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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

6 CHERYL DEAVER,  
7 Plaintiff,  
8  
9 v.  
10 COMPASS BANK, et al.,  
11 Defendants.

Case No. 13-cv-00222-JSC

**ORDER GRANTING PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

Re: Dkt. Nos. 75, 87, 89

United States District Court  
Northern District of California

12  
13 In this pre-certification class action dispute, Plaintiff Cheryl Deaver alleges that, among  
14 other things, Defendants Compass Bank, Inc. (“Compass”) and BBVA Compass Insurance  
15 Agency, Inc. (“BBVA”) maintained and enforced unlawful practices and policies in violation of  
16 California wage and hour laws. Now pending before the Court is the parties’ joint motion for  
17 preliminary approval of a class action settlement. (Dkt. No. 75.) After reviewing the proposed  
18 settlement, with the benefit of oral argument on June 4, 2015 and post-hearing briefing, the Court  
19 GRANTS the motion as outlined below.

20 **BACKGROUND**

21 Defendants, Texas and Alabama corporations, collectively doing business as “BBVA  
22 Compass” operate a chain of retail banking centers throughout California. Plaintiff, a California  
23 citizen, worked for BBVA Compass as a non-exempt financial sales advisor. Plaintiff’s Revised  
24 Second Amended Complaint (“SAC2”) includes five causes of action under California law: (1)  
25 failure to pay wages for hours worked in violation of California Labor Code Section 1194; (2)  
26 failure to provide meal periods or compensation in lieu thereof in violation of California Labor  
27 Code Sections 226, 226.7, 1174(d), and Section 11 of the IWC Wage Orders, and Cal. Code  
28 Regs., Title 8, section 11000 et seq.; (3) failure to timely pay wages due at termination in violation

1 of California Labor Code Sections 21, 202, 203; (4) failure to provide accurate wage statements in  
2 violation of California Labor Code Section 226(a); and (5) violation of Unfair Competition Law,  
3 California Business and Professions Code Section 17200 et seq. (Dkt. No. 66 ¶¶ 35-65.)

4 The case has a complicated and protracted procedural history, which is briefly summarized  
5 below.

6 Plaintiff initially filed suit in Riverside County Superior Court (the “Prior Action”).  
7 Pursuant to the Class Action Fairness Act (“CAFA”) of 2005, see 28 U.S.C. §§ 1332(d), 1441,  
8 1453, Defendants removed the Prior Action to the Central District. (Case No. EDCV11-1489  
9 PSG). Plaintiff did not move to remand, and the case remained in federal court. The parties  
10 thereafter stipulated to dismissal of the Prior Action without prejudice pursuant to Federal Rule of  
11 Civil Procedure 41(a)(1)(A)(ii), with each party to bear her or its own attorneys’ fees and costs,  
12 and the court so ordered. (Id. at 10-12.) The stipulation did not contain any conditions or  
13 limitations on Plaintiff’s ability to file the same, or a similar action, in the future.

14 Approximately four months after the stipulated dismissal of the Prior Action, Plaintiff filed  
15 the present putative class action complaint (“the Complaint”) in Alameda County Superior Court.  
16 Defendants timely removed the Complaint on the ground that this Court has original jurisdiction  
17 under CAFA. In their removal papers, Defendants performed calculations for each of Plaintiff’s  
18 causes of action on a class-wide basis and determined that the total amount in controversy was  
19 \$5,772,662. However, as Plaintiff demonstrated in her motion to remand and as Defendants  
20 conceded, Defendants’ original calculations contained errors that inflated the final amount above  
21 the \$5,000,000 threshold. Defendants corrected those errors in their subsequent calculations in  
22 their opposition to the motion to remand (“Opposition”), but in so doing, they also changed their  
23 approach to those calculations. Initially, Defendants based their calculations on the allegations of  
24 the Complaint. Upon realizing the errors in their calculations, however, Defendants changed their  
25 approach and based their amount in controversy calculations on the more detailed allegations from  
26 the Prior Action. The Court determined that it could not consider Plaintiff’s allegations in the  
27 Prior Action in determining whether Defendants had proved the requisite amount in controversy to  
28 a legal certainty. (Dkt. No. 32 at pp. 5-6.<sup>1</sup>) Applying the legal certainty test to the allegations of

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<sup>1</sup> Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the

1 the Complaint together with Defendants’ evidence, the Court concluded that the amount in  
2 controversy was not satisfied and remanded the case to Alameda County Superior Court.<sup>2</sup>

3 Pursuant to CAFA, Defendants timely filed a petition with the Ninth Circuit for permission  
4 to appeal the remand order. See 28 U.S.C. § 1453(c)(1). While the petition was pending, the  
5 Ninth Circuit overruled the legal certainty test of *Lowdermilk v. United States Bank National*  
6 *Association*, 479 F.3d 994 (9th Cir. 2007), as a result of the United States Supreme Court’s  
7 decision in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), and held that under CAFA  
8 a removing defendant must satisfy the amount in controversy by a preponderance of the evidence.  
9 *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 981-82 (2013). *Rodriguez* also held that  
10 in determining the amount in controversy courts “must necessarily ‘look beyond the four corners  
11 of the complaint’ when the complaint alleges damages below the jurisdictional minimum.” *Id.* at  
12 981. In light of *Rodriguez*, Defendants again removed the action from the Alameda Superior  
13 Court and the action was ultimately assigned to the undersigned judge. N.D. Cal. Case No. 13-  
14 cv-4598 (JSC). Plaintiff then moved, again, to remand. In the meantime, the Ninth Circuit  
15 vacated the remand order and sent the case back to this Court for reconsideration in light of  
16 *Rodriguez*. The Court ultimately denied Plaintiff’s first motion to remand concluding that  
17 Defendants had established by a preponderance of the evidence that the amount in controversy  
18 was \$5,433,414.35, thus satisfying the CAFA jurisdictional requirements.<sup>3</sup> (Dkt. No. 58 at 14.).  
19 The Court also denied Defendant’s motion to transfer venue to the Central District—the venue of  
20 the Prior Action. (*Id.* at 18.) The Court, however, granted Defendant’s motion to dismiss under  
21 Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. (*Id.* at 19.)

22 Plaintiff thereafter filed her Second Amended Complaint and then the operative Revised  
23 Second Amended Complaint.<sup>4</sup> (Dkt. Nos. 59 and 66.)

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24 ECF-generated page numbers at the top of the documents.

25 <sup>2</sup> In support of their claims of CAFA jurisdiction, Defendants provided extensive data regarding  
26 the size of the class, number of workweeks worked, average hourly rates for class members,  
27 percentage of full-time and part-time workers in the class; this evidence formed the basis for these  
28 calculations. (Dkt. Nos. 4; 22-2; 22-3.)

<sup>3</sup> Given the Court’s conclusion that jurisdiction lay in federal court, the second removal action was  
dismissed as moot. (Dkt. No. 58.)

<sup>4</sup> Based on the stipulation of the parties, the Revised Second Amended Complaint omitted the  
Private Attorneys General Act of 2004 claim which had been added to the Second Amended  
Complaint. (Dkt. No. 62.)

**SETTLEMENT PROPOSAL**

1  
2 On December 10, 2014, the parties participated in a full-day mediation session with  
3 Mariam Zadech, Esq., an independent mediator with extensive experience in wage and hour class  
4 actions. (Dkt. No. 89 at ¶ 4.) In preparation for the mediation, Defendants provided Plaintiff with  
5 “over 426,000 lines of time entries (punch data) for the class, over 42,000 lines of wage data for  
6 the class, over 7,400 lines of meal period premium data for the class, job descriptions for the  
7 various positions in the class, handbooks/manuals containing the relevant policies and procedures,  
8 and hundreds of pages of documents that describe the policies and procedures at issue in the  
9 litigation (scheduling templates, checklists, reference guides, etc.)” (Dkt. No. 75-1 at ¶ 13.)  
10 Although the parties did not reach an agreement at the mediation, their negotiations continued and  
11 on January 16, 2015, the parties reached an agreement on the basic terms of the settlement. (Id. at  
12 ¶¶ 15-16.)

13 Plaintiff submitted the parties’ Joint Stipulation re: Class Action Settlement with her  
14 Motion for Preliminary Approval. (Dkt. No. 75, Ex. 1 (pp. 28-64).) Following a hearing on June  
15 4, 2015, the parties filed an Amended Joint Stipulation Re: Class Action Settlement to address  
16 certain concerns raised by the Court. (Dkt. No. 87.) The Court thereafter requested additional  
17 briefing (Dkt. No. 87) and the parties submitted a Second Amended Joint Stipulation Re: Class  
18 Action Settlement (Dkt. No. 89) which modified the settlement and proposed notice to address the  
19 two concerns raised by the Court. The key provisions of the revised settlement are set forth  
20 below.

**A. Payment Terms**

21 The parties’ agreement provides a settlement fund of \$500,000. Reduced from that fund  
22 are (1) attorney’s fees up to one-third of the fund (\$166,665), (2) actual litigation costs of up to  
23 \$20,000, (3) an enhancement award for the named Plaintiff of \$7,500, (4) claims administration  
24 expenses up to \$20,000, and (5) a \$5,000 PAGA penalty, 75 percent of which shall be paid to the  
25 California Labor & Workforce Development Agency, and 25 percent shall be included in the net  
26 distribution to the class. (Dkt. No. 89 at ¶ 18.) The remaining funds are then distributed to the  
27 class members who do not opt out of the class. Class members will receive a pro rata share of the  
28

1 fund based on the number of workweeks worked.<sup>5</sup> (Id. at ¶ 18(g).) All checks to non-objecting  
2 class members not cashed within 90 days of mailing will escheat to the California Industrial  
3 Unclaimed Wages Fund. No settlement funds will revert to Defendants.

4 **B. Proposed Class**

5 The class is comprised of all current and former non-exempt branch employees of  
6 Defendant Compass Bank who are currently working, and/or who have worked in California  
7 during the period from August 22, 2009 to the date of preliminary approval of the settlement, in  
8 the following positions: Branch Associate, Senior Branch Associate I, Senior Branch Associate II,  
9 Associate Manager, Financial Sales Advisor II, Sr. Financial Sales Advisor, P & R Teller, Senior  
10 Teller, Business Class Teller, Customer Service Coordinator, Financial Sales Representative,  
11 Senior Financial Sales Representative and Senior Financial Sales Consultant, and who do not  
12 timely submit a Request for Exclusion. (Dkt. No. 89 at ¶ 11.) Defendants estimate that the class  
13 size is 911 individuals. (Dkt. No. 89 at ¶ 6.)

14 **C. Releases**

15 The scope of the release is as follows:

16 Any and all of the claims asserted in this Action or which could  
17 have reasonably been asserted based on factual allegations asserted  
18 in the past and operative complaints in this Action, including:

- 19 • Failure to Provide Meal Periods or Compensation in Lieu  
20 Thereof;
- Failure to Pay Wages for Hours Worked as a result of  
alleged off-the-clock work;
- Failure to Timely Pay Wages Due at Termination;
- Knowing and Intentional Failure to Comply with Itemized  
Employee Wage Statement Provisions;

21  
22 <sup>5</sup> The precise calculation is as follows:

23 The Net Settlement Amount shall be divided by the number of  
24 aggregate Qualified Workweeks worked by all Class Members  
25 during the Class Period to produce a “Weekly Settlement Value.”  
26 The number of “Qualified Workweeks” worked by each class  
27 member shall be determined by the length of each Class Member’s  
28 employment with Defendant[s] during the Class Period, as a non-  
exempt branch employee in California. Each Class Member shall be  
eligible to receive a settlement payment in the amount of the total  
number of Qualified Workweeks worked by the Class Member  
multiplied by the Weekly Settlement Value, less applicable  
withholdings provided that the Class Member has signed and  
submitted a timely and valid Claim Form.

(Dkt. No. 89 at ¶ 18(g).)

- Violations of the Unfair Competition Law;
- Enforcement of Private Attorneys General Act of 2004 (Cal. Lab. Code section 2698, et seq.).

The Released Claims specifically include any and all items of alleged damage, interest or penalties sought in the complaints filed in the Action, including, but not limited to, claims for unpaid wages; meal and rest period premiums pursuant to California Labor Code section 226.7; interest; penalties (including waiting time penalties pursuant to California Labor Code section 203, wage statement penalties pursuant to California Labor Code section 226, and civil penalties pursuant to the Private Attorneys General Act of 2004 (California Labor Code sections 2698, et seq.)); claims pursuant to California Labor Code sections 200, 201, 202, 218.5, 226, 226.7, 510, 512, 558, 1174, 1194, 1197, 1198, and 1199; claims pursuant to the California Industrial Welfare Commission Wage Orders; claims under California Business and Professions Code sections 17200, et seq.; claims for attorneys' fees and costs, and/or unfair business practices for the time period from August 22, 2009 up to and including the date of preliminary approval of the Settlement.

(Id. at ¶ 15.)

#### **D. Procedure for Claims**

Class Members will each be mailed a Claim Form which includes (1) the number of Qualified Workweeks worked by the Class Member during the Class Period and the estimated range of settlement awards according to Defendants' data, (2) the process by which this Class Member may contest the number of Qualified Workweeks worked during the Class Period; (3) the release language; and (4) a place to sign and date the form. (Id. at ¶ 20(d).)

#### **E. Deadlines**

Following preliminary approval, Defendants have 15 days to provide the following data to the Claims Administrator: (1) the Class Member's Name, (b) the Class Member's last known address, (c) the last four digits of the Class Member's social security number; and (d) information necessary for the Claims Administrator to determine the number of Qualified Workweeks worked during the Class Period. (Id. at ¶ 25.) The Claims Administrator then has 10 calendar days to mail a copy of the Claim Form and Notice. (Id.)

Class Members have 75 days to return the Claim Form or evidence in writing their intent to opt out of the settlement ("the Claims Receipt Deadline"). (Id. at ¶ 20(e).) Written objections to the settlement are also due by the Claims Receipt Deadline. (Id. at ¶ 20(f).)

Within 15 days of the Effective Date (Final Approval) Defendants must deposit the total settlement amount into account maintained by the Claims Administrator. (Id. at ¶ 30.)

1 Non-Objecting Class Members must cash their checks within 90 days of receipt of the  
2 check. (Id. at ¶ 20(q).)

### 3 DISCUSSION

4 A class action settlement must be fair, adequate, and reasonable. Fed. R. Civ. P. 23(e)(2).  
5 When, as here, parties reach an agreement before class certification, “courts must peruse the  
6 proposed compromise to ratify both the propriety of the certification and the fairness of the  
7 settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). If the Court temporarily  
8 certifies the class and finds the settlement appropriate after “a preliminary fairness evaluation,”  
9 then the class will be notified and a final “fairness” hearing scheduled to determine if the  
10 settlement is fair, adequate, and reasonable pursuant to Federal Rule of Civil Procedure 23.  
11 *Villegas v. J.P. Morgan Chase & Co.*, No. 09-00261, 2012 WL 5878390, at \*5 (N.D. Cal. Nov.  
12 21, 2012).

#### 13 **A. Conditional Certification of the Settlement Class**

14 Class actions must meet the following requirements for certification:

- 15 1) the class is so numerous that joinder of all members is  
16 impracticable; 2) there are questions of law or fact common to the  
17 class; 3) the claims or defenses of the representative parties are  
18 typical of the claims or defenses of the class; and 4) the  
19 representative parties will fairly and adequately protect the interests  
20 of the class.

21 Fed. R. Civ. P. 23(a).

22 In addition to meeting the requirements of Rule 23(a), a potential class must also meet one  
23 of the conditions outlined in Rule 23(b)—of relevance here, the condition that “the court finds that  
24 the questions of law or fact common to class members predominate over any questions affecting  
25 only individual members, and that a class action is superior to other available methods for fairly  
26 and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). In evaluating the proposed  
27 class, “pertinent” matters include:

28 (A) the class members’ interests in individually controlling the  
prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the  
controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of

1 the claims in the particular forum; and

2 (D) the likely difficulties in managing a class action.

3 Fed. R. Civ. P. 23(b)(3). Prior to certifying the class, the Court must determine that Plaintiffs have  
4 satisfied their burden to demonstrate that the proposed class satisfies each element of Rule 23.

5 **1. Rule 23(a)**

6 The Rule 23(a) factors are satisfied here. First, the 911 member estimated class satisfies  
7 the numerosity requirement. See *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350–51  
8 (N.D. Cal. 2005) (“[w]here the exact size of the class is unknown but general knowledge and  
9 common sense indicate that it is large, the numerosity requirement is satisfied,” particularly where  
10 the proposed “class is geographically dispersed” with “difficult to identify” members). Second,  
11 the common questions of law and fact center around BBVA’s alleged uniform course of conduct  
12 with respect to meal period policies and off-the-clock work which satisfies the commonality  
13 requirement. See *Bellinghausen v. Tractor Supply Co.*, 303 F.R.D. 611, 616-17 (N.D. Cal. 2014)  
14 (“divergent factual predicates with shared legal issues and a common core of salient facts coupled  
15 with disparate legal remedies within the class can be sufficient”). Third, because the at-issue  
16 policies are applied across the board, all non-exempt employees are alleged to have suffered  
17 similar injuries with respect to failure to pay wages and penalties, thereby meeting the typicality  
18 requirement. *Id.* at 617 (“[t]he typicality requirement is satisfied here because Plaintiff alleges that  
19 he, like the other class members, worked for Defendant in California during the class period and  
20 was subjected to the same wage-and-hour policies and procedures at issue in this litigation.”).  
21 Finally, both Plaintiff and Class Counsel appear adequate. Plaintiff was employed by Defendant  
22 during the Class Period and has allegedly been injured in the same way as the Class Members.  
23 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594–95 (1997) (“[r]epresentatives must be part of  
24 the class and possess the same interest and suffer the same injury as the class members.”). Class  
25 Counsel has represented plaintiffs in numerous wage-and-hour class actions, see Dkt. Nos. 75-2 at  
26 ¶ 6; 75-3 at ¶ 4; 86 at ¶ 8. See *Andrews Farms v. Calcot, LTD.*, No. 07–0464, 2010 WL 3341963,  
27 at \*4 (E.D. Cal. Aug. 23, 2010) (“class counsel must be qualified, experienced, and generally able  
28 to conduct the class action litigation.”).



1                                   **2. Rule 23(b)(3)**

2                   Rule 23(b)(3) requires establishing the predominance of common questions of law or fact  
3 and the superiority of a class action relative to other available methods for the fair and efficient  
4 adjudication of the controversy. See Fed. R. Civ. P. 23(b)(3). Because of the common policies at  
5 issue here there are no predominance or superiority concerns.

6   **a) Predominance**

7                   Rule 23(b)(3) first requires “a predominance of common questions over individual ones”  
8 such that “the adjudication of common issues will help achieve judicial economy.” *Valentino v.*  
9 *Carter–Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.1996). This “inquiry focuses on the relationship  
10 between the common and individual issues.” *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d  
11 935, 944 (9th Cir. 2009) (internal citation and quotation marks omitted). In particular, the  
12 predominance requirement “tests whether proposed classes are sufficiently cohesive to warrant  
13 adjudication by representation.” *Amchem Prods.*, 521 U.S. at 594.

14                   The core common questions in this case—the lawfulness of Defendants’ policies and  
15 practices with respect to meal periods and off-the-clock work—predominate over any differences  
16 with respect to implementation of those policies and practices at particular branches. As such,  
17 common questions of law and fact predominate.

18   **b) Superiority**

19                   A class action is a superior means of adjudicating a dispute “[w]here classwide litigation of  
20 common issues will reduce litigation costs and promote greater efficiency.” *Valentino*, 97 F.3d at  
21 1234. In evaluating superiority, “courts consider the interests of the individual members in  
22 controlling their own litigation, the desirability of concentrating the litigation in the particular  
23 forum, and the manageability of the class action.” *Hunt v. Check Recovery Sys., Inc.*, 241 F.R.D.  
24 505, 514 (N.D. Cal. 2007) modified, No. 05–04993 MJJ, 2007 WL 2220972 (N.D. Cal. Aug. 1,  
25 2007), *aff’d* sub nom. *Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137 (9th Cir. 2009). There is  
26 no indication that members of the proposed class have a strong interest in individual litigation or  
27 an incentive to pursue their claims individually, given the small amount of damages likely to be  
28 recovered relative to the resources required to prosecute such an action. See *Chavez v. Blue Sky*

1 Natural Beverage Co., 268 F.R.D. 365, 379 (N.D. Cal. 2010) (evaluating superiority under Rule  
2 23(b)(3) and noting that “the class action is superior to maintaining individual claims for a small  
3 amount of damages”). A class action is superior to other forms of litigation in this action.

4 Accordingly, the Court finds that conditional class certification for settlement purposes is  
5 proper.

6 **B. Class Counsel**

7 “[A] court that certifies a class must appoint class counsel.” Fed. R. Civ. P. 23(g)(1). In  
8 considering this appointment, a court must consider:

- 9 (i) the work counsel has done in identifying or investigating  
10 potential claims in the action;
- 11 (ii) counsel’s experience in handling class actions, other complex  
litigation, and the types of claims asserted in the action;
- 12 (iii) counsel’s knowledge of the applicable law; and
- 13 (iv) the resources that counsel will commit to representing the class.

14 Fed. R. Civ. P. 23(g)(1)(A). Plaintiff’s counsel has litigated numerous wage-and-hour class action  
15 cases, and is thus experienced in the field. (See Dkt. Nos. 5-2 at ¶ 6; 75-3 at ¶ 4; 86 at ¶ 8.) In this  
16 action, Plaintiff’s counsel has engaged in considerable motion practice, including multiple motions  
17 to remand, dismiss, and for change of venue, as well as a Ninth Circuit appeal. Counsel also  
18 participated in an ultimately fruitful mediation. The Court accordingly concludes that counsel has  
19 the requisite experience, knowledge, qualifications, and resources to represent the class members  
20 in this action and that the reasons for pursuing settlement at this stage in the litigation do not call  
21 into question their representation of absent class members.

22 **C. Preliminary Approval of the Settlement**

23 In determining whether a settlement agreement is fair, adequate, and reasonable to all  
24 concerned, a court typically considers the following factors: “(1) the strength of the plaintiff’s  
25 case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of  
26 maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the  
27 extent of discovery completed and the stage of the proceedings; (6) the experience and views of  
28 counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members

1 of the proposed settlement.” In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th  
2 Cir. 2011) (quoting Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004)).

3 However, when “a settlement agreement is negotiated prior to formal class certification,  
4 consideration of these eight . . . factors alone is” insufficient. *Id.* In these cases, courts must  
5 show not only a comprehensive analysis of the above factors, but also that the settlement did not  
6 result from collusion among the parties. *Id.* at 947. Because collusion “may not always be  
7 evident on the face of a settlement, . . . [courts] must be particularly vigilant not only for explicit  
8 collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-  
9 interests and that of certain class members to infect the negotiations.” *Id.* In Bluetooth, the court  
10 identified three such signs:

11 (1) when class counsel receives a disproportionate distribution of the  
12 settlement, or when the class receives no monetary distribution but  
13 counsel is amply rewarded;

14 (2) when the parties negotiate a “clear sailing” arrangement  
15 providing for the payment of attorney’s fees separate and apart from  
16 class funds without objection by the defendant (which carries the  
17 potential of enabling a defendant to pay class counsel excessive fees  
18 and costs in exchange for counsel accepting an unfair settlement);  
19 and

20 (3) when the parties arrange for fees not awarded to revert to  
21 defendants rather than be added to the class fund.

22 *Id.*

23 The Court cannot fully assess all of these fairness factors until after the final approval  
24 hearing; thus, “a full fairness analysis is unnecessary at this stage.” *Alberto v. GMRI, Inc.*, 252  
25 F.R.D. 652, 665 (E.D. Cal. 2008) (internal quotation marks and citation omitted). Instead, “the  
26 settlement need only be potentially fair, as the Court will make a final determination of its  
27 adequacy at the hearing on Final Approval, after such time as any party has had a chance to  
28 object and/or opt out.” *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007). At  
this juncture, “[p]reliminary approval of a settlement and notice to the class is appropriate if [1]  
the proposed settlement appears to be the product of serious, informed, noncollusive  
negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment  
to class representatives or segments of the class, [4] and falls within the range of possible

1 approval.” Cruz v. Sky Chefs, Inc., No. 12-02705, 2014 WL 2089938, at \*7 (N.D. Cal. May 19,  
2 2014) (quoting In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)).

3 **1. The Fairness Factors**

4 **1. The Proposed Settlement**

5 This first factor concerns “the means by which the parties arrived at settlement.” Harris v.  
6 Vector Mktg. Corp., No. 08–5198, 2011 WL 1627973, at \*8 (N.D. Cal. Apr. 29, 2011). For the  
7 parties “to have brokered a fair settlement, they must have been armed with sufficient information  
8 about the case to have been able to reasonably assess its strengths and value.” Acosta, 243 F.R.D.  
9 at 396. Particularly with pre-certification settlements, enough information must exist for the court  
10 to assess “the strengths and weaknesses of the parties’ claims and defenses, determine the  
11 appropriate membership of the class, and consider how class members will benefit from  
12 settlement” in order to determine if it is fair and adequate. Id. at 397 (internal quotation marks  
13 omitted).

14 The use of a mediator and the presence of discovery “support the conclusion that the  
15 Plaintiff was appropriately informed in negotiating a settlement.” Villegas, 2012 WL 5878390, at  
16 \*6; Harris, 2011 WL 1627973, at \*8 (noting that the parties’ use of a mediator “further suggests  
17 that the parties reached the settlement in a procedurally sound manner and that it was not the result  
18 of collusion or bad faith by the parties or counsel”). However, the use of a neutral mediator “is  
19 not on its own dispositive of whether the end product is a fair, adequate, and reasonable settlement  
20 agreement.” Bluetooth, 654 F.3d at 948.

21 Here, in preparation for the mediation, Defendants provided Plaintiff with “over 426,000  
22 lines of time entries (punch data) for the class, over 42,000 lines of wage data for the class, over  
23 7,400 lines of meal period premium data for the class, job descriptions for the various positions in  
24 the class, handbooks/manuals containing the relevant policies and procedures, and hundreds of  
25 pages of documents that describe the policies and procedures at issue in the litigation (scheduling  
26 templates, checklists, reference guides, etc.)” (Dkt. No. 75-1 at ¶ 13.) The parties thereafter  
27 participated in an all-day mediation with a mediator experienced in wage and hour class actions,  
28 and continued to work together after the mediation to formulate the settlement. On balance, the

1 settlement appears to be the produce of serious, informed, non-collusive negotiations, and this  
2 factor weighs in favor of preliminary approval of the settlement.

3 **2. Obvious Deficiencies**

4 The Court next considers “whether there are obvious deficiencies in the Settlement  
5 Agreement.” Harris, 2011 WL 1627973, at \*8. The Court initially identified the following three  
6 deficiencies—or potential deficiencies—in the settlement agreement: 1) the 30 percent of the fund  
7 requested for attorney’s fees, (2) the scope of the release, and (3) the timeframe for notice. At the  
8 preliminary approval hearing, the Court discussed these issues with the parties, and in response,  
9 the parties have amended the settlement to address the Court’s concerns with the second and third  
10 issues. The release has been re-written to only cover the legal claims raised in this action and the  
11 notice process now allows 75 days for submission of the claim form, rather than the prior 60  
12 days.<sup>6</sup>

13 The matter of the attorney’s fees, however, remains. “While attorneys’ fees and costs may  
14 be awarded in a certified class action where so authorized by law or the parties’ agreement,  
15 Fed.R.Civ.P. 23(h), courts have an independent obligation to ensure that the award, like the  
16 settlement itself, is reasonable, even if the parties have already agreed to an amount.” Bluetooth,  
17 654 F.3d at 941. Where a settlement produces a common fund for the benefit of the entire class,  
18 courts have discretion to employ either the lodestar method or the percentage-of-recovery method.  
19 See *In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010). “Because the benefit to  
20 the class is easily quantified in common-fund settlements, we have allowed courts to award  
21 attorneys a percentage of the common fund in lieu of the often more time-consuming task of  
22 calculating the lodestar.” Bluetooth, 654 F.3d at 942 (noting that 25% of the fund is considered the  
23 “benchmark” for a reasonable fee). “Though courts have discretion to choose which calculation  
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26 <sup>6</sup> The Court thereafter requested briefing about two additional issues: (1) although the settlement  
27 releases all PAGA claims, it did not call for payment of any PAGA penalties, and (2) the  
28 settlement did not provide any opportunity for class members to object to the fee motion pursuant  
to Federal Rule of Civil Procedure 23(h). (Dkt. No. 88.) The parties subsequently filed a Second  
Amended Joint Stipulation re: Class Action Settlement which addressed the Court’s concerns by  
providing for payment of a PAGA penalty, and notifying class members of their right to object to  
the settlement and/or the motion for attorney’s fees and costs. (Dkt. No. 89.)

1 method they use, their discretion must be exercised so as to achieve a reasonable result. Thus, for  
2 example, where awarding 25% of a ‘megafund’ would yield windfall profits for class counsel in  
3 light of the hours spent on the case, courts should adjust the benchmark percentage or employ the  
4 lodestar method instead.” Id. (citations omitted).

5 “The lodestar figure is calculated by multiplying the number of hours the prevailing party  
6 reasonably expended on the litigation (as supported by adequate documentation) by a reasonable  
7 hourly rate for the region and for the experience of the lawyer.” Id. at 941. The resulting figure  
8 may be adjusted upward or downward to account for several factors including the quality of the  
9 representation, the benefit obtained for the class, the complexity and novelty of the issues  
10 presented, and the risk of nonpayment. Hanlon, 150 F.3d at 1029.

11 The Ninth Circuit recommends that whatever method is used, the district court perform a  
12 cross-check using the second method to confirm the reasonableness of the fee, e.g., if the lodestar  
13 method is applied, a cross-check with the percentage-of-recovery method will reveal if the lodestar  
14 amount surpasses the 25% benchmark. See Bluetooth, 654 F.3d at 944–45.

15 Plaintiff seeks an award of attorneys’ fees in the amount of 33.3 percent of the settlement  
16 fund; that is, \$166,665.00. Plaintiff argues that this fee award is proper based on the work  
17 performed in this action and the results achieved for the class. (Dkt. No. 75 at 13.) However,  
18 Plaintiff fails to show that “the risks associated with this case are [ ] greater than that associated  
19 with any other wage and hour action.” Clayton v. Knight Transp., No. 11–00735, 2013 WL  
20 5877213, at \*8 (E.D. Cal. Oct. 30, 2013) (rejecting plaintiff’s contention that contingent nature of  
21 the case warranted an increase above the 25 percent benchmark). And while many class members  
22 in this case will likely recover a monetary award in the range of a few hundred dollars, Plaintiff  
23 has failed to show that this benefit is exceptional relative to Defendant’s potential liability.

24 At this stage, Plaintiff has failed to persuade the Court that attorneys’ fees of 33.3 percent  
25 of the fund are appropriate; however, the Court will wait until final approval to make a  
26 determination as to fees. Along with the parties’ final approval filings with the Court, Plaintiff  
27 shall submit detailed billing records and an explanation of her counsels’ hourly rate so that the  
28 Court may determine an appropriate lodestar figure. See Bluetooth, 654 F.3d at 944–45.

1           Thus, while the Court has concerns about the amount of fees sought, given that the amount  
2 of fees is ultimately in the Court’s discretion, the settlement lacks obvious deficiencies which  
3 would preclude preliminary approval.

4                           **3. Lack of Preferential Treatment**

5           Under this factor, “the Court examines whether the Settlement provides preferential  
6 treatment to any class member.” Villegas, 2012 WL 5878390, at \*7. Each proposed class  
7 member in this case may claim their pro rata share of the fund based on the number of workweeks  
8 worked during the class period, less the employee’s share of statutorily required tax withholdings.<sup>7</sup>  
9 The settlement further provides that Plaintiff will receive a \$7,500 enhancement award.  
10 “Incentive awards [as opposed to agreements] are fairly typical in class action cases.” Rodriguez v.  
11 *W. Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir.2009). There is no evidence that named Plaintiff and  
12 counsel agreed prior to the suit to a particular incentive agreement. Though viewed more  
13 favorably than incentive agreements, “excess incentive awards may put the class representative in  
14 a conflict with the class and present a considerable danger of individuals bringing cases as class  
15 actions principally to increase their own leverage to attain a remunerative settlement for  
16 themselves and then trading on that leverage in the course of negotiations.” *Id.* at 960 (internal  
17 quotation marks and citation omitted). Incentive awards “compensate class representatives for  
18 work done on behalf of the class, to make up for financial or reputational risk undertaken in  
19 bringing the action, and, sometimes, to recognize their willingness to act as a private attorney  
20 general.” *Id.* at 958–59.

21           Plaintiff’s request for a \$7,500 incentive award is fifty-percent more than the amount  
22 generally awarded by courts in this district. See, e.g., *Wren v. RGIS Inventory Specialists*, No. 06–  
23 05778, 2011 WL 1230826, at \*37 (N.D. Cal. Apr. 1, 2011) (approving \$5,000 incentive awards to

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25 <sup>7</sup> At the preliminary approval hearing, the Court inquired as to how this calculation would  
26 differentiate between full and part-time employees given counsel estimate that 70 percent of the  
27 class was full-time employees, and 30 percent part-time. Defense counsel has since confirmed  
28 that their historical data does not contain this information, and current employee schedules may  
fluctuate sufficiently such that it is impracticable to distinguish between the two. (Dkt. No. 87-2 ¶  
3.) The settlement has also been revised to clarify that it is only the employee’s share of the taxes  
which will be taken out of the settlement amount—Defendant is responsible for separately  
contributing its share of the taxes. (Dkt. No. 87 at ¶ 17(a).)

1 24 named plaintiffs in \$27,000,000 settlement) supplemented, No. 06–05778, 2011 WL 1838562  
 2 (N.D. Cal. May 13, 2011); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000)  
 3 (approving \$5,000 to two plaintiff representatives of 5,400 potential class members in \$1.75  
 4 million settlement); *Hopson v. Hanesbrands, Inc.*, No. CV–08–0844, 2009 WL 928133, at \*10  
 5 (N.D. Cal. Apr. 3, 2009) (approving \$5,000 award to one member of 217 member class from  
 6 \$408,420 settlement amount). At the same time, the Court is aware from having presided over the  
 7 action that this case has engendered significant motion practice and litigation given the multiple  
 8 remand motions and appeal thereof. Ultimately, the Court need not resolve the matter at this  
 9 preliminary approval stage, and thus, defers the issue to final approval.

10 **4. Range of Possible Approval**

11 Finally, the Court must determine whether the proposed settlement falls within the range  
 12 of possible approval. “To evaluate the range of possible approval criterion, which focuses on  
 13 substantive fairness and adequacy, courts primarily consider plaintiff’s expected recovery  
 14 balanced against the value of the settlement offer.” *Harris*, 2011 WL 1627973, at \*9 (internal  
 15 citation and quotation marks omitted).

16 Plaintiff estimates Defendants’ potential liability to be \$3,512,000 for all the claims. The  
 17 settlement fund of \$500,000 thus equals 10.7 percent of the total potential liability exposure,  
 18 before any deductions for fees, costs, or incentive awards. Because this represents a significant  
 19 departure from the parties’ prior estimates as to the amount in controversy—which was the subject  
 20 of extensive briefing and two Orders valuing the claims between \$4.7 million and \$5.4 million—  
 21 the Court questioned Plaintiff regarding the valuation of the claims at the hearing and Plaintiff  
 22 submitted a supplemental declaration.<sup>8</sup> (Dkt. No. 86.) According to counsel, documents produced

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23 <sup>8</sup> The Court’s initial remand Order valued Plaintiff’s claims at \$4,712,595. Following the Ninth  
 24 Circuit’s reversal and remand, the Court revisited the calculations under the new preponderance of  
 25 the evidence standard and concluded that Defendants had established by a preponderance of the  
 26 evidence that the amount in controversy was \$5,433,414.35. The Court’s calculations were based  
 27 information supporting Defendants’ notice of removal and Defendants’ opposition to Plaintiff’s  
 28 Motion to remand. (Dkt. Nos. 3-4 & 22-2.) In particular, Defendants’ counsel, Beth Gunn,  
 submitted a declaration indicating that the breakdown among Class Members was 70 percent full-  
 time and 30 percent part-time, and the average hourly rate of pay among class members was  
 \$14.87. (Dkt. No. 22-2 at ¶ 8; Ex. B (p. 13).) Based on this information, the Court performed  
 detailed calculations and valued each of Plaintiff’s claims as follows:  
 Claim 1: Off-the-clock Claim – \$1,394,206.28



1 for purposes of mediation caused them to reevaluate their claims as follows.

2 For the meal period claim, the employee time records reflected a meal period violation rate  
3 of less than five percent. (Dkt. No. 86 at ¶ 12.) Based on this data, Plaintiff’s expert estimated  
4 that there were 21,000 violations, which equaled approximately \$312,000 in potential meal period  
5 penalties at the average hourly rate. However, Defendant produced evidence showing that it had  
6 paid over 8,000 meal period premiums through April 2012. (Id.) Counsel estimated that this left  
7 just 800 unpaid violations for a total of \$12,000 in damages. (Id.) The valuation in the remand  
8 motion assumed a much higher violation rate and failed to account for the meal period premiums  
9 Defendant paid through April 2012. (Id. at ¶ 13.)

10 For the off-the-clock claim, counsel attests that the prior valuation over-estimated the  
11 amount of the off-the-clock time because Plaintiff was unaware of two things. First, Plaintiff was  
12 unaware of Defendant’s practice of rounding up time entries for pay periods to the nearest 15-  
13 minute increment effectively “mut[ing] much of the effect of any preliminary and postliminary work  
14 performed by the class members.” (Id. at ¶ 15.) Second, Plaintiff was unaware that many of the  
15 class members were salaried non-exempt employees who were paid the same amount for all hours  
16 worked up to 40 within a week, so to the extent the pre and post shift work did not push them over  
17 40-hours a week, it was accounted for in their salary. Given these two factors, counsel suggests  
18 that the potential damages should be cut in half to approximately \$1 million. (Id.)

19 The derivative penalties for the waiting time and wage statement are estimated to be worth  
20 \$900,000 to \$1,600,000, respectively, which is within the range of the prior estimates. (Id. at ¶  
21 17.)

22 As noted, the \$500,000 settlement represents only 10.7 percent of the potential recovery  
23 based on Plaintiff’s liability estimates. This amount, while low, is not “per se inadequate or  
24 unfair” given the limitations on Plaintiff’s claims outlined above. *Officers for Justice v. Civil*  
25 *Serv. Comm’n*, 688 F.2d 615, 628 (9th Cir. 1982) (“It is well-settled law that a cash settlement

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26  
27 Claim 2: Missed Meal Break – \$ 1,144,511.20  
28 Claim 3: Waiting Time Penalties – \$1,025,492  
Claim 4: Inaccurate Wage Statements – \$1,009,600  
(Dkt. No. 58 at 9-14.)

1 amounting to only a fraction of the potential recovery does not per se render the settlement  
2 inadequate or unfair.”); see also *In re Mego*, 213 F.3d at 459 (noting that whether the settlement is  
3 fair and adequate depends on the “the difficulties in proving the case”). Further, any concerns that  
4 the Court might have are best addressed at final approval following the claims administration  
5 process. *Harris v. Vector Mktg. Corp.*, No. 08-5198, 2011 WL 1627973, at \*14 (N.D. Cal. Apr.  
6 29, 2011) (“the actual value of the settlement cannot be accurately assessed until the claims  
7 process is completed. At the time of the final fairness hearing, the parties and the Court will be in  
8 a position to accurately calculate the value of the settlement and compare it to the maximum  
9 damages recoverable were the Plaintiff class to succeed at trial.”).

10 In consideration of all the foregoing factors, the Court makes a preliminary finding that  
11 the proposed settlement is fair, adequate and reasonable and in the best interests of the class  
12 members given the uncertainty of continued litigation.

13 **D. Class Notice Plan**

14 For any class certified under Rule 23(b)(3), class members must be afforded the best notice  
15 practicable under the circumstances, which includes individual notice to all members who can be  
16 identified through reasonable effort. The notice must clearly and concisely state in plain, easily  
17 understood language:

- 18 (i) the nature of the action;
- 19 (ii) the definition of the class certified;
- 20 (iii) the class claims, issues, or defenses;
- 21 (iv) that a class member may enter an appearance through an attorney if the member so desires;
- 22 (v) that the court will exclude from the class any member who requests exclusion;
- 23 (vi) the time and manner for requesting exclusion; and
- 24 (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

25 Fed. R. Civ. P. 23(c)(2)(B). “Notice is satisfactory if it generally describes the terms of the  
26 settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come  
27 forward and be heard.” *Churchill*, 361 F.3d at 575 (internal quotation marks omitted).

28 The Court notes one minor issue with respect to the notice. In Section V. two different

1 claims administrators are referenced in subsection A and C. Subsection C shall be amended to  
2 indicate that Rust Consulting, Inc. is the Claims Administrator. The information described in the  
3 notice otherwise meets the requirements of Rule 23(c)(2)(B).

4 The notice plan itself is likewise adequate. Within 15 days of preliminary approval  
5 Defendant will provide the Claims Administrator with the class members' last known addresses  
6 and within 10 days of receipt of that information the Claims Administrator will mail and email (to  
7 current employees) the notice packet to the class members. The Claims Administrator will  
8 engage in skip tracing to locate the addresses for class members whose notices are returned.  
9 Further, a reminder postcard will be mailed 30 days before the Claims Receipt Deadline.

10 At the hearing, counsel also agreed to create a website for the class members. Although  
11 this is not referenced in the parties' joint stipulation, the Notice states that the Claims  
12 Administrator will also establish a website which will have "a complete copy of the settlement  
13 agreement, the motion for attorney's fees and costs, and any papers filed in this action." (Dkt. No.  
14 89 at 47.) Class Counsel shall ensure that the website has a complete copy of the settlement  
15 agreement, the Notice and Claim Form, the Motion for Preliminary Approval and the Second  
16 Amended Joint Stipulation re: Class Action Settlement, the Motion for Attorney's Fees and Costs,  
17 and the Motion for the Class Enhancement Award, as well as the Motion for Final Approval of the  
18 Class Action Settlement.

### 19 CONCLUSION

20 The Court preliminarily finds that the proposed class meets the requisite certification  
21 standards and GRANTS conditional certification of the class for settlement purposes. The  
22 proffered settlement agreement, as amended by the parties' stipulations filed July 13 and August  
23 17, 2015 (Dkt. Nos. 87 & 89), meets the requisite requirements for fair, adequate, and reasonable  
24 settlement at this juncture of the settlement process. For the reasons stated above, the Court  
25 therefore GRANTS the motion for preliminary approval of the class action settlement as follows:

- 26 1. Roger Carter and Scott Cooper of the Carter Law Firm, and Marc H. Phelps of the  
27 Phelps Law Group are appointed as Class Counsel, and Plaintiff Cheryl Deaver is  
28 appointed as the Class Representative for settlement purposes

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2. Notice shall be provided in accordance with the notice plan and this Order.
3. Within 25 days, Class Counsel shall file a motion seeking approval of attorneys' fees and costs and the proposed incentive awards.
4. Counsel shall return before this Court for a final approval hearing, at which the Court shall finally determine whether the settlement is fair, reasonable, and adequate, on December 10, 2015 at 9:00 a.m. in Courtroom F, 450 Golden Gate Ave., San Francisco, California.
5. Class Counsel shall file a noticed motion for final approval of the settlement no later than 35 days before the final approval hearing.

**IT IS SO ORDERED.**

Dated: August 21, 2015

  
JACQUELINE SCOTT CORLEY  
United States Magistrate Judge