UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

Gabriel Cilluffo, et al.,

Plaintiffs,

v.

Central Refrigerated Services, Inc., et al.,

Defendants.

ED 12-cv-00886 VAP (OPx)

Order GRANTING Plaintiffs' Motion for Final Settlement Approval (Doc. No. 274).

On February 26, 2018, Named Plaintiffs Gabriel Cilluffo, Kevin Shire, and Bryan Ratterree (collectively "Plaintiffs") filed a motion for final approval of a Settlement Agreement. (Doc. No. 274.) Having considered the papers filed in support of the Motion, the Court GRANTS the Motion as set forth below.

I. BACKGROUND

A. The Action

Named Plaintiffs, Gabriel Cilluffo, Kevin Shire, and Bryan Ratterree (collectively "Plaintiffs" or "Named Plaintiffs"), are long-haul truck drivers who leased trucks from Defendant Central Leasing, Inc. in order to haul freight for Defendant Central Refrigerated Service, Inc.'s customers. On June 1, 2012, the Named Plaintiffs filed a Collective & Class Action

Complaint ("Complaint") against Defendants Central Refrigerated Service, Inc.; Central Leasing, Inc.; Jerry Moyes; and Jon Issacson (collectively, "Defendants") in the above-captioned case pending in this Court ("Action"). (Doc. No. 1).

Plaintiffs alleged in their Complaint that the Defendants are liable for the misclassification of the Plaintiffs and other lease operator drivers as independent contractors and failing to pay them the legally required minimum wage for each hour worked per week in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206 *et seq*. The Plaintiffs also alleged that the Defendants violated the federal forced labor statutes, 18 U.S.C. §§ 1589, 1595.

On September 24, 2012, the Court stayed the Action, and granted Defendants' motion to compel arbitration pursuant to the UUAA. (Doc. No. 53.) On November 8, 2012, the Court held that the FLSA claim could proceed on a collective basis, but arbitration of Plaintiffs' forced labor claims must occur individually. (Doc. No. 61 at 4).

B. The Collective Action

The Collective Action consists of a conditionally-certified collective of approximately 1,350 plaintiffs who opted-in to the FLSA collective arbitration between the parties pending before the American Arbitration Association ("AAA") Case No. 77 160 00126 13 PLT. (Doc. No. 228-2 at ¶¶15-19.) This Collective Action consists of "truckers who leased a truck from Central

Leasing, Inc. to drive for Central Refrigerated Service, Inc. on or after June 1, 2009." (Id. at ¶17.) The Arbitrator Patrick Irvine (the "Arbitrator") denied Defendants' Motion to Decertify the Conditionally-Certified Class on October 26, 2016, dismissed 26 members, and ruled that approximately 1,350 plaintiffs were employees under the FLSA and that Defendants had misclassified these plaintiffs as independent contractors. (Id. at ¶¶20-21.) The parties entered into a Memorandum of Understanding to begin settlement negotiations at the end of April, 2017 – just before an arbitration was scheduled to begin in the Collective Action in early May 2017. (Id. at ¶¶22, 35.)

C. The Individual Arbitrations

The "Individual Arbitrations" refers to the approximately 328 individual drivers ("Individual Plaintiffs") who have submitted demands to the AAA for individual arbitration against Defendants. (Doc. No. 228-2 at ¶¶23.) The Individual Plaintiffs asserted claims for: "federal common law fraud," Utah common law fraud and negligent misrepresentation, "unconscionability," Utah common law unjust enrichment, as well as claims for violation of federal forced labor statutes and "state wage and hour law" (i.e., they alleged violations of state minimum wage and unlawful deduction statutes). (Id. at ¶24.) Twenty nine arbitrators were assigned to hear the claims of the first 300 individual arbitrations. (Id. at ¶¶25.) In July 2016, the parties agreed to fast-track eight "bellwether" arbitrations in front of four arbitrators. (Id. at ¶¶26.) In March 2017, the parties filed motions for summary judgment in all bellwether cases. (Id. at ¶¶27.) Four-day arbitration trials for

each of the bellwether cases were scheduled to start in July 2017. (Id. at ¶¶28.)

D. Settlement Agreement

This Settlement Agreement provides for the settlement of the pending claims against Defendants in Cilluffo, et al. v. Central Refrigerated Service, Inc., et al., Case No. 12-00886-VAP (OPx), as well as the Collective Action and Individual Arbitrations pending before the American Arbitration Association ("AAA"). It is attached as Exhibit 1 to Plaintiffs' Memorandum In Support of Motion for Final Settlement Approval. ("Settlement Agreement"). Key provisions of the Settlement Agreement are outlined below.

1. Monetary Relief to Claimants

The Settlement Agreement provides for a Gross Settlement Amount of no more than a certain lump sum. (Settlement Agreement at ¶ 2.3(A)(i).) The Gross Settlement Amount will be divided between two non-reversionary funds, Fund A and Fund B. (Settlement Agreement at ¶ 2.3(A)(ii) and (iii).)

a. Fund A

Fund A Claimants consist of drivers who joined the Collective Action or filed an Individual Arbitration. (See Settlement Agreement at ¶2.1 (N); id. at Exh. E.) The parties estimate that there are approximately 1,356 Fund A Claimants. (Settlement Agreement at ¶2.3(A)(ii).) Fund A Claimants were able to opt out of the settlement if they do not wish to participate, but none have opted out as of February 15, 2018 (Doc. No. 281-3 at 4-5, ¶12.)

82.5% of the total settlement amount – less the proportionate share of approved attorneys' fees and expenses, administrative costs and service awards – will be allocated pro rata to Fund A Claimants who do not timely opt out of the settlement. (Settlement Agreement at ¶2.3(A)(ii); Settlement Agreement at ¶ 2.3(B)(i).) Each claimant will receive a payment based on a formula that takes the total number of hours worked multiplied by a damage recovery per hour which is variable based on their average hourly earnings. This formula is "based on Plaintiffs' counsel's privileged assessment of the Fair Settlement Value of claims in relation to the average hourly wages paid by Defendants." (Settlement Agreement at Exh. F.)

Each Fund A Claimant will received a minimum award. (Id.) All Fund A Claimants who filed individual arbitration claims will receive an additional award. (Id.)

b. Fund B

Fund B claimants consist of drivers who were eligible to and did not previously join the Collective Action or file an Individual Arbitration, but who timely opt in to the settlement. The parties estimate that there are approximately 1,955 potential Fund B Claimants. (Settlement Agreement at Exh. G.)

About 17.5% of the total settlement amount, less the proportionate share of approved attorneys' fees and costs, administrative costs and service awards, will be allocated to participating Fund B Claimants who

timely opt in to the settlement, on a pro rata basis based on the number of months each participating Fund B Claimant worked for Central Refrigerated from June 1, 2009 to the date of the Settlement Agreement. (Settlement Agreement at ¶ 2.3(B)(ii).)[1]

Each participating Fund B claimant will receive a minimum payment. (Settlement Agreement at ¶2.3(B)(ii).)

2. Cy Pres Recipient

The unclaimed funds remaining in Fund A one year after distribution from Fund A commences, shall be paid to a cy pres recipient. Since the parties could not come to an agreement on a cy pres recipient, the Court resolves the parties' dispute by selecting the National Employment Law Project as the cy pres receipient. (Settlement Agreement at ¶¶ 2.3(B)(i), 2.5(A), and 2.6(B)(i); Doc. No. 258 at 20-22)

3. Additional Benefits Offered to Claimants

Defendants have agreed not to pursue collection efforts against participating settlement members with respect to leases involving Central Leasing or in connection with Central Refrigerated's contracts. (Settlement Agreement at ¶ 2.8(D). Central Refrigerated and Central Leasing will also

[1] The settlement administrator has received thirteen untimely and two incomplete Fund B claim forms. (Doc. No. 295-1 at 3, ¶5.) Plaintiffs' counsel recognizes that "[w]hile these additional claims forms are clearly untimely, the individuals who filed them clearly wished to assert their claims herein and neither Plaintiff's counsel nor Defendants assert any objection to these claims being considered as valid." (Id. at 4, ¶10.) Plaintiffs' counsel has agreed to reduce the Fund B attorneys' fees if necessary to allow payment to these claimants. (Id. at 4, ¶11.) The Court approves of this proposal.

release and dismiss with prejudice any counterclaims they have filed, or ever could file, based on any occurrences that took place prior to May 5, 2017. (Id.) Upon request, Defendants Central Refrigerated and Central Leasing will timely provide a letter to a background screening company on behalf of a Participating Settlement Member, stating that defaults under the Central Leasing lease have been rescinded. (Settlement Agreement at ¶ 2.8(I).)

4. Release of Claims Against Defendants

The Named Plaintiffs have agreed to release any and all claims against Defendants and all other Released Parties. (Settlement Agreement at ¶ 2.8(F).) Other participating Settlement Members release all claims against Defendants and other Released Parties that related to the services they provided at issue in the Action. (Settlement Agreement at ¶ 2.8(A).) The Settlement Agreement does not affect the claims by potential Fund A claimants who opt-out of the settlement, or potential Fund B claimants who do not affirmatively opt-in. (Settlement Agreement at ¶¶ 2.9(C), 2.10 (C).

5. Attorney's Fees and Costs

Plaintiffs' counsel intended to request attorney's fees in an amount of 33% of the Gross Settlement Amount and certain costs. (Settlement Agreement at ¶ 2.3(F).) The Court preliminarily approved this fee amount, but deferred ruling on whether the amount sought was reasonable until after Plaintiffs' counsel submitted copies of contemporaneous time-keeping records for this case. (Doc. No. 258 at 17.) In order to correct a calculation error in the notices sent to certain Fund A Claimants, the Court approved

Plaintiff's counsel's proposal to reduce the attorney's fee award. (Doc. No. 269.) Attorney's fees and costs are to be proportionally deducted from Fund A and Fund B, but the attorneys' fees to be deducted from Fund A are reduced to correct this calculation error. Plaintiffs' counsel now seeks a fee that equals 30% of the Gross Settlement Fund. Plaintiffs' counsel also seeks reimbursement of certain additional litigation expenses.

6. Incentive Awards

Plaintiffs seek approval of "service awards" not more than 2.7% of the Gross Settlement Amount, to be deducted proportionally from Fund A and Fund B. (Settlement Agreement at ¶ 2.3(G).) The three named plaintiffs will receive the highest incentive award, ten plaintiffs who gave all day depositions and acted as representatives in the FLSA Collective action will each receive one fifth of the award proposed for the named plaintiffs, and the 166 plaintiffs who sat for the half-day depositions in the Individual Arbitration awards will receive the smallest incentive awards, amounting to one tenth of the award proposed for the named plaintiffs. (Id.) These service awards are to be deducted proportionally from Fund A and Fund B. (Id.)

7. Notice

The Court approved of the proposed method of service to the Settlement Class Members on November 9, 2017. (Doc. No. 258 at 22-23). On December 7, 2017 the settlement administrator, Settlement Services, Inc., sent notices to the class members by email and first class mail. (Settlement Agreement at ¶¶ 2.5(A), 2.9(A), 2.10(A), 2.12(A); Doc. No. 281-

3 at 4, ¶10.) After identifying an error in calculating the individual award for 226 Fund A claimants, Settlement Services Inc. mailed and e-mailed corrective notices on January 30, 2018 pursuant to the Court's January 22, 2018 order. (Doc. No. 271; Doc. No. 281-3 at 4, ¶11.) The notice period closed on March 7, 2018. (Doc. No. 281-2 at 14.) Settlement Services Inc. has reported that as of March 21, 2018, it had only received one letter from a class member that could be construed as an objection. (Doc. No. 293-1 at 4, ¶11.)

II. LEGAL STANDARD

Under Rule 23(e) of the Federal Rules of Civil Procedure, "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). A court must engage in a two-step process to approve a proposed class action settlement. First, the court must determine whether the proposed settlement deserves preliminary approval. Nat'l Rural Telecomms. Coop. v. DirecTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004). Second, after notice is given to class members, the Court must determine whether final approval is warranted. Id. A court should approve a settlement pursuant to Rule 23(e) only if the settlement "is fundamentally fair, adequate and reasonable." Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1375 (9th Cir. 1993) (internal quotation marks omitted); accord In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (citing Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998)).

"The Court is not bound to exercise the same oversight of a settlement of a FLSA collective action as it must exercise with a class action under Federal Rule of Civil Procedure 23(e)." Villalobos v. Calandri, No. CV12-2615 PSG (JEMx), 2016 WL 6901695, at *4 (C.D. Cal. Mar. 14, 2016); Millan v. Cascade Water Servs., Inc., 310 F.R.D. 593, 607 (E.D. Cal. 2015) ("[A] Court has a 'considerably less stringent' obligation to ensure fairness of the settlement in a FLSA collective action than a Rule 23 action because parties who do not opt in are not bound by the settlement."). Yet courts in the Ninth Circuit assessing FLSA collective action settlements often look to the same factors used in assessing Rule 23 class action settlements, including "(1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." Id. (citing Torrisi, 8 F.3d at 1375).

III. DISCUSSION

A. Fairness, Adequacy, and Reasonableness of the Settlement

1. Strength of Plaintiffs' Case and the Risk, Expense, Complexity, and Likely Duration of Further Litigation

As noted in the Court's Preliminary Approval Order, Plaintiffs' FLSA Collective Action minimum wage claim appears strong given Plaintiffs' success at the summary judgment stage and the aribtrator's denial of a

motion to decertify the Collective Action before trial. (Doc. No. 258 at 10).[2] The complexity of damages, the large number of plaintiffs, and Defendants' efforts in opposition indicate that significant risks remain for Plaintiffs, however. (Id. at 10-11). Accordingly, these factors weigh in favor of approval.

2. The Amount Offered in Settlement

In order to determine whether this factor favors approval, the Court must compare the amount offered in settlement to the maximum possible recovery. Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424–25 (1968) ("Basic to this process in every instance [of assessing the merits of compromises between litigants], of course, is the need to compare the terms of the compromise with the likely rewards of litigation."). Depending on the Court's assessment of the strength of the case, an appropriate fraction of the maximum recovery may be approved. 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.") (citation omitted.); Millan, 310 F.R.D. at 611 (illustrating the broad range of settlements for fractions of the estimated maximum recovery that have been

[2] Given that the evidence has not been fully presented, the Court does not reach any final conclusions regarding the contested issues of fact and law that underlie the merits of Plaintiffs' case. Aguilar v. Wawona Frozen Foods, No. 115CV00093 DAD (EPG), 2017 WL 2214936, at *3 (E.D. Cal. May 19, 2017). Instead, "the court is to 'evaluate objectively the strengths and weaknesses inherent in the litigation and the impact of those considerations on the parties' decisions to reach these agreements.'" Id. (quoting In re Wash. Pub. Power Supply Sys. Sec. Litig., 720 F. Supp. 1379, 1388 (D. Ariz. 1989).)

approved by district courts); Bautista v. Harvest Mgmt. Sub LLC, No. CV12-10004 FMO (CWx), 2013 WL 12125768, at *14 (C.D. Cal. Oct. 16, 2013) (same).

As discussed above, the Settlement Agreement creates two settlements funds, Fund A and Fund B. (See Doc. No. 258 at 10.) The parties have agreed to allocate 82.5% of this amount to Fund A, and 17.5% to Fund B, less the proportionate share of approved attorneys' fees and costs, administrative costs and service awards. (Doc. No. 281 at 11.) Plaintiffs have provided an estimate for the minimum recovery and average recovery that members of Fund A and Fund B should receive if the Settlement Agreement is approved. (Doc. No. 228 at 20-24; Doc. No. 281-2 at 16, 23.)

As the Court found in its Preliminary Approval Order, the parties' estimates for the minimum recovery and the average recovery for members of Fund A is a fair and adequate recovery based on the estimates of damages and the risks and uncertainties remaining in the litigation. (Doc. No. 258 at 12-13.) Furthermore, since Fund B claimants did not file any claims, it is not possible to determine with precision whether the amount offered in settlement is fair and adequate; however, each Fund B claimant may decline the settlement amount if they determine it to be unsatisfactory. (Id.)

The Court finds that this factor weighs in favor of granting preliminary approval.

3. The Extent of Discovery Completed, and the Stage of the Proceedings

This factor requires the Court to evaluate whether "the parties have sufficient information to make an informed decision about settlement." Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1239 (9th Cir. 1998). As discussed in the Court's Preliminary Approval Order, Plaintiffs have demonstrated that class counsel conducted the following discovery: (1) hundreds of thousands of pages of documents and dozens of gigabytes of data have been exchanged; (2) over two hundred depositions have been conducted; and (3) additional exchanges of data, documents and information in connection with the mediation and settlement process (Doc. No. 258 at 14.) In addition, each party commissioned several experts. (Id.) The Court finds that this factor supports final approval of the Settlement Agreement since the parties possessed sufficient information to make an informed decision about the settlement.

4. Experience and Views of Counsel

Since "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation," courts tend to give considerable weight to counsel's opinion. Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 967 (9th Cir. 2009) (quoting In re Pac. Enters. Sec. Litig., 47 F.3d 373, 378 (9th Cir. 1995); See, e.g., Alberto v. GMRI, Inc., No. CIV. 07-1895 WBS, 2008 WL 4891201, at *10 (E.D.Cal. Nov.12, 2008) ("When approving class action settlements, the court must give considerable weight to class counsel's opinions due to counsel's familiarity with the litigation and its previous experience with class action lawsuits."); but see, Kempen v. Matheson Tri-Gas, Inc., No. 15-CV-

00660-HSG, 2017 WL 3670787, at *6 (N.D. Cal. Aug. 25, 2017) ("[T]he Court affords only modest weight to counsel's views."); Chun-Hoon v. McKee Foods Corp., 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) ("[T]his court is reluctant to put much stock in counsel's pronouncements, as parties to class actions and their counsel often have pecuniary interests in seeing the settlement approved."). In the Court's Preliminary Approval Order, the Court found that all parties are represented by experienced counsel who approve of this settlement. (Doc. No. 258 at 14-15.) The Court now finds that this factor weighs in favor of final approval.

5. Presence of a Governmental Participant

There is no governmental participant in this action. Thus, this factor is irrelevant for the purposes of final approval.

6. Reaction of Class Members to the Proposed Settlement

The lack of objections or opt-outs, combined with a high claim rate, weighs strongly in favor of settlement approval. See, e.g., Barcia v. Contain-a-Way, Inc., No. 07-cv-938 IEG, 2009 WL 587844, at *4 (S.D.Cal. Mar.6, 2009); Thompson v. Costco Wholesale Corp., No. 14-cv-02778 CAB (WVG), 2017 WL 3840342, at *7 (S.D. Cal. Sept. 1, 2017).

The settlement administrator has sent notices to potential claimants by email and first class mail by December 7, 2017. (Doc. No. 281-3 at 4, ¶10.) As of March 21, 2018, the settlement administrator has received no opt-outs from Fund A Claimants, and 341 opt-in forms from Fund B Claimants. (Doc. No. 295-1 at 3, ¶5.) The settlement administrator received one letter from a

class member that expresses frustration with the settlement, but is not clearly an objection. (Doc. No. 295-2 at 8.)

Only two other people have indicated to Plaintiffs' counsel that they may object to the settlement. (Id. at 5, ¶13.) The first, Walter Ellis, did not opt-in to the collective action and lost in arbitration against Defendants. (Id. at ¶14-15.) For this reason, Ellis is explicitly excluded from the Settlement Class. (Settlement Agreement at ¶1.1 ("[N]ot counting Walter Ellis, who was initially represented by Claimants' counsel but then chose to proceed with and litigated his case to conclusion *pro se*.") The second is Randall Pittman, who never worked for any of the Defendants and thus has no claims against any of the Defendants in this litigation. (Doc. No. 281-3 at 5, ¶16.) As non-parties, Ellis and Pittman have no standing to object to the class settlement. Nitsch v. DreamWorks Animation SKG Inc., No. 14-CV-04062-LHK, 2017 WL 2423161, at *12 (N.D. Cal. June 5, 2017). Court thus disregards these potential objections.[3]

[3] Ellis and Pittman—neither of them attorneys—seem to have made a practice of asserting meritless objections to various class settlements. See, e.g., Krumbine v. Schneider Nat'l Carriers, Inc., No. 10-cv-4565 GHK (JEMx), 2013 WL 12209908, at *4 (C.D. Cal. Aug. 6, 2013) ("The Court disregards and overrules any objection by Mr. Walter Ellis and Mr. Randall Pittman, because: . . . they are not members of the Final Settlement Class on 'aggrieved employees' under PAGA for the purposes of this action. and do not have standing to object to the Settlement."); Bickley v. Schneider Nat'l Carriers, Inc., No. 4:08-CV-05806-JSW, 2016 WL 6910261, at *2 (N.D. Cal. Oct. 13, 2016) ("The objections filed by Mr. Walter Ellis and Mr. Randall Pittman are overruled and found to be without merit. Moreover, the Court finds that Mr. Pittman is not a class member and thus, has no standing to object to this settlement.").

Where "the overwhelming majority of the class willingly approved the offer and stayed in the class," there is "at least some objective positive commentary as to its fairness." Hanlon, 150 F.3d at 1027. This factor, therefore, favors final approval of the settlement.

7. Arms-Length Negotiations

A settlement that is the product of an arms-length negotiation "conducted by capable and experienced counsel" is presumed to be fair and reasonable. Roe v. SFBSC Management, LLC, No. 14-CV-03616-LB, 2017 WL 4073809, at *9 (N.D. Cal. Sept. 14, 2017) (quoting Garner v. State Farm Mut. Auto Ins. Co., 2010 WL 1687832, *13 (N.D. Cal. Apr. 22, 2010); Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 965 (9th Cir. 2009)("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."); Bautista v. Harvest Mgmt. Sub LLC, No. CV12-10004 FMO (CWx), 2013 WL 12125768, at *12 (C.D. Cal. Oct. 16, 2013) ("A settlement reached through the assistance of an experienced mediator supports a determination that the settlement process was not collusive."); Satchell v. Fed. Express Corp., No. C 03 2878 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.")

As discussed in the Court's Preliminary Approval Order, the parties employed the assistance of an experienced mediator in the settlement process. (Doc. No. 258 at 9-10.) Accordingly, the Court finds that the Settlement Agreement is the product of a non-collusive arms-length negotiation.

B. Attorney's Fee, Incentive Payments for Named Plaintiffs, and Expenses,

1. Attorney's Fees

The FLSA mandates "a reasonable attorney's fee to be paid by the defendant, and the costs of the action" if a judgment is awarded to the plaintiff. 29 U.S.C. § 216(b). The Court has an "independent obligation to ensure that the [attorney's fees] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011). "[T]he district court must assume the role of fiduciary for the class plaintiffs when awarding attorneys' fees from a common fund" since "the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage." In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1302 (9th Cir. 1994).

In cases such as this one, where the attorney's fees are calculated using the "percentage of the fund" method, twenty-five percent (25%) is the benchmark used in the Ninth Circuit. In re Bluetooth, 654 F.3d at 942; Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002); Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000). Any departure from that percentage requires adequate explanation in the record of the "special circumstances" involved. In re Bluetooth, 654 F.3d at 942.

Certain factors may justify an upward departure from the benchmark percentage. Hightower v. JPMorgan Chase Bank, N.A., No. CV11-1802

PSG (PLAx), 2015 WL 12644569, at *10 (C.D. Cal. Feb. 3, 2015) ("These factors include the quality of the results achieved; the risks of litigation; whether counsel generated benefits beyond the cash settlement; the skill required and the quality of the work; the contingent nature of the fee; the prevailing market rate compared to awards in similar cases; and the financial burden carried by counsel.")

At the preliminary approval stage, Plaintiffs indicated that they would seek attorney's fees in the amount of "33% of the Gross Settlement Amount plus costs and expenses incurred in prosecuting the litigation." (Doc. No. 228 at 14, n.1.) In its Preliminary Approval Order, the Court found that Plaintiff's counsel's explanation for the requested upward departure from the benchmark percentage persuasive, and found this factor weighed in favor of granting preliminary approval. (Doc. No. 258 at 17.) Since then, Plaintiffs' counsel propose using a portion of the allotted attorney's fees to correct a calculation error in some settlement notices rather than reduce the amount promised to any claimant. (Doc. No. 281-3 at 4, ¶11.) In effect, this has reduced the total attorney's fees to 30% of the Gross Settlement Fund. (Doc. No. 281-2 at 13.) The total amount sought by Plaintiffs' counsel is 1.5 times greater than the lodestar amount calculated by Plaintiff's counsel. (Doc. No. 281-2 at 32.) This lodestar multiplier is within the low end of the range found acceptable by the Ninth Circuit. Steiner v. Am. Broad. Co., 248 F. App'x 780, 783 (9th Cir. 2007) (finding that a 6.85 lodestar multiplier "falls well within the range of multipliers that the courts have allowed"); Vizcaino v. Microsoft Corp., 290 F.3d 1043, Appendix (9th Cir. 2002) (collecting cases). The Court remains impressed by the result achieved in this case and the

time and resources invested by Plaintiff's counsel. Following a review of the contemporaneous time-keeping records for this case, and the hourly rates of the time-keepers, the Court approves of Plaintiffs' counsels' fee request to be deducted from Funds A and B, subject to such reduction as necessary to cap the settlement at the agreed-upon maximum amount.

2. Incentive Payments for Named Plaintiffs

Incentive awards for class representatives must be "scrutinize[d] carefully . . . so that they do not undermine the adequacy of the class representatives." Radcliffe v. Experian Info. Sols. Inc., 715 F.3d 1157, 1163 (9th Cir. 2013) ("[I]n some cases incentive awards may be proper but . . . awarding them should not become routine practice. . . ."). In determining whether and how much to award class representatives in incentive payments, Plaintiffs must demonstrate the representatives' actions in protecting the interests of the class, the degree to which those actions benefitted the class, the amount of time and effort the representatives spent pursuing the litigation, and the representatives' reasonable fear of being retaliated against for their visible participation. Staton v. Boeing Co., 327 F.3d 938, 977 (9th Cir. 2003) (citing Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir.1998)). Courts also consider the number of representatives being awarded incentive payments, the proportion of the payments to the settlement amount, and the size of each payment. Staton, 327 F.3d at 977. "Courts may award different fees to representatives based on their different contributions to the case." Hightower v. JPMorgan Chase Bank, N.A., No. CV11-1802 PSG (PLAx), 2015 WL 12644569, at *11 (C.D. Cal. Feb. 3, 2015).

Here, the Plaintiffs seek approval of "service awards" that total approximately 2.7% of the Gross Settlement Amount), to be deducted proportionally from Fund A and Fund B. (Doc. No. 281-2 at 13.) Under Plaintiffs' proposal, named plaintiffs receive the highest incentive award, the ten plaintiffs who sat for an all-day deposition and served as representatives in the Collective Action received the award of the named plaintiffs, and the 166 plaintiffs who sat for a half-day deposition in the Individual Arbitrations receives the one-tenth the award of the named plaintiffs. (Id.)

The Court finds it compelling that the incentive awards sought only make up a small percentage of the total settlement amount. (Doc. No. 281-2 at 21 ("[T]he service awards to the Named Plaintiffs amount to 0.375% of the total settlement fund and the deposition awards amount to 2.3%. All service awards taken together amount to 2.7% of the total settlement fund.") Plaintiff's declarations also support the argument that active participation in this case could harm employment prospects. (See, e.g., Doc. No. 251-6 at ¶¶7-11; Doc. No. 251-7 at ¶¶8-9. Doc. No. 251-8 at ¶9; Doc. No. 291 at 4, ¶5; Doc. No. 292 at 7, ¶¶4, 6; id. at 9, ¶6; id. at 10, ¶3; Doc. No. 281-3 at 6, ¶18 ("Plaintiffs' counsel regularly hears from individuals who call to learn of their rights, but who ultimately do not step forward to assert them, due to fear of long-term consequences in publicly suing one's employer.").)

At the Preliminary Approval stage, the Court expressed skepticism of the difficulty that the various participants had in responding to discovery requests. The Court found Plaintiff's counsel's claim that Plaintiffs "had to

drop their work and family lives on a moment's notice to respond to discovery requests" to be dubious. (Doc. No. 251-1 at 20.) The Court stated that it was not inclined to grant the incentive awards requested by Plaintiffs, but found that more than a nominal amount for incentive awards was likely appropriate. In addition those advanced at the preliminary approval stage, Plaintiffs have advanced several other arguments in support of the proposed incentive payments.

First, all evidence on the record supports a finding that the other class members support the proposed incentive awards. Plaintiffs correctly point out that there have been no objections to the incentive awards from any class members. (Doc. No. 281-3 at 4-5, ¶12.) Indeed, Plaintiffs have filed several declarations from other class members in support of the proposed incentive payments. (See, e.g., Doc. No. 291 at 4, ¶5 ("I would not have been willing to be a Named Plaintiff . . . because I feared retaliation from Defendants, I would not want my name attached to a lawsuit against an employer, I believe it would hurt my chances of future employment . . ."); id. at 6, ¶8 ("I believe that this small amount [of requested service awards] is more than well-deserved by the Named Plaintiffs and deponents for all the work they did and the risk of negative publicity they bore on behalf of myself and other settlement class members."); id. at 8, ¶5 ("I was not aware that we were misclassified until I heard about this case, so I appreciate the named plaintiffs realizing there was something wrong with the way we were treated and stepping forward."); id. at 10, ¶6 ("I did not have to travel to a deposition, miss work to attend the deposition, subject myself to hours of grueling questioning by Defendants' attorneys (including some highly

personal questions about my family life and finances) the way that the Named Plaintiffs and deponents did, and yet I will benefit greatly from their efforts."). These class members are not best positioned to fully assess the fairness of the incentive awards in the context of the prevailing law – that is the Court's role – their opinions lend some support to the requested incentive wards.

Furthermore, Plaintiffs have also submitted additional declarations that because of the inflexible schedule and amount of travel associated with their profession, trucker plaintiffs face particularly challenging logistics associated with deposition attendance. (Doc. No. 292 at 3-4, ¶¶2, 3; id. at 6-7 ¶¶2, 3; id. at 11, ¶5.) This also supports incentive awards greater than a nominal sum.

The Court approves the requested incentive awards for each of the Named Plaintiffs, the requested incentive awards for the 10 people who gave all-day deposition as representatives of the Collective Action, and the requested incentive awards for each of the 166 people who gave half-day depositions in the Individual Arbitration, to be deducted proportionally from Fund A and B.

3. Expenses and Administrative Costs

The FLSA provides for recovery of costs beyond attorney's fees. See 29 U.S.C. § 216(b) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, *and costs of the action*.") (emphasis added).

Plaintiffs' counsel have incurred certain litigation expenses. (Doc. No. 281-2 at 25.) The litigation expenses for which Plaintiffs seek reimbursement include, but are not limited to, expenses for filings and motions, costs associated with court hearings, travel costs related to this litigation, deposition costs, expert witness fees, and computerized legal research costs. (See Doc. No. 276, Attachment B; Doc. No. 277 Attachment A; Doc. No. 279 at Exh. 2.) The Court is concerned about the inclusion of costs attributed to computerized legal research. Before approving of the costs attributed to the use of Westlaw and LEXIS services, the Court requires assurance that these charges are customarily charged to paying clients rather than being subsumed into Plaintiff's counsel's overhead. See Downey Surgical Clinic, Inc. v. Optuminsight, Inc., No. CV09-5457 PSG (JCx), 2016 WL 5938722, at *14 (C.D. Cal. May 16, 2016) (granting reimbursement of computerized research costs where class counsel explained that it was a standard custom and practice to pass through legal research expenses to paying litigation clients, rather than subsuming such expenses in overhead); Matter of Cont'l Illinois Sec. Litig., 962 F.2d 566, 570 (7th Cir. 1992), as amended on denial of reh'g (May 22, 1992) (finding that it was clear error not to reimburse class counsel for LEXIS and Westlaw expenses because the "paying, arms' length market" did not subsume these expenses into a lawyer's overhead). Otherwise, the Court is satisfied that counsel's remaining litigation expenses are reasonable.

Plaintiffs also seek reimbursement of administrative costs as contemplated by paragraphs 2.1(A) and 2.5(B) of the Settlement

Agreement. (Doc. No. 281-2 at 25.) The Court determines this cost to be reasonable.

The court approves the requested reimbursement of Plaintiffs' counsels' requested litigation expenses, to be deducted proportionally from Funds A and B. The Court approves of the requested administrative costs to be deducted proportionally from Funds A and B.

C. Release of Claims

The Court must examine whether the settlement agreement includes a release of absent class members' claims and whether any such release is overly broad. See Spann v. J.C. Penney Corp., 314 F.R.D. 312, 328 (C.D. Cal. 2016) (balancing "fairness to absent class members and recovery for plaintiffs with defendants' business interest in ending this litigation with finality."); Bond. v. Ferguson Enterprises, Inc., No. 1:09-CV-01662, 2011 WL 284962, at *7 (E.D. Cal. Jan. 25, 2011) (rejecting settlement for containing an overly broad settlement release of class members' claims); Goodwin v. Winn Mgmt. Grp. LLC, No. 1:15-CV-00606 DAD EPG, 2017 WL 3173006, at *11 (E.D. Cal. July 26, 2017) (determining release provision to be appropriate since the claims would only be released who affirmatively opted-in and tracked the claims at issue in the lawsuit.).

As discussed in the Court's Preliminary Approval Order, the releases in the Settlement Agreement only pertain to those Plaintiffs who have affirmatively opted-in to the settlement, and do not affect the claims of Fund

A claimants who opt-out or Fund B claimants who do not affirmatively opt-in. (Doc. No. 258 at 20.) Accordingly, the Court approves the release of all the Released Claims against Respondents and/or any of the other released Parties as those term are defined in the Settlement Agreement, which releases shall be fully effective and enforceable upon the occurrence of the Settlement Effective Date.

D. Cy Pres Award

"[A] *cy pres* remedy must provide the 'next best distribution' absent a direct monetary payment to absent class members," not necessarily the recipient that the court or class members would find ideal. Lane v. Facebook, Inc., 696 F.3d 811, 820-21 (9th Cir. 2012). The Court must examine whether the choice of cy pres recipient furthers "(1) the objectives of the underlying statute(s) and (2) the interests of the silent class members." Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011). It must also account for the geographic distribution of the class." Id. at 1040.

Having failed to agree upon a cy pres recipient, the parties proposed several potential cy pres recipients and delegated the final choice to the Court. (Doc. No. 258 at 20-21.) As detailed in the Court' Preliminary Approval Order, the Court has found of the options selected by the parties, the National Employment Law Project ("NELP") most directly serves the underlying purposes of the FLSA, and will also provide silent class members with assistance related to the issues raised by this litigation. (Id. at 21-22.) Accordingly, the Court approves NELP as the cy pres recipient to receive

any unclaimed funds remaining in Fund A one year after distribution from Fund A commences.

E. The Proposed Forms and Method of Notice to Class Members are Fair and Accurate.

"For a proposed settlement under the FLSA, the court must provide potential plaintiffs accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether or not to participate." Goodwin v. Winn Mgmt. Grp. LLC, No. 115CV00606 DAD (EPG), 2017 WL 3173006, at *13 (E.D. Cal. July 26, 2017) (internal quotation marks removed); 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

The Court previously accepted the proposed notice form and administration procedures. (Doc. No. 258 at 22-23.) According to Dan Getman, Plaintiffs' lead counsel, the settlement administrator disseminated notice pursuant to the Court's preliminary approval order. (See Doc. No. 281-3 at 4-5, ¶¶10-12.) Given Getman's representations, the Court finds that the notice was reasonable as to its content and the method of communication.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Final settlement Approval is GRANTED.

The Court approves the Parties' Settlement Agreement as fair, reasonable and adequate. The Court approves the plan of allocation of the settlement funds as described above. The Court ends the tolling of any and all FLSA claims for Plaintiffs and all other putative class members in this case, including for all Fund A Claimants as well as all Potential Fund B Claimants, as of the Settlement Effective Date as set forth in Section 2.4D of the Settlement Agreement.

The Court also approves the dismissal of this action in its entirety with prejudice, which dismissal shall be effective upon the Settlement Effective Date and the subsequent funding of the settlement as set forth in Section 2.14 of the Settlement Agreement.

The Court also approves the release of all of the Released Claims against respondents and/or any of the other Released Parties as those terms are defined in the Settlement Agreement, which releases shall be fully effective and enforceable upon the occurrence of the Settlement Effective Date.

Furthermore, the Court shall retain jurisdiction over the Parties, and over the Settlement Agreement, for all purposes, including but not limited to (i) monitor and enforce compliance with the Settlement Agreement, Final

Approval and/or any related order of this Court; and/or (ii) resolve any disputes over this Settlement Agreement or the administration of the benefits of this Settlement Agreement, including disputes over entitlement to payments sought by Settlement Counsel. The Court shall retain jurisdiction regardless of dismissal.

IT IS SO ORDERED.

Dated 4/3/18

Virginia A. Phillips

Chief United States District Judge