

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

VALERIY BYKOV,

 Plaintiff,

 v.

DC TRANSPORTATION SERVICES,
INC.,

 Defendant.

No. 2:18-cv-1691 DB

ORDER

Each of the parties in the above-captioned case has consented to proceed before a United States Magistrate Judge. See U.S.C. § 636(c). Accordingly, this matter has been reassigned to the undersigned for all purposes. (ECF No. 12.) Noticed for hearing before the court on March 29, 2019, is plaintiff’s unopposed motion for preliminary approval of a class action settlement. (ECF No. 16.)

Having reviewed the record, the court finds that this matter may be decided without a hearing pursuant to Local Rule 230(g). Plaintiff’s motion for preliminary approval of a class action settlement is granted as explained below.

///
///
///

1 **BACKGROUND**

2 Plaintiff commenced this action on May 3, 2018, by filing a complaint in the Sacramento
3 County Superior Court. (ECF No. 1 at 22.¹) The complaint alleged the following claims against
4 defendant DC Transportations Services, Inc., dba DC Transport: (1) willful misclassification of
5 plaintiff and his fellow drivers as independent contractors; (2) failure to pay their current and
6 former truck drivers in California separately and on an hourly basis for their time spent taking
7 their statutory rest periods and on their pre- and post-trip inspections, loading/unloading time,
8 time spent cleaning their trucks, time spent fueling their trucks and on time spent on work-related
9 paperwork (collectively referred to as “Non-Driving Tasks”); (3) failure to provide paid rest
10 breaks and rest break premiums to their current and former truck drivers in California; (4) failure
11 to provide meal periods and pay missed meal period premiums to its current and former truck
12 drivers in California; (5) failure to reimburse business expenses including gas mileage, insurance
13 coverage, and personal cell phone expenses, incurred by their current and former truck drivers in
14 California; (6) failure to provide complete wage statements to their current and former truck
15 drivers in California within the one year prior to the filing of the complaint; (7) failure to pay all
16 wages due to former employees based on the foregoing; (8) unfair business practices based on the
17 foregoing; and (9) California’s Private Attorneys General Act (“PAGA”) and other penalties
18 based on the foregoing. (Id. at 25.)

19 Defendant filed an answer on June 7, 2018. (Id. at 55-67.) On June 8, 2018, defendant
20 removed the matter to this court pursuant to diversity jurisdiction and the Class Action Fairness
21 Act of 2005. (Id. at 5.) On December 11, 2018, the parties advised the court they had reached a
22 settlement. (ECF No. 12.) On February 11, 2019, plaintiff filed a motion for preliminary
23 approval of a class action settlement. (ECF No. 16.) On February 25, 2019, defendant filed a
24 statement of non-opposition. (ECF No. 17.)

25 On March 12, 2019, the court issued an order addressing some concerns with the proposed
26 Notice of Proposed Class Action Settlement and Hearing Date for Court Approval (“Notice”).

27 _____
28 ¹ Page number citations such as this one are to the page number reflected on the court’s CM/ECF
system and not to page numbers assigned by the parties.

1 (ECF 18.) Plaintiff was given an opportunity to file a revised Notice and the hearing of plaintiff's
2 motion was continued to March 22, 2019. On March 21, 2019, plaintiff filed a revised Notice.
3 (ECF No. 19-1.) Defendant does not object to the revised Notice. (ECF No. 19-3.)

4 **LEGAL STANDARDS**

5 The settlement of class actions is supported by strong judicial policy. Class Plaintiffs v.
6 City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). However, “[t]o guard against th[e] potential
7 for class action abuse, Rule 23(e) of the Federal Rules of Civil Procedure requires court approval
8 of all class action settlements, which may be granted only after a fairness hearing and a
9 determination that the settlement taken as a whole is fair, reasonable, and adequate.” In re
10 Bluetooth Headset Products Liability Litigation, 654 F.3d 935, 946 (9th Cir. 2011).

11 “It is the settlement taken as a whole, rather than the individual component parts, that
12 must be examined for overall fairness.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir.
13 1998) (citing Officers for Justice v. Civil Serv. Comm’n of San Francisco, 688 F.2d 615, 628 (9th
14 Cir. 1982)). “Where, as here, the parties reach a settlement before class certification, the district
15 court must apply a ‘higher standard of fairness.’” Cotter v. Lyft, Inc., 176 F.Supp.3d 930, 935
16 (N.D. Cal. 2016) (quoting Hanlon, 150 F.3d at 1026). In this context, “‘courts must peruse the
17 proposed compromise to ratify both the propriety of the certification and the fairness of the
18 settlement.’” In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability
19 Litigation, 895 F.3d 597, 606 (9th Cir. 2018) (quoting Staton v. Boeing Co., 327 F.3d 938, 952
20 (9th Cir. 2003)). “The factors and warning signs identified in Hanlon, Staton, In re Bluetooth,
21 and other cases are useful, but in the end are just guideposts.” Id. at 611.

22 “District courts have interpreted Rule 23(e) to require a two-step process for the approval
23 of class action settlements: ‘the Court first determines whether a proposed class action settlement
24 deserves preliminary approval and then, after notice is given to class members, whether final
25 approval is warranted.’” In re High-Tech Emp. Antitrust Litig., No. 11-cv-02509-LHK, 2014 WL
26 3917126, at *3 (N.D. Cal. Aug. 8, 2014) (quoting Nat’l Rural Telecomms. Coop. v. DIRECTV,
27 Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004)). In evaluating a proposed settlement at the
28 preliminary approval stage, “[s]ome district courts . . . have stated that the relevant inquiry is

1 whether the settlement ‘falls within the range of possible approval’ or ‘within the range of
2 reasonableness.’” In re High-Tech Emp. Antitrust Litig., 2014 WL 3917126, at *3 (quoting In re
3 Tableware Antitrust Litig., 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007)).

4 ANALYSIS

5 A. Preliminary Class Certification

6 “A party seeking class certification must satisfy the requirements of Federal Rule of Civil
7 Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b).” Wang
8 v. Chinese Daily News, Inc., 737 F.3d 538, 542 (9th Cir. 2013). Rule 23(a) “requires a party
9 seeking class certification to satisfy four requirements: numerosity, commonality, typicality, and
10 adequacy of representation.” Id. The “specifications of the Rule . . . demand undiluted, even
11 heightened, attention in the settlement context.” Amchem Products, Inc. v. Windsor, 521 U.S.
12 591, 620 (1997).

13 1. Numerosity

14 A proposed class must be “so numerous that joinder of all members is impracticable.”
15 Fed. R. Civ. P. 23(a)(1). “Courts have found the requirement satisfied when the class comprises
16 of as few as thirty-nine members, or where joining all class members would serve only to impose
17 financial burdens and clog the court’s docket.” Goodwin v. Winn Management Group LLC, No.
18 1:15-cv-0606 DAD EPG, 2017 WL 3173006, at *5 (E.D. Cal. July 26, 2017).

19 Here, plaintiff is seeking to certify a class of 92 members. (ECF No. 16 at 18.) The court
20 finds that the numerosity requirement is satisfied.

21 2. Commonality

22 The requirement for commonality is satisfied when “there are questions of law or fact that
23 are common to the class.” Fed. R. Civ. P. 23(a)(2). “[T]he key inquiry is not whether the
24 plaintiffs have raised common questions,” but “whether class treatment will ‘generate common
25 answers apt to drive the resolution of the litigation.’” Arredondo v. Delano Farms Co., 301
26 F.R.D. 493, 503 (E.D. 2014) (quoting Abdullah v. U.S. Sec. Assocs., 731 F.3d 952, 957 (9th Cir.
27 2013)); see also Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (“What matters to
28 class certification . . . is not the raising of common ‘questions’—even in droves—but, rather the

1 capacity of a classwide proceeding to generate common answers apt to drive the resolution of the
2 litigation.”).

3 Here, classwide proceeding would generate the common answer to whether defendant
4 misclassified these plaintiffs, failed to pay for non-productive time, etc. “Because it therefore
5 appears that the same alleged conduct of defendant would form the basis of each of the plaintiff’s
6 claims class relief based on commonality is appropriate.” Murillo v. Pacific Gas & Elec. Co., 266
7 F.R.D. 468, 475 (E.D. Cal. 2010) (citation, quotation, and alteration omitted).

8 Therefore, the court finds the commonality requirement satisfied.

9 3. Typicality

10 “The test of typicality ‘is whether other members have the same or similar injury, whether
11 the action is based on conduct which is not unique to the named plaintiffs, and whether other
12 class members have been injured by the same course of conduct.’” Hanon v. Dataproducts Corp.,
13 976 F.2d 497, 508 (9th Cir. 1992). Here, plaintiff and the class members were allegedly
14 subjected to the same practices and miscalculations, resulting in the same or similar injuries.

15 Accordingly, the court finds the typicality requirement satisfied.

16 4. Adequacy

17 “To satisfy constitutional due process concerns, absent class members must be afforded
18 adequate representation before entry of a judgment which binds them.” Hanlon, 150 F.3d at
19 1020. “To determine whether named plaintiffs will adequately represent a class, courts must
20 resolve two questions: ‘(1) do the named plaintiffs and their counsel have any conflicts of interest
21 with other class members and (2) will the named plaintiffs and their counsel prosecute the action
22 vigorously on behalf of the class?’” Ellis v. Costco Wholesale Corp., 657 F.3d 970, 985 (9th Cir.
23 2011) (quoting Hanlon, 150 F.3d at 1020).

24 Here, there is nothing before the court to suggest that the named plaintiff or class counsel
25 has any conflict of interest with any class member. To the contrary, it appears that plaintiff has
26 the same interest and injury as the other class members. And plaintiff’s counsel are experienced
27 litigators of class actions involving the precise claims here, i.e., wage and hour disputes involving
28 truck drivers. See Martinez v. Knight Transportation, Inc., No. 1:16-cv-1730 DAD SKO, 2018

1 WL 6308110, (E.D. Cal. Dec. 3, 2018); Clayton v. Knight Transp., Inc., No. 1:11cv0735 LJO
2 DLB, 2012 WL 2912395, (E.D. Cal. July 16, 2012).

3 Accordingly, the court finds the adequacy requirement satisfied.

4 **5. Rule 23(b)(3)**

5 Having satisfied the requirements for Rule 23(a), plaintiff must also satisfy at least one of
6 the categories under Rule 23(b). Here, plaintiff seek certification pursuant to Rule 23(b)(3).
7 (ECF No. 16 at 20.) “To qualify for certification under Rule 23(b)(3), a class must meet two
8 requirements beyond the Rule 23(a) prerequisites: Common questions must ‘predominate over
9 any questions affecting only individual members’; and class resolution must be ‘superior to other
10 available methods for the fair and efficient adjudication of the controversy.’” Amchem, 521 U.S.
11 at 615 (quoting Fed. R. Civ. P. 23(b)(3)).

12 “When common questions present a significant aspect of the case and they can be
13 resolved for all members of the class in a single adjudication, there is clear justification for
14 handling the dispute on a representative rather than on an individual basis.” Hanlon, 150 F.3d at
15 1022 (quotation omitted). Here, plaintiff challenges defendant’s uniform employment policies.
16 “Class actions in which a defendant’s uniform policies are challenged generally satisfy the
17 predominance requirement of Rule 23(b)(3).” Goodwin, 2017 WL 3173006, at *7.

18 In analyzing superiority, “the court should consider class members’ interests in pursuing
19 separate actions individually, any litigation already in progress involving the same controversy,
20 the desirability of concentrating the litigation in one forum, and potential difficulties in managing
21 the class action-although the last two considerations are not relevant in the settlement context.”
22 Palacios v. Penny Newman Grain, Inc., No. 1:14-cv-1804 KJM, 2015 WL 4078135, at *6 (E.D.
23 Cal. July 6, 2015).

24 Here, forcing class members to proceed individually on identical claims, in which the
25 relief is relatively small, is antagonistic to the class members’ interest. And the court is aware of
26 no other litigation in progress. Accordingly, the court finds that a class action is superior to
27 having the plaintiffs proceeding individually.

28 ///

1 Having found the requirements of Rule 23(a) and Rule 23(b)(3) have been satisfied, the
2 court conditionally certifies the class for settlement purposes.

3 **B. Terms of the Proposed Settlement**

4 The basic provisions of the parties' proposed settlement are as follows. The parties have
5 agreed to settle the claims of a class defined as:

6 Plaintiff and all other California residents who work or worked as
7 truck drivers and who are or have been classified as independent
8 contractors by Defendants from March 9, 2017 through the date of
preliminary approval.

9 (ECF No. 16-2 at 5.) Defendant has agreed to pay a gross settlement amount of \$475,000 to
10 resolve the claims of class members who do not opt out. (Id. at 9, 12.) The following deductions
11 will be subtracted from the gross settlement amount:

- 12 • \$10,000 PAGA payment pursuant to California Labor Code § 2698 *et seq.*, distributed
13 75% to the California Labor and Workforce Development Agency and 25% to Class
Participants.
- 14 • Administrative Expenses not to exceed \$10,000.
- 15 • Employee's Taxes and Required Withholdings including federal, state, or local payroll
16 taxes.
- 17 • Class Attorney Fees not to exceed \$118,750, (25% of the gross settlement amount) and
Expenses not to exceed \$12,000.
- 18 • Incentive Award to plaintiff of up to \$10,000.

19 (Id. at 4-15, 19.)

20 Each class participant will receive a share of the net settlement amount based on the pro
21 rata number of weeks worked by the settlement class members during the class period—May 3,
22 2014, through the date of this order—as a proportion of all weeks worked by all settlement class
23 members. (Id. at 13, 19.) On average, each class member will recover \$3,442. (ECF No. 16 at
24 33.) Class participants receiving payment will be responsible for tax obligations and payment
25 will not affect employee benefits. (ECF No. 16-2 at 13-14.)

26 Class participants will be given 180 days to cash their settlement checks. (Id. at 20.) If
27 more than 10% of class members opt-out of the settlement, defendant may declare the settlement
28 null and void. (Id. at 21.) If the class list contains more than 102 class members, the gross

1 settlement shall be increased proportionately for each additional class member over 102. (Id.)

2 CPT Group, Inc., will be responsible for the administration of the settlement. (Id. at 9.)

3 The settlement administrator will mail to the class members the Notice and share form and will
4 provide proof of mailing to class counsel. (Id. at 15-16.) The settlement administrator will
5 handle inquiries from class members, determine individual settlement amounts, maintain the
6 settlement funds, and distribute the individual settlement amounts. (Id. at 15.) Notice to class
7 members will be provided within 14 days of preliminary approval. (Id. at 16.)

8 C. Preliminary Fairness Determination

9 When assessing a proposed class action settlement, the court should balance several
10 factors including:

11 the strength of the plaintiffs' case; the risk, expense, complexity, and
12 likely duration of further litigation; the risk of maintaining class
13 action status throughout the trial; the amount offered in settlement;
14 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.

15 Hanlon, 150 F.3d at 1026.

16 A "preliminary approval of a settlement has both a procedural and a substantive
17 component." In re Tableware Antitrust Litigation, 484 F.Supp.2d 1078, 1080 (N.D. Cal. 2007).

18 As to the procedural component, "a presumption of fairness applies when settlements are
19 negotiated at arm's length, because of the decreased chance of collusion between the negotiating
20 parties." Gribble v. Cool Transports Inc., No. CV 06-4863 GAF (SHx), 2008 WL 5281665, at *9

21 (C.D. Cal. Dec. 15, 2008). Likewise, "[p]articipation in mediation tends to support the

22 conclusion that the settlement process was not collusive." Ogbuehi v. Comcast of

23 California/Colorado/Fla./Oregon, Inc., 303 F.R.D. 337, 350 (E.D. Cal. 2014) (quotation omitted).

24 With respect to the substantive component, "[a]t this preliminary approval stage, the court need
25 only 'determine whether the proposed settlement is within the range of possible approval.'"

26 Murillo, 266 F.R.D. at 479 (quoting Gautreaux v. Pierce, 690 F.2d 616, 621 n. 3 (7th Cir.1982)).

27 Here, the settlement was reached after informal discovery and a full day of private
28 mediation. (ECF No. 16 at 33.) Moreover, the settlement agreement and defendant's financial

1 information was evaluated by retired U.S. Bankruptcy Judge Mitchel R. Goldberg who opined
2 that the “settlement amount is fair and reasonable under the circumstances.” (Goldberg Decl.
3 (ECF No. 16-6) at 4-5.) Additionally, the court has reviewed the proposed settlement and the
4 parties’ briefing, and finds that the settlement is within the range of possible approval. See
5 generally Goodwin, 2017 WL 3173006, at *5 (preliminary approval of \$250,000 settlement
6 involving similar claims for class of 1,259).

7 The court, therefore, will grant preliminary approval of the settlement.

8 **D. Concerns Going Forward**

9 Despite preliminary approval, the court has the following concerns which the parties shall
10 address in briefing prior to the Final Approval Hearing:

11 **1. Attorneys’ Fees:** The proposed settlement includes a “clear sailing agreement” in
12 which defendant agrees not to object to the award of attorneys’ fees. (ECF No. 16-2 at 14); In re
13 Bluetooth, 654 F.3d at 947. In order to obtain final approval, the parties must provide adequate
14 briefing to evaluate the reasonableness of the agreed upon attorneys’ fees, including information
15 from which the court may determine the lodestar.

16 **2. Plaintiff’s Incentive Award:** As noted above, plaintiff is seeking a \$10,000
17 incentive award. (ECF No. 16 at 36.) Plaintiff shall provide a detailed declaration describing
18 plaintiff’s current employment status, any risk faced as a class representative, specific activities
19 performed as class representative, and the amount of time spent on each activity.

20 **3. Discovery and Mediation:** Plaintiff assert that this settlement “was a product of
21 extensive informal discovery and a full day of mediation.” (Id. at 33.) The parties briefing shall
22 address with specificity what discovery was produced, and what information was exchanged
23 pursuant to the mediation. This information includes, but is not limited to, mediation statements
24 and any relevant communications during the negotiations.

25 **4. Notice:** It appears from the settlement’s Opt-Out Procedure that there is the
26 potential for known class members whose notice is ultimately returned as undeliverable to be
27 nonetheless bound by the terms of the settlement and yet not receive payment. The parties’
28 briefing shall address this issue and the court’s concerns with respect to fairness. See Palacios v.

1 Penny Newman Grain, Inc., No. 1:14-cv-1804 KJM, 2015 WL 4078135, at *10 (E.D. Cal. July 6,
 2 2015) (“This aspect of the Settlement Agreement may not sufficiently protect absent class
 3 members’ due process rights.”); Lusby v. Gamestop Inc., 297 F.R.D. 400, 413 (N.D. Cal. 2013)
 4 (“The Court finds that this aspect of the Settlement Agreement does not give due process to Class
 5 Members who are known not to have received notice of the Settlement Agreement, and yet are
 6 bound by its terms.”).

7 **5. Enforcement:** The parties are advised that the court does not intend to maintain
 8 jurisdiction to enforce the terms of the settlement agreement absent an independent basis for
 9 federal jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994). The
 10 parties may address any concerns with respect to this in their briefing.

11 **FINAL APPROVAL HEARING SCHEDULE**

| | |
|--|--|
| 12 Defendant to make payment of the Gross Settlement Amount to the Settlement Administrator. | Within 10 calendar days of the date of this order. These funds shall be held in a trust account by the Administrator pending final approval. |
| 13 Defendant to provide Class List to the Settlement Administrator. | Within 14 calendar days of the date of this order. |
| 14 Settlement Administrator to mail Notice Packet to Class Members. | Within 28 calendar days of the date of this order. |
| 15 Deadline for Class Members to object to, or opt out of, the Settlement. | Within 30 calendar days after mailing of Notice Packet by the Settlement Administrator |
| 16 Plaintiff to file Motion for Attorneys’ Fees, Costs and Service Payment. | Not less than 25 calendar days after the mailing of the Notice Packet. |
| 17 Deadline for Plaintiff to file Motion for Final Approval. | Not less than 28 calendar days before the Final Approval hearing. |

18 ///

19 ///

20 ///

1 **CONCLUSION**

2 1. Plaintiff's February 11, 2019 motion for preliminary approval of class action
3 settlement (ECF No. 16) is granted.

4 2. Pursuant to Rule 23, and for purposes of settlement only, the following class, estimated
5 to consist of 92 truck drivers, is preliminarily and conditionally certified:

6 Plaintiff and all other California residents who work or worked as
7 truck drivers and who are or have been classified as independent
8 contractors by Defendants from March 9, 2017 through the date of
the entry of this order granting preliminary approval.

9 3. Plaintiff Valeriy Bykov is preliminarily appointed as Class Representative.

10 4. Ackerman & Tilajef, P.C. and Melmed Law Group, P.C., by and through Lead Counsel
11 Craig J. Ackermann and Jonathan Melmed, respectively, are hereby preliminarily approved and
12 appointed as Class Counsel.

13 5. CPT Group, Inc. is hereby appointed as the Settlement Administrator.

14 6. The Court grants preliminary approval of the Settlement between plaintiff and
15 defendant DC Transportation Service, Inc., dba DC Transport and DC Transport, Inc., based upon
16 the terms set forth in the Settlement Agreement (ECF No. 16-2).

17 7. The Settlement Agreement appears to be fair, adequate and reasonable, and the court
18 preliminarily approves the terms of the Settlement Agreement, including, without limitation:

19 a. a non-reversionary Settlement Amount of \$475,000 for an
20 estimated 92 current and former truck drivers of defendant;

21 b. the Class Representative enhancement payment to the named
Plaintiff of \$10,000;

22 c. Court approved attorneys' fees to Class Counsel of up to
23 \$118,750.00, representing 25% of the Settlement Amount;

24 d. Court approved litigation costs to Class Counsel of up to \$12,000;

25 e. Fees and Costs of the Settlement Administrator of up to \$10,000;
and

26 f. Payment of \$7,500 to the California Labor & Workforce
27 Development Agency for its portion of the PAGA penalties.

28 ///

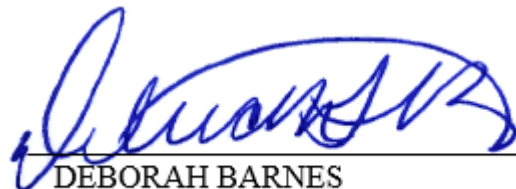
1 8. The Court approves, as to form and content, the Revised Notice of Proposed Class
2 Action Settlement (“Notice Packet”), in substantially the form collectively attached to the
3 Supplemental Declaration of Avi Kreitenberg filed in support of preliminary approval as Exhibit
4 A thereto (ECF No. 19-1). The court further approves the procedure for Class Members to opt
5 out of, and to object to, the Settlement as set forth in the Settlement Agreement and the Revised
6 Notice Packet.

7 9. The court directs the mailing of the Notice Packet in accordance with the terms of the
8 Settlement Agreement and on the schedule set forth above. The court finds the dates selected for
9 the mailing and distribution of the Notice Packet, as set forth above, meet the requirements of due
10 process and provide the best notice practicable under the circumstances and shall constitute due
11 and sufficient notice to all persons entitled thereto, subject to the concerns noted above.

12 10. A Final Approval hearing on the question of whether the proposed Settlement,
13 including the requested attorneys’ fees and costs to Class Counsel that will be included in the
14 forthcoming motion for fees and costs, and whether the Class Representative’s Incentive Award
15 should be finally approved as fair, reasonable and adequate as to the members of the Class is set
16 for **August 30, 2019, at 10:00 a.m.** in courtroom no. 27 before the undersigned.

17 11. The parties to the Agreement are directed to carry out their obligations under the
18 Settlement Agreement.

19 Dated: March 28, 2019

20
21 
22 DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

23 DLB:6
24 DB\orders\orders.consent\bykov1691.mot.pre.approv.ord