

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

Case No. **EDCV 18-1633 JGB (SHKx)** Date October 28, 2021

Title *Marc Rivera v. Western Express Inc. et al.*

Present: The Honorable **JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE**

**MAYNOR GALVEZ**

Deputy Clerk

Not Reported

Court Reporter

Attorney(s) Present for Plaintiff(s):

None Present

Attorney(s) Present for Defendant(s):

None Present

**Proceedings: Order (1) GRANTING Plaintiff’s Renewed Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 49.); and (2) VACATING the November 1, 2021 Hearing (IN CHAMBERS)**

Before the Court is Plaintiff Marc Rivera’s Renewed Motion for Preliminary Approval of Class Settlement. (“Motion,” Dkt. No. 49.) The Court finds the Motion appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed, the Court DENIES the Motion. The Court vacates the hearing set for November 1, 2021.

### I. BACKGROUND

On May 15, 2018, Plaintiff Marc Rivera filed a Complaint against Defendant Western Express, Inc. (“Western Express”) in the Superior Court for the State of California for the County of San Bernardino. (Dkt. No. 1-1.) On June 26, 2018, Plaintiff amended his Complaint as of right and filed a First Amended Complaint in Superior Court. (“FAC,” Dkt. No. 1-2.) Plaintiff’s FAC was brought on behalf of Plaintiff and a putative class of current and former employees of Western Express. (FAC.) The FAC alleges violations of various wage and hour provisions of the California Labor Code, unfair competition, and civil penalties pursuant to the Private Attorneys General Act (“PAGA”) for the alleged wage and hour violations. (*Id.*) Western Express removed the case on August 3, 2018. (Dkt. No. 1.)

On February 26, 2020, Plaintiff filed his first Motion for Preliminary Approval. (“First Motion,” Dkt. No. 27.) On March 2, 2020, Markson Plaintiffs (“Objector”) filed an objection to the First Motion. (Dkt. No. 29.) Defendant filed a Motion to Strike the objection on March

27, 2020. (Dkt. No. 31.) On May 1, 2020, the Court denied the First Motion and Defendant's Motion to Strike. ("First Order," Dkt. No. 44.) In the First Order, the Court found that Plaintiff met the requirements of Federal Rules 23(a) and 23(b)(3), providing for the preliminary certification of a settlement class. (First Order.) However, the Court lacked information about the settlement and expressed concern about the impact of a general release on the Objector, who is currently pursuing other claims against Defendant. (Id.)

On October 22, 2020, Plaintiff filed a Renewed Motion for Preliminary Approval. ("Second Motion," Dkt. No. 47.) No oppositions or objections were filed. The Court denied the Second Motion without prejudice. ("Second Order," Dkt. No. 48.) In the Second Order, the Court found that Plaintiff failed to explain how prospective class members could challenge Defendant's representation of hours worked and wages owed given Plaintiff's lack of discovery and data gathering. (Second Order.)

On August 20, 2021, Plaintiff filed a Renewed Motion for Preliminary Approval. ("Motion," Dkt. No. 49.) Plaintiffs filed the following documents in support:

- Declaration of J. Jason Hill, ("Hill Declaration," Dkt. No. 49-2);
- The Settlement Agreement, ("Agreement," Dkt. No. 49-3);
- Proposed Second Amended Class Action Complaint, filed for the purposes of settlement only, ("SACC," Dkt. No. 49-4);<sup>1</sup>
- Proposed Notice of Class Action Settlement, ("Ex. 1B," Dkt. No. 49-5);
- Change of Address Form, ("Ex. 1C," Dkt. No. 49-6);
- A California Labor and Workforce Development Agency ("LWDA") Notice dated April 6, 2018, ("LWDA Notice," Dkt. No. 49-9);
- Settlement Administrator CPT Group, Inc.'s Company Resume, (Dkt. No. 49-13);
- Settlement Administrator CPT Group, Inc.'s Administration Bid, (Dkt. No. 49-14);
- Declaration of Jonathan M. Lebe, (Dkt. No. 49-10);
- Declaration of David Yermeian, (Dkt. No. 49-11);
- Declaration of Julie Green, (Dkt. No. 49-12);
- Declaration of Marc Rivera, (Dkt. No. 49-15); and
- Declaration of Jacquelyn Hutto, (Dkt. No. 49-16).

No oppositions or objections have been filed.

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<sup>1</sup> Plaintiffs include the proposed Second Amended Complaint to add Jacquelyn Hutto as a Plaintiff and class representative. The Court will therefore consider Ms. Hutto a Plaintiff for the purposes of settlement only.

## II. LEGAL STANDARD

The standard for approval of a class settlement appears in the Court’s previous Order. (See First Order.) Briefly, approval of a class action settlement requires certification of a settlement class. La Fleur v. Med. Mgmt. Int’l, Inc., 2014 WL 2967475, at \*2–3 (C.D. Cal. June 25, 2014) (internal quotation marks omitted). At the preliminary approval stage, the Court “must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms.” See Fed. R. Civ. P. 23(e). To determine whether a settlement agreement is potentially fair, a court considers the following factors: the strength of the plaintiff’s case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003).

## III. CONDITIONAL CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS

In the First Order, the Court assessed a proposed settlement class comprised of “[a]ll current and former hourly non-exempt drivers residing in the State of California at any time during the period from October 26, 2016 to January 13, 2020.” (First Order p. 4.) In the Second Order, the Court assessed a proposed settlement class of “[a]ll current and former hourly non-exempt drivers in residing in [sic] the State of California at any time during the period from October 26, 2016 to October 31, 2020.” (Second Order p. 3.) This proposed class is different. Plaintiff’s proposed settlement class is comprised of:

[A]ll current and former employee drivers of Defendant who resided in California during the October 26, 2016 through December 31, 2020, whose duties included, among other things, driving commercial motor vehicles and performing related services within the State of California and who were paid on a “piece rate” and/or rate-per-mile basis for compensation purposes.

(Motion at 1-2.)

The Agreement defines the class in a slightly different way:

[A]ll current and former hourly non-exempt drivers who resided in California during the Class Period, whose job details included, among other things, driving commercial motor vehicles and performing related services within the State of California, and who were paid on a “piece rate” and/or rate-per-mile basis for compensation purposes. The class period means the period from October 26, 2016 through December 31, 2020.

(Agreement ¶ 6-7).<sup>2</sup> The Court finds that the proposed settlement class meets the requirements of Rule 23.

## A. Requirements of Rule 23(a)

### 1. Numerosity

A class satisfies the prerequisite of numerosity if it is so large that joinder of all class members is impracticable. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). To be impracticable, joinder must be difficult or inconvenient, but need not be impossible. Keegan v. Am. Honda Motor Co., 284 F.R.D. 504, 522 (C.D. Cal. 2012). There is no numerical cutoff for sufficient numerosity. Id. However, 40 or more members will generally satisfy the numerosity requirement. Id. A plaintiff has the burden to establish that this requirement is satisfied. United Steel, Paper & Forestry, Rubber, Mfg. Energy v. Conoco Phillips Co., 593 F.3d 802, 806 (9th Cir. 2010). Plaintiffs' proposed class is likely to include over 2,200 members. (Motion p. 22.) Accordingly, the Court concludes that the numerosity requirement is satisfied.

### 2. Commonality

The commonality requirement is satisfied when plaintiffs assert claims that “depend upon a common contention . . . capable of classwide resolution—which means that a determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). All class members' claims flow from the same alleged injury—that Defendant's pay practices injured them by denying them compensation for meal and rest periods, among other things. (Motion pp. 23-24.) These claims are subject to common legal theories because Plaintiffs challenge the pay practices as a whole. Accordingly, Plaintiffs have established commonality.

### 3. Typicality

“The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class.” Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). “The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiff, and whether other class members have been injured by the same course of conduct.” Wolin v. Jaguar Land Rover No. Am., 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting Hanon, 976 F.2d at 508). Because typicality is a permissive standard, the claims of the named plaintiff need not be identical to those of the other class members. Hanlon, 150 F.3d at 1020. Plaintiffs allege their claims are typical of those of the class because they arise from the same pay program—Plaintiffs

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<sup>2</sup> The Motion cites to the Hill Declaration and Agreement for its definition of the proposed class. The Hill Declaration and the Motion appear to contain typos in the description of the class. The Court considers the Agreement's proposed class definition as the operative definition.

were employees of Defendant during the relevant time period and their wages were subject to the same restrictions as those of other class members. (Motion pp. 23-24.) Accordingly, the Court is satisfied that Plaintiffs have met the typicality requirement.

#### 4. Adequacy

In determining whether a proposed class representative will adequately protect the interests of the class, the court should ask whether the proposed class representative and her counsel have any conflicts of interest with any class member and whether the proposed class representative and her counsel will prosecute the action vigorously on behalf of the class. Johnson v. General Mills, Inc., 275 F.R.D. 282, 288 (C.D. Cal. 2011). Class counsel submits ample evidence of their own experience in support of a finding of adequacy. (Motion p. 24; Hill Declaration.) There are no declarations from proposed class representative in the record, only a representation that “named Plaintiffs, like each absent Class Member, have a strong interest in proving WEX’s productivity pay plan was a common and uniform course of conduct, and each have the same interesting in obtaining redress.” (Motion p. 24.) Nevertheless, the Court concludes that both the representatives and class counsel are adequate.

#### B. Requirements of Rule 23(b)

“In addition to satisfying Rule 23(a)’s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).” Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997). Plaintiffs argue conditional certification is appropriate under Rule 23(b)(3). (Motion p. 24.) Rule 23(b)(3) requires the Court to find “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.” Fed. R. Civ. P. 23(b)(3). Plaintiffs argue that individualized litigation would create the potential for inconsistent and contradictory judgments as well as increase delay and expense to all parties. (Motion pp. 24-25.) The Court agrees. This case also raises special access-to-justice issues common in the aggregation of small value claims for which individuals might have difficulty finding representation alone. Accordingly, Plaintiff’s request to conditionally certify a class under Rule 23(b)(3) is granted.

### IV. SETTLEMENT AGREEMENT

#### A. Settlement Summary

Subject to approval from the Court, the class of roughly 2,250 current and former employees of Defendant (“all current and former employee drivers of Defendant who resided in California during the Class Period, whose job duties included, among other things, driving commercial motor vehicles and performing related services within the State of California, and who were paid on a “piece rate” and/or rate-per-mile basis for compensation purposes,” Agreement ¶ 6) agree to a settlement with a total value of \$1,510,040.12 (Agreement ¶ 11.)

Defendant may revoke the settlement if 2.5% or more of the proposed Settlement Class excludes themselves or opts-out of participation in the settlement. (Agreement ¶ 49.)

## **B. Settlement Terms**

### **1. Financial Terms**

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

- Gross settlement amount:	\$1,510,040.12
- Attorneys' fees: <sup>3</sup>	\$451,012
- Litigation costs:	\$20,000
- Settlement administration costs:	\$30,000
- Service awards to class representatives:	\$20,000
- PAGA payment to LWDA:	\$50,000
- Net settlement amount:	\$937,028.12

(Agreement ¶ 13.) The Motion and Hill Declaration state that the gross settlement amount is non-reversionary, (Motion at 6; Hill Decl. ¶ 29), and the Agreement states that unclaimed funds will be forwarded to the State of California Controller's Office. (Agreement ¶ 53.)

### **2. Settlement Class Members**

Each member will be eligible to receive payment without submitting a claim form so long as they do not opt out. (Motion at 7; Agreement ¶ 48.)

### **3. Class Representatives**

The Agreement provides for a service award of up to \$10,000 for both Plaintiffs Rivera and Hutto. (Agreement ¶ 13.)

### **4. Settlement Administration Costs**

The proposed settlement administrator, CPT Group estimates costs up to \$30,000. (Id. ¶¶ 11, 13.)

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<sup>3</sup> This fee amount is calculated as 30% of the gross settlement amount, described as the maximum fee award in the Agreement. (Agreement ¶ 4.) This does not reflect the Court's position on what appropriate fees may be. Generally, a court may exercise discretion to award attorneys' fees in a class action settlement. See Fischel v. Equitable Life Assurance Soc'y of U.S., 307 F.3d 997, 1006 (9th Cir. 2002).

## 5. Attorneys' Fees and Costs

Class counsel will seek an award of attorneys' fees not to exceed 30% of the gross settlement amount and litigation costs not to exceed \$20,000. (Id. ¶ 4.)

## 6. Injunctive Relief

There is no injunctive relief associated with the Agreement.

## 7. Release

The Agreement releases:

all claims, rights, demands, liabilities, penalties, fines, debts and causes of action of every nature and description, under state, federal, and local law, whether known or unknown, arising from the claims pled in the Plaintiffs' complaints filed in the Action or that could have been pled based on the factual allegations in the operative complaint, in the Plaintiffs' original respective complaints, or in the Second Amended Class Action Complaint (Exhibit "A"), including but not limited to claims for unpaid wages, including any theory of piece-rate law, unpaid minimum wage, meal and rest period premiums, waiting time penalties, itemized wage statements, wages for unpaid time, other civil or statutory penalties related thereto, and any claim based on California Labor Code sections 201, 202, 203, 204, 226, 226.2, 226.3, 226.7, 510, 512, 1174(d) 1194, 1194.2, 1197, 2699 et seq., the Private Attorneys General Act of 2004, California Code of Regulations, Title 8 Section 11000 et seq., the applicable Industrial Welfare Commission (IWC) Wage Orders, including 7-2001, Business & Professions Code section 17200-17208 or any related damages, penalties, restitution, disgorgement, interest or attorneys' fees for the period from October 26, 2016 through December 31, 2020. The "Released Claims" specifically excludes claims based on the facts and/or legal theories alleged or that could be alleged in Markson v. CRST, et al., United States District Court, Central District of California, Case No. 5:17-cv-01261-FMO-SPx, operative Complaint that include anti-competitive claims for the hiring of former employees of other potential defendants in the Markson case.

(Agreement ¶ 20.)

## 8. Notice

Within thirty days of this Order, Defendant will provide the class list to the Settlement Administrator. (Id. ¶ 43.) Within 10 days after receiving this information, Settlement Administrator will send the Notice Packet to each class member via U.S. Mail. (Id. ¶ 45.) Before mailing, the Settlement Administrator will perform a search of the National Change of Address Database to update and correct for any known or identifiable address changes, and if any Notice

Packets are returned, the Settlement Administrator will attempt to determine correct addresses using skip-tracing or other searching. (*Id.* ¶ 44.)

The Agreement details that all class members will be mailed a Notice Packet containing the following: (1) Notice of Class Action Settlement; (2) Change of Address form; and (3) pre-printed return envelope to be mailed to all class members. (Agreement ¶ 15.)

In the First Order, the Court ordered the parties to amend the Notice to give class members more information regarding their right to dispute the hours Defendant claims each class member worked. (First Order p. 9.) The Second Order emphasized that the parties did not amend the issue. (Second Order p. 8.)

The Court notes that the parties have since amended the Notice to provide class members the information and mechanism necessary to dispute Defendant's claimed hours worked for each class member. (Agreement ¶ 49.) The Notice is satisfactory.

## V. PRELIMINARY APPROVAL OF THE SETTLEMENT

The First Order set forth the standards for preliminary approval. Briefly, to determine whether a proposed settlement is “fundamentally fair, adequate, and reasonable,” *Hanlon*, 150 F.3d at 1026, courts consider factors including “the strength of the plaintiff's case, the risk, expense, complexity, and likely duration of further litigation, the risk of maintaining class action status throughout trial, the amount offered in settlement, the extent of discovery completed, and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.” *Stanton*, 327 F.3d at 959 (internal citations omitted). The settlement may not be a product of collusion among the negotiating parties. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1992)).

### A. Scope of the Release

Again, a settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action. . . .” *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (internal quotation marks omitted) (emphasis added). Therefore, “[d]istrict courts in this Circuit have declined to approve settlement agreements where such agreements would release claims based on different facts than those alleged in the litigation at issue.” *Chavez v. PVH Corp.*, 2015 WL 581382, at \*5 (N.D. Cal. Feb. 11, 2015).

In the Second Order, the Court expressed concern about the breadth of the Agreement's release but considered the factor neutral because the proposed release was much narrower than the previous iteration. The Court finds the since amended release substantively the same as the one analyzed in the Second Order. This factor is neutral.



## **B. Extent of Discovery and Stage of the Proceedings**

In the First and Second Orders, the Court underscored the necessity of sufficient discovery to understand how class members could challenge Defendant’s representation of hours worked and wages owed. (First Order p. 11; Second Order p. 9.)

The Notice now includes a method by which class members are informed of their ability to challenge Defendant’s calculation of hours worked and wages owed and how to effectuate the challenge. (Agreement ¶ 49.) This weighs in favor of preliminary approval.

## **C. Strength of Case and Risk, Expense, Complexity, and Likely Duration of Litigation**

The Court previously found that this factor weighs in favor of preliminary approval; it remains unchanged. (First Order pp. 11-12; Second Order p. 9.)

## **D. Amount Offered in Settlement**

“Even a fractional recovery of the possible maximum recovery amount may be fair and adequate in light of the uncertainties of trial and difficulties in proving the case.” Millan v. Cascade Water Servs., 310 F.R.D. 593, 611 (E.D. Cal. 2015). Here, the recovery amount is consistent with amounts found to be fair and reasonable. See, e.g., In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000) (permitting settlement amount that was one-sixth of potential recovery); Deaver v. Compass Bank, 2015 WL 8526982, at \*7 (N.D. Cal. Dec. 11, 2015) (approving a settlement that was 10.7% of the total potential liability).

The gross settlement amount is \$1,510,040.12—which, after fees and costs, becomes a net settlement amount of \$949,528.12. (Motion at 6.) Plaintiffs calculate the maximum potential recovery as \$4,649,564 without interest or attorneys’ fees. (Id. at 21.) This factor weighs in favor of approval.

## **E. Experience and Views of Counsel**

The Court previously found that this factor weighs in favor of preliminary approval; it remains unchanged. (Second Order p. 9.)

## **F. Collusion Between the Parties**

The Court previously found that this factor weighs in favor of preliminary approval; it remains unchanged. (First Order pp. 13-14; Second Order p. 9.)

## VI. CONCLUSION

For the reasons above, the Court GRANTS Plaintiff's Preliminary Approval Motion and VACATES the November 1, 2021 hearing. The Court ORDERS as follows:

1. The Settlement Agreement is preliminary approved as potentially fair, reasonable, and adequate.
2. The following Settlement Class is certified for settlement purposes only:

“[A]ll current and former hourly non-exempt drivers who resided in California during the Class Period, whose job details included, among other things, driving commercial motor vehicles and performing related services within the State of California, and who were paid on a “piece rate” and/or rate-per-mile basis for compensation purposes. The class period means the period from October 26, 2016 through December 31, 2020.”
3. The Court approves and appoints Cohelan Khoury & Singer, Lebe Law APC, David Yeremian & Associates, Inc. and Sommers Schwartz, P.C. to serve as counsel on behalf of the Settlement Class for purposes of settlement only.
4. Plaintiffs Marc Rivera and Jacquelyn Hutto are appointed as the representatives of the Settlement Class for purposes of settlement only.
5. The Court appoints CPT Group, Inc. as the settlement administrator.
6. The Class Notice forms are approved.
7. The Court authorizes distribution of Class Notice to the Settlement Class members pursuant to the Agreement.
8. The hearing date for the Final Fairness Hearing is hereby set for April 25, 2022 at 9:00 a.m. in Courtroom 1 of the United States District Court for the Central District of California, Eastern Division located at 3470 12th Street, Riverside, California 92501.

**IT IS SO ORDERED.**