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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD TERRY,
Plaintiff,

v.

HOOVESTOL, INC.,
Defendant.

Case No. 16-cv-05183-JST

**ORDER GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND PROVISIONAL
CLASS CERTIFICATION**

Re: ECF No. 62

Before the Court is Plaintiff's renewed motion for preliminary approval of a class action settlement and provisional certification of the class. ECF No. 62. For the reasons below, the Court will grant the motion in full.

I. BACKGROUND

A. The Parties and Claims

Plaintiff Richard Terry is a former truck driver for Defendant Hoovestol, Inc. ECF No. 1-1 ¶ 27. Hoovestol hauls bulk mail for the United States Postal Service ("USPS") and employs truck drivers in California. *Id.* ¶¶ 36-37. Terry brings this putative wage and hour class action for violations of California Labor Code Sections 226(b), 226.7, 510, 512, 515, 558, and 1194 as well as California Code of Regulations Title 8 Section 11090. *Id.* ¶ 24. He alleges causes of action for: failure to pay all straight time wages; failure to pay overtime; failure to provide meal periods; failure to authorize and permit rest periods; knowing and intentional failure to comply with itemized employee wage statement provisions; failure to pay all wages due at the time of termination of employment; and violation of Unfair Competition Law. ECF No. 62 at 12.

B. Procedural History

Terry filed the initial complaint in this action in the Alameda County Superior Court on

1 July 20, 2016. ECF No. 62 at 12. On September 8, 2016, Hoovestol removed the case to this
2 Court pursuant to the Class Action Fairness Act (“CAFA”). Id. On February 2, 2018, Terry filed
3 a motion for class certification, proposing seven subclasses. See ECF No. 41. After Hoovestol’s
4 opposition and Terry’s reply were filed, the Court ordered supplemental briefing regarding
5 whether the subclasses satisfied the numerosity requirement of Rule 23. ECF No. 46. On March
6 30, 2018, Terry filed a supplemental brief and a motion to strike. ECF Nos. 47, 49. Hoovestol
7 also provided supplemental briefing. See ECF Nos. 50, 51.

8 After the exchange of discovery, mediation, and continued negotiation following
9 mediation, the parties reached a proposed class action settlement. ECF No. 62 at 14. On June 14,
10 2018, Terry moved for preliminary approval of the proposed class action settlement including
11 conditional certification of the settlement class. ECF No. 55. Terry’s motions for class
12 certification and to strike were terminated as moot on June 18, 2018 in light of this motion. ECF
13 No. 56. The Court denied Terry’s motion for preliminary approval and identified four obvious
14 deficiencies in the proposed class action settlement: lack of a driving nexus between the plaintiff
15 class and proposed cy pres beneficiaries; an overbroad release provision; a too-short opt-out
16 period; and lack of any provision for a second distribution of unredeemed checks. ECF No. 59.

17 Terry now renews his motion for preliminary settlement approval and provisional class
18 certification. ECF No. 62. Pursuant to CAFA, Hoovestol sent notice of the proposed settlement
19 to the United States Attorney General and the Attorney General of the State of California on
20 October 5, 2018. ECF No. 63. No Attorney General has submitted a statement of interest or
21 objection in response to these notices.

22 **II. CLASS CERTIFICATION**

23 **A. Legal Standard**

24 Class certification under Rule 23 of the Federal Rules of Civil Procedure is a two-step
25 process. First, a plaintiff must demonstrate that the four requirements of Rule 23(a) are met:
26 numerosity, commonality, typicality, and adequacy. “Class certification is proper only if the trial
27 court has concluded, after a ‘rigorous analysis,’ that Rule 23(a) has been satisfied.” Wang v.
28 Chinese Daily News, Inc., 709 F.3d 829, 833 (9th Cir. 2013) (quoting Wal-Mart Stores, Inc. v.

1 Dukes, 131 S. Ct. 2541, 2551 (2011)).

2 Second, a plaintiff must establish that the action meets one of the bases for certification in
3 Rule 23(b). Here, because he relies on Rule 23(b)(3), Plaintiff must establish that “questions of
4 law or fact common to class members predominate over any questions affecting only individual
5 members, and . . . [that] a class action is superior to other available methods for fairly and
6 efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Plaintiff bears the burden of
7 demonstrating by a preponderance of the evidence that all four requirements of Rule 23(a) and at
8 least one of the three requirements under Rule 23(b) are met. See Wal-Mart, 131 S. Ct. at 2551.

9 **B. Proposed Class**

10 Terry requests that the Court provisionally certify the class for settlement purposes, a
11 request Hoovestol does not oppose. ECF No. 62 at 26. The Settlement Agreement defines the
12 class as follows:

13 All persons who are or have been employed by Defendant in the State of California as
14 hourly truck drivers at any time between July 20, 2012, to the date the Court issues an
15 order granting preliminary approval of the settlement and who did not execute an
individual release of the claims.

16 Settlement Agreement ¶ I.E. Terry explains that, because he did not sign an individual release, it
17 is unclear whether he would be considered an adequate and typical representative of those who
18 did; thus, those employees are excluded from the class. ECF No. 62 at 13 n.5.

19 **C. Analysis**

20 For the reasons set forth below, the Court grants the request to provisionally certify the
21 settlement class.

22 **1. Rule 23(a)(1): Numerosity**

23 To be properly certified a class must be “so numerous that joinder of all members is
24 impracticable.” Fed. R. Civ. P. 23(a)(1). Here, Plaintiff’s proposed class includes approximately
25 39 class members. ECF No. 62 at 35. While the case involved approximately 338 drivers at its
26 inception, individual settlement efforts by Hoovestol have whittled that number down to the 39
27 proposed class members remaining. Id.

28 There is no fixed numerical threshold class members must exceed to satisfy the numerosity

1 requirement. *Rannis v. Recchia*, 380 Fed. App'x 646, 651 (9th Cir. 2010). “A class or subclass
2 with more than 40 members raises a presumption of impracticability of joinder” on numbers alone.
3 *West v. Cal. Servs. Bureau, Inc.*, 323 F.R.D. 295, 303 (N.D. Cal. 2017) (quotation and internal
4 alterations omitted). Meanwhile, a class with fewer “than 21 does not.” *Ries v. Ariz. Beverages*
5 *USA LLC*, 287 F.R.D. 523, 536 (N.D. Cal. 2012). Because Plaintiff’s proposed class contains 39
6 members, the Court finds that it is sufficiently numerous to render joinder impracticable.

7 **2. Rule 23(a)(2): Commonality**

8 A Rule 23 class is certifiable only if “there are questions of law or fact common to the
9 class.” Fed. R. Civ. P. 23(a)(2). For the purposes of Rule 23(a)(2), “even a single common
10 question” is sufficient. *Wal-Mart*, 131 S. Ct. at 2556 (quotation and internal alterations omitted).
11 The common contention, however, “must be of such a nature that it is capable of classwide
12 resolution – which means that determination of its truth or falsity will resolve an issue that is
13 central to the validity of each one of the claims in one stroke.” *Id.* at 2551.

14 As Terry explains, all members of the proposed class share common questions – for
15 instance, whether Hoovestol’s policies deprived them of compliant meal and rest periods. ECF
16 No. 62 at 27. This, along with the other shared legal questions as to Hoovestol’s liability in this
17 case, satisfies the commonality requirement.

18 **3. Rule 23(a)(3): Typicality**

19 In certifying a class, courts must find that “the claims or defenses of the representative
20 parties are typical of the claims or defenses of the class.” Fed R. Civ. P. 23(a)(3). “The purpose
21 of the typicality requirement is to assure that the interest of the named representative aligns with
22 the interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). “The
23 test of typicality ‘is whether other members have the same or similar injury, whether the action is
24 based on conduct which is not unique to the named plaintiffs, and whether other class members
25 have been injured by the same course of conduct.’” *Id.* (quoting *Schwartz v. Harp*, 108 F.R.D.
26 279, 282 (C.D. Cal. 1985)).

27 Plaintiff Richard Terry is a former Hoovestol truck driver. ECF No. 1-1 ¶ 27. His claims
28 and those of the potential class members rely on the same policies of Hoovestol – for instance, the

1 claim that Hoovestol does not provide compliant meal and rest periods. ECF No. 62 at 27. This
2 satisfies the typicality requirement.

3 **4. Rule 23(a)(4): Adequacy**

4 “The adequacy of representation requirement . . . requires that two questions be addressed:
5 (a) do the named plaintiffs and their counsel have any conflicts of interest with other class
6 members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on
7 behalf of the class?” In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 462 (9th Cir. 2000).

8 No party has suggested, and the Court has not found, any evidence in the record suggesting
9 that Terry has any conflict of interest with the other class members. Terry shares common claims
10 with the proposed class, seeks the same relief they do, and bases his claims on the same
11 underlying facts and common injury. ECF No. 62 at 28. Further, Terry’s lead counsel has
12 submitted a declaration highlighting his experience litigating wage and hour class actions in the
13 transportation industry under California law. See ECF No. 62-1 ¶ 14. The Court concludes that
14 Terry and his counsel will adequately represent the proposed class.

15 **5. Rule 23(b)(3): Predominance and Superiority**

16 To certify a Rule 23 damages class, the Court must find that “questions of law or fact
17 common to class members predominate over any questions affecting only individual members,
18 and [that] a class action is superior to other available methods for fairly and efficiently
19 adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The predominance inquiry “tests whether
20 proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem*
21 *Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). “When common questions present a
22 significant aspect of the case and they can be resolved for all members of the class in a single
23 adjudication, there is clear justification for handling the dispute on a representative rather than on
24 an individual basis.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998).

25 Again, the dominant legal issue here is whether Hoovestol provided timely and duty-free
26 meal and rest periods to Terry and the rest of the proposed class. Terry alleges that his claims are
27 based on uniform, class-wide policies. The Court finds that the various questions surrounding
28 those policies predominate over any questions that could affect only individual class members. A

1 class action is also a superior method for fairly and efficiently adjudicating those questions.
2 Resolving the proposed class members' disputes in a single class action will be far more efficient
3 than requiring them each to proceed individually. The Court concludes that the proposed class
4 satisfies the requirements of Rule 23(b)(3).

5 Accordingly, the Court finds that provisional certification of the proposed class is
6 appropriate for the purposes of settlement.

7 **III. PRELIMINARY APPROVAL**

8 **A. Legal Standard**

9 The Ninth Circuit maintains a "strong judicial policy" that favors the settlement of class
10 actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). "The initial
11 decision to approve or reject a settlement proposal is committed to the sound discretion of the trial
12 judge." *City of Seattle*, 955 F.2d at 1276 (citation omitted). The court's task at the preliminary
13 approval stage is to determine whether the settlement falls "within the range of possible approval."
14 *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). Then, courts must
15 hold a hearing pursuant to Rule 23(e)(2) to make a final determination of whether the settlement is
16 "fair, reasonable, and adequate."

17 Preliminary approval of a settlement is appropriate if "the proposed settlement appears to
18 be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does
19 not improperly grant preferential treatment to class representatives or segments of the class, and
20 falls within the range of possible approval." *In re Tableware*, 484 F. Supp. 2d at 1079 (quotations
21 omitted). The proposed settlement need not be ideal, but it must be fair and free of collusion,
22 consistent with counsel's fiduciary obligations to the class. *Hanlon v. Chrysler Corp.*, 150 F.3d
23 1011, 1027 (9th Cir. 1998) ("Settlement is the offspring of compromise; the question we address is
24 not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate
25 and free from collusion."). To assess a settlement proposal, courts must balance a number of
26 factors:

27 the strength of the plaintiffs' case; the risk, expense, complexity, and likely
28 duration of further litigation; the risk of maintaining class action status throughout

1 the trial; the amount offered in settlement; the extent of discovery completed and
2 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.

3 Id. at 1026 (citations omitted). The proposed settlement must be “taken as a whole, rather than the
4 individual component parts” in the examination for overall fairness. Id. Courts do not have the
5 ability to “delete, modify, or substitute certain provisions”; the settlement “must stand or fall in its
6 entirety.” Id.

7 **B. Terms of the Settlement**

8 Under the terms of the agreement, Defendant agrees to pay no more than \$100,000 as a
9 gross settlement amount, without admitting liability. ECF No. 62-2 (“Settlement Agreement”) ¶¶
10 III.A, III.L.1. This amount includes Plaintiff’s attorneys’ fees and costs, the cost of class notice
11 and settlement administration, the class representative’s enhancement award, and
12 employer/employee payroll taxes on the portion of the settlement payments deemed wages. Id.
13 ¶ I.V. Plaintiff’s counsel will seek \$25,000 in attorneys’ fees and no more than \$20,000 in
14 litigation costs. Id. ¶¶ I.D, I.M. The gross settlement amount includes \$3,000 for settlement
15 administration costs. Id. ¶ I.B. In addition, Terry will be paid an enhancement award of \$2,500 in
16 exchange for the general release of all his claims against Hoovestol. Id. ¶¶ I.L, III.K. After these
17 deductions from the gross settlement amount, approximately \$49,500 will remain to be distributed
18 among the participating class members. ECF No. 62 at 23. Each participating class member will
19 receive a proportion of the amount “equal to (i) the number of weeks he or she worked for
20 [Hoovestol] in California . . . divided by (ii) the total number of weeks worked by all Participating
21 Class Members.” Settlement Agreement ¶ III.F.1.a. Sixty percent of each individual’s share is
22 intended to settle claims for unpaid wages and forty percent is intended to settle claims for interest
23 and penalties. Id. ¶¶ III.F.2.a, 2.b. The portion for unpaid wages will be “reduced by applicable
24 payroll tax withholdings and deductions.” Id.

25 Class members who wish to object must mail a written objection to the court no later than
26 sixty days after the settlement administrator mails the class notices. Id. ¶ III.I.4. Class members
27 may opt-out of the settlement by mailing a written request for exclusion to the settlement
28

1 administrator no later than sixty days after the settlement administrator mails the class notices. *Id.*
2 ¶ III.I.5. The Settlement Agreement further provides that when checks mailed to participating
3 class members are not redeemed or deposited within ninety days, the settlement administrator will
4 mail a reminder postcard. *Id.* ¶ III.I.11. Ninety days after the reminder notice is mailed, funds
5 from any unredeemed checks will be paid to the United Way of California. *Id.*

6 In exchange for the settlement awards, participating class members will release Hoovestol
7 from liability as to “all known and unknown state law claims that both: (1) were alleged or that
8 could have been alleged based on the facts plead in the complaints filed in the matter; and ([2])
9 concern, arise out of, relate to, or are based upon Defendant’s failure to pay all wages, including
10 straight time and overtime wages; failure to provide meal and rest periods; knowing and
11 intentional failure to comply with itemized employee wage statement provisions; failure to pay all
12 wages timely, including wages due at the time of termination; and violations of California’s Unfair
13 Competition Law.” *Id.* ¶ I.BB.

14 **C. Analysis**

15 The Court’s order on Terry’s earlier motion preliminarily approved of the proposed
16 settlement in many respects. The Court concluded: that the negotiations and agreement were non-
17 collusive and likely to benefit the class; that resolution through settlement was appropriate in light
18 of the risks inherent in further litigation; that the gross settlement amount, attorneys’ fees, costs,
19 and enhancement award were all within the range of possible approval; that the parties conducted
20 sufficient discovery to make an informed decision about the settlement; that class counsel’s views
21 of the settlement agreement weighed in favor of approval; that the settlement agreement did not
22 provide improper preferential treatment to any class member; and that the proposed notice
23 procedure met the requirements of Federal Rule of Civil Procedure 23(c)(2)(B). ECF No. 59. The
24 provisions upon which the Court based these conclusions remain unchanged, as do the Court’s
25 corresponding conclusions. The Court now addresses only those portions of the proposed
26 settlement agreement that the parties have modified to remedy the deficiencies previously
27 identified by the Court. See ECF No. 59 at 8-10. The Court concludes those defects have been
28 corrected and accordingly, grants preliminary approval of the proposed settlement.

1 **1. Cy Pres Distribution of Unclaimed Funds**

2 The prior agreement provided that funds from unredeemed checks would be paid to the
3 State Treasury for the Trial Court Improvement and Modernization Fund and the Equal Access
4 Fund of the Judicial Branch. ECF No. 55-2 ¶ III.I.11. The Settlement Agreement now names the
5 United Way of California as the cy pres recipient of these unclaimed funds. Settlement
6 Agreement ¶ III.I.11. As the Agreement explains, the United Way provides direct service
7 “programs aimed at promoting steady, gainful employment of Californians,” as well as advocating
8 for the interests of employees at a policy level. Id. Because this is a class action brought by
9 employees against their employer, the Court concludes that the parties have met their burden to
10 show “a driving nexus between the plaintiff class and the cy pres beneficiaries.” Dennis v.
11 Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012) (citation omitted). An award to the United Way of
12 California is “guided by (1) the objectives of the underlying statute(s) and (2) the interests of the
13 silent class members.” Id. (citation omitted). Accordingly, the cy pres distribution plan described
14 in the revised Settlement Agreement poses no barrier to preliminary approval.

15 **2. Release of Class Members’ Claims**

16 Under the former Settlement Agreement, participating class members would release
17 Hoovestol from liability as to “all known and unknown state law claims that were alleged or that
18 could have been alleged based on the facts of the complaints filed in the matter.” ECF No. 55-2 ¶
19 I.BB. Terry’s release – which ran “from the beginning of time” – was even broader. ECF No. 55
20 at 11. The Court rejected the proposed release in the former Settlement Agreement as overbroad
21 and “beyond the scope of the present litigation” because it released all state law claims based on
22 the facts of the complaint without regard to the breadth of Plaintiffs’ allegations in the complaint.
23 See Otey v. CrowdFlower, Inc., No. 12-CV-05524-JST, 2014 WL 1477630, at *7 (N.D. Cal. Apr.
24 15, 2014); see also McKeen-Chaplin v. Franklin Am. Mortg. Co., No. C 10-5243 SBA, 2012 WL
25 6629608, at *3 (N.D. Cal. Dec. 19, 2012). In the release now proposed by the parties,
26 participating class members will release Hoovestol from liability as to “all known and unknown
27 state law claims that both: (1) were alleged or that could have been alleged based on the facts
28 plead in the complaints filed in the matter; and ([2]) concern, arise out of, relate to, or are based

1 upon Defendant’s failure to pay all wages, including straight time and overtime wages; failure to
2 provide meal and rest periods; knowing and intentional failure to comply with itemized employee
3 wage statement provisions; failure to pay all wages timely, including wages due at the time of
4 termination; and violations of California’s Unfair Competition Law.” Settlement Agreement
5 ¶ I.BB. Because this release is limited to the factual claims raised in the complaint, the Court
6 approves of the revised release provision. The Court observes with approval that Terry’s release
7 has also been narrowed, and now runs only “from the beginning of his employment with
8 Defendant.” ECF No. 62 at 15.

9 **3. Notice Procedure**

10 The prior agreement set the deadline to opt-out or object to the settlement at 45 days after
11 mailing of the initial notice. ECF No. 55-2 ¶¶ III.I.4, I.5. As the Court noted, “any period shorter
12 than 60 days is too short a time to allow class members to properly respond.” *Thomas v.*
13 *Magnachip Semiconductor Inc.*, No. 14-CV-01160-JST, 2016 WL 1394278, at *8 (N.D. Cal. Apr.
14 7, 2016). The revised Settlement Agreement now sets the opt-out and objection deadlines at 60
15 days after the initial notice is mailed. Settlement Agreement ¶¶ III.I.4, I.5. With this deficiency
16 addressed, the Court preliminarily approves the parties’ proposed notice procedure.

17 **4. Second Distribution**

18 Finally, the Court noted in its earlier order that the parties planned to pay funds from
19 unredeemed checks to the cy pres beneficiary after 180 days rather than attempting a second
20 distribution. See ECF No. 55-2 ¶ III.I.11. The Court instructed the parties to either include a
21 second distribution in their agreement or explain why attempting a second distribution would be
22 infeasible or inappropriate. ECF No. 59 at 10 n.3. In the renewed motion for settlement approval,
23 the parties explain that they feel a reminder postcard at the 90-day mark is an appropriate
24 substitute for a second distribution because otherwise, class members “may try to cash both checks
25 they receive – from the first and second distributions – thinking that they were entitled to both.”
26 ECF No. 62 at 24. Instead, the reminder postcard will prompt them to either cash their check or
27 obtain a new check if their original check was lost or misplaced. *Id.* The Court accepts the
28 parties’ explanation, and thus will preliminarily approve the settlement although it does not

1 provide for a second distribution.

2 **CONCLUSION**

3 Because Terry’s renewed motion for preliminary approval and provisional certification
4 corrects the deficiencies addressed in the Court’s earlier order, the Court GRANTS the motion.
5 The proposed class is hereby provisionally certified for the purposes of settlement. The Court
6 grants preliminary approval of the settlement and approves of the proposed notice procedure and
7 form. The Court will hold a final approval hearing on Thursday, May 9, 2019 at 2:00 p.m., as
8 requested by the parties.¹

9 **IT IS SO ORDERED.**

10 Dated: December 7, 2018

11 
12 JON S. TIGAR
13 United States District Judge

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28 ¹ The parties must also add 49 days to each of the other deadlines leading up to the final approval hearing, see ECF No. 62-6, including in the form of notice, ECF No. 62-2.