adequate"); In re Uber, 2017 WL 2806698, *7 (N.D. Cal. 2017) (granting preliminary approval of settlement that was worth 7.5% or less of the expected value); see also Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1242 (9th Cir. 1998) ("The fact that a proposed settlement may only amount to a fraction of the

potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.") (internal quotation marks omitted).

2. **Release of Claims.**

The court also considers whether the settlement contains an overly broad release of liability. See 4 Newberg on Class Actions § 13:15 at p. 326-27 (5th ed. 2014) ("Beyond the value of the settlement, courts have rejected preliminary approval when the proposed settlement contains obvious substantive defects such as . . . overly broad releases of liability."); see, e.g., Fraser v. Asus Computer Int'l, 2012 WL 6680142, *3 (N.D. Cal. 2012) (denying preliminary approval of proposed settlement that provided defendant a "nationwide blanket release" in exchange for payment "only on a claims-made basis," without the establishment of a settlement fund or any other benefit to the class).

Here, class members who do not exclude themselves from the settlement will release defendant from "all claims . . . that were or could have been pled based on the factual allegations in the operative complaint[.]" (Dkt. 82-3, Settlement Agreement at § H.3). Class members who submit the FLSA Opt-In Form will also release federal law claims, including claims under the FLSA, "that were or could have been pled based on the factual allegations in the operative complaint[.]" (Id. at § H.4). The release signed by the class representative, as partial consideration for the service payment, includes an additional general release of all claims, including a waiver of her rights under Cal. Civ. Code § 1542. (See id. at § H.5).

With the understanding that class members are not giving up claims unrelated to those asserted in this lawsuit, and that the § 1542 waiver applies only to the class representative, the court finds that the release adequately balances fairness to absent class members and recovery for plaintiff with defendant's business interest in ending this litigation. See, e.g., Fraser, 2012 WL 6680142, at *4 (recognizing defendant's "legitimate business interest in 'buying peace' and moving on to its next challenge" as well as the need to prioritize "[f]airness to absent class member[s]").

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C. The Settlement Agreement Does Not Improperly Grant Preferential Treatment to the Class Representative.

"Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit." Radcliffe v. Experian Info. Sols. Inc., 715 F.3d 1157, 1163 (9th Cir. 2013). The Ninth Circuit has instructed "district courts to scrutinize carefully the awards so that they do not undermine the adequacy of the class representatives." Id. The court must examine whether there is a "significant disparity between the incentive awards and the payments to the rest of the class members" such that it creates a conflict of interest. See id. at 1165. "In deciding whether [an incentive] award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).

The Settlement Agreement provides that plaintiff may apply to the court for an incentive award of not more than $10,000. (See Dkt. 82-3, Settlement Agreement at § H.12(c)). Here, the class representative participated in the case by, among other things, sitting for her deposition, "respond[ing] to several sets of discovery sent by Renzenberger . . . [,] provid[ing] supplemental responses to [her] discovery and consult[ing] with [her] attorneys about this discovery frequently." (Dkt. 74-5, McConville Decl. at ¶¶ 8-9). Additionally, the class representative was required to sign a broader release than the one to which the class members are subject. (See Dkt. 82-3, Settlement Agreement at § H.5). Finally, the class representative did not condition her approval of the settlement on the incentive payment. (See Dkt. 74-5, McConville Decl. at ¶ 17). Nevertheless, although the class representative appears to have been diligent and taken on substantial responsibility in litigating the case, the court believes a $10,000 service payment is excessive, and tentatively finds that an incentive payment of no more than $5,000 is appropriate. See Dyer v. Wells Fargo Bank, N.A., 303 F.R.D. 326, 335 (N.D. Cal. 2014) (finding an incentive award of $5,000 presumptively reasonable).

D. Class Notice and Notification Procedures.

Upon settlement of a certified class, "[t]he court must direct notice in a reasonable manner

to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Federal Rule of Civil Procedure 23(c)(2) requires the "best notice that is practicable under the circumstances, including individual notice" of particular information. See Fed. R. Civ. P. 23(c)(2)(B) (enumerating notice requirements for classes certified under Rule 23(b)(3)).

A class action settlement "[n]otice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." In re Hyundai, 926 F.3d at 567 (internal quotation marks omitted). "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 113 (2d Cir. 2005); Low v. Trump University, LLC, 881 F.3d 1111, 1117 (9th Cir. 2018) ("The yardstick against which we measure the sufficiency of notices in class action proceedings is one of reasonableness.") (internal quotation marks omitted). Settlement notices "are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing[.]" Gooch v. Life Inv'rs Ins. Co. of Am., 672 F.3d 402, 423 (6th Cir. 2012) (internal quotation marks omitted); see Wershba v. Apple Comput., Inc., 91 Cal.App.4th 224, 252 (2001), disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc., 4 Cal.5th 260, 269 (2018) ("As a general rule, class notice must strike a balance between thoroughness and the need to avoid unduly complicating the content of the notice and confusing class members."). The notice should provide sufficient information to allow class members to decide whether they should accept the benefits of the settlement, opt out and pursue their own remedies, or object to its terms. See In re Integra Realty Res., Inc., 262 F.3d 1089, 1111 (10th Cir. 2001) ("The standard for the settlement notice under Rule 23(e) is that it must 'fairly apprise' the class members of the terms of the proposed settlement and of their options.").

Here, the parties request that CPT be appointed as Settlement Administrator. (Dkt. 82-3, Settlement Agreement at § H.17(e)). Class members will receive notice by first class mail, (see id. at §§ H.17(d), H.17(i)), which will consist of the Notice of Class Action Settlement ("Notice"),

(see id., Exh. 1 ("Notice")), and a FLSA Opt-In Form, (id., Exh. 2 ("Opt-In Form") (collectively, "Notice Packet"). (Dkt. id. at H.17(e)).

The Notice describes the nature of the action, and the claims for relief. (See Dkt. 82-3, Settlement Agreement, Exh. 1, Notice at 2-3); Fed. R. Civ. P. 23(c)(2)(B)(i) & (iii). It provides the definition of the class, (see Dkt. 82-3, Settlement Agreement, Exh. 1, Notice at 1-2); see also Fed. R. Civ. P. 23(c)(2)(B)(ii), and explains the terms of the settlement, including the settlement amount, the distribution of that amount, and the release of claims. (See Dkt. 82-3, Settlement Agreement, Exh. 1, Notice at 6-9). It includes an explanation that lays out the class members' options under the settlement: they may remain in the class and/or opt-in to the FLSA collective action, object to the settlement but still remain in the class, or exclude themselves from the settlement and pursue their claims separately against defendant. (Id. at 4-5). The Notice also informs collective action class members that in order to receive a payment for their FLSA claims, they must complete and submit the enclosed Opt-In Form. (See id. at 3-4). Finally, the Notice provides information about the Final Fairness Hearing. (See id. at 2). If class members would like more detailed information regarding the settlement, the Notice directs them to a settlement website, which contains links to important documents, including the Notice, the Settlement Agreement, and any motion for attorney's fees. (See id. at 10).

Based on the foregoing, the court finds there is no alternative method of distribution that would be more practicable here, or any more reasonably likely to notify the class members. Under the circumstances, the court finds that the procedure for providing notice and the content of the class notice constitute the best practicable notice to class members and complies with the requirements of due process.

E. Summary.

In short, the court's preliminary evaluation of the Settlement Agreement does not disclose grounds to doubt its fairness "such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, . . . or excessive compensation for attorneys." Manual for Complex Litigation § 21.632 (4th ed. 2004); see also Spann, 314 F.R.D. at 323.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Plaintiff's Motion for Preliminary Approval of Class Action Settlement **(Document No. 74)** is **granted** upon the other terms and conditions set forth in this Order.

2. The court preliminarily certifies the class, as defined in § B of the Settlement Agreement, (Dkt. 82-3 ("[A]ll persons who are or have been employed by Renzenberger as a Drivers in the State of California at any time from April 14, 2012, through the date the Court grants Preliminary Approval[.]")), for the purposes of settlement.

3. The court preliminarily appoints Kristina McConville as class representative for settlement purposes.

4. The court preliminarily appoints the Turley & Mara Law Firm as Class Counsel for settlement purposes.

5. The court preliminarily finds that the terms of the Settlement are fair, reasonable, and adequate, and comply with Rule 23(e) of the Federal Rules of Civil Procedure.

6. The court approves the form, substance, and requirements of the Class Notice, (Dkt. 82-3, Exhibit 1), and FLSA Opt-In Form. (Id., Exh. 2). The proposed manner and method of giving class members notice of the settlement constitutes the best notice practicable under the circumstances and complies with the requirements of due process.

7. The court appoints CPT Group, Inc., as the Settlement Administrator. CPT shall complete dissemination of class notice, in accordance with the Settlement Agreement, no later than **January 17, 2020**.

8. Plaintiff shall file a motion for an award of class representative incentive payment and attorney's fees and costs no later than **February 14, 2020,** and notice it for hearing for the date of the final approval hearing set forth below.

9. Any class member who wishes to: (a) object to the settlement, including the requested attorney's fees, costs and incentive award; (b) exclude him or herself from the settlement; and/or (c) opt in to the FLSA collective action must do so no later than **March 17, 2020**, in accordance with the Notice.

10. Plaintiff shall, no later than **April 30, 2020,** file and serve a motion for final approval of the settlement and a response to any objections to the settlement. The motion shall be noticed for hearing for the date of the final approval hearing set forth below.

11. Defendant may file and serve a memorandum in support of final approval of the Settlement Agreement and/or in response to objections no later than **May 7, 2020**.

12. Any class member who wishes to appear at the final approval (fairness) hearing, either on his or her own behalf or through an attorney, to object to the settlement, the requested attorney's fees, costs or incentive award, shall, no later than **May 12, 2020**, file with the court a Notice of Intent to Appear at Fairness Hearing.

13. A final approval (fairness) hearing is hereby set for **May 21, 2020**, at **10:00 a.m.** in Courtroom 6D of the First Street Courthouse, to consider the fairness, reasonableness, and adequacy of the Settlement as well as the award of attorney's fees and costs to class counsel, and incentive award to the class representative.

14. All proceedings in the Action, other than proceedings necessary to carry out or enforce the Settlement Agreement or this Order, are stayed pending the final fairness hearing and the court's decision whether to grant final approval of the settlement.

Dated this 2nd day of December, 2019.

/s/
Fernando M. Olguin
United States District Judge

Case Name: **Kristina McConville v. Renzenberger, Inc.**
Court: **Central District of California Western Division**
Case Number: **2:17-cv-02972-FMO-JC**

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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

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

On December 2, 2019 I served the foregoing document(s) described as:

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

On interested parties addressed as follows:

William V. Whelan
Leah S. Strickland
Solomon Ward Seidenwurm & Smith, LLP
401 B Street, Suite 1200
San Diego, CA 92101
Email: wwhelan@swsslaw.com
lstrickland@swsslaw.com

[XX] (BY UNITED STATES MAIL) On December 2, 2019, I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses named above and deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

[XX] (BY E-MAIL) On December 2, 2019, I caused the documents to be sent to the persons at the electronic notification addresses of the parties named above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Dated: December 2, 2019

Coley Hayes