

1 **I. BACKGROUND**

2 **A. Plaintiffs’ Allegations**

3 This putative class action arises out of defendant’s alleged failure to reimburse sales
4 employees for work-related expenses incurred during demonstrations of products. Dkt. No.
5 1 at ¶ 1. Plaintiffs allege that they were required to travel to diverse geographic areas to
6 demonstrate defendant’s products and services. *Id.* Plaintiffs allege that defendant required
7 class members to partially cover the cost of the products used for the demonstrations, in
8 violation of California law. *Id.* Plaintiffs also allege that defendant required class members
9 to “purchase laptop computers, cell-phones, iPads, and even [] corporate uniform shirts”
10 and that defendant did not reimburse any of these costs, in violation of California law. *Id.*

11 Plaintiffs’ proposed class includes employees who sold defendant’s products in
12 California who either “incurred expenditures or losses as a direct result of their employment
13 with [defendant] but were not reimbursed for those expenditures or losses” or who “had
14 costs of [defendant’s] products deducted from their wages.” *Id.* at ¶ 2. There are
15 approximately forty-two members of the purported class for settlement purposes. Dkt. No.
16 21-1 at 6.

17 **B. Procedural History**

18 On September 20, 2013, plaintiffs filed a putative class action against Hillyard, Inc.
19 Dkt. No. 1. The complaint brought claims for failure to reimburse expenses under
20 California Labor Code §2802, unlawful deductions under California Labor Code §221,
21 inaccurate wage statements under California Labor Code §226, waiting time penalties under
22 California Labor Code §§201-203, and a claim for unfair business practices under
23 California Business and Professions Code § 17200. Defendant answered the complaint on
24 November 7, 2013. Dkt. No. 14.

25 The parties engaged in private mediation on March 6, 2013. Dkt. No. 21-1 at 5.
26 After a full day of mediation, the parties reached a settlement and later executed a formal
27 settlement agreement. *Id.*

28 On May 7, 2014, plaintiffs moved for preliminary approval of the class action

1 settlement . Dkt. No. 21. The Court held a hearing on June 11, 2014. Dkt. No. 23. No
2 objectors have thus far raised an objection to the proposed settlement.

3 Plaintiffs and defendant have consented to the jurisdiction of a magistrate judge. Dkt.
4 No. 16.

5 **C. Overview of the Settlement Agreement**

6 Following an all-day mediation session on March 6, 2013, the parties reached a
7 settlement. Dkt. Nos. 20, 21-1 at 5. The key provisions of the settlement agreement are as
8 follows:

9 **1. Class Definition**

10 The settlement agreement defines the class as “all employees of Defendant employed
11 in a Covered Position at any time during the period from September 20, 2009 through
12 the Date of Preliminary Approval.” Dkt. No. 21-3 at 2. “Covered Positions” means “the
13 positions in which the Named Plaintiffs were employed by Defendant at any time during the
14 relevant Class Period, including outside sales representative.” *Id.* at 3.

15 **2. Payment to the Settlement Class**

16 Under the settlement, defendant will pay a gross amount of \$750,000 “plus the
17 employer’s share of withholding taxes on that portion of the Net Settlement Amount
18 allocated to wages.” *Id.* at 6. The net benefit to be paid to the class will be \$750,000, less
19 (1) any enhancement award paid to lead plaintiffs; (2) any fee and expense award paid to
20 class counsel, and (3) payment to the settlement administrator. *Id.* at 4. The net settlement
21 amount is estimated to be \$474,750. *Id.* at 7.

22 Under the agreement, each of the approximately forty-two class members who submit
23 complete and timely claim forms will receive a portion of the net settlement amount based
24 on “(a) the individual Class Member’s total number of work weeks in a covered position (b)
25 divided by the aggregate number of work weeks for all members of the classes (with the
26 division rounded to four decimal places) (c) multiplied by the value of the Net Settlement
27 Amount.” *Id.* The class members can expect to receive \$75, less taxes, for each week
28 worked during the class period, depending on when the Court grants preliminary approval

1 and the amount of attorney's fees and plaintiffs' enhancement awards. *Id.* at 7-8.

2 Five percent of each settlement payment is "intended to settle each authorize [sic]
3 claimant's claims for unpaid wages [and thus] will be reduced by applicable payroll tax
4 withholdings and deductions." *Id.* at 8. Defendant will pay its share of payroll taxes for
5 this portion of the settlement in addition to the gross settlement amount. *Id.*

6 **3. Enhancement Award and Attorneys' Fees and Costs**

7 The settlement agreement provides for a \$5,000.00 enhancement to be paid to named
8 plaintiffs, Lawrence Christensen and George Currea, and that defendant will not object to
9 the awards. *Id.* at 9. In addition, under the agreement, plaintiffs' counsel intends to ask the
10 Court to award attorneys' fees and costs "of not more than \$249,750.00 or rather 33.3% of
11 the [gross settlement] for Class Counsel fees and total award of an estimated \$7,000.00 for
12 Class Counsel's litigation expenses." *Id.* at 9. Under the agreement, defendant will not
13 object to this request for fees and costs. *Id.*

14 **4. Release of Claims**

15 The settlement agreement provides for a broad release of the named plaintiffs' claims
16 against defendant. *Id.* at 17-19. Although the settlement agreement references "section
17 III.8.2" as including additional releases for the general class, that section is not included in
18 the settlement agreement. *Id.* at 17. Additionally, although the proposed notice contains a
19 general release of claims on behalf of class members, the Court is unable to find that
20 general release in the settlement agreement. *Id.* at 32-33.

21 **5. Class Notice**

22 The parties propose that CPT Group, Inc. administer direct notice to the class. Dkt.
23 *Id.* at 10. Defendant agrees to provide the settlement administrator with a list of all class
24 members, including the class members' names, last known mailing addresses and telephone
25 numbers, dates of employment, number of work weeks during the class period, and social
26 security numbers. *Id.* at 11.

27 The settlement agreement states that the settlement administrator will send notice to
28 the class members via first-class mail. *Id.* If a notice is returned because of an incorrect

1 address, the settlement administrator will search for a current address using the National
2 Change of Address Data Base, and will re-mail the notice if a new address is found. *Id.* at
3 12. The settlement administrator will provide counsel with a declaration of
4 compliance affirming that it has completed the tasks assigned to it by the Court and
5 under the agreement. *Id.* Class members will be afforded forty-five days to elect to
6 opt out from the settlement or to file an objection. *Id.* at 13-14. If more than five
7 class members object to the settlement, defendant may exercise an option to declare
8 the agreement void. *Id.* at 6.

9 III. DISCUSSION

10 A. Preliminary Approval of the Settlement

11 Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement by
12 a certified class. Although there is a “strong judicial policy that favors settlements,
13 particularly where complex class action litigation is concerned,” *Linney v. Cellular Alaska*
14 *P’ship*, 151 F.3d 1234, 1238 (9th Cir. 1998), “[t]he purpose of Rule 23(e) is to protect the
15 unnamed members of the class from unjust or unfair settlements affecting their rights,” *In*
16 *re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Accordingly, a settlement
17 should only be approved if it is “fundamentally fair, adequate, and reasonable.” *Torrise v.*
18 *Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (internal quotation marks
19 omitted). In determining whether the proposed settlement meets this standard, the Court
20 does not have the ability “to delete, modify, or substitute certain provisions The
21 settlement must stand or fall in its entirety.” *Id.* Due to the dangers of collusion between
22 class counsel and the defendant, as well as the need for additional protections when the
23 settlement is not negotiated by a court designated class representative, settlement approval
24 that takes place prior to formal class certification requires a higher standard of fairness.
25 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

26 “The Court may grant preliminary approval of a settlement and direct notice to the
27 class if the settlement: (1) appears to be the product of serious, informed, non-collusive
28 negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential

1 treatment to class representatives or segments of the class; and (4) falls within the range of
2 possible approval.” *Harris v. Vector Mktg. Corp.*, No. 08-cv-05198 EMC, 2011 WL
3 1627973, at *7 (N.D. Cal. Apr. 29, 2011); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d
4 1078, 1079 (N.D. Cal. 2007). The Court reviews each of the preliminary approval factors
5 in turn.

6 **1. The Settlement Process**

7 The Court first considers the means by which the parties reached their settlement.
8 Here, the settlement was reached after counsel conducted extensive investigation into the
9 facts of this case, which included the review of pay records and interviews with class
10 members. Settlement negotiations occurred at arm’s length with the assistance of a
11 mediator experienced in wage and hour class actions. The settlement thus appears to be the
12 product of serious, informed, non-collusive negotiations. Accordingly, the process by
13 which the parties reached their settlement weighs in favor of preliminary approval.

14 **2. The Presence of Obvious Deficiencies**

15 The Court finds the settlement agreement to suffer from two obvious deficiencies:
16 first, the settlement agreement appears to be binding only on named plaintiffs and
17 defendant, rather than binding named plaintiffs on behalf of the putative class. Dkt. No. 21-
18 3 at 2 (“this Settlement Agreement is between Lawrence Christensen, George Currea
19 (collectively “Plaintiffs”), and Hillyard, Inc. (“Defendant”)”); second, the settlement
20 agreement includes a release of claims for named plaintiffs, and references a release of
21 claims for all class members, but does not include the terms of that general release for class
22 members. *See* Dkt. No. 21-3 at 17 (referencing “section III.8.2” as including additional
23 releases for the class). Although the class notice includes a general release for class
24 members, the Court is unable to locate that general release within the settlement agreement.
25 Without this information, the Court cannot assess whether the release, and thus the
26 settlement as a whole, is fair and reasonable. Accordingly, the Court denies preliminary
27 approval of the proposed settlement but grants leave to file a new motion for preliminary
28 approval if the parties reach a settlement agreement that cures this deficiency.

1 **3. Preferential Treatment**

2 The third factor the Court considers is whether the settlement agreement provides
3 preferential treatment to any class member. Here, the net settlement award is to be paid out
4 to each class member based on the number of weeks worked in the class period. The
5 settlement agreement does allow named plaintiffs to request an incentive award of \$5,000
6 each to compensate them for the time spent and risk assumed in prosecuting this case. But
7 these incentive awards to plaintiffs, should the Court finally approve them, do not render
8 the settlement unfair, since “the Ninth Circuit has recognized that service awards to named
9 plaintiffs in a class action are permissible and do not render a settlement unfair or
10 unreasonable.” *Harris*, 2011 WL 1627973, at *9. The Court finds no other indication of
11 unfair treatment to certain members of the class, and therefore this factor supports
12 preliminary approval.

13 **4. Whether the Settlement Falls Within the Range of Possible Approval**

14 Finally, the Court must determine whether the proposed settlement falls within the
15 range of possible approval. “To evaluate the range of possible approval criterion, which
16 focuses on substantive fairness and adequacy, courts primarily consider plaintiffs’ expected
17 recovery balanced against the value of the settlement offer.” *Id.* To determine whether an
18 agreement is fundamentally fair, adequate, and reasonable, the Court may preview the
19 factors that ultimately inform final approval: “[1] the strength of plaintiffs’ case; [2] the
20 risk, expense, complexity, and likely duration of further litigation; [3] the risk of
21 maintaining class action status throughout the trial; [4] the amount offered in settlement; [5]
22 the extent of discovery completed, and the stage of the proceedings; [6] the experience and
23 views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the
24 class members to the proposed settlement.” *Id.* (citing *Churchill Village v. Gen. Elec.*, 361
25 F.3d 566, 575 (9th Cir. 2004)).

26 The terms of the settlement provide for a fair amount of recovery for the class
27 members, with individualized calculations based on the number of weeks worked during the
28 class period. The plaintiffs faced a significant amount of uncertainty if they were to go

1 forward with this litigation due to the disputed nature of the legal issues in this case, namely
2 whether plaintiffs' claimed unreimbursed expenses were actually reimbursed through
3 commission compensation. Dkt. No. 21-1 at 18. Given these risks, the amount of
4 settlement represents a significant recovery for class members. Plaintiffs estimated that
5 Hillyard faced potential liability of roughly \$1,886,566.12. *Id.* Thus the gross settlement
6 amount of \$750,000 reflects a recovery for class members equal to approximately forty
7 percent of plaintiffs' estimated maximum recovery, which is within the range of fair
8 recoveries. *See Hopson v. Hanesbrands Inc.*, No. 08-cv-0844 EDL, 2008 WL 3385452, at
9 *3 (N.D. Cal. Aug. 8, 2008) (preliminarily approving settlement where class members
10 would recover thirty-nine percent of estimated maximum potential recovery).

11 But as discussed, because the settlement agreement lacks a general release for class
12 members and appears to not bind the class, the Court denies preliminary approval.

13 **B. Notice**

14 The notice to be delivered to class members includes the information required by
15 Rule 23 of the Federal Rules of Civil Procedure, except for one omission. Although the
16 class notice describes the nature of the action, the definition of the class, the class-wide
17 claims, the time requirements and manner of requesting exclusion, as well as the binding
18 effect of a class-wide judgment, the notice fails to explain that class members may enter an
19 appearance through an attorney. Fed. R. Civ. P. 23(c)(2)(B) (stating that "[t]he notice must
20 clearly and concisely state in plain, easily understood language: (i) the nature of the action;
21 (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a
22 class member may enter an appearance through an attorney if the member so desires; (v)
23 that the court will exclude from the class any member who requests exclusion; (vi) the time
24 and manner for requesting exclusion; and (vii) the binding effect of a class judgment on
25 members under Rule 23(c)(3)"). If the parties amend the proposed notice to cure this
26 defect, the proposed notice will meet the requirements of Rule 23.

27 **C. Conditional Certification of Class for Settlement**

28 Because the Court is denying preliminary approval of the settlement, the Court

1 declines to decide at this time whether conditional certification of the class for settlement
2 purposes is appropriate.

3 **IV. CONCLUSION**

4 The Court denies preliminary approval of the proposed settlement agreement, but
5 grants leave to re-file for preliminary approval should the parties reach a settlement
6 agreement that cures the deficiencies identified in this order. The Court also denies
7 adopting the proposed notice to the class as that notice fails to inform class members that
8 they may enter an appearance through an attorney.

9
10 IT IS SO ORDERED.

11 Date: July 10, 2014



12
13 Nathanael M. Cousins
14 United States Magistrate Judge