

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ENRIQUEZ VASQUEZ and JUAN
ANDRES RUIZ on behalf of a
class of similarly situated
employees,

Plaintiffs,

v.

COAST VALLEY ROOFING, INC., dba
COAST ROOFING, and FRANCIS
DOMINIC GIANGROSSI,

Defendants.

1:07-CV-00227 OWW DLB

MEMORANDUM DECISION AND ORDER
GRANTING JOINT MOTIONS FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT, CLASS CERTIFICATION,
AND JUDGMENT (DOC. 60), AND FOR
APPROVAL OF FEES, REPRESENTATIVE
AWARDS, AND COSTS (DOC. 61).

I. INTRODUCTION

Plaintiffs Enriquez Vasquez and Juan Andres Ruiz brought this
action on behalf of themselves and approximately 177 current and
former roofing workers employed by Defendants Coast Roofing, Inc.
("Coast") and Francis Dominic Giangrossi, alleging violations of
federal and state wage-and-hour laws. *See* First Amended Class Action
Complaint ("FAC"), filed Sept. 19, 2007, Doc. 23. On November 17,
2009, the district court preliminarily approved the terms of a
negotiated Class Action Settlement. Doc. 57. Before the court for
decision are joint motions for final approval of the class action

1 settlement, class certification, and judgment, Doc. 60, and for
2 approval of fees, representative awards, and costs, Doc. 61. No
3 oppositions have been filed, nor was any oral objection made in open
4 court during the publicly-noticed hearing of these motions on February
5 22, 2010 at 10:00 AM in Courtroom 3 (OWW).
6

7 II. FACTUAL BACKGROUND

8 A. Summary of the Litigation.

9 The FAC alleges that Coast failed to pay overtime and minimum
10 wages; failed to pay wages due at termination of employment; failed to
11 provide all legally required meal periods and rest breaks; failed to
12 provide accurate, itemized employee wage statements; and failed to
13 compensate employees for travel time and mileage. The FAC seeks to
14 certify a class composed of Plaintiffs and similarly situated
15 individuals and to recover back wages, interest, penalties, and
16 attorneys' fees and costs from Defendants.
17

18 Plaintiffs' counsel reviewed employee records gathered pursuant
19 to pre-litigation non-discovery methods provided by California Labor
20 Code section 226, interviewed numerous witnesses, and reviewed
21 hundreds of pages of documents from employees before filing the
22 complaint. Mallison Decl., Doc. 62, at ¶¶ 37-39.
23

24 B. Summary of the Settlement.

25 1. The Gross Settlement Payment.

26 Under the Settlement, Coast will make a Gross Settlement Payment
27 of \$300,000. This payment will cover Settlement Shares to be paid to
28

1 Class Members who submit valid claims; the employer share of payroll
2 taxes on the Settlement Shares; a \$10,000 payment to the California
3 Labor and Workforce Development Agency for its share of the settlement
4 of civil penalties; the Settlement Administrator's reasonable fees and
5 expenses of \$25,000 (which is less than the Administrator's actual
6 costs of \$27,592); and (subject to court approval) payments to
7 Plaintiffs, in addition to their Settlement Shares, of \$5,000 each in
8 compensation of their services as Class Representatives and payments
9 to Class Counsel of up to \$100,000 for their reasonable attorneys'
10 fees and up to \$10,000 in expenses. See Settlement Agreement
11 ("Settlement") § III.A-C, attached to Mallison Decl. at Ex. 1, Doc.
12 62-2. There will be no reversion of the Gross Settlement Payment to
13 Coast.
14
15

16 2. Payment of Settlement Shares.

17 After the other amounts are deducted, the Gross Settlement Amount
18 (termed the "Net Settlement Amount") will be distributed as Settlement
19 Shares to all Class Members who submit valid claims, based upon the
20 following allocation formula:
21

22 The Settlement Share for each Claimant will be based on (a)
23 that Claimant's total number of Months of Employment during
24 the Class Period (b) divided by the aggregate number of
25 Months of Employment of all Participating Class Members
26 during the Class Period (with the division rounded to four
27 decimal places) (c) multiplied by the value of the Net
28 Settlement Amount.

26 Settlement § III.D.1. This simple formula relies upon information
27 readily available from Coast's records and is commonly used in wage-
28

1 and-hour cases. Mallison Decl. at ¶43.

2
3 3. Distribution of Unclaimed Funds and Uncashed Checks.

4 In the event that not all Class Members submit claims, the
5 residual will be redistributed to those Class Members who do submit
6 valid claims. Settlement § III.D.3. In the event that checks issued
7 to Class Members are not cashed, these monies will be donated to two
8 public interest organizations on a 50%/50% basis: (1) the California
9 Rural Legal Assistance; and (2) the Boys and Girls Club of
10 Bakersfield. *Id.* § III.F.10. Donation of the residual to these
11 public interest organizations that serve low-income workers is
12 appropriate. *See* Mallison Decl. at ¶44.

13
14 4. Scope of the Release.

15 The Settlement provides that all Participating Class Members
16 release Defendants as follows:

17
18 As of the date of the Judgment, all Participating Class
19 Members hereby fully and finally release Coast, and its
20 parents, predecessors, successors, subsidiaries, affiliates,
21 and trusts, and all of its employees, officers, agents,
22 attorneys, stockholders, fiduciaries, other service
23 providers, and assigns, from any and all claims, known and
24 unknown, for or related to all claims based on or arising
25 from the allegations that they were or are improperly
26 compensated under federal, California, or local law (the
27 "Class's Released Claims"). The Class's Released Claims
28 include all such claims for alleged unpaid wages, including
overtime compensation, missed meal-period and rest-break
wages or penalties, and interest; related penalties,
including, but not limited to, recordkeeping penalties, pay-
stub penalties, minimum-wage penalties, missed meal-period
and rest-break penalties, and waiting-time penalties; and
costs and attorneys' fees and expenses.

Settlement § III.G.2.

1 5. Objections and Opt-Out Process

2 Any Class Member who so wishes had an opportunity to object to or
3 comment on the Settlement, or may elect not to participate in the
4 Settlement. The Class Notice fully explains the objection/comment and
5 opt-in procedures. Settlement § III.F.4.
6

7 6. Termination of Settlement.

8 The Settlement provided for confirmatory discovery to be
9 conducted during the approval process. Plaintiffs reserved the right
10 to void the Settlement if this confirmatory discovery revealed any
11 substantial variance from previous discovery or other factual
12 representations made by defendants and relied upon by Plaintiffs as
13 the basis for the Settlement. Settlement § III.F.7. Plaintiffs
14 completed this confirmatory discovery, including consultation with
15 experts in construction accounting and database analysis. This
16 discovery did not reveal any reason to void the settlement. Doc. 67
17 at 6.
18

19
20 III. DISCUSSION

21 A. The Terms of Preliminary Approval Have Been Satisfied.

22 1. Notice.

23 The procedures for giving notice to the class members, as set
24 forth in the Settlement and ordered in the Court's Preliminary
25 Approval Order, Doc. 57, have been carried out. The Notice of
26 Certification of Settlement Class and Collective Action, Settlement
27 and Hearing Date for Final Court Approval (the "Class Notice"), and
28

1 the forms of Claim for Settlement Share and Election Not to
2 Participate in Settlement (referred to in conjunction with the "Class
3 Notice" as "Notice Packets") were sent out by the Settlement
4 Administrator via U.S. Mail to Class Members on December 9, 2009, in
5 the manner specified by the Settlement. *Only Decl.*, Doc. 69, at ¶10.
6 In addition, on December 11, 2009 a summary version of the Class
7 Notice was published in the Bakersfield Californian and El Popular
8 newspapers. *Id.* at ¶11.

10 The U.S. Postal Service returned 40 Notice Packets to the
11 Settlement Administrator. *Id.* at ¶13. Best efforts to trace these
12 individuals and/or find their updated addresses were conducted
13 resulting in 24 additional delivered notice packets mailed and 23
14 delivered. *Id.* at ¶13. On December 26, 2009, the Settlement
15 Administrator contacted 165 Class Member who had not yet provided
16 claims forms via phone to remind them about the deadlines in the
17 settlement. *Id.* at ¶12.

19 As of January 14, 2010, 56 class members, or more than 31% of the
20 class members submitted claims. *Id.* at ¶12. Zero individuals
21 submitted elections not to participate, *id.* at ¶15, and as of January
22 22, 2010, the date on which Plaintiffs' motion for final approval was
23 filed, no class member had submitted an objection to the settlement,
24 *id.* at ¶18.

26 B. Final Approval of a Settlement Class is Appropriate.

27 In order to approve a class action settlement, a district court
28

1 must first make a finding that a class can be certified. *See, e.g.,*
2 *Molski v. Gleich*, 318 F.3d 937, 943, 946-50 (9th Cir. 2003). "When,
3 as here, the parties have entered into a settlement agreement before
4 the district court certifies the class, reviewing courts must pay
5 undiluted, even heightened, attention to class certification
6 requirements." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.
7 2003).
8

9 Pursuant to Federal Rule of Civil Procedure 23(c)(1), approval of
10 the class is appropriate where the plaintiff establishes the four
11 prerequisites of Federal Rule of Civil Procedure 23(a) -- (1)
12 numerosity, (2) commonality, (3) typicality, and (4) adequacy of
13 representation -- as well as one of the three requirements of Rule
14 23(b). *See Horton v. USAA Cas. Ins. Co.*, --- F.R.D. --- 2009 WL
15 5066681, *4 (D. Ariz. 2009).
16

17 Here, the proposed class is comprised of all individuals who have
18 been employed by Coast in California as non-exempt roofing workers
19 during the period from January 31, 2003 to July 31, 2009. There are
20 approximately 177 Class Members.
21

22 1. Numerosity.

23 A proposed class must be "so numerous that joinder of all members
24 is impracticable." Fed. R. Civ. P. 23(a)(1). The numerosity
25 requirement demands "examination of the specific facts of each case
26 and imposes no absolute limitations." *General Tel. Co. of the*
27 *Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980). Courts have
28

1 routinely found the numerosity requirement satisfied when the class
2 comprises 40 or more members. *Ansari v. New York Univ.*, 179 F.R.D.
3 112, 114 (S.D.N.Y. 1998). Here, the presence of approximately 177
4 similarly situated Class Members satisfies the numerosity requirement.

5 Plaintiffs also must establish impracticability of joinder. A
6 court should consider "not only the class size but other factors as
7 well, including the geographic diversity of class members, the ability
8 of individual members to institute separate suits, and the nature of
9 the underlying action and the relief sought." *See, Nat'l Ass'n of*
10 *Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986).
11 The limited size of any individual plaintiff's recovery is also
12 relevant. *Edmondson v. Simon*, 86 F.R.D. 375, 379 (N.D. Ill. 1980).
13 Here, where the potential recovery by any individual plaintiff is
14 relatively small, individual members of the class would likely be
15 unwilling or unable to bring institute separate suits. Moreover, the
16 filing of individual suits by 177 separate plaintiffs would create and
17 unnecessary burden on judicial resources.

20
21 2. Commonality.

22 Rule 23(a) also demands "questions of law or fact common to the
23 class." It does not require that all questions of law or fact be
24 common to every single member of the class. To satisfy the
25 commonality requirement, plaintiffs need only point to a single issue
26 common to the class. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1225
27 (9th Cir. 2007); *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 655 (C.D.
28

1 Cal. 2000). Commonality is generally satisfied where, as in this
2 case, "the lawsuit challenges a system-wide practice or policy that
3 affects all of the putative class members." *Armstrong v. Davis*, 275
4 F.3d 849, 868 (9th Cir. 2001); *LaDuke v. Nelson*, 762 F.2d 1318, 1332
5 (9th Cir. 1985). Differences in the ways in which these practices
6 affect individual members of the class do not undermine the finding of
7 commonality. *Armstrong*, 275 F.3d at 868 (finding commonality
8 requirement satisfied despite individual class members having
9 different disabilities, since all suffered similar harm as a result of
10 defendant's actions).

12 Here, for purposes of the Settlement only, the parties agree that
13 common questions of both fact and law exist regarding Coast's alleged
14 failure to abide by federal and state wage-and-hour law, including:
15

- 16 • whether Coast failed to provide roofing workers with
required meal periods;
- 17 • whether Coast failed to pay roofing workers wages for
18 meal periods during which they remained on duty;
- 19 • whether Coast authorized and permitted the roofing
workers to take required rest periods;
- 20 • whether Coast failed to pay roofing workers an
21 additional hour of wages for missed meal periods and
rest breaks;
- 22 • whether Coast failed to pay all legally required
23 minimum wages and overtime compensation to hourly
production workers;
- 24 • whether hourly production workers are owed waiting time
25 penalties because Coast allegedly willfully failed to
26 pay them additional wages for missed meal periods and
rest breaks, and for meal periods taken during which
27 they remained on duty, upon the termination of their
employment; and
- 28 • whether Coast's business practices violated Business
and Professions Code section 17200 et seq.

- whether Coast's failed to pay for travel time and mileage to roofing workers.

These common questions of law or fact are sufficient to satisfy the commonality requirement.

3. Typicality.

Rule 23(a)(3) demands that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Armstrong*, 275 F.3d at 868. "Typicality ... is said ... to be satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Id.* Under the rule's "permissive standards," representative claims are typical if they are "reasonably co-extensive with those of absent class members; they need to be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Plaintiffs' claims are essentially identical to those of the class as whole, as they are all roofing workers who were paid under the same pay practices. The typicality requirement is satisfied.

4. Adequacy of Representation.

The final Rule 23(a) prerequisite is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The proper resolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of

1 interest with other class members and (b) will the named plaintiffs
2 and their counsel prosecute the action vigorously on behalf of the
3 class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th
4 Cir. 2000). The adequacy of representation requirement is met here
5 because Plaintiffs have the same interests as the remaining members of
6 the Settlement Class, i.e. obtaining payment for wages unlawfully
7 withheld; there is no apparent conflict between the named Plaintiffs'
8 claims and those of the other Class Members; and Plaintiffs are
9 represented by experienced and competent counsel who has experience in
10 litigating over 40 wage and hour class action cases.
11

12
13 5. Rule 23(b)(3).

14 Having satisfied the prerequisites set forth in Rule 23(a),
15 Plaintiffs must also satisfy one of the three provisions of Rule
16 23(b). The parties agree for purposes of the Settlement only that
17 certification of the Class is appropriate under Rule 23(b)(3) because
18 "questions of law or fact common to the members of the class
19 predominate over any questions affecting only individual members, and
20 ... a class action is superior to other available methods for the fair
21 adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).
22

23 With regard to superiority, Rule 23(b) provides four determining
24 factors. Fed. R. Civ. P. 23(b). The first factor for consideration
25 is the interest of each member in "individually controlling the
26 prosecution or defense of separate actions." Fed. R. Civ. P.
27 23(b)(3)(A). This factor is more relevant where each class member has
28

1 suffered sizeable damages or has an emotional stake in the litigation.
2 *See, e.g., In re N. Dist. of Cal., Dalkon Shield, Etc.*, 693 F.2d 847,
3 856 (9th Cir. 1982). Here, where the monetary damages each plaintiff
4 individually suffered are relatively modest, certifying a class action
5 is favored. *Id.*

6
7 The second factor to consider is "the extent and nature of any
8 litigation concerning the controversy already commenced by or against
9 members of the class." Fed. R. Civ. P. 23(b)(3)(B). The only known
10 litigation concerning the controversy is the consolidated cases at
11 issue in this settlement.

12 The third factor to consider is "the desirability or
13 undesirability of concentrating the litigation of the claims in the
14 particular forum." Fed. R. Civ. P. 23(b)(3)(C). The fourth and final
15 factor is "the likely difficulties in managing a class action." Fed.
16 R. Civ. P. 23(b)(3)(D). This factor "encompasses the whole range of
17 practical problems that may render the class format inappropriate for
18 a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164
19 (1974). However, the context of settlement, these two factors are
20 essentially irrelevant. *See Amchem Prods. Inc. v. Windsor*, 521 U.S.
21 591, 620 (1997) (where a district court is confronted with a
22 settlement-only class certification, the court need not inquire
23 whether the case, if tried, would present manageability problems
24 because the point is that there will be no trial).

25
26
27 Here, where the monetary damages each plaintiff individually
28

1 suffered are relatively modest, and where no other litigation
2 concerning these allegations is pending, certifying a class action is
3 favored under Rule 23(b)(3).

4 The motion for final approval of the Settlement Class is GRANTED.
5

6 C. Final Approval of the Settlement Is Appropriate.

7 "The court must approve any settlement ... of the claims ... of a
8 certified class." Fed. R. Civ. P. 23(e)(1)(A). A settlement may be
9 approved only after a hearing and on finding that it is fair,
10 reasonable, and adequate. Fed. R. Civ. P. 23(e)(1)(C). Such approval
11 is required to make sure that any settlement reached is consistent
12 with plaintiffs' fiduciary obligations to the class. *See Ficalora v.*
13 *Lockheed Cal. Co.*, 751 F.2d 995, 996 (9th Cir. 1985). The court also
14 serves as guardian for the absent class members who will be bound by
15 the settlement, and therefore must independently determine the
16 fairness of any settlement. *Id.* However, the district court's role
17 in intruding upon what is otherwise a private consensual agreement is
18 limited to the extent necessary to reach a reasoned judgment that the
19 agreement is not the product of fraud or collusion between the
20 negotiating parties, and that the settlement, taken as a whole, is
21 fair, reasonable, and adequate to all concerned. *FDIC v. Alshuler*, 92
22 F.3d 1503, 1506 (9th Cir. 1996). Therefore, the settlement hearing is
23 not to be turned into a trial or rehearsal for trial on the merits.
24 *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th
25 Cir. 1982). Ultimately, the district court's determination is nothing
26
27
28

1 more than an amalgam of delicate balancing, gross approximations, and
2 rough justice. *Id.*

3 In determining whether a settlement agreement is fair, adequate,
4 and reasonable to all concerned, a district court may consider some or
5 all of the following factors: (1) the strength of the Plaintiff's case
6 (2) the risk, expense, complexity, and likely duration of further
7 litigation; (3) the risk of maintaining class action status throughout
8 the trial; (4) the amount offered in settlement; (5) the extent of
9 discovery completed; (6) the stage of the proceedings; (7) the views
10 and experience of counsel; (8) any opposition by class members; (9)
11 the presence of a governmental participant. *Linney v. Cellular Alaska*
12 *Pshp.*, 151 F.3d 1234,1242 (9th Cir. 1998). This list of factors is
13 not exclusive and the court may balance and weigh different factors
14 depending on the circumstances of each case. *Torrison v. Tucson Elec.*
15 *Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

16
17
18
19 1. Strength of Plaintiffs' Case.

20 "An important consideration in judging the reasonableness of a
21 settlement is the strength of the plaintiffs' case on the merits
22 balanced against the amount offered in the settlement." *Nat'l Rural*
23 *Telecom. Coop. v. DirectTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)
24 (quoting 5 Moore's Federal Practice § 23.85[2][b] (Matthew Bender 3d.
25 ed.)). However, in balancing these factors, "a proposed settlement is
26 not to be judged against a speculative measure of what might have been
27 awarded in a judgment in favor of the class." *Id.*

1 [T]he settlement or fairness hearing is not to be turned
2 into a trial or rehearsal for trial on the merits. Neither
3 the trial court nor [the Court of Appeals] is to reach any
4 ultimate conclusions on the contested issues of fact and law
5 which underlie the merits of the dispute, for it is the very
6 uncertainty of outcome in litigation and avoidance of
7 wastefulness and expensive litigation that induce consensual
8 settlements.

9 *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th
10 Cir. 1982).

11 Although Plaintiffs maintain their strong belief in the
12 underlying merits of their case, Plaintiffs' counsel acknowledges that
13 wage and hour cases on behalf of low wage workers can difficult to
14 prove on a class basis and considered the uncertainties surrounding
15 proving their claims in a lengthy and complex jury trial. This factor
16 weighs in favor of approval.

17 2. Risk, Expense, Complexity, and Likely Duration of Further
18 Litigation.

19 Another relevant factor is the risk of continued litigation
20 balanced against the certainty and immediacy of recovery from the
21 Settlement. *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec.*
22 *Litig.)*, 213 F.3d 454, 458 (9th Cir. 2000). A court may "consider the
23 vagaries of litigation and compare the significance of immediate
24 recovery by way of the compromise to the mere possibility of relief in
25 the future, after protracted and expensive litigation." *Oppenlander*
26 *v. Standard Oil Co. (Ind.)*, 64 F.R.D. 597, 624 (D. Colo. 1974). "It
27 has been held proper to take the bird in hand instead of a prospective
28 flock in the bush." *Id.*

1 Here, there are significant risks in continued litigation and no
2 guarantee of recovery given the current state of the law. The
3 California Supreme Court is currently reviewing the standards
4 applicable to recovery of rest and meal period premiums. *See Brinker*
5 *Restaurant Corp. v. Superior Court*, 85 Cal. Rptr. 3d 688 (2008). This
6 factor weighs in favor of approval.
7

8 3. Risk of Maintaining Class Action Status Throughout the
9 Trial.

10 To the extent that all class members were employed as roofers and
11 were compensated on the same basis, the only lack of class eligibility
12 is that lost compensation calculations are individual. This would not
13 defeat class treatment. This factor is neutral.
14

15 4. Amount Offered in Settlement.

16 The recovery of \$300,000, or approximately \$2600 per claimant net
17 of all expenses, is a sizeable settlement in a wage and hour case
18 involving low-income workers. Although a higher per claimant award
19 was arguably possible, "the very essence of a settlement is
20 compromise, a yielding of absolutes and an abandoning of highest
21 hopes." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th
22 Cir. 1234)(internal citation and quotation omitted). This factor
23 weighs in favor of approval.
24

25 5. Extent of Discovery Completed, and the Stage of the
26 Proceedings.

27 A settlement following sufficient discovery and genuine arms-
28 length negotiation is presumed fair. *See City P'ship Co. v. Atlantic*

1 *Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). Here,
2 Plaintiffs conducted significant discovery of the underlying
3 timekeeping and payroll documents in this case, consisting of tens of
4 thousands of pages, and undertook in depth interviews of numerous
5 Class members, resulting in informed prosecution and eventual
6 settlement of the matter. By the time the settlement was reached, the
7 litigation had proceeded to a point in which both plaintiffs and
8 defendants "ha[d] a clear view of the strengths and weaknesses of
9 their cases." *In re Warner Communications Sec. Litig.*, 618 F Supp
10 735, 745 (S.D.N.Y. 1985). This factor weighs in favor of approval.
11
12

13 6. Experience and Views of Counsel.

14 In reviewing the opinions of counsel, "great weight" is accorded
15 to the recommendation of the attorneys. *In re Painwebber Ltd.*
16 *P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997). They are
17 the ones who are most closely acquainted with the facts of the
18 underlying litigation. *Id.* "Parties represented by competent counsel
19 are better positioned than courts to produce a settlement that fairly
20 reflects each party's expected outcome in the litigation." *Pac.*
21 *Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). "[T]he trial
22 judge, absent fraud, collusion, or the like, should be hesitant to
23 substitute its own judgment for that of counsel." *Cotton v. Hinton*,
24 559 F.2d 1326, 1330 (5th Cir. 1977); *Hanrahan v. Britt*, 174 F.R.D.
25 356, 366-368 (E.D. Pa. 1997) (presumption of correctness applies to a
26 class action settlement reached in arms'-length negotiations between
27
28

1 experienced, capable counsel after meaningful discovery).

2 Here, class counsel understood the complex risks and benefits of
3 any settlement and concluded that the proposed Settlement was a just,
4 fair, and certain result. This factor weighs in favor of approval.
5

6 7. Presence of a Governmental Participant.

7 Pursuant to California's Private Attorneys General Act ("PAGA"),
8 Cal. Lab. Code. § 2699.3, California granted Plaintiffs the right to
9 stand in the shoes of the State of California to enforce these claims
10 on behalf of the state and employees. As a result, Plaintiffs stand
11 as a proxy for the State and have obtained \$10,000 for the State of
12 California. This factor does not weigh against approval.
13

14 8. Reaction of Class Members to the Proposed Settlement.

15 "The reactions of the members of a class to a proposed settlement
16 is a proper consideration for the trial court." Nat'l Rural Telecom.
17 Coop., 221 F.R.D. at 528 (quoting 5 Moore's Fed. Practice §
18 23.85[2][d]). Class representatives' opinions of the settlement are
19 especially important because "[t]he representatives' views may be
20 important in shaping the agreement and will usually be presented at
21 the fairness hearing; they may be entitled to special weight because
22 the representatives may have a better understanding of the case than
23 most members of the class." *Id.* (citing Manual for Complex
24 Litigation, Third, § 30.44 (1995)).
25
26

27 The Class Representatives, who have an extensive understanding of
28 the merits of the case and the Settlement, see Vasquez Decl., Doc. 63

1 at ¶¶ 7-17; Ruiz Decl., Doc. 64 at ¶¶ 7-17, are strongly in support of
2 the Settlement, Mallison Decl., Doc. 62 at ¶57. In addition, no class
3 members have objected to the settlement. This factor weighs in favor
4 of approval.

5
6
7 In sum, the majority of the relevant factors weigh in favor of
8 approving the Settlement. It represents a substantial recovery that
9 avoids the risks associated with protracted litigation in a document-
10 intensive wage and hour case.

11
12 D. Class Representative Payments; Class Counsel Attorneys' Fees
Payment and Class Counsel Litigation Expenses Payment.

13 Where the payment of attorney's fees is also part of the
14 negotiated settlement, the fee settlement must be separately evaluated
15 for fairness in the context of the overall settlement. *Kinsely v.*
16 *Network Assocs.*, 312 F.3d 1123, 1126 (9th Cir. 2002).

17
18 Plaintiffs and their counsel seek (and Defendants do not oppose),
19 awards to Plaintiffs of Class Representative Payments of \$5,000 each,
20 in addition to their Settlement Shares, in compensation for their
21 services as Class Representatives; a Class Counsel Attorneys' Fees
22 Payment of \$100,000 (or 33-1/3% of the Gross Settlement Amount); and a
23 Class Counsel Litigation Expenses Payment of \$8,967. *See Settlement §*
24 *III.B.1-2.*

25
26 1. Class Representative Payments of \$5,000 Each are Fair and
27 Reasonable.

28 Plaintiffs seek payments in the amount of \$5,000 to Class

1 Representatives Enriquez Vasquez and Juan Andres Ruiz. These payments
2 are intended to recognize the time and efforts Mr. Vasquez and Mr.
3 Ruiz spent on behalf of the Class Members. Mallison Decl., Doc. 62,
4 at ¶67.; *see generally* Vasquez Decl., Doc. 63; Ruiz Decl., Doc. 64.
5 "Courts routinely approve incentive awards to compensate named
6 plaintiffs for the services they provide and the risks they incurred
7 during the course of the class action litigation." *Ingram v. The*
8 *Coca-Cola Company*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (internal
9 quotations and citations omitted) (approving service awards of
10 \$300,000 to each named plaintiff in recognition of the services they
11 provided to the class by responding to discovery, participating in the
12 mediation process, and taking the risk of stepping forward on behalf
13 of the class.); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F.
14 Supp. 294, 299 (N.D. Cal. 1995) (approving \$50,000 participation award
15 to plaintiffs).

16
17
18 Here, the Class Representatives assisted prosecution and
19 settlement of the Class' claims by: (1) investigating and
20 substantiating the claims alleged in this action; (2) helping to
21 prepare the complaint; (3) producing documentary evidence to Counsel;
22 and (4) aiding with settlement of this litigation. *See* Mallison Decl.
23 at ¶57; Vasquez Decl. at ¶¶ 6-17 (estimating that he has devoted
24 "dozens" of hours of his time to the litigation); Ruiz Decl. at ¶¶ 6-
25 17 (same). Moreover, Class Representatives undertook the financial
26 risk that, in the event of a judgment in favor of Defendant in this
27
28

1 action, they could have been personally responsible for any costs
2 awarded in favor of Defendant. *See, e.g., Whiteway v. Fed Ex Kinkos*
3 *Office & Print Services, Inc.*, 2007 WL 4531783, at *2-*4 (N.D. Cal.
4 Dec. 17, 2007). There has been no objection to the Class
5 Representative payment.

6
7 In light of the work the Class Representatives performed on
8 behalf of Class Members, the risk the Class Representatives undertook,
9 and the Class Members' response to the Settlement, the requested
10 payment is reasonable and appropriate.

11
12 2. Class Counsel Attorneys' Fee Payment of \$100,000 is Fair and
13 Reasonable.

14 Class Counsel seeks an attorney's fee award of \$100,000, or 33
15 1/3% of the common fund. This is significantly less than Class
16 Counsel's asserted lodestar of \$178,475.¹ Courts have long recognized
17 the "common fund" or "common benefit" doctrine, under which attorneys
18 who create a common fund or benefit for a group of persons may be
19 awarded their fees and costs to be paid out of the fund. *See Hanlon*,
20 150 F.3d at 1029. "[A] lawyer who recovers a common fund for the

21
22 ¹ The district court has reviewed the billing records of Plaintiffs' counsel,
23 submitted as attachments to the Supplemental Declaration of Stan Mallison. Doc. 71.
24 These records reveal that Stan Mallison, a partner who bills at \$525 per hour spent
25 approximately 190 hours on this case; Hector Martinez, a partner who also bills at
26 \$525 per hour spent approximately 75 hours on this case; Marco Palau, an associate
27 who bills at \$350 per hour spent approximately 30 hours on the case; and Hector
28 Hernandez, a paralegal who bills at \$150 per hour, spent approximately 170 hours on
the case. *See id.* at ¶4. The billed lodestar is reasonable, given that this case
involved considerable investigation, the filing of a fairly complex, thirty-six page
complaint, the litigation of a motion to dismiss followed by the filing of an amended
complaint, and the subsequent settlement of a putative class action, requiring
preliminary approval, notice, and final approval. Moreover, the settlement only
provides for recovery of slightly more than half of the total lodestar.

1 benefit of persons other than himself or his client is entitled to a
2 reasonable attorney's fee from the fund as a whole." *Staton v. Boeing*
3 *Co.*, 327 F.3d 938, 972 (9th Cir. 2003) (quoting *Boeing Co. v. Van*
4 *Gemert*, 444 U.S. 472, 478 (1980)). Awarding a percentage of the
5 common fund is particularly appropriate "when each member of a
6 certified class has an undisputed and mathematically ascertainable
7 claim to part of a lump-sum judgment recovered on his behalf.'" *Id.*
8 (quoting *Boeing Co.*, 444 U.S. at 478-79).

10 Here, where the Settlement requires lump sum allocations to each
11 Settlement Class and applies distribution formulas pursuant to which
12 each Class Member who submits a valid claim will receive a
13 mathematically ascertainable payment, application of the percentage of
14 common fund doctrine appropriate. The typical range of acceptable
15 attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total
16 settlement value, with 25% considered the benchmark. *Powers v.*
17 *Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *Hanlon*, 150 F.3d at 1029;
18 *Staton*, 327 F.3d at 952. However, the exact percentage varies
19 depending on the facts of the case, and in "most common fund cases,
20 the award exceeds that benchmark." *Knight v. Red Door Salons, Inc.*,
21 2009 WL 248367 (N.D. Cal. 2009); see also *In re Activision Sec.*
22 *Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) ("nearly all
23 common fund awards range around 30%").
24
25

26 When assessing whether the percentage requested is reasonable,
27 courts look to factors such as: (a) the results achieved; (b) the risk
28

1 of litigation; (c) the skill required, (d) the quality of work; (e)
2 the contingent nature of the fee and the financial burden; and (f) the
3 awards made in similar cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d
4 1043, 1047 (9th Cir. 2002); *Six Mexican Workers v. Arizona Citrus*
5 *Growers*, 904 F.2d 1301 (9th Cir. 1990).

6
7 a. Results Achieved.

8 Given that the individual claims in this case concerned
9 Defendants' alleged failure to pay class members for portions of days
10 on an intermittent basis and failure to properly provide rest and meal
11 periods, claims that would not generally produce substantial damages
12 awards, the recovery of \$300,000, which will provide the 56 claimant
13 employees with a net recovery of approximately \$2,600 per employee on
14 average, is a favorable result.

15
16 b. Risks Involved.

17 There were significant risks in pursuing this case. Among other
18 things, some of the key claims involved the timely provision of rest
19 and meal periods, an issue that is pending before the California
20 Supreme Court. It is possible that any resulting decision could
21 significantly lower the potential recovery in this case.

22
23 c. Skill Required

24 This case required specialized skills to find and contact largely
25 Spanish speaking workers, litigate cutting-edge legal theories
26 surrounding rest and meal periods, and navigate challenging issues of
27
28

1 proof in light of the limited recording keeping by Defendant. The
2 case also required intensive extrapolation from existing records.
3

4 d. The Quality of the Work.

5 Counsel thoroughly investigated the case, weeding through a
6 myriad of potential claims to find those that could be litigated.
7 Counsel also developed sophisticated legal claims, such as the clock
8 rounding and on-duty meal period claims, despite the lack of clear
9 caselaw on point.

10 e. Contingent Nature of the Representation.

11 Class Counsel prosecuted the case on a contingency basis, which
12 presented considerable risk. *See In re Sumitomo Copper Litig.*, 74 F.
13 Supp. 2d 393, 396-398 (S.D.N.Y. 1999) ("No one expects a lawyer whose
14 compensation is contingent on the success of his services to charge,
15 when successful, as little as he would charge a client who in advance
16 of the litigation has agreed to pay for his services, regardless of
17 success. Nor, particularly in complicated cases producing large
18 recoveries, is it just to make a fee depend solely on the reasonable
19 amount of time expended.").

20
21
22 f. Awards made in similar cases.

23 The requested fee is in line with fee awards made in the
24 following, similar class action wage and hour cases litigated in the
25 Central Valley:

- 26 • 33.3% in *Benitez et al. v. Wilbur* (E.D. Cal., 1:08-CV-1122 LJO
27 GSA)
28

- 1 • 33.3% in *Chavez et al. v. Petrissans et al.* (E.D. Cal., 1:08-CV-
- 2 00122 LJO-GSA)
- 3 • 30% in *Vasquez v. Aartman* (E.D. Cal., 1:02-CV05624 AWI LJO)
- 4
- 5 • 31.25% in *Baganha v. California Milk Trans.* (E.D. Cal., 1:01-CV-
- 6 05729 AWI LJO)
- 7 • 33% in *Randall Willis et al. v. Cal Western Transport*, and *Earl*
- 8 *Baron et al. v. Cal Western Transport*, Coordinated Case No. 1:00-
- 9 cv-05695 AWI LJO)
- 10
- 11

12 The Settlement's provision of \$100,000 in attorney's fees (or
13 approximately 33.3% of the total recovery obtained, is fair and
14 reasonable in light of the good result achieved for Plaintiffs, the
15 risk counsel took pursuing the matter, and the skill they exhibited
16 prosecuting the case.

17

18 3. Class Counsel Litigation Expenses Payment of \$8,967 is Fair
19 and Reasonable.

20 In the course of this litigation, Plaintiffs' counsel incurred
21 out-of-pocket costs totaling \$8,967, and expect to incur modest
22 additional in costs related to the final approval of the Settlement.
23 See Mallison Decl. at ¶62. The costs billed, which include ground
24 transportation, copy and scanning costs, computer research, and expert
25 witness fees, are reasonable. See Doc. 71. The actual costs incurred
26 are less than the estimated \$10,000, which was included in the Class
27 Notice.

1 IV. CONCLUSION

2 For the reasons set forth above, the joint motion to:

3 (1) Certify the Settlement Class is GRANTED;

4 (2) Approve the Settlement is GRANTED;

5 (4) Approve the proposed Class Representative Payments in the
6 amount of \$5,000 to Enrique Vasquez and \$5,000 to Juan Andres
7 Ruiz is GRANTED;

8 (5) Approve the proposed Class Counsel Attorney Fee Award in the
9 amount of \$100,000 is GRANTED;

10 (6) Approve Class Counsel's Costs Award in the amount of 8,967 is
11 GRANTED.
12

13
14 SO ORDERED

15 Dated: March 8, 2010

16 /s/ Oliver W. Wanger
17 Oliver W. Wanger
18 United States District Judge
19
20
21
22
23
24
25
26
27
28