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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROY D. TAYLOR, on behalf of himself  
and all others similarly situated,

Plaintiff,

v.

FEDEX FREIGHT, INC., an Arkansas  
corporation; and DOES 1 through 10,  
inclusive,

Defendants.

No. 1:13-cv-01137-DAD-BAM

ORDER GRANTING FINAL APPROVAL OF  
CLASS ACTION SETTLEMENT AND  
ATTORNEY’S FEES AND COSTS

(Doc. Nos. 68 and 69)

On June 7, 2016, plaintiff’s counsel filed a motion for attorney’s fees and costs (Doc. No. 27) and, on August 1, 2016, a motion for final approval of class action settlement (Doc. No. 68.) These matters came before the court on August 29, 2016, for a final fairness hearing. Attorney R. Duane Westrup appeared telephonically for plaintiff. Attorneys Keith A. Jacoby and Mireya A.R. Llauro appeared telephonically for defendants. Oral argument was heard and the motions were taken under submission. For the reasons set forth below, the motion for final approval of class action settlement and the motion for attorney’s fees and costs will be granted.

**BACKGROUND**

This action was removed from Kings County Superior Court on July 19, 2013. (Doc. No. 1.) The complaint, filed as a class action against defendant FedEx Freight, Inc. (“FedEx”),

1 alleges violation of the California Labor Code § 201–03, 204, 210, 226, 226.7, 510, 512, 558,  
2 1174, 1194, 1197, 1197.1, 2698, and California Business and Professions Code § 17200 *et seq.*,  
3 for failing to pay truck drivers for all time worked when driving to and from designated hotels  
4 and dispatch centers, failing to pay for non-personal time spent at designated hotels, failing to pay  
5 for time spent off the clock while waiting to trade trailers with other drivers, failing to pay for all  
6 time worked inspecting trucks, failing to provide meal and rest periods, failing to timely pay  
7 compensation upon termination, and failing to provide accurate itemized wage statements. (Doc.  
8 No. 1, at 21.)

9 Plaintiff Roy Taylor filed a motion to certify the class action on August 14, 2014. (Doc.  
10 No. 17.) The assigned magistrate judge issued findings and recommendations recommending that  
11 class certification be granted and, on July 24, 2015, the previously assigned District Judge  
12 adopted those findings and recommendations. (Doc. Nos. 36 and 48.) In doing so, the court  
13 certified the classes as follows:

14 All person who worked for Defendant as line-haul drivers from  
15 January 28, 2012 through the date of trial.

16 All Class Members who have left their employment with Defendant  
17 from January 28, 2012, through the date of trial. (Labor Code §  
203: Waiting time penalties subclass).

18 (Doc. No. 48, at 5.) The court also appointed Roy D. Taylor as class representative and the law  
19 firm of Westrup & Associates and the Labor Law Office, APC as class counsel. (*Id.*)

20 On January 14, 2016, the parties attended mediation with Judge Stephen J. Sundvold  
21 (retired). (Doc. No. 57 at 7.) As a result of that mediation, the parties reached a settlement of this  
22 action. (*Id.*)

23 On April 20, 2016, the court granted preliminary approval of the class action settlement.  
24 (Doc. No. 63.) In that order, the court: (1) granted preliminary approval of the class action  
25 settlement; (2) confirmed Westrup & Associates, including Duane Westrup, Esq., and Labor Law  
26 Office APC, including Michael L. Carver, as class counsel; (3) approved Rust Consulting as the  
27 administrator; (4) directed that notice be given to the class; and (5) adopted the settlement  
28 implementation schedule. (*Id.* at 16.)

1 The court further conditionally certified the following class for purposes of the settlement:

2 [A]ll California-based employees who worked for Defendant as  
3 Road Drivers or other drivers paid by the hour to the extent they  
4 performed road runs paid on a piece rate basis, in California on or  
after January 28, 2012 through December 31, 2015.

5 (*Id.* at 3–6.)

6 Claim forms with respect to the settlement were mailed on May 10, 2016. (Doc. No. 69-1,  
7 at 3.) The objection period closed on June 9, 2016, and the opt-out and claim submission period  
8 closed on June 24, 2016. Of the 1445 class members, 965 settlement class members submitted  
9 valid claim forms to recover their individual shares of the net settlement fund of \$2,530,000, with  
10 one request for exclusion and no objections. Individual payouts will total up to \$7,042, with the  
11 average award estimated to be \$2,616. (*Id.*)

12 After conducting the final fairness hearing and carefully considering the terms of the  
13 settlement, the court now addresses whether the proposed settlement is fair, reasonable, and  
14 adequate; and whether class counsel’s request for attorneys’ fees and costs should be granted.

15 **CERTIFICATION OF SETTLEMENT CLASS**

16 The court previously conditionally certified the proposed settlement class and determined  
17 that the requirements of Federal Rule of Civil Rule 23(a) and (b) had been met. (Doc. No. 63 at  
18 3–6.) Accordingly, there is no need for the court to repeat the analysis here. *See, e.g., Harris v.*  
19 *Vector Marketing*, No. C–08–5198, 2012 WL 381202 at \*3, at \*7 (N.D. Cal. Feb.6, 2012) (“As a  
20 preliminary matter, the Court notes that it previously certified ... a Rule 23(b)(3) class ... [and  
21 thus] need not analyze whether the requirements for certification have been met and may focus  
22 instead on whether the proposed settlement is fair, adequate, and reasonable”); *In re Apollo*  
23 *Group Inc. Securities Litigation*, Nos. CV 04–2147–PHX–JAT, CV 04–2204–PHX–JAT, CV 04–  
24 2334–PHX–JAT, 2012 WL 1378677 at \*4 (D. Ariz. Apr.20, 2012) (“The Court has previously  
25 certified, pursuant to Rule 23 of the Federal Rules of Civil Procedure, and hereby reconfirms its  
26 order certifying a class”). The court therefore certifies the proposed settlement class.

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1 **FINAL APPROVAL OF THE SETTLEMENT**

2 A class action may be settled only with the court’s approval. Fed. R. Civ. P. 23(e).  
3 “Approval under 23(e) involves a two-step process in which the Court first determines whether a  
4 proposed class action settlement deserves preliminary approval and then, after notice is given to  
5 class members, whether final approval is warranted.” *Nat’l Rural Telecomms. Coop. v.*  
6 *DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage, the primary  
7 inquiry is whether the proposed settlement “is fundamentally fair, adequate, and reasonable.”  
8 *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012); *Hanlon v. Chrysler Corp.*, 150 F.3d  
9 1011, 1026 (9th Cir. 1998). “It is the settlement taken as a whole, rather than the individual  
10 component parts, that must be examined for overall fairness.” *Hanlon*, 150 F.3d at 1026 (citing  
11 *Officers for Justice v. Civil Serv. Comm’n of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982)); *see also*  
12 *Lane*, 696 F.3d at 818-19. Having already completed a preliminary examination of the  
13 agreement, the court reviews it again, mindful that the law favors the compromise and settlement  
14 of class action suits. *See, e.g., In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008);  
15 *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City*  
16 *of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Serv. Comm’n*, 688  
17 F.2d 615, 625 (9th Cir. 1982). Ultimately, “the decision to approve or reject a settlement is  
18 committed to the sound discretion of the trial judge because he [or she] is exposed to the litigants  
19 and their strategies, positions, and proof.” *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir.  
20 2003) (quoting *Hanlon*, 150 F.3d at 1026).

21 Assessing a settlement proposal requires the district court to  
22 balance a number of factors: the strength of the plaintiffs’ case; the  
23 risk, expense, complexity, and likely duration of further litigation;  
24 the risk of maintaining class action status throughout the trial; the  
25 amount offered in settlement; the extent of discovery completed and  
the stage of the proceedings; the experience and views of counsel;  
the presence of a governmental participant; and the reaction of the  
class members to the proposed settlement.

26 *Hanlon*, 150 F.3d at 1026 (citing *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.  
27 1993)); *see also Lane*, 696 F.3d at 819. “To survive appellate review, the district court must  
28 show it has explored comprehensively all factors[.]” *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th

1 Cir. 2015) (quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012)); *Hanlon*, 150 F.3d  
2 at 1026.

3 1. *Strength of Plaintiff's Case*

4 When assessing the strength of plaintiff's case, the court does not reach "any ultimate  
5 conclusions regarding the contested issues of fact and law that underlie the merits of this  
6 litigation." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1388 (D. Arizona  
7 1989). The court cannot reach such a conclusion, because evidence has not been fully presented.  
8 *Id.* Instead, the court is to "evaluate objectively the strengths and weaknesses inherent in the  
9 litigation and the impact of those considerations on the parties' decisions to reach these  
10 agreements." *Id.*

11 Here, the court has already granted plaintiff's motion for class certification. (Doc. No.  
12 48.) The court found that the claims should be certified based on FedEx's concededly uniform  
13 pay plan as well as documentary evidence, including FedEx's time keeping and wage records,  
14 which would show that class members were paid on a load or line basis and whether they were  
15 separately compensated for non-piece-rate work and rest breaks. (*Id.*) Accordingly, plaintiff's  
16 claims are not without merit.

17 2. *The Risk, Expense, Complexity, and Likely Duration of Further Litigation and the Risk of*  
18 *Maintaining Class Action Status Through Trial*

19 If this litigation were to proceed, however, both sides would face significant risks. For  
20 instance, defendant has suggested its exposure is limited by the recent enactment of Labor Code  
21 § 226.2 concerning piece rate compensation, which went into effect on January 1, 2016. That  
22 new Labor Code provision (i) clarifies pay requirements for mandated breaks and other  
23 nonproductive time going forward; and (ii) provides a short time period for employers to make  
24 back wage payments for the time between July 1, 2012, through December 31, 2015, in exchange  
25 for relief from statutory penalties and other damages. The parties would likely dispute, however,  
26 whether cases filed prior to March 1, 2014 are excluded from the penalty relief provisions of §  
27 226.2. (Doc. No. 69-1, at 4–5.)

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1 Plaintiff also faces risks associated with decertification, liability and damages, as well as  
2 satisfying the burden of proof necessary to overcome defendant's defenses and any motion for  
3 summary adjudication and/or judgment. There is also a risk that the trier of fact could determine  
4 that drivers were compensated for all of their non-driving activity time. (*Id.*) Defendant, on the  
5 other hand, would face the risk that the certified class could recover on its claims if the case goes  
6 to trial. The damage on those claims could be substantial and, of course, both parties risk losing  
7 costs and attorney's fees if the other party prevails. In light of all of these risks, the strength of  
8 plaintiff's case, and all known facts and circumstances, the court finds that the proposed  
9 settlement is fair, reasonable, and adequate and is in the best interest of the class members.

10 *3. The Amount Offered in Settlement*

11 To fairly allocate settlement funds based on the class member's length of service, whether  
12 the class member drove road runs on a regular basis as opposed to only occasionally, and whether  
13 the class member may be entitled to waiting time penalties, the distribution amounts will be  
14 calculated using a point system: (i) each class member will be credited one point for each shift  
15 employed during the class period unless the class member was on leave of absence for that  
16 workweek; and (ii) each class member who separated from employment during the class period  
17 will be credited five additional points to compensate the class member for his or her potential  
18 waiting time penalty claim. The payouts will be divided among class members who have timely  
19 submitted claims as follows: (i) five percent will be paid to settlement class members who did  
20 not regularly work as road drivers, and who instead perform road services only on an occasional  
21 basis and were paid pursuant to the road pay plan for such work; and (ii) ninety-five percent will  
22 be paid to class members who regularly worked as road drivers for some or all of the class period.

23 The total proposed settlement amount is \$3,750,000 with \$25,000 allocated for the cost of  
24 administration of the settlement, \$25,000 for the class representative, \$1,125,000 for attorney's  
25 fees, \$25,000 for attorney costs, \$20,000 for a penalty payment under California's Private  
26 Attorney General Act of 2004, Cal. Labor Code § 2698 et seq. ("PAGA"), and \$2,530,000 for the  
27 net settlement fund. Individual payouts will total up to \$7,042, with the average award estimated  
28 to be \$2,616. (Doc. No. 69-1, at 3.) The court concludes that the settlement pays a reasonable

1 amount of what each settlement class member may be owed.

2 4. *The Extent of Discovery Completed and the Stage of the Proceedings*

3 Here, the settlement was reached after informed, arm's length negotiations between the  
4 parties. Both parties conducted extensive investigation and discovery allowing them to assess the  
5 strengths and weaknesses of the case. (Doc. No. 59-1, at 6-8.) Plaintiff's counsel took  
6 depositions of defendant's corporate designees, reviewed documents and data, consulted with  
7 experts, prepared a damage analysis, and prepared briefings. (*Id.*) The settlement resulted from  
8 mediation presided over by an impartial mediator. (*Id.*) The settlement is the product of non-  
9 collusive negotiations after substantial discovery had been conducted, giving plaintiff and  
10 plaintiff's counsel a good grasp of the merits of the case before settlement talks began. The  
11 settlement is "not the product of fraud or overreaching by, or collusion among, the negotiating  
12 parties." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1992) (quoting *Ficalora*  
13 *v. Lockheed Cal. Co.*, 751 F.2d 995, 997 (9th Cir. 1985)); *see also Rodriguez v. West Publishing*  
14 *Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

15 5. *The Experience and Views of Counsel*

16 Plaintiff's counsel are qualified law firms with extensive experience handling class actions  
17 and labor law litigation. (Doc. No. 69-1, at 7.) Class counsels collectively have been appointed  
18 as class counsel in over one hundred class action cases during the fifteen years. (*Id.*) In the prior  
19 orders granting class certification and preliminary approval of the class action settlement, the  
20 court found that the same plaintiff and class counsel were adequate to represent the class. (Doc.  
21 Nos. 48 and 63.) Plaintiff's counsel, as well as the class representative, "strongly believe" that  
22 the settlement is fair, adequate, and preferable to continued litigation. (Doc. No. 69, at 15.)

23 6. *The Presence of a Governmental Participant*

24 Plaintiff sought to enforce claims under PAGA on behalf of the state and affected  
25 employees. The settlement will result in a \$20,000 PAGA penalty payment. This weighs in favor  
26 of approval. *See Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012);  
27 *Zamora v. Ryder Integrated Logistics, Inc.*, No. 13cv2679-CAB (BGS), 2014 WL 9872803, at  
28 \*10 (S.D. Cal. Dec. 23, 2014) (factoring civil PAGA penalties in favor of settlement approval).



1 role for the class members in evaluating a request for an award of attorney fees from the common  
2 fund. *Id.*; *see also Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012); *Rodriguez v. West*  
3 *Publishing Corp.*, 563 F.3d 948, 968 (9th Cir. 2009).

4 The Ninth Circuit has approved two methods for determining the appropriate attorneys'  
5 fees in such cases where the attorneys' fee award is taken from the common fund set aside for the  
6 entire settlement: the "percentage of the fund" method and the "lodestar" method. *Vizcaino v.*  
7 *Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (citation omitted). The district court retains  
8 discretion in common fund cases to choose either method. *Id.* Under either approach,  
9 "[r]easonableness is the goal, and mechanical or formulaic application of either method, where it  
10 yields an unreasonable result, can be an abuse of discretion." *Fischel v. Equitable Life Assurance*  
11 *Soc'y of the U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002).

12 Under the percentage of the fund method, the court may award class counsel a given  
13 percentage of the common fund recovered for the class. *Id.* In the Ninth Circuit, a twenty-five  
14 percent award is the "benchmark" amount of attorneys' fees, but courts may adjust this figure  
15 upward or downward if the record shows "'special circumstances' justifying a departure." *Id.*  
16 (quoting *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990));  
17 *see also Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016). Percentage awards of between  
18 twenty and thirty percent are common. *See Vizcaino*, 290 F.3d at 1047; *In re Activision Sec.*  
19 *Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) ("This court's review of recent reported cases  
20 discloses that nearly all common fund awards range around 30% even after thorough application  
21 of either the lodestar or twelve-factor method."). Nonetheless, an explanation of how the court  
22 arrived at the award figure is necessary when the district court departs from the twenty-five  
23 percent benchmark. *Powers v. Eichen*, 229 F.3d 1249, 1256–57 (9th Cir. 2000).

24 To assess whether the percentage requested is reasonable, courts may consider a number  
25 of factors, including

26 [T]he extent to which class counsel achieved exceptional results for  
27 the class, whether the case was risky for class counsel, whether  
28 counsel's performance generated benefits beyond the cash  
settlement fund, the market rate for the particular field of law (in  
some circumstances), the burdens class counsel experienced while

1 litigating the case (e.g., cost, duration, foregoing other work), and  
2 whether the case was handled on a contingency basis.

3 *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 954–55 (9th Cir. 2015) (internal  
4 quotation marks omitted) (quoting *Vizcaino*, 290 F.3d at 1047-50). The Ninth Circuit has  
5 permitted courts to award attorneys’ fees using this method “in lieu of the often more time-  
6 consuming task of calculating the lodestar.” *Bluetooth*, 654 F.3d at 942.

7 In this case, plaintiff brings various state law claims. Previously, under California law,  
8 “[t]he primary method for establishing the amount of reasonable attorney fees [was] the lodestar  
9 method.” *In re Vitamin Cases*, 110 Cal. App. 4th 1041, 1053 (2003). The court determines the  
10 lodestar amount by multiplying a reasonable hourly rate by the number of hours reasonably spent  
11 litigating the case. *See Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 (9th Cir. 2001).  
12 The product of this computation, the “lodestar” amount, yields a presumptively reasonable fee.  
13 *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013); *Camacho v. Bridgeport Fin.,*  
14 *Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). However, the California Supreme Court recently also  
15 endorsed the percentage of the fund method for calculating reasonable attorneys’ fees. *See*  
16 *Laffitte v. Robert Half Int’l Inc.*, No. S222996, 2016 WL 4238619, at \*1 (Cal. Aug. 11, 2016).  
17 Nonetheless, the Ninth Circuit has recommended that district courts apply one method but cross-  
18 check the appropriateness of the amount by employing the other, as well. *See Bluetooth*, 654  
19 F.3d at 944.

20 The settlement agreement here includes an award of \$1,125,000 in attorney’s fees. (Doc. No.  
21 68-1, at 2.) This represents thirty percent of the \$3,750,000 gross settlement. (*Id.*) Class counsel has  
22 significant experience in the field and the results of the settlement, if approved, would pay a  
23 reasonable amount of what each settlement class member may be owed. The class members have  
24 not filed a single objection to the settlement and only one class member filed a complete and timely  
25 exclusion to the settlement. As discussed above, both parties would face risks if the case proceeded to  
26 trial. Moreover, class counsel has litigated this factually and legally complex case on a contingency  
27 fee basis for nearly three years. Finally, thirty percent is consistent with attorney fee awards made in  
28 many other wage-and-hour class actions in this court. (*See Doc. 68 at 12.*) Consideration of these

1 factors supports an attorneys' fees award of thirty percent of the gross settlement. *See Hensley v.*  
2 *Eckerhart*, 461 U.S. 424, 436 (1983) (noting that the "most critical factor" to the reasonableness  
3 of an attorney fee award is "the degree of success obtained").

4 The *Lodestar* cross-check confirms that the requested attorney fees are reasonable. Class  
5 counsel contends that they collectively have incurred nearly \$500,000 in lodestar attorneys' fees and  
6 \$8,712 in costs, excluding the time drafting the motion for final approval, and traveling to and  
7 appearing at the hearing on the final approval of the class action settlement.<sup>2</sup> (Doc. No. 68-1 at 2.)  
8 Westrup & Associates has expended a total of 874 hours representing \$446,178 in fees and Labor  
9 Law Offices APC has expended attorney time of \$51,643 in lodestar fees. Class counsel calculates its  
10 attorneys' fees with a rate of \$525/hour for senior associates and \$700/hour for the senior partner R.  
11 Duane Westrup. (*Id.* at 6–8.) These rates have been approved in other class actions litigated in this  
12 district by class counsel. *See Owens v. Kraft Foods Global, Inc.*, No 1:10-cv-02062-AWI-SMS, Doc.  
13 No. 56 (E.D. Cal. Nov. 22, 2013) (approving \$700/hour for R. Duane Westrup); *Miller v. CEVA*  
14 *Logistics USA, Inc.*, No. 2:13-cv-01321-TLN-CKD, 2015 WL 4730176 (E.D. Cal. Aug. 10, 2015)  
15 (approving \$525/hour for associates and \$700/hour for R. Duane Westrup).

16 Class counsel further requests a *Lodestar* multiplier of 2.26 to arrive at the requested  
17 \$1,125,000 attorney's fees award. (Doc. No. 68, at 14.) "Multipliers in the 3–4 range are common in  
18 lodestar awards for lengthy and complex class action litigation." *Van Vranken v. Atlantic Richfield*  
19 *Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) (citing *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D.  
20 534, 549 (S.D. Fla. 1988)); *see also* 4 NEWBERG ON CLASS ACTIONS § 14.7 (courts typically  
21 approve percentage awards based on lodestar cross-checks of 1.9 to 5.1 or even higher, and "the  
22 multiplier of 1.9 is comparable to multipliers used by the courts"); *In re Prudential Ins. Co. America*  
23 *Sales Practice Litigation Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) ("[M]ultiples ranging from  
24 one to four are frequently awarded in common fund cases when the lodestar method is applied.")  
25 (quoting Newberg). Here, the multiplier of 2.26 therefore falls within the range of multipliers

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26 <sup>2</sup> Class counsel notes that costs to date of \$8,712.00 does not include the costs to attend the final  
27 approval hearing, but that the difference between the actual costs and the preliminary approved  
28 costs of \$25,000 will be add to the net settlement sum for distribution to the class. (Doc. No. 68  
at 19.)

1 generally awarded to counsel in successful class action litigation. The court therefore approves class  
2 counsel’s motion for attorneys’ fees.

3 2. *Class Representative Payment*

4 The settlement agreement provides for a class representative payment of \$25,000.  
5 “Incentive awards are fairly typical in class action cases.” *Rodriguez v. West Publ’g Corp.*, 563  
6 F.3d 948, 958–59 (9th Cir. 2009). However, the decision to approve such an award is a matter  
7 within the court’s discretion. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir.  
8 2000). Generally speaking, incentive awards are meant to “compensate class representatives for  
9 work done on behalf of the class, to make up for financial or reputational risk undertaking in  
10 bringing the action, and, sometimes, to recognize their willingness to act as a private attorney  
11 general.” *Rodriguez*, 563 F.3d at 958–59. The Ninth Circuit has emphasized that “district courts  
12 must be vigilant in scrutinizing all incentive awards to determine whether they destroy the  
13 adequacy of the class representatives . . . . [C]oncerns over potential conflicts may be especially  
14 pressing where, as here, the proposed service fees greatly exceed the payments to absent class  
15 members.” *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013)  
16 (internal quotation marks and citation omitted). A class representative must justify an incentive  
17 award through “evidence demonstrating the quality of plaintiff’s representative service,” such as  
18 “substantial efforts taken as class representative to justify the discrepancy between [his] award  
19 and those of the unnamed plaintiffs.” *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 669 (E.D. Cal.  
20 2008). Incentive awards are particularly appropriate in wage-and-hour actions where a plaintiff  
21 undertakes a significant “reputational risk” by bringing suit against their former employers.  
22 *Rodriguez*, 563 F.3d at 958–59. The district court must evaluate their awards individually, using  
23 ““relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class,  
24 the degree to which the class has benefitted from those actions, . . . the amount of time and effort  
25 the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace  
26 retaliation.”” *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (quoting *Cook v. Niedert*,  
27 142 F.3d 1004, 1016 (7th Cir. 1998)).

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1 In this case, the class representative estimates that he spent well over eighty hours  
2 working on this lawsuit. (Doc. No. 69-2, at 10.) Plaintiff faced personal risks associated with the  
3 stigma of bringing the lawsuit and, if he failed to prevail, could have been ordered to pay  
4 attorneys' fees and costs. (*Id.*) He is the only class representative in the matter and the incentive  
5 payment makes up a small portion of the overall settlement funds. However, at the hearing on the  
6 motion for final approval, defense counsel objected to the amount of the class representative  
7 payment, arguing that an incentive award of \$25,000 is high for a case, such as this, that did not  
8 go to trial and where there is no general release of liability because the class representative has  
9 another pending case against defendant.

10 Plaintiffs' requested class representative payment of \$25,000 is indeed more than the  
11 typical enhancement award in this circuit, where \$5,000 is presumptively reasonable. *See Harris*  
12 *v. Vector Marketing Corp.*, No. C-08-5198-EMC, 2012 WL 381202 (N.D. Cal. Feb. 6, 2012)  
13 ("Several courts in this District have indicated that incentive payments of \$10,000 or \$25,000 are  
14 quite high and/or that, as a general matter, \$5,000 is a reasonable amount.) (citations omitted).  
15 The decision in *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 335 (N.D. Cal. 2014) is  
16 illustrative. There, one class representative spent more than 200 hours assisting the case and a  
17 second devoted many hours as well and attended a four-day mediation. *Id.* Both class  
18 representatives faced professional risks as well as the possibility of retaliation because they  
19 continued to work in the same industry. *Id.* Nonetheless, the court in *Dyer* found that a \$15,000  
20 enhancement award for each class representative was too great because the representatives did not  
21 sign a broader general release than their fellow class members, the litigation had a relatively short  
22 duration and ended prior to class certification, and the award was disproportionate to the average  
23 class member's recovery, which was estimated to be \$1,271. Instead, the court awarded \$10,000  
24 to each class representative for the time and effort they spent in connection with the litigation and  
25 the risks they took on behalf of their fellow class members. *Id.* at 336.

26 This court finds that a class representative payment of less than \$25,000 is appropriate in  
27 this case. While there is no general release of liability by the class representative, his release of

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1 liability is broader than the class members.<sup>3</sup> The duration of this litigation has been slightly  
2 longer than that in *Dyer* because a class has been certified in this case. However, this case is  
3 otherwise remarkably similar to *Dyer*. Accordingly, the court finds that a class representative  
4 payment of \$15,000 is appropriate in this case.<sup>4</sup>

5 3. *Cost of Administration and PAGA Penalty Payment.*

6 The court finds the expected cost of administration of the settlement of \$25,000 and the  
7 PAGA penalty payment of \$20,000 are reasonable.

8 4. *The Lien*

9 On August 26, 2016, a notice of lien under Cal. Code of Civ. Pro. § 708.410 was filed by  
10 Nancy Ann Underwood (formerly Westrup), regarding attorneys' fees awarded in this case to  
11 plaintiffs' attorney, R. Duane Westrup, and related entities. (Doc. No. 71). The basis of that lien  
12 was an unsatisfied judgment in the case of *In re Marriage of Westrup*, Case No: BD513445, in  
13 the Los Angeles County Superior Court. (*Id.* at 2.) After the filing of the lien, on August 27,  
14 2016, Nancy Underwood passed away. (Doc. No. 81-1 at 9.) Courtney Finney (the daughter of  
15 Nancy Underwood and R. Duane Westrup) was appointed successor in interest for Underwood in  
16 the marital proceeding. (Doc. No. 81-1 at 4, 16-17). She is also the sole beneficiary to the Nancy  
17 Ann Westrup Family Trust, dated October 15, 2015 ("the trust"), which became irrevocable at the

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18  
19 <sup>3</sup> Specifically, the settlement agreement provides the following release of liability for the class  
20 representative:

21 As of the Effective Date, Plaintiff hereby releases and waives any  
22 and all claims of any kind whatsoever, known or unknown, against  
23 the Released Parties through the Effective Date of the Agreement,  
24 except for (i) the claims in the pending *Hall, et al. v. FedEx  
Freight, Inc.* (D.C. Case No. 1:13-CV-1711-AWI-SKO) (9th Cir.  
Ct. of Appeals Case No. 15-15441), and (ii) any claims of any kind  
directly relating to the termination of Plaintiff's employment with  
Defendant.

25 (Doc. No. 57-2 at 25.)

26 <sup>4</sup> The settlement agreement provides that "Defendant reserves the right to oppose the amount of  
27 the Class Representative Service Fee. In the event that the Court awards a lesser amount than  
28 requested, then any portion of the requested amount not awarded to Named Plaintiff shall be a  
part of the Net Settlement Fund." (Doc. No. 57-2 at 14.)

1 time of Nancy Underwood's (formerly Westrup) death. (Doc. 81-1 at 3). Ms. Finney has filed a  
2 notification with this court representing that she has consulted an attorney and wishes to withdraw  
3 the previously filed lien. (Doc. No. 81-1 at 2-9). Accordingly, the court orders that the lien  
4 (Doc. No. 71) be released. Cal. Code of Civ. Proc. ("CCP") § 708.440(a) (unless the creditor's  
5 money judgment is first satisfied or the lien is released, no settlement or dismissal in the  
6 underlying pending action may be entered into without the written consent of the judgment  
7 creditor); *see also* CCP § 377.31 (successor in interest has a right to be substituted in for the  
8 decedent); CCP § 377.32 (listing requirements for acting as successor in interest).

### 9 CONCLUSION

10 There is no evidence of collusion in this case and all factors weigh in favor of granting  
11 final approval of the settlement. Accordingly, the settlement is approved as fair and reasonable  
12 and class counsel's motion for attorney's fees is granted.

13 For all of the reasons set forth above, the court:

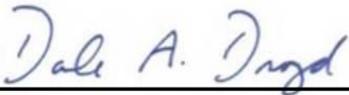
- 14 1) Confirms the certification of the settlement class for settlement purposes;
- 15 2) Confirms Westrup & Associates, including Duane Westrup, Esq., and Labor Law  
16 Office APC, including Michael L. Carver, as class counsel;
- 17 3) Confirms Rust Consulting as the claim administrator;
- 18 4) Finds the terms of the proposed settlement agreement to be fair, adequate, and  
19 reasonable and comply with Rule 23(e) of the Federal Rules of Civil Procedure;
- 20 5) Grants the motion for final approval of the class action settlement (Doc. No. 68);
- 21 6) Grants the motion for attorneys' fees (Doc. No. 68);
- 22 7) Orders that the notice of lien filed on August 26, 2016 (Doc. No. 71) against Duane  
23 Westrup and all entities named therein be released;
- 24 8) Orders that the settlement awards be made and administered in accordance with the  
25 terms of the settlement agreement to the 966 valid claimants;
- 26 9) Orders payment of the class representative service fees to plaintiff Roy D. Taylor in  
27 the amount of \$15,000 from the settlement fund;

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- 1 10) Orders payment for the costs of administration to the claims administrator Rust  
2 Consulting in the amount of \$25,000 from the settlement fund;
- 3 11) Orders that under the California Labor Codes' Private Attorneys General Act  
4 ("PAGA"), California Labor Code § 2699, et seq., a PAGA payment of \$20,000 is  
5 reasonable and apportions that payment as follows: \$15,000 to the Labor and  
6 Workforce Development Agency and \$5,000 to the claimants, to be distributed  
7 pursuant to the claims process defined the settlement agreement;
- 8 12) Orders payment for class counsel fees of \$1,250,000 (40% to be paid to Michael L.  
9 Carver, Labor Law Offices, and 60% to be paid to the Law Offices of Westrup &  
10 Associates, A.P.C.) and costs up to \$25,000 to be paid from the settlement as final  
11 payment for and complete satisfaction of any and all attorneys' fees and costs incurred  
12 by and/or owed to class counsel as set forth in the settlement agreement;
- 13 13) Proceeds from any uncashed checks shall be donated *cy pres* to Central California  
14 Legal Services within 140 days after the effective date of this settlement, and within  
15 10 days thereafter, the claims administrator shall provide a declaration of compliance  
16 to the parties;
- 17 14) Enters this final judgment and orders that parties act in accordance with the terms in  
18 the settlement agreement;
- 19 15) The court will retain jurisdiction over the matter for the purposes of the interpretation,  
20 implementation, and enforcement of the settlement and agreement and all orders  
21 entered in connection therewith.

22 IT IS SO ORDERED.

23 Dated: October 12, 2016

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26 UNITED STATES DISTRICT JUDGE  
27  
28