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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

10
11 DON CLAYTON,

12 Plaintiff,

13 v.

14 KNIGHT TRANSPORTATION,

15 Defendant.

Case No. 1:11-cv-00735-SAB

ORDER ON MOTION SEEKING PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT

(ECF Nos. 70-72)

16
17 **I.**

18 **INTRODUCTION**

19 On September 27, 2013, Plaintiff Don Clayton filed a motion seeking preliminary
20 approval of class action settlement. The Court has considered the proposed settlement between
21 the parties, the proposed notice, claim and opt-out forms. A hearing on the motion was held on
22 October 30, 2013. Counsel Craig J. Ackermann appeared telephonically for Plaintiff and counsel
23 Ellen Bronchetti appeared telephonically for Defendant. For the following reasons, Plaintiff's
24 motion for preliminary approval of class settlement is granted.

25 **II.**

26 **FACTUAL AND PROCEDURAL BACKGROUND**

27 Plaintiff filed this class action on behalf of himself and other similarly situated individuals
28 in Tulare County Superior Court on March 8, 2011. (ECF No. 1-1.) Plaintiff was seeking

1 declaratory relief, damages, and attorney fees for Defendant's failure to pay its California truck
2 drivers minimum wage for the time spent in mandatory orientation, failure to pay all wages upon
3 termination of employment, failure to provide accurate itemized wage statements, and unfair
4 business practices. (Id.) Defendant removed this action to the Eastern District of California on
5 May 6, 2011. (ECF No. 1.) On July 20, 2011, an order issued establishing deadlines for
6 precertification discovery and class certification. (ECF No. 11.) On or around August 1, 2011,
7 the parties exchanged initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) and
8 the parties engaged in extensive discovery. (Decl. of Craig Ackerman ¶ 10, ECF No. 71.)

9 On March 21 and 22, 2012, Plaintiff deposed Timothy Pollock, Michael David Hitchcock,
10 Puneet Bawa, and William Johnson. (Id. at ¶ 11.) Defendant deposed Plaintiff on April 3, 2012.
11 (Id.) Plaintiff filed a motion to certify the class on April 20, 2012. (ECF No. 17.) On July 16,
12 2012, a findings and recommendation issued recommending certifying four classes in this action.
13 (ECF No. 41.) On August 21, 2012, United States District Judge Lawrence J. O'Neill issued an
14 order adopting the findings and recommendation and four classes were certified: 1) orientation
15 pay class; 2) California Labor Code section 203 class; 3) California Labor Code section 226 class;
16 and 4) California Business and Professions Code section 17200 class. (ECF No. 44.) On
17 December 3, 2013, the parties attended private mediation before JAMS Mediator Michael Loeb,
18 Esq. in San Francisco, however, the case did not settle at this time. (Decl. of Craig Ackerman at ¶
19 13.)

20 On February 12, 2013, Plaintiff consented to the jurisdiction of the magistrate judge.
21 (ECF No. 55.) On February 13, 2013, an order issued establishing further deadlines in this action.
22 (ECF No. 57.) On March 21, 2013, the parties filed a stipulation requesting approval of class
23 notice, a settlement administrator and seeking an order authorizing distribution of class notice.
24 (ECF No. 58.) The motion was granted on March 25, 2013. (ECF No. 59.) The parties
25 continued to investigate the claims of the class and engaged in arms-length negotiations until they
26 reached settlement in August of 2013. (Decl. of Craig Ackerman ¶ 15.)

27 On August 13, 2013, Defendant consented to the jurisdiction of the magistrate judge.
28 (ECF No. 63.) On August 19, 2013, the parties filed a notice informing the Court that this action

1 had settled. (ECF No. 66.) On September 27, 2013, the parties filed the instant motion for
2 preliminary approval of the class action settlement. (ECF No. 70-72.)

3 **III.**

4 **TERMS OF SETTLEMENT AGREEMENT**

5 The parties have agreed to a gross settlement amount of \$300,000.00, with a 40% floor of
6 distribution of the net settlement amount on behalf of the class members. (Motion for
7 Preliminary Approval of Class Action Settlement 12,¹ ECF No. 70.) The gross settlement amount
8 includes the class counsel fee and cost award of up to 33.33% of the gross settlement amount (not
9 to exceed \$100,000.00 in fees and \$12,000.00 in costs); a class representative's enhancement
10 payment (not to exceed \$7,500.00); the claims administrator's fees and costs (not to exceed
11 \$25,000.00); with the net settlement amount being \$155,500.00. (Motion for Order 13, ECF No.
12 70.)

13 **A. Release and Waiver of Claims by Class Members**

14 The release and waiver of claims for class members provides that the class members,
15 including Plaintiff, fully and finally release and discharge Defendant from any claims based upon
16 the facts in the operative complaint, including those unknown to the class member. (Joint
17 Stipulation of Class Action Settlement and Release ¶¶ 7.1.1 and 7.1.2, ECF No. 71-1.) Plaintiff's
18 release provides that he releases the defendants from liability for all claims or actions of every
19 nature and description that could be asserted against Defendant. (Id. at 7.2.1.) Accordingly,
20 Plaintiff's release encompasses more claims than those released by the class members.

21 **B. Payment Terms**

22 The settlement agreement provides for a gross settlement amount of \$300,000.00 to be
23 paid within 15 calendar days after the effective date of the settlement. (ECF No. 71-1 at ¶¶ 11.1,
24 11.7.) The net settlement amount shall be calculated by deducting the class counsel fee, not to
25 exceed \$100,000.00; costs not to exceed \$12,000.00; the class representative enhancement
26 payment, not to exceed \$7,500; and the claims administrator's fees and costs not to exceed

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¹ All references to pagination of specific documents pertain to those as indicated on the upper right corners via the
28 CM/ECF electronic court docketing system.

1 \$25,000.00 from the gross settlement amount. (Id. at ¶ 11.1.)

2 The net settlement distribution is subject to a minimum distribution of 40%, with any
3 undistributed funds in excess of 40% remaining the property of Defendant. (ECF No. 71-1 at ¶
4 11.3.2.) The payment to each class representative is subject to payroll taxes, and Defendant will
5 pay the employer portion of the payroll taxes from the net settlement amount if the amount
6 claimed is less than 100% of the funds available. (Id. at ¶ 11.3.3.)

7 Plaintiff, as the class representative, shall receive his portion of the class settlement
8 payment as well as an enhancement payment of \$7,500.00. (Id. at ¶ 11.4.) Any funds remaining
9 in the settlement fund that are uncollected 150 calendar days after the effective date shall be
10 returned to Defendant. (Id. at ¶ 11.7.)

11 Within forty-five days after the notice is mailed, the class members will be required to
12 accurately complete and sign a claim form. (Id. at ¶ 9.2.2.) Claims will be rejected by the claims
13 administrator if the class member failed to sign or completely fill out the form or submits the
14 claim after the claim deadline has passed. (Id. at ¶ 9.3.) The payment to each class member shall
15 be their proportionate share of the net amount which is expected to total at least \$72.00. An
16 allegation that the class member did not receive the notice packet will not be cause for the claims
17 administrator to accept a late claim form. (Id. at ¶ 11.3.1; ECF No. 70 at 13.)

18 To be valid the claim form must include the last four digits of the class member's Social
19 Security Number, the form must be signed by the class member, and the name and last four digits
20 of the Social Security Number must match Defendant's records provided to the claims
21 administrator. (ECF No. 71-1 at ¶ 9.4.) Any checks to class members that are not cancelled
22 within ninety calendar days will be deemed void and turned over to the State Controller's office
23 pursuant to California Code of Civil Procedure section 1150, et seq. (Id. at ¶ 9.7.)

24 **C. Stipulated Term**

25 During the October 30, 2013 hearing, the Court expressed concern regarding the term that
26 uncashed checks made out to class members would return to Defendant should the claims exceed
27 40% of the net settlement account. These checks would be issued in response to a class member
28 filing a claim. The Court was concerned with the fairness of depriving the class member of their

1 portion of the settlement due to the failure to timely cash a check when they had filed a claim.

2 Due to the concerns expressed by the Court, the parties stipulated during the hearing to
3 revise the term of the settlement agreement and any uncashed checks will escheat to the State.

4 **D. Objection and Opt-Out Procedures**

5 Class members shall have the opportunity to object to or opt-out of the settlement. Within
6 forty-five days from the date the notice of settlement is filed, the class members may object in
7 writing to the terms of the settlement. (ECF No. 71-1 at ¶ 8.4.1.) Class members who fail to
8 submit timely written objections will be deemed to have waived any objections to the settlement.
9 (Id. at ¶ 8.4.3.)

10 Class members may exclude themselves from the settlement by submitting a request for
11 exclusion within forty-five calendar days from the mailing of the notice of settlement. (Id. at ¶
12 8.5.1.)

13 **IV.**

14 **LEGAL STANDARD**

15 Federal Rule of Civil Procedure 23(e)(2) requires that any settlement in a class action be
16 approved by the court which must find that the settlement is fair, reasonable, and adequate. The
17 role of the district court in evaluating the fairness of the settlement is not to assess the individual
18 components, but to assess the settlement as a whole. Lane v. Facebook, Inc., 696 F.3d 811, 818-
19 19 (9th Cir. 2012) reh'g denied 709 F.3d 791 (9th Cir. 2013). The class representatives have an
20 incentive to advance their own interests over that of the class and class counsel owes the ultimate
21 fiduciary responsibility to the class as a whole and are not bound by the views of the named
22 plaintiffs regarding settlement. Staton v. Boeing Co., 327 F.3d 938, 959-60 (9th Cir. 2003).
23 Therefore, in assessing the fairness of the settlement, the court is to ensure that “the agreement is
24 not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that
25 the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” Hanlon v.
26 Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998) (quoting Officers for Justice v. Civil Serv.
27 Comm’n of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982)).

28 The court considers a number of factors in making the fairness determination including:

1 “the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further
2 litigation; the risk of maintaining class action status throughout the trial; the amount offered in
3 settlement; the extent of discovery completed and the stage of the proceedings; the experience
4 and views of counsel; the presence of a governmental participant;² and the reaction of the class
5 members to the proposed settlement.” Lane, 696 F.3d at 819 (quoting Hanlon, 150 F.3d at 1026).

6 **V.**

7 **DISCUSSION**

8 The Court has previously certified the classes in this action. (ECF No. 44.) The Rule
9 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation and
10 Rule 23(b) requirements of commonality and superiority have been met and are still present. The
11 settlement class is defined as “all current and former truck drivers employed by Defendant who
12 were based in the State of California and who participated and/or attended Defendant’s
13 orientation in the State of California from March 9, 2007 through the date upon which the Court
14 grants this Preliminary Approval Order, excluding those who participated in the online training
15 course in place of classroom training and those who opted out of the non-settlement certified
16 class. The Class Members consists of those drivers who attended and completed Knight’s
17 orientation and who were ultimately hired by Defendant.” (ECF No. 71-1 at ¶ 1.4.) The class
18 remains intact for the purposes of settlement.

19 The Court confirms appointment of Craig Ackermann of Ackermann & Tilajef, P.C. and
20 Michael Malk of The Malk Law Firm as Class Counsel, and Don Clayton as Class
21 Representative.

22 **A. The Strength of Plaintiffs' Case**

23 In this action, Plaintiff asserts that Defendant failed to pay class members minimum
24 wages for a mandatory pre-employment orientation and additional derivative claims. In
25 Plaintiff’s case, he attended three days of orientation and was not paid minimum wages for the
26 hours attended. He alleges that because he was not paid these wages he was not provided with an

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28 ² Since there is no government participant in this action, this factor does not weigh in the Court’s analysis.

1 accurate wage statement, and when he was terminated he was not paid all wages due to him.
2 (ECF No. 70 at 10.) Defendant contends that, since the class members were not employees at the
3 time that they attended orientation, the time qualifies as pre-employment training under California
4 law. Defendant asserts that the employees were not entitled to minimum wage compensation for
5 this pre-employment orientation.

6 While the issue of preemployment training has been address by courts, the question of
7 how it applies to truck drivers has not been addressed by California courts or the federal court.
8 Since this is a novel issue, there is a risk that Defendant would prevail in the asserted defense.
9 Accordingly, this factor weighs in favor of preliminary approval of the class settlement.

10 **B. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**

11 While the parties vigorously disagree regarding Defendant's liability for unpaid wages,
12 Defendant agreed to resolve this action to avoid incurring substantial costs. If this action does not
13 settle, it will require the parties to spend additional time and incur the costs of proceeding to trial
14 on the merits. The settlement of this action results in a benefit to the class members without the
15 additional costs and risks associated with proceeding to a trial on the class members' claims.

16 In this action, Defendant had a policy of paying drivers a \$50.00 bonus upon completion
17 of the orientation training. According to the motion to approve the settlement, the most that
18 individual drivers would be owed would be \$142.00 in unpaid wages. (ECF No. 70 at 19 n.2.)
19 Under the proposed settlement, class members would be receiving approximately fifty percent of
20 the amount of unpaid overtime to which they would be entitled should they prevail at trial.

21 The settlement of this action will result in immediate recovery for the class and, given the
22 risk of the class not receiving any recovery in this action, this factor weighs in favor of
23 preliminary approval of the class settlement.

24 **C. The Risk of Maintaining Class Action Status Throughout the Trial**

25 The class in this action has been certified and there is no foreseeable risk of maintaining
26 class action status throughout the trial of this action. This factor does not weigh for or against
27 preliminary approval of the class settlement.

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1 **D. The Amount Offered in Settlement**

2 “The very essence of a settlement is compromise, ‘a yielding of absolutes and an
3 abandoning of highest hopes.’ ” Officers for Justice, 688 F.2d at 624 (citations omitted). The
4 district court cannot rewrite the settlement agreement and may not delete, modify, or substitute
5 certain provisions. Id. at 630. The Court is cognizant that it is to assess the settlement as a whole
6 and not the individual provisions. Lane, 696 F.3d at 818-19.

7 The parties have agreed to settle the case for \$300,000.00. The class in this action
8 consists of approximately 2,139 members. (Ackermann Decl. ¶ 19, ECF No. 71.) If Plaintiff
9 were to prevail on his theory, the highest amount of unpaid wages to which the class would be
10 entitled is \$303,738.00; and statutory damages would be \$106,950.00.³

11 The Court finds that the amount offered in settlement, which is equivalent to the damages
12 on the class’s first cause of action, supports the approval of the settlement agreement.

13 **E. The Extent of Discovery Completed and the Stage of the Proceedings**

14 The parties have been litigating this action since 2011. According to Plaintiff, in the
15 course of the litigation the parties,

16 exchanged Initial Disclosures and engaged in extensive discovery, including
17 written discovery and requests for production of documents. Defendant also
18 produced a substantial number of documentation. Plaintiff was deposed for a full
19 day on April 3, 2012 and Plaintiff took the depositions of four of Defendant’s
employees, including its designated corporate representatives pursuant to Federal
Rule of Civil Procedure 30(b)(6). [Citation omitted.] Additional discovery also
took place after the Parties attended mediation.

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21 (ECF No. 70 at 11:11-16.)

22 Plaintiff contends that “Class Counsel has carefully reviewed and analyzed thousands of
23 pages of records received from Defendant, including, but not limited to the documents and
24 policies and procedures referenced above.” (Id. at 11.) Based upon the information and
25 discovery obtained during litigation, documents and information were scrutinized and analyzed to
26 determine Defendant’s liability and amounts due in damages. (Id.) Accordingly, the

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³ Unpaid wages are calculated at \$142.00 x 2,139 members = \$303,738.00. Statutory damages would be calculated
28 at \$50.00 x 2,139 members = \$106,950.00.

1 investigation and discovery conducted in this action supports the approval of the settlement
2 agreement.

3 **F. The Experience and Views of Counsel**

4 Counsel for both parties to this action are particularly experienced in employment law and
5 wage and hour class actions involving the trucking industry. (ECF No. 70 at 18.) Class counsel
6 has experience in negotiating class action settlement for wage and hour violations in the trucking
7 industry. (Id.) “In light of the facts revealed during discovery, both Parties’ positions, the
8 complexities of the case, the uncertainties of litigation, and the interests of a fair result for the
9 members of the Settlement Class, and available information about comparable settlements,
10 Counsel on both sides share the view that this Settlement is a fair and reasonable settlement.”
11 (Id.) These opinions of counsel, experienced in matters such as that at issue here, are entitled to
12 significant weight and support the approval of the settlement agreement.

13 **G. The Reaction of the Class Members to the Proposed Settlement.”**

14 Plaintiff has agreed to the terms of the settlement agreement. However, the class
15 members have not yet received notice, so this factor shall be revisited following the fairness
16 hearing for final approval of the settlement.

17 **H. Attorney Fees**

18 Class counsel is requesting a fee under the common fund method of 33 1/3%, not to
19 exceed \$100,000. (ECF No. 70 at 21-22.) In determining whether the settlement is
20 fundamentally fair, adequate and reasonable as required by Rule 23(e), the court must carefully
21 assess the reasonableness of the attorney fees that are proposed under the settlement agreement.
22 Staton v. Boeing Co., 327 F.3d 938, 963 (9th Cir. 2003). “If fees are unreasonably high, the
23 likelihood is that the defendant obtained an economically beneficial concession with regard to the
24 merits provisions, in the form of lower monetary payments to class members or less injunctive
25 relief for the class than could otherwise have obtained.” Staton, 327 F.3d at 963.

26 The court is required to carefully scrutinize the fee agreement even when there has been
27 no objection to it because the court assumes the role of fiduciary for the class plaintiffs. Staton,
28 327 F.3d at 970. In Staton, the Ninth Circuit held that:

1 in a class action involving both a statutory fee-shifting provision and an actual or
2 putative common fund, the parties may negotiate and settle the amount of
3 statutory fees along with the merits of the case, as permitted by Evans. In the
4 course of judicial review, the amount of such attorneys' fees can be approved if
5 they meet the reasonableness standard when measured against statutory fee
6 principles. Alternatively, the parties may negotiate and agree to the value of a
7 common fund (which will ordinarily include an amount representing an estimated
hypothetical award of statutory fees) and provide that, subsequently, class counsel
will apply to the court for an award from the fund, using common fund fee
principles. In those circumstances, the agreement as a whole does not stand or fall
on the amount of fees. Instead, after the court determines the reasonable amount
of attorneys' fees, all the remaining value of the fund belongs to the class rather
than reverting to the defendant.

8 Id. at 972.

9 In the Ninth Circuit, courts typically calculate 25% of the common fund as the
10 “benchmark” for a reasonable fee award providing adequate explanation in the record for any
11 special circumstances that justify departure. In re Bluetooth Headset Products Liability
12 Litigation, 654 F.3d 935, 942 (9th Cir. 2011). The usual range for common fund attorney fees are
13 between 20-30%. Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002). The Court
14 may use the lodestar method to cross check the reasonableness of the percentage award.
15 Vizcaino, 290 F.3d at 1050. Under the lodestar method, the court will first determine the
16 appropriate hourly rate for the work performed, and that amount is then multiplied by the number
17 of hours properly expended in performing the work. Antoninetti v. Chipotle Mexican Grill, Inc.,
18 643 F.3d 1165, 1176 (9th Cir. 2010). This amount may be increased or decreased by a multiplier
19 that reflects factors not considered in the calculations, such as, “the quality of representation, the
20 benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of
21 nonpayment[.]” In re Bluetooth, 654 F.3d at 942.

22 1. Quality of the representation

23 Plaintiff argues that class counsel’s skill and experience in litigating wage and hour
24 actions further supports the uncontested fee award. Plaintiff contends that class counsel’s
25 experience in litigating similar matters was integral in evaluating the strengths and weaknesses of
26 Plaintiff’s case.

27 This action was filed on May 6, 2011; and the parties litigated the action from July of
28 2011 through the settlement in August 2013. The parties conducted discovery. Plaintiff deposed

1 four of Defendant's employees and reviewed relevant documents. The parties participated in a
2 single day of formal mediation. Other than the motion to certify the class, there were no
3 contested motions filed in this action. While the Court finds that class counsel is experienced in
4 wage and hour cases, the circumstances here do not support a finding that this action required
5 exceptional skill. This factor does not support an increase from the 25% benchmark.

6 2. Benefit Obtained for the class

7 Class counsel obtained a settlement of \$300,000.00 for the class. Plaintiff asserts that this
8 is a substantial recovery and class counsel received exceptional results. The class members in
9 this action are anticipated to recover less than 50% of the their potential recovery. Since there
10 was a risk involved, including the risk of no recovery, the Court finds that this is a good result.
11 However, the circumstances here do not lead the Court to conclude that the result is exceptional.

12 Additionally, the recovery in this class action is subject to only 40% of the net settlement
13 fund being distributed to the class with the remaining undistributed funds reverting to the
14 defendant. Therefore, depending upon the number of class members who file claims, the class
15 may only recover \$62,000. In this instance, the attorney fees are approximately 40% more than
16 what the class may ultimately recover. Where the total fees sought are significantly more than the
17 total recovered by class members, the fees may not be "fair and reasonable." Parkinson v.
18 Hyundai Motor America, 796 F.Supp.2d 1160, 1170 (C.D. Cal. 2010).

19 3. Complexity and novelty of the issues presented

20 Class counsel argues that the instant wage and hour issues surrounding orientation pay are
21 a developing area of case law with conflicting authorities. However, there is nothing in the
22 record to show that the issues addressed in this action are complex. While the law regarding
23 preemployment training has not been applied to claims for truck drivers, the area of law has been
24 developed and opinions set forth the specific criteria governing the claims. Accordingly, this
25 factor does not support an increase from the 25% benchmark.

26 4. Risk of nonpayment

27 Class counsel states that they bore the entire risk of and cost of this action on a
28 contingency basis and these risks are substantial because of the great expenditure of attorney time

1 with an uncertain outcome. The contingent nature of the fee is an important factor in determining
2 the fee award and may justify awarding a premium over the attorney's normal hourly rate.
3 Monterrubio v. Best Buy Stores, L.P., ___ F.R.D. ___, 2013 WL 2106085, at *14 (E.D. Cal. May
4 14, 2013). However, the risks associated with this case are no greater than that associated with
5 any other wage and hour action and no extraordinary circumstances exist that would support an
6 increase from the 25% benchmark.

7 5. Awards in Similar Cases

8 Plaintiff cites to similar cases in which the court awarded 33% of the common fund as
9 attorney's fees. However, a review of these cases reveals that they are not similar to this action.

10 In re Pacific Enterprises Securities Litigation, 47 F.3d 373 (9th Cir. 1995), was not a wage
11 and hour action, but involved a securities class action lawsuit and derivative class action lawsuit.
12 Id. at 375. In Garcia v. Gordon Trucking, Inc., No. 1:10-cv-0324-AWI-SKO, 2012 WL 5364575
13 (E.D. Cal. Oct. 31, 2012), while the case was pending, the California Supreme Court issued a
14 ruling that posed obstacles to certification of a significant number of plaintiff's claims. Id. at *5.
15 After Plaintiffs filed a motion for summary judgment, the class settled for \$3.7 million and each
16 class member received a pre-tax recovery of \$1,626.00. Id. at *5-6. The parties participated in
17 sixteen depositions and class counsel conducted informal interviews with dozens of class
18 members and obtained twenty signed statements by class members to support the plaintiff's
19 claims. Id. at *6.

20 In Singer v. Becton Dickinson and Co., No. 08-cv-0821-IEG (BLM), 2010 WL 2196104
21 (S.D. Cal. June 1, 2010), the class recovery was \$1,000,000.00 and the recovery was 110% of
22 actual wages owed to one of the classes and 26% recovery for another class whose meal and rest
23 period claims were uncertain due to whether the premiums sought were wages or penalties. Id. at
24 *2, 4-5. Due to the litigation, defendants conducted an in-depth review of all wage statements
25 and payroll records and implemented auditing tools and training efforts to ensure compliance with
26 California law. Id. at *5. Further, awards in the Central District are in the 20% to 50% range,
27 which is above those awarded in this district. Id. at *8.

28 In Vasquez v Coast Valley Roofing, 266 F.R.D. 482 (E.D. Cal. 2010), plaintiffs' claims

1 involved rest and meal period premiums and the California Supreme Court was reviewing the
2 applicable standards causing a significant risk of no recovery. Id. at 489. The class recovery was
3 \$300,000 which resulted in at least \$2,600.00 for each claimant. Id. Class counsel conducted
4 significant discovery which involved tens of thousands of pages, and took in-depth interviews of
5 numerous class members. Id. The class itself required counsel to find and contact largely
6 Spanish speaking workers and navigate challenging issues of proof due to defendant's limited
7 record keeping. Id. at 492.

8 Finally, in Romero v. Producers Dairy Foods, Inc., No. 1:05-cv-0484-DLB, 2007 WL
9 3492841 (E.D. Cal. Nov. 14, 2007), plaintiff's counsel negotiated an award of \$240,000 as well
10 as changes to defendants employment policies and practices. Id. at *1, 3. During the course of
11 the action, class counsel spent 933.83 hours litigating the action which translated to fees of
12 approximately \$257,500.00. Id. at *3. The court award 33% of the recovery for a total award of
13 \$80,000.00. Id. In this instance, counsel only received approximately 31% of their lodestar. The
14 case contained complex legal issues regarding whether the plaintiff's claims for overtime
15 compensation were barred by a Motor Carrier exception to the Fair Labor Standards Act. Id. at
16 *3.

17 This case is distinguishable from those awarding a higher percentage for attorney fees.
18 The average class member is expected to receive approximately \$72.00. While Plaintiff claims
19 the issues were complex, the claims in this action did not involve any case pending before the
20 California Supreme Court or any other court that could drastically change the outcome once this
21 case is decided. There is no evidence before the Court to show that the claims here are cutting
22 edge legal issues. The parties conducted five depositions and engaged in a single day of formal
23 mediation that did not result in settlement.

24 6. Lode Star Comparison

25 Class counsel has submitted a declaration that they have spent 185.45 attorney and
26 paralegal hours on this action and anticipate spending 40 additional hours through final approval
27 of the settlement. (Decl. of Craig Ackerman ¶ 34.) Calculating the hours spent by the agreed
28 upon percentage, class counsel is requesting approximately \$444.00 per hour for attorney and

1 paralegal work.

2 Class counsel cites cases to support his request as reasonable. However, in Barrios v.
3 Diamond Contract Services, Inc., 461 Fed.Appx. 571, 2011 WL 6168403 (9th Cir. Dec 13, 2011),
4 while the appellate court held the that district court erred by failing to award attorney fees, it did
5 not address the rate requested. Id. at 572. Further, in Bond v. Ferguson Enterprises, Inc., 2011
6 WL 2648879 (E.D. Cal. June 30, 2011), the court found that the fees counsel requested were
7 higher than normally permitted under federal law. Id. at *12.

8 Additionally, many cases in the Eastern district find that prevailing hourly rates for
9 attorneys are in the \$400/hour range. Monterrubio v. Best Buy Stores, L.P., ___ F.R.D. ___, 2013
10 WL 2106085, at *18 (E.D. Cal. May 14, 2013) (collecting cases). Rates for paralegals in the
11 Eastern District range from \$75.00 to 100.00 per hour. Id. While Plaintiff contends that, based
12 upon the lodestar rate, the fees in this action to date total \$122,720.50, counsel did not provide a
13 breakdown for the Court to calculate such fees, and based upon the information provided,
14 counsel's rate is not within the prevailing range in this district.⁴ Based upon the information
15 before the Court, the award of attorney fees at 33 1/3% is not reasonable.

16 7. Conclusion

17 In light of the factors discussed above, the Court finds that there are not circumstances in
18 this action justifying an award of 33 1/3% in this action. This action was litigated for
19 approximately two years. There is no evidence that this case involved extremely complex or
20 risky issues or that the results achieved in the litigation were extraordinary. Further, the lodestar
21 analysis does not support an award of 33.3%. Accordingly, the Court finds no exceptional
22 circumstances to justify an upward adjustment in the lodestar and recommends that the attorney
23 fee in this class action be set at 25%. However, the Court may revisit this matter at the final
24 fairness hearing.

25 **I. Other Provisions of Concern to the Court**

26 In this instance, the parties have agreed to settle the case for \$300,000.00. The class in

27 ⁴ At the October 30, 2013 hearing, Plaintiff's counsel noted that the fees are calculated based upon rates in the
28 Central District which are higher than those in the Eastern District.

1 this action consists of approximately 2,139 members. (Ackermann Decl. ¶ 19, ECF No. .) Each
2 participating class member will receive at least \$72.00, reduced by the employee's portion of
3 payroll taxes. (ECF No. 70 at 13.) Plaintiff contends that this is reasonable in relation to other
4 similar actions which have been settled and provide for far less compensation than each class
5 member will receive in this instance. (ECF No. 70 at 22.)

6 The Court discusses two areas of concern in the settlement in this action: 1) the class
7 representative's "enhancement payment" of \$7,500.00; and 2) the provision that only 40% of the
8 net proceeds are required to be distributed to the class plaintiffs.

9 1. Incentive Award

10 Incentive awards, which the proposed settlement refers to as enhancement pay, "are
11 payments to class representatives for their service to the class in bringing the lawsuit." Radcliffe
12 v. Experian Information Solutions Inc., 715 F.3d 1157, 1163 (9th Cir. 2013). These awards come
13 out of the class's recovery in instances where the class receives a monetary settlement. Radcliffe,
14 715 F.3d at 1163. While the court may approve incentive awards, the Ninth Circuit has advised
15 district courts to carefully scrutinize the awards to ensure they do not undermine the adequacy of
16 the class representatives. Radcliffe, 715 F.3d at 1163.

17 In Staton, the Ninth Circuit found it was an abuse of discretion to approve a settlement
18 where the class representatives received an incentive award that was, on average sixteen times
19 greater than the award that the unnamed class members would receive. 327 F.3d at 946. The
20 district court must evaluate the fairness of the incentive award by considering "relevant factors
21 includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to
22 which the class has benefitted from those actions, ... the amount of time and effort the plaintiff
23 expended in pursuing the litigation ... and reasonabl[e] fear[s of] workplace retaliation." Id. at
24 977 (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)).

25 Plaintiff argues that the proposed payment of \$7,500.00 is intended to recognize his
26 substantial initiative and significant efforts on behalf of the settlement class. Plaintiff assisted
27 class counsel in this action, attended a full day deposition, communicated with class counsel, and
28 furnished background information regarding his claims. Plaintiff also argues that the proposed

1 payment recognizes the risk he took of being personally liable for all costs incurred, facing
2 intrusive discovery, and the disclosure to potential employers that he sued a former employer.
3 (ECF No. 70 at 20.)

4 Courts have found enhancement payment of \$7,500.00 to be reasonable. See Rodriguez v.
5 D.M. Camp & Sons, No. 1:09-cv-00700-AWI-JLT, 2013 WL 2146927, at *3, 18 (E.D. Cal. May
6 15, 2013) (reducing incentive award to \$7,500.00 for class representatives where action settled
7 for \$675,000, and average class member would receive \$2,204.68); Gong-Chun v. Aetna Inc., No.
8 2012 WL 2872788, at *15, 25 (E.D. Cal. July 12, 2012) (approving \$7,500.00 for one class
9 representative and \$2,000.00 award for 2 other representatives where action settled for
10 \$700,000.00); Alvarado v. Nederend, No. 1:08-v-01099-OWW-DLB, 2011 WL 90228, at *2,
11 (E.D. Cal. Jan. 11, 2011) (approving \$7,500.00 incentive award where action settled for
12 \$505,058.60 and average class member would receive \$2,000.00); Bond v. Ferguson Enterprises,
13 Inc., No. , 2011 WL 2648879, at *2, 8 (E.D. Cal. June 30, 2011) (approving \$7,500.00 incentive
14 award in action that settled for \$2,250,000.00 with average settlement share of \$2,776.34 per
15 employee).

16 In bringing this action, Plaintiff participated in several lengthy interviews and phone
17 conferences; produced a significant number of relevant documents; reviewed pleadings,
18 documents, and data provided by Defendant; communicated about the case with class members;
19 kept in contact with his attorneys; and was deposed. (Decl. of Don Clayton ¶ 6, ECF No. 72.)

20 In this instance, Plaintiff would receive \$7,500.00 for his participation in the litigation
21 compared to the unnamed class members who will only receive \$72.00. This action was litigated
22 for a period of just over two years. While Plaintiff's assistance did result in this action settling
23 and the class members will benefit from his participation, there is no evidence that Plaintiff sent
24 more time assisting counsel than would occur in an average case. Finally, since Plaintiff's
25 employment with Defendant terminated prior to his bringing this action, there was no fear of
26 workplace retaliation in bringing this suit. However, the Court does take note of the possibility
27 that the fact Plaintiff sued his former employer could negatively affect his job prospects in the
28 future.

1 In similar cases, courts have found awards in the range of \$2-3,000.00 appropriate to
2 compensate the class representative for his participation. See Monterrubio, 2013 WL 2106085, at
3 *21 (awarding class representative \$2,500.00 where action settled for \$400,000.00 and each class
4 member will receive \$65.79); Wolph v. Acer America Corporation, No. C 09-01314 JSW, 2013
5 WL 5718440, at *6 (N.D. Cal. Oct. 21, 2013) (reducing incentive award to \$2,000.00 where
6 named representatives did not demonstrate any great risk to either finances or reputation in
7 bringing the class action); Rigo v. Kason Industries, Inc., No. 11-cv-64-MMA(DHB), 2013 WL
8 3761400, at *8 (S.D. Cal. July 16, 2013) (finding \$2,500.00 incentive award for more than two
9 years of service well within the acceptable range).

10 While Plaintiff argued that he is releasing his claims to other class actions which are
11 proceeding against Defendant, such as meal and break period claims, the Court notes that Plaintiff
12 was only employed by Defendant from August 2008 through December 2008. Since Plaintiff was
13 only employed by Defendant for four months, the release of these wage claims would not result in
14 a loss of substantial damages. The Court finds that Plaintiff is entitled to an incentive award for
15 his efforts on behalf of the class members, however, given the large disproportion of the incentive
16 award to the recovery of the unnamed class members, a downward adjustment of the award is
17 warranted. The Court agrees with counsel's argument that providing minimal incentive payments
18 in actions such as this where the damages are small would discourage litigants from pursuing
19 violations. Giving consideration to the relevant factors, the Court finds an incentive award to
20 Plaintiff of \$3,500.00 for his efforts in this action is appropriate.

21 2. Distribution of Unclaimed Funds

22 Additionally, the Court considers that according to the settlement agreement, Defendants
23 are only required to distribute 40% of the net settlement proceeds. Therefore, depending upon the
24 number of class members who file claims, the class as a whole may only recover \$62,000. The
25 Court was concerned that the attorney fees as initially proposed were approximately 40% more
26 than what the class could ultimately recover. Where the total fees sought are significantly more
27 than the total recovered by class members, the fees may not be "fair and reasonable." Parkinson
28 v. Hyundai Motor America, 796 F.Supp.2d 1160, 1170 (C.D. Cal. 2010).

1 The parties have agreed that 40% of any unclaimed net settlement amount will remain the
2 property of Defendant. The distribution of unclaimed funds may be by cy pres or fluid
3 distribution, escheat to the government, reversion to the defendants, or pro rata distribution to
4 located class members. Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301,
5 1306 (9th Cir. 1990). The distribution of unclaimed funds should be guided by the objections of
6 the underlying statute and the interests of the silent class members. Six (6) Mexican Workers,
7 904 F.2d at 1306.

8 The Court's main concern here was that Defendant would only be required to distribute
9 40% of the net settlement amount. As initially proposed, this could result in a recovery to the
10 class of \$62,000.00 with class counsel receiving \$100,000.00. However, with the modifications
11 to the attorney fees and class representative incentive payment, 40% of the net settlement amount
12 would be \$74,200.00. When considering this in relation to the attorney fees of \$75,000.00, the
13 Court finds this is a fair distribution of funds.

14 **J. Notice Requirements of Rule 23(c)(2)(B)**

15 For absent class members to be bound by the agreement, class members must adequately
16 represent the absent class members at all times, and the absent class members must be provided
17 with notice, an opportunity to be heard, and a right to opt out of the class. AT&T Mobility LLC
18 v. Concepcion, 131 S.Ct. 1740, 1752 (2011). Federal Rule of Civil Procedure 23(e)(1) requires
19 that the court "direct notice in a reasonable manner to all class members who would be bound by
20 the proposal." Where, as here, the class has been certified under Rule 23(b)(3), the notice must
21 meet the requirements of Rule 23(c)(2)(B).

22 "Adequate notice is critical to court approval of a class action settlement under Rule
23 23(c)(2)(B). Thus, both the content of the notice and the form of the notice must be adequate and
24 approved by the Court." Monterrubio, 2013 WL 2106085 at *7 (internal citations omitted).

25 Rule 23(c)(2)(B) requires the court to "direct to class members the best notice that is
26 practicable under the circumstances, including individual notice to all members who can be
27 identified through reasonable effort." However, this does not require actual notice and notice by
28 mail is sufficient if it is reasonably calculated to apprise the interested parties of the pendency of

1 the action and affords them an opportunity to object. Monterrubio, 2013 WL at *8 (citing
2 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

3 Here, the parties have selected a neutral third party claims administrator, CPT Group, Inc.
4 (“CPT”), to administer the settlement. (ECF No. 70 at 25.) CPT has provided prior notice to the
5 unnamed class members in this action. (Id. at 26.) Prior to mailing the notices, CPT will update
6 the most current mailing address information for class members using the United States Postal
7 Service National Change of Address List. (Id. at 25.) If any notice packets are returned
8 undelivered prior to the claims submission deadline, the notices will be sent to the forwarding
9 address. (Id. at 25-26.) If no forwarding address is provided, CPT will attempt to determine the
10 individual’s correct address by using the social security number of the individual. (Id. at 26.)

11 While the proposed notice to the parties will need to be modified to comply with this
12 order, it adequately meets the requirements of Rule 23(c)(2)(B). The notice states the nature of
13 the action, gives the definition of the class certified, and sets forth the claims, issues and defenses.
14 (Notice of Proposed Class Settlement and Final Fairness and Approval Hearing 3, ECF No. 71-2.)
15 The notice explains the terms of the settlement including the distribution to the members of the
16 class and those claims that are released. (Id. at 4, 7.) The notice informs the class members that
17 they may request exclusion and of the time and manner to make such a request. (Id. at 5.) Class
18 members are informed that they may object and appear at the hearing. (Id. at 6.) The class
19 members are informed of the binding effect of a class judgment on members under Rule 23(c)(3).
20 (Id. at 5.)

21 Finally, the agreement complies with the requirements of 28 U.S.C. § 1715(b), which
22 requires “[n]ot later than 10 days after a proposed settlement of a class action is filed in court,
23 each defendant that is participating in the proposed settlement shall serve upon the appropriate
24 State official of each State in which a class member resides and the appropriate Federal official, a
25 notice of the proposed settlement. . . .” (Joint Stipulation of Class Action Settlement and Release
26 ¶ 15.16, ECF No. 71-1.)

27 This system for providing notice is the best practicable means under the circumstances
28 and is reasonably calculated to provide notice to all class members. Monterrubio, 2013 WL

VI.

CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for a preliminary approval of the class action settlement is GRANTED;
2. CPT Group, Inc. is appointed as claims administrator for this settlement pursuant to the terms set forth in the settlement agreement;
3. The proposed notice and claim form are approved subject to the modifications ordered herein, specifically:
 - a. Class representative Don Clayton is awarded three thousand five hundred dollars (\$3,500.00) as an incentive award; and
 - b. Class counsel is awarded 25% of the total settlement as attorney fees;
4. The following dates shall govern for purposes of this Settlement:
 - a. Deadline for Defendant to provide to Claims Administrator the Class Data: within fifteen (15) calendar days after the entry of an Order granting Preliminary Approval.
 - b. Deadline for Claims Administrator to mail the Notice Package to Class Members: within thirty (30) calendar days after the entry of an Order granting Preliminary Approval.
 - c. Deadline for Class Members to postmark objections to the Claims Administrator and serve on Counsel or postmark Requests for Exclusion: within forty-five (45) calendar days after notice of the Settlement is first mailed as part of the Notice Packet.
 - d. Deadline for Class Members to postmark Claim Forms: within forty-five (45) calendar days after Claims Administrator originally mails the Notice Package.
 - e. Deadline for Class Counsel to file a Motion for Attorneys' Fees and Costs:

1 at least ten (10) calendar days prior to the expiration of the deadline for
2 Class Members to postmark their Claim Forms and/or Objections.

3 f. Deadline for Class Counsel to file Motion for Final Approval: at least ten
4 (10) calendar days prior to the proposed date for the Final Approval
5 Hearing.

6 5. Plaintiff's Motion for Final Approval of the Settlement shall be filed with the
7 Court and served on the Parties' Counsel no later than ten (10) calendar days
8 before the Final Approval Hearing. Plaintiff shall also file a motion for attorneys'
9 fees and costs at least ten (10) calendar days prior to the deadline for the Class
10 Members to object, opt out or submit valid claims.

11 6. The Final Approval Hearing will be held before this Court on March 19, 2014 at
12 9:30 a.m. in Courtroom 9 at the United States District Court for the Eastern
13 District of California, 2500 Tulare Street, Fresno, CA 93721, to determine all
14 necessary matters concerning the Settlement, including whether the proposed
15 Settlement on the terms and conditions provided for in the Agreement is fair,
16 adequate and reasonable and should be finally approved by the Court; whether a
17 Final Judgment, as provided in the Agreement, should be entered herein; and to
18 formally approve the Class Counsel Fee and Cost Award, the Class
19 Representative's enhancement payment and the Claims Administrator's fees and
20 costs.

21
22 IT IS SO ORDERED.

23 Dated: October 30, 2013

24 
25
26 UNITED STATES MAGISTRATE JUDGE
27
28