

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

MARK KERZICH and TIMOTHY
WERTZ, on behalf of themselves and all
similarly situated individuals,

Plaintiffs,

v.

COUNTY OF TUOLUMNE,

Defendants.

No. 1:16-cv-01116-DAD-SAB

ORDER APPROVING REVISED FLSA
SETTLEMENT AND DISMISSING ACTION
WITH PREJUDICE

(Doc. No. 71)

This matter is before the court on the parties’ renewed motion for approval of their FLSA settlement agreement. (Doc. No. 71.) On December 4, 2018, that motion came before the court for hearing. Attorney Jason Jasmine appeared on behalf of plaintiffs and attorney Arthur Hartinger appeared on behalf of defendants. Having considered the parties’ briefing, and having heard from counsel, the court will grant the parties’ motion.

BACKGROUND

The complaint in this action was filed on July 28, 2016, alleging that defendants had violated the FLSA by under-paying municipal employees’ overtime when the employees accepted cash in lieu of healthcare benefits, following the holding in *Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016). (Doc. No. 2.) A scheduling order was entered on November 1, 2016, setting a deadline for non-expert discovery to be completed by June 9, 2017 and expert discovery

1 to be completed by September 20, 2017. (Doc. No. 32.) Prior to the passing of the discovery
2 deadline, the parties stipulated to conditional certification of the action on February 23, 2017.
3 (Doc. No. 37.) No substantive motion practice took place. A magistrate judge of this court held
4 two separate settlement conferences in this action, one on October 2, 2017 (Doc. No. 47) and the
5 other on October 23, 2017 (Doc. No. 48). A settlement was reached following the second of
6 those settlement conferences.

7 After a hearing before the undersigned, and after supplemental briefing provided by the
8 parties, on August 14, 2018, the court denied approval of the settlement agreement without
9 prejudice. (Doc. No. 64.) Following that denial, the parties engaged in an additional round of
10 settlement negotiations under the direction of Magistrate Judge Barbara A. McAuliffe. The
11 revised settlement agreement currently before the court is the product of those negotiations.

12 This proposed settlement essentially encompasses three theories of liability plaintiffs have
13 alleged against defendant. The first directly follows the decision in *Flores v. City of San Gabriel*,
14 824 F.3d 890 (9th Cir. 2016), and alleges that any cash payments made to plaintiffs in lieu of
15 healthcare benefits must be included in the calculation of overtime wages (the “cash-in-lieu”
16 theory). (Doc. No. 71 at 12–13.) The second theory is an expansion of the holding in *Flores*, and
17 seeks to have the total payments for healthcare benefits made by defendant on behalf of plaintiffs
18 included in the calculation of overtime, regardless of whether they were paid as cash directly to
19 plaintiffs or were in the form of healthcare benefits secured for plaintiffs (the “total benefits plan”
20 theory). (*Id.* at 13.) Finally, plaintiffs seek to settle what they denote as their “canine claim,”
21 which concerns alleged underpayment of the defendant’s canine police officers. (*Id.* at 14.)

22 The settlement agreement proposes a total payment of \$450,000.00. (*Id.* at 10.) This total
23 amount is designated to the following categories: \$227,000.00 in damages to plaintiffs for both
24 *Flores* theories of liability; \$25,000.00 in damages for the canine claim; \$6,000.00 total as
25 incentive payments, awarding \$3,000.00 each to plaintiffs Kerzich and Wertz; and \$192,000.00 in
26 attorneys’ fees and costs to plaintiffs’ counsel. (*Id.*) Notably, and in contrast to the prior
27 proposed settlement, plaintiffs’ counsel is not now seeking a further award of contingency fees.
28 (*Id.* at 29.)

1 **LEGAL STANDARD**

2 “The FLSA establishes federal minimum-wage, maximum-hour, and overtime guarantees
3 that cannot be modified by contract.” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69
4 (2013). Because an employee cannot waive claims under the FLSA, they may not be settled
5 without supervision of either the Secretary of Labor or a district court. *See Barrentine v. Ark.-*
6 *Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *Beidleman v. City of Modesto*, No. 1:16-cv-
7 01100-DAD-SKO, 2018 WL 1305713, at *1 (E.D. Cal. Mar. 13, 2018); *Yue Zhou v. Wang’s*
8 *Rest.*, No. 05-cv-0279 PVT, 2007 WL 2298046, at *1 n.1 (N.D. Cal. Aug. 8, 2007). Since
9 neither party has represented that the Secretary of Labor has approved this settlement, it falls to
10 the court to evaluate whether this settlement should be approved under the FLSA.

11 Employees may bring collective actions under the FLSA, representing all “similarly
12 situated” employees, but “each employee [must] opt-in to the suit by filing a consent to sue with
13 the district court.” *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1064 (9th Cir.
14 2000); *see also Jones v. Agilysys, Inc.*, No. C 12-03516 SBA, 2014 WL 108420, at *2 (N.D. Cal.
15 Jan. 10, 2014).

16 The Ninth Circuit has not established criteria for district courts to consider in determining
17 whether an FLSA settlement should be approved. *Dunn v. Teachers Ins. & Annuity Ass’n of Am.*,
18 No. 13-CV-05456-HSG, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016). However, district
19 courts in this circuit have frequently applied a widely-used standard adopted by the Eleventh
20 Circuit, which looks to whether the settlement is a fair and reasonable resolution of a bona fide
21 dispute. *Id.*; *see also Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th
22 Cir. 1982); *Selk v. Pioneers Mem’l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1172 (S.D. Cal.
23 2016); *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1333 (N.D. Cal. 2014); *Yue Zhou*, 2007 WL
24 2298046, at *1. “A bona fide dispute exists when there are legitimate questions about the
25 existence and extent of Defendant’s FLSA liability.” *Selk*, 159 F. Supp. 3d at 1172 (internal
26 quotation marks and citation omitted). A court will not approve a settlement of an action in
27 which there is certainty that the FLSA entitles plaintiffs to the compensation they seek, because it
28 would shield employers from the full cost of complying with the statute. *Id.*

1 Additionally, because FLSA settlements require court approval, payment of attorneys’
2 fees from settlement proceeds is also subject to review by the court. *See Avila v. Los Angeles*
3 *Police Dep’t*, 758 F.3d 1096, 1104–05 (9th Cir. 2014) (reviewing an award of attorneys’ fees
4 under the FLSA); *Dunn*, 2016 WL 153266, at *9 (N.D. Cal. Jan. 13, 2016) (“The Court retains
5 the authority to determine what fees are reasonable [in an FLSA settlement].”); *Selk*, 159 F. Supp.
6 3d at 1180 (“Where a proposed settlement of FLSA claims includes the payment of attorney’s
7 fees, the court must also assess the reasonableness of the fee award.”) (quoting *Wolinsky v.*
8 *Scholastic Inc.*, 900 F. Supp. 2d 332, 336 (S.D.N.Y. 2012)).

9 Once it is established that there is a bona fide dispute, courts often apply the Rule 23
10 factors for assessing proposed class action settlements when evaluating the fairness of an FLSA
11 settlement, while recognizing that some of those factors do not apply because of the inherent
12 differences between class actions and FLSA actions. *Khanna v. Inter-Con Sec. Sys., Inc.*, No.
13 CIV S-09-2214 KJM, 2013 WL 1193485, at *2 (E.D. Cal. Mar. 22, 2013). To determine whether
14 the proposed FLSA settlement is fair, adequate, and reasonable, courts in this circuit have
15 balanced factors such as:

16 the strength of the plaintiffs’ case; the risk, expense, complexity, and
17 likely duration of further litigation; the risk of maintaining class
18 action status throughout the trial; the amount offered in settlement;
19 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.

20 *Khanna v. Intercon Sec. Sys., Inc.*, No. 2:09-CV-2214 KJM EFB, 2014 WL 1379861, at *6 (E.D.
21 Cal. Apr. 8, 2014), *order corrected*, 2015 WL 925707 (E.D. Cal. Mar. 3, 2015); *see also*
22 *Almodova v. City & Cty. of Honolulu*, Civil No. 07–00378 DAE–LEK, 2010 WL 1372298, at *4
23 (D. Haw. Mar. 31, 2010), *recommendations adopted by* 2010 WL 1644971 (D. Haw. Apr. 20,
24 2010) (adopting class action settlement factors in evaluating a FLSA collective action settlement
25 even though some of those factors will not apply). District courts in this circuit have also taken
26 note of the “unique importance of the substantive labor rights involved” in settling FLSA actions
27 and adopted a “totality of circumstances approach that emphasizes the context of the case.” *Selk*,
28 159 F. Supp. 3d at 1173. With this approach, a “district court must ultimately be satisfied that the

1 settlement’s overall effect is to vindicate, rather than frustrate, the purposes of the FLSA.” *Id.* In
2 connection with this, the district court’s “[o]bligation is not to act as caretaker but as gatekeeper,”
3 so that FLSA “settlements do not undermine the Act’s purposes.” *Goodwin v. Citywide Home*
4 *Loans, Inc.*, No. SACV 14–866–JLS (JCGx), 2015 WL 12868143, at *2 (C.D. Cal. Nov. 2, 2015)
5 (quoting *Goudie v. Cable Commc ’ns, Inc.*, No. CV 08-507-AC, 2009 WL 88336 at *1 (D. Or.
6 Jan. 12, 2009)). Settlements that reflect a fair and reasonable compromise of issues that are
7 actually in dispute may be approved to promote the efficiency of encouraging settlement of
8 litigation. *McKeen-Chaplin v. Franklin Am. Mortg. Co.*, No. C 10-5243 SBA, 2012 WL
9 6629608, at *2 (N.D. Cal. Dec. 19, 2012).

10 DISCUSSION

11 A. Bona Fide Disputes

12 Under the decision in *Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016), the
13 payment of cash in lieu of health insurance benefits (“CIL compensation”) must be included in
14 the calculation of the regular rate of pay for overtime payments under the FLSA. There appears
15 to be no dispute that defendant is liable under *Flores*, at least to some degree. (*See* Doc. No. 71 at
16 21.) However, as stated above, some of plaintiffs’ theories of liability go beyond what was
17 addressed by the Ninth Circuit in *Flores*. For instance, the total benefits plan theory “is novel and
18 untested to verdict at trial.” (*Id.* at 23.)

19 The parties also have numerous disagreements regarding the measure of liability. (*See*
20 Doc. No. 71 at 21–23.) First, the parties dispute whether defendant acted in good faith in light of
21 the uncertainty in the law prior to *Flores*. *See Callahan v. City of Sanger*, No. 14-cv-600-BAM,
22 2015 WL 2455419, at *13–14 (E.D. Cal. May 22, 2015) (finding that the failure to include a
23 health benefit reimbursement amount in calculating the regular rate of pay was done in good faith
24 due to uncertainty in the law at the time). If not, plaintiffs would be entitled to an award of
25 liquidated damages. *See* 29 U.S.C. §§ 216(b), 260. The parties also dispute whether the
26 violations as alleged in this case were willful. (Doc. No. 71 at 22.) If so, the relevant statute of
27 limitations period is three years rather than two. 29 U.S.C. § 255(a); *McLaughlin v. Richland*
28 *Shoe Co.*, 486 U.S. 128, 135 (1988); *see also Wagner v. County of Inyo*, No. 1:17-cv-00969-

1 DAD-JLT, 2018 WL 5099761, at *2 (E.D. Cal. Oct. 18, 2018). With respect to the CIL claim,
2 however, it is questionable whether a bona fide dispute exists in light of the decision in *Flores*.
3 However, “that fact alone does not compel rejection of the settlement because the value of the
4 [CIL] claim[] has not been discounted as part of the settlement” in this case. *McManus v. City of*
5 *Ceres*, No. 1:17-cv-00355-DAD-BAM, 2018 WL 4262126, at *3 (E.D. Cal. Sept. 6, 2018). As to
6 plaintiffs’ remaining causes of action, however, all of these issues impact the extent of
7 defendant’s FLSA liability in this case. The court is therefore satisfied that there is a bona fide
8 dispute at issue here.

9 **B. The Proposed Settlement is Fair and Reasonable**

10 To determine whether a FLSA settlement is fair and reasonable, the court evaluates the
11 “totality of the circumstances” within the context of the purposes of the FLSA. *Slezak v. City of*
12 *Palo Alto*, No. 16-cv-03224-LHK, 2017 WL 2688224, at *3 (N.D. Cal. June 22, 2017). Courts in
13 this circuit have considered the following factors when determining whether a settlement is fair
14 and reasonable under the FLSA: (1) the plaintiff’s range of possible recovery; (2) the stage of
15 proceedings and amount of discovery completed; (3) the seriousness of the litigation risks faced
16 by the parties; (4) the scope of any release provision in the settlement agreement; (5) the
17 experience and views of counsel and the opinion of participating plaintiffs; and (6) the possibility
18 of fraud or collusion. *See Selk*, 159 F. Supp. 3d at 1173; *Slezak*, 2017 WL 2688224, at *3;
19 *Roberts v. City of Chula Vista*, No. 16-cv-1955-MMA-DHB, 2017 WL 6541105, at *2 (S.D. Cal.
20 Dec. 21, 2017). The court addresses each of these factors below.

21 1. Plaintiffs’ Range of Possible Recovery

22 Under the terms of the settlement agreement, defendant will pay plaintiffs a total sum of
23 \$258,000.00. (Doc. No. 74-1 at 3.) Of that amount, \$227,000.00 corresponds to damages arising
24 from plaintiffs’ *Flores* CIL claim and the total benefits claim, \$25,000.00 corresponds to damages
25 arising from the canine claim, and \$6,000.00 arises from incentive payments of \$3,000.00 each to
26 named plaintiffs Kerzich and Wertz. (*Id.*) The agreement makes clear that, as counsel clarified at
27 the hearing, the CIL claim has not been discounted, and reflects both the payment of liquidated
28 damages and a three-year statute of limitations. In other words, that claim is being compensated

1 at 100% of what plaintiffs could expect to recover at trial, even if they were to demonstrate both
2 bad faith and willfulness on the part of defendants. (*Id.*) Owing to the novelty of the total
3 benefits plan claim, that claim has been discounted to 22.4% of its anticipated value, although
4 that amount also includes 100% of liquidated damages on that 22.4% backpay. (*Id.*) With
5 respect to the canine claim, the parties agreed that no liquidated damages, and a two-year statute
6 of limitations, were appropriate because the Deputy Sheriffs Association had jointly agreed to the
7 canine pay methodology. (Doc. No. 72 (“Hartinger Decl.”) at ¶ 7.) Accordingly, plaintiffs do not
8 contend that bad faith is applicable to this claim.

9 Plaintiffs and defendant each retained outside experts to analyze the value of plaintiffs’
10 claims. (Doc. No. 71 at 12–13.) As the pending motion indicates, this resulted in wildly different
11 valuations. (*Id.* at 19.) The parties explained at oral argument on the pending motion that this
12 disparity reflects a disagreement with respect to the appropriate modifier to be employed.
13 Plaintiffs believe that a 1.5 multiplier is appropriate, while defendants (citing to several
14 authorities) believe that only a 0.5 multiplier is warranted. *See* 29 C.F.R. § 778.110; *Chavez v.*
15 *City of Albuquerque*, 630 F.3d 1300, 1313 (10th Cir. 2011) (rejecting employees’ argument that a
16 1.5 multiplier should be applied because “[u]nder that scenario, the Employees would receive two
17 and one-half times the regular rate for each overtime hour worked, which is more than the one
18 and one-half that the FLSA requires”); *Flores v. City of San Gabriel*, LACV 12-4884 JGB
19 (JCGx) (C.D. Cal. Nov. 5, 2018) (Doc. No. 128) (“[T]he correct multiplier is 0.5, not 1.5.”).
20 After applying these multipliers to their respective calculations, the parties averaged the resulting
21 dollar amounts to arrive at the total award of \$227,000.00 for the CIL and total benefits plan
22 claims. (Doc. No. 71 at 19.) Under these circumstances, the court finds that consideration of this
23 factor weighs in favor of approval of the FLSA settlement.

24 2. The Stage of the Proceedings and the Amount of Discovery Completed

25 The court is also required to evaluate the stage of the proceedings and the amount of
26 discovery completed to ensure that “the parties carefully investigated the claims before reaching a
27 resolution.” *Ontiveros v. Zamora*, 303 F.R.D. 356, 371 (E.D. Cal. 2014). This factor will weigh

28 ////

1 in favor of approval if the parties have sufficient information to make an informed decision
2 regarding settlement. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998).

3 Here, the parties have sufficient information to make an informed decision regarding
4 settlement. During discovery, defendant produced over 61,000 pages of information to plaintiffs,
5 as well as multiple files containing payroll data. (Doc. No. 73 (“Jasmine Decl.” at ¶ 12.)
6 Plaintiffs deposed three of defendant’s employees, and defendant deposed both named plaintiffs.
7 (*Id.*) Based upon defendant’s productions and payroll records, both parties retained expert
8 witnesses to calculate potential liability. (*Id.*) In addition to this discovery, the parties
9 participated in a two-day settlement conference before the assigned magistrate judge, at the end of
10 which they reached agreement on the terms of the settlement. (*Id.* at ¶ 13.) Under these
11 circumstances, the court finds that the parties had sufficient information to reach an appropriate
12 settlement.

13 3. The Seriousness of the Litigation Risks Faced by the Parties

14 Courts favor settlement where “there is a significant risk that litigation might result in a
15 lesser recover[y] for the class or no recovery at all.” *Bellinghausen v. Tractor Supply Co.*, 306
16 F.R.D. 245, 255 (N.D. Cal. 2015). Although liability with respect to some of plaintiffs’ claims is
17 essentially uncontested after *Flores*, other claims advanced by plaintiffs here are more novel, and
18 recovery under those theories of liability is uncertain. In addition, and as discussed above, the
19 parties disagree with respect to the proper multiplier, which greatly impacts the calculation of
20 damages. Were a court to side with defendant on that issue, plaintiffs’ recovery would be
21 significantly reduced. In addition, with respect to at least some of plaintiffs’ theories of liability,
22 the calculation of damages as presented to the court is premised upon proving both willfulness
23 and bad faith. As stated above, those issues remain disputed. While plaintiffs could expect at
24 least some recovery if this case were to proceed to trial, the court concludes that under the
25 circumstances, it is far from clear that they would recover more than they will receive under the
26 settlement agreement. Accordingly, consideration of this factor weighs in favor of approval of
27 the parties’ FLSA settlement.

28 /////

1 4. The Scope of Any Release Provision in the Settlement Agreement

2 “A FLSA release should not go beyond the specific FLSA claims at issue in the lawsuit
3 itself.” *Slezak*, 2017 WL 2688224, at *5. Expansive release of claims would allow employers to
4 unfairly extract valuable concessions from employees using wages that they are guaranteed by
5 statute. *See Moreno v. Regions Bank*, 729 F. Supp. 2d 1346, 1351 (M.D. Fla. 2010) (“An
6 employee who executes a broad release effectively gambles, exchanging unknown rights for a
7 few hundred or a few thousand dollars to which he is otherwise unconditionally entitled.”).
8 Courts are therefore hesitant to approve settlement agreements that release claims that are not
9 directly related to the allegations brought in the case. *See Daniels v. Aeropostale W., Inc.*, No. C
10 12-05755 WHA, 2014 WL 2215708, at *4 (N.D. Cal. May 29, 2014) (rejecting proposed FLSA
11 settlement in which 60 percent of collective-action opt-in members did not receive any payment
12 in exchange for a release provision that extended beyond the FLSA limits of the case); *McKeen–*
13 *Chaplin*, 2012 WL 6629608, at *5 (rejecting FLSA settlement in part because the release
14 provision exceeded the breadth of allegations in the action and released unrelated claims that
15 plaintiffs may have against defendants).

16 Here, the release provision is limited to all “grievances, disputes or claims of every nature
17 and kind, known or unknown, suspected or unsuspected, arising from or attributable to Plaintiffs’
18 claims that the County violated the FLSA and/or the MOU with regard to overtime occurring up
19 to and including the Effective Date of this Agreement.” (Doc. No. 74-1 at 5.) This release
20 provision is nearly identical to those previously found appropriate in other FLSA cases, and the
21 court similarly finds here that this release provision is reasonable. *See Amador v. City of Ceres*,
22 No. 1:17-cv-00552-DAD-BAM, 2019 WL 935496, at *4 (E.D. Cal. Feb. 26, 2019); *McManus*,
23 2018 WL 4262126, at *5. Consideration of this factor therefore also weighs in favor of approval
24 of the FLSA settlement here.

25 5. The Experience and Views of Counsel and the Opinion of Participating Plaintiffs

26 In determining whether a settlement is fair and reasonable, “[t]he opinions of counsel
27 should be given considerable weight both because of counsel’s familiarity with th[e] litigation
28 and previous experience with cases.” *Larsen v. Trader Joe’s Co.*, No. 11-cv-05188-WHO, 2014

1 WL 3404531, *5 (N.D. Cal. July 11, 2014). Here, plaintiffs’ counsel Jason Jasmine states that he
2 has roughly fifteen years’ experience in labor and employment law, primarily representing public
3 safety employees. (Jasmine Decl. at ¶¶ 4–5.) Based upon this experience, and based in particular
4 upon his belief that plaintiffs “would most likely not obtain a better outcome if they were to
5 litigate and prevail on all of the disputed issues,” attorney Jasmine contends that the settlement is
6 fair and reasonable. (*Id.* at ¶ 11.) Similarly, although defendant’s attorney Arthur Hartinger does
7 not state what relevant experience he possesses, he also concludes that this settlement “effectively
8 pays plaintiffs and consenters full value of back pay, with a three-year statute of limitations plus
9 liquidated damages.” (Hartinger Decl. at ¶ 12.) Attorney Hartinger also states that defendant was
10 amenable to this settlement because it avoids the substantial litigation costs that would necessarily
11 be incurred if this case were to proceed to trial. (*Id.*) This factor also weighs in favor of approval
12 of the settlement agreement.

13 6. The Possibility of Fraud or Collusion

14 In addressing the parties’ prior motion for approval of the settlement agreement (Doc. No.
15 58), the court at that time expressed great concern with respect to the amount of attorneys’ fees
16 sought. *Kerzich v. County of Tuolumne*, 335 F. Supp. 3d 1179, 1185–90 (E.D. Cal. 2018). As the
17 Ninth Circuit has cautioned, courts should be wary of such awards, which may indicate “that class
18 counsel have allowed pursuit of their own self-interests and that of certain class members to infect
19 the negotiations.” *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).
20 Indeed, as this court reminded the parties, “[i]t is precisely the self-interest of counsel against
21 which the court must guard.” *Kerzich*, 335 F. Supp. 3d at 1187. As will be discussed in greater
22 detail below, the parties have substantially reworked the settlement agreement with respect to the
23 apportionment of attorneys’ fees, and are to be commended for doing so. Thus, while this factor
24 previously militated against approval of the settlement agreement, the court now finds that its
25 prior concerns with respect to fraud and collusion have been effectively alleviated.

26 **C. Attorneys’ Fees and Costs**

27 “Where a proposed settlement of FLSA claims includes the payment of attorney’s fees,
28 the court must also assess the reasonableness of the fee award.” *Selk*, 159 F. Supp. 3d at 1180;

1 *see also* 29 U.S.C. § 216(b) (providing that, in a FLSA action, the court shall “allow a reasonable
2 attorney’s fee to be paid by the defendant, and costs of the action”). “Under Ninth Circuit law,
3 the district court has discretion in common fund cases to choose either the percentage-of-the-fund
4 or the lodestar method” for awarding attorneys’ fees. *Vizcaino v. Microsoft Corp.*, 290 F.3d
5 1043, 1047 (9th Cir. 2002).

6 The Ninth Circuit has generally set a twenty-five percent benchmark for the award of
7 attorneys’ fees in common fund cases. *Id.* at 1047–48; *see also In re Bluetooth*, 654 F.3d at 942
8 (“[C]ourts typically calculate 25 percent of the fund as the ‘benchmark’ for a reasonable fee
9 award, providing adequate explanation in the record of any ‘special circumstances’ justifying a
10 departure.”). Reasons to vary the benchmark award may be found when counsel achieves
11 exceptional results for the class, undertakes “extremely risky” litigation, generates benefits for the
12 class beyond simply the cash settlement fund, or handles the case on a contingency basis.
13 *Vizcaino*, 290 F.3d at 1048–50; *see also In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934,
14 954–55 (9th Cir. 2015). Ultimately, however, “[s]election of the benchmark or any other rate
15 must be supported by findings that take into account all of the circumstances of the case.”
16 *Vizcaino*, 290 F.3d at 1048. The Ninth Circuit has approved the use of lodestar cross-checks as a
17 way of determining the reasonableness of a particular percentage recovery of a common fund.¹
18 *Id.* at 1050 (“Where such investment is minimal, as in the case of an early settlement, the lodestar
19

20 ¹ In its prior order the court commented that “[t]ypically, attorneys’ fees under the FLSA are
21 determined using the lodestar method.” *Kerzich*, 335 F. Supp. 3d at 1185. However, this
22 statement is best understood in the context of the Ninth Circuit’s opinion in *Vizcaino*, stating that
23 the lodestar “may provide a useful perspective on the reasonableness of a given percentage
24 award.” *Vizcaino*, 290 F.3d at 1050. Applying this guidance, the undersigned has routinely used
25 the lodestar calculation as a cross-check in FLSA settlements, while ultimately determining
26 attorneys’ fees as a percentage of the fund. *See, e.g., Quiroz v. City of Ceres*, No. 1:17-cv-00444-
27 DAD-BAM, 2019 WL 1005071, at *6–7 (E.D. Cal. Mar. 1, 2019); *Amador*, 2019 WL 935496, at
28 *5–7; *Seguin v. County of Tulare*, No. 1:16-cv-01262-DAD-SAB, 2018 WL 1919823, at *5–7
(E.D. Cal. Apr. 24, 2018). Indeed, in its earlier order in this case the court ultimately concluded
that the amount of attorneys’ fees was excessive after applying the percentage-of-the-fund
method and concluding that a settlement agreement awarding 52% of the total settlement amount
to plaintiffs’ counsel could not be approved. *Kerzich*, 335 F. Supp. 3d at 1186–87. The court will
therefore adhere to its approach of first analyzing attorneys’ fees under the percentage-of-the-
fund method, while applying a lodestar cross-check to ensure that the amount is reasonable.

1 calculation may convince a court that a lower percentage award is reasonable. Similarly, the
2 lodestar calculation can be helpful in suggesting a higher percentage when litigation has been
3 protracted.”); *see also In re Online DVD–Rental*, 779 F.3d at 955.

4 According to the terms of this settlement, plaintiffs’ counsel will be paid \$192,000 in fees
5 and costs out of a total settlement amount of \$450,000. (Doc. No. 71 at 29.) Of that total,
6 plaintiffs’ counsel avers that \$67,551.26 is for costs, with the remainder for fees. (Doc. No. 74
7 (“Messing Decl.”) at ¶ 18.) When that amount of costs incurred in this litigation is removed, the
8 total attorneys fee award is \$124,448.74. That equates to roughly 28 percent of the total
9 settlement amount. Although slightly higher than the 25% benchmark employed by the Ninth
10 Circuit, this amount is quite reasonable, and below similar fee awards the undersigned has
11 previously approved in FLSA settlements. *See, e.g., Goodwin v. Winn Mgmt. Grp.*, No. 1:15-cv-
12 00606-DAD-EPG, 2018 WL 1036406, at *7 (E.D. Cal. Feb. 23, 2018) (approving attorneys’ fees
13 of \$75,000 in a settlement of a class action and FLSA collective action, which was thirty percent
14 of the total settlement amount).

15 The court turns to the lodestar amount to cross-check whether a 28 percent award of
16 attorneys’ fees is appropriate here. Where a lodestar is merely being used as a cross-check, the
17 court “may use a ‘rough calculation of the lodestar.’” *Bond v. Ferguson Enters., Inc.*, No. 1:09–
18 cv–01662-OWW-MJS, 2011 WL 2648879, at *12 (E.D. Cal. June 30, 2011) (quoting *Fernandez*
19 *v. Victoria Secret Stores, LLC*, No. CV 06–04149 MMM (SHx), 2008 WL 8150856 (C.D. Cal.
20 July 21, 2008)).

21 This court has previously accepted as reasonable for lodestar purposes hourly rates
22 between \$370 and \$495 for associates, and between \$545 and \$695 for senior counsel and
23 partners. *See Emmons v. Quest Diagnostics Clinical Labs., Inc.*, No. 1:13–cv–00474–DAD–
24 BAM, 2017 WL 749018, at *8 (E.D. Cal. Feb. 27, 2017). Some judges in the Eastern District of
25 California have approved similar rates in various class action settings, while others have approved
26 lower rates. *See Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 452 (E.D. Cal. 2013)
27 (awarding between \$280 and \$560 per hour for attorneys with two to eight years of experience,
28 and \$720 per hour for attorney with twenty-one years of experience); *Gong–Chun v. Aetna Inc.*,

No. 1:09-cv-01995-SKO, 2012 WL 2872788, at *23 (E.D. Cal. July 12, 2012) (between \$300 and \$420 per hour for associates, and between \$490 and \$695 per hour for senior counsel and partners). *But see In re Taco Bell Wage and Hour Actions*, 222 F. Supp. 3d 813, 839–40 (E.D. Cal. 2016) (concluding that appropriate rates were \$350 to \$400 per hour for attorneys with twenty or more years of experience, \$250 to \$350 per hour for attorneys with less than fifteen years of experience, and \$125 to \$200 per hour for attorneys with less than two years of experience); *Reyes v. CVS Pharm., Inc.*, No. 1:14-cv-00964-MJS, 2016 WL 3549260, at *12–13 (E.D. Cal. June 29, 2016) (awarding between \$250 and \$380 for attorneys with more than twenty years of experience, and between \$175 and \$300 for attorneys with less than ten years of experience); *Rosales v. El Rancho Farms*, No. 1:09-cv-00707-AWI, 2015 WL 4460635, at *25 (E.D. Cal. July 21, 2015) (awarding between \$175 and \$300 per hour for attorneys with less than ten years of experience and \$380 per hour for attorneys with more than twenty years of experience); *Schiller v. David’s Bridal, Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *22 (E.D. Cal. June 11, 2012) (awarding between \$264 and \$336 per hour for associates, and \$416 and \$556 per hour for senior counsel and partners).

Here, the declaration submitted by plaintiffs’ counsel Gary M. Messing states that the attorneys who performed work on this case agreed to work at reduced rates. (Messing Decl. at ¶ 15.) Specifically, attorney Messing averred that labor and employment law litigation rates in the Eastern District of California “are seldom below the level of \$450–475 per hour.” (*Id.* at 6.) That declaration also included a chart showing the hours worked on this action by each attorney as well as the rates charged by each, which is replicated below:

Attorney	Time	Rate	Value
Gary Messing	25.5	\$350.00	\$8,925.00
Jason Jasmine	94.0	\$320.00	\$30,080.00
Paul Bird	360.0	\$340.00	\$122,400.00
Tylor Dominguez	125.2	\$245.00	\$30,674.00
TOTAL	574.8		\$192,079.00

(*Id.*) Given counsels’ level of experience, and given the prevailing rates in the Eastern District of

1 California, the court finds the fee award proposed in the settlement reasonable in light of this
2 lodestar cross-check.

3 **D. Incentive Award**

4 At its discretion, a district court may award incentive payments to named plaintiffs in
5 class action cases or FLSA collective actions. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–
6 59 (9th Cir. 2009); *see also Selk*, 159 F. Supp. 3d at 1181 (discussing FLSA collective action
7 cases).

8 To justify an incentive award, a class representative must present “evidence demonstrating
9 the quality of plaintiff’s representative service,” such as “substantial efforts taken as class
10 representative to justify the discrepancy between [his] award and those of the unnamed
11 plaintiffs.” *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 669 (E.D. Cal. 2008). Such incentive awards
12 are particularly appropriate in wage-and-hour actions where a plaintiff undertakes a significant
13 reputational risk by bringing suit against his or her former employers. *Rodriguez*, 563 F.3d at
14 958–59.

15 The Ninth Circuit has emphasized, however, that “district courts must be vigilant in
16 scrutinizing all incentive awards.” *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1165
17 (9th Cir. 2013) (internal quotation marks and citation omitted). In keeping with that admonition,
18 district courts have declined to approve incentive awards that represent an unreasonably high
19 proportion of the overall settlement amount, or that are disproportionate relative to the recovery
20 of other class members. *See Ontiveros*, 303 F.R.D. at 365–66; *see also Ko v. Natura Pet Prods.,*
21 *Inc.*, Civ. No. 09–2619 SBA, 2012 WL 3945541, at *15 (N.D. Cal. Sept. 10, 2012) (holding that
22 an incentive award of \$20,000, comprising one percent of the approximately \$2 million common
23 fund was “excessive under the circumstances” and reducing the award to \$5,000); *Wolph v. Acer*
24 *Am. Corp.*, No. C 09–01314 JSW, 2013 WL 5718440, at *6 (N.D. Cal. Oct. 21, 2013) (reducing
25 the incentive award to \$2,000 where the class representatives did not demonstrate great risk to
26 finances or reputation in bringing the class action). These courts have reasoned that
27 overcompensation of class representatives could encourage collusion at the settlement stage of
28 class actions by causing a divergence between the interests of the named plaintiff and the absent

1 class members, destroying the adequacy of class representatives. *See Radcliffe*, 715 F.3d at 1165;
2 *Staton v. Boeing Co.*, 327 F.3d 938, 977–78 (9th Cir. 2003).

3 Here, named plaintiffs Kerzich and Wertz will each receive \$3,000.00 as an incentive
4 payment under the proposed settlement, for a total of \$6,000.00. (Doc. No. 71 at 29.) This
5 equates to roughly 1.3 percent of the total settlement fund, which is in line with other incentive
6 awards previously approved by this court. *See, e.g., Goodwin*, 2018 WL 1036406, at *11
7 (awarding the named plaintiff \$3,750, equivalent to 1.5 percent of the total settlement fund); *Syed*
8 *v. M-I, L.L.C.*, No. 1:12-cv-01718-DAD-MJS, 2017 WL 3190341, at *9 (E.D. Cal. July 27, 2017)
9 (awarding the two named plaintiffs \$20,000 and \$15,000 respectively, which amounted to 0.2
10 percent and 0.3 percent of the total settlement fund). In addition, the named plaintiffs’ recovery
11 does not appear to be out of proportion to that of the remaining plaintiffs. The parties’ motion
12 indicates that the plaintiffs collectively will receive \$252,000.00 in damages, and that there are 99
13 plaintiffs in this action. (Doc. No. 71 at 2, 29.) This averages to an award of \$2,545.45 per
14 plaintiff. Thus, the named plaintiffs will receive slightly more than double what the remaining
15 plaintiffs will receive, which again is comparable to incentive awards previously found
16 reasonable by this court. *See Wagner*, 2018 WL 5099761, at *7.

17 Considering these factors, the court approves an incentive award in the amount of
18 \$3,000.00 to each of the named plaintiffs.

19 CONCLUSION

20 For the reasons set forth above,

- 21 1. The Settlement Agreement, which is incorporated herein by reference, is approved
22 as fair, reasonable, and just in all respects as to the plaintiffs and the parties shall
23 perform the Settlement Agreement in accordance with its terms;
- 24 2. The Notice of Collective Action Settlement Claim Form and Release to be sent to
25 all plaintiffs, attached as Exhibit C to the Settlement Agreement and incorporated
26 herein by reference, is approved;
- 27 3. The Court has made no findings or determination regarding the law, and this
28 motion and any exhibits and any of the other documents or written materials

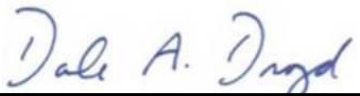
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

prepared in conjunction with this motion and order shall not constitute evidence of, or any admission of, any violation of the law;

4. Simpluris, Inc. will administer the issuance of the Claim Form and Release to all plaintiffs, receive and process completed Claim Form and Releases, issue payments to plaintiffs with appropriate withholdings, issue payments to plaintiffs' counsel, and otherwise manage the Settlement Amount as set forth in the Settlement Agreement;
5. This action is dismissed with prejudice; and
6. The Clerk of Court is directed to close this case.

IT IS SO ORDERED.

Dated: April 18, 2019


UNITED STATES DISTRICT JUDGE