

1
2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION
5

6 KHANH NIELSON, individually, and on
7 behalf of all others similarly situated,

8 Plaintiffs,

9 vs.

10 THE SPORTS AUTHORITY, and DOES 1
11 through 100, inclusive,

12 Defendants.

Case No: C 11-4724 SBA

**ORDER DENYING PLAINTIFF'S
MOTION FOR PRELIMINARY
APPROVAL**

Dkt. 24

13 The parties are presently before the Court on Plaintiff's Motion for Order:

14 (1) Granting Preliminary Approval of Class Action Settlement; (2) Granting Conditional
15 Certification of the Settlement Class; (3) Appointing Class Counsel; (4) Appointing Class
16 Representative; (5) Appointing Claims Administrator; and (6) Approving First Amended
17 Complaint, Class Notice, Claim Form, Request For Exclusion Form and Timeline for
18 Administration ("Motion for Preliminary Approval"). Dkt. 24. Having read and
19 considered the papers filed in connection with the motion, and finding good cause
20 therefrom, the Court DENIES Plaintiff's motion. The Court, in its discretion, finds this
21 matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal.
22 Civ. L.R. 7-1(b).

23 **I. BACKGROUND**

24 On August 22, 2011, Plaintiff Khanh Nielson ("Plaintiff") filed the instant wage and
25 hour class action against The Sports Authority ("Defendant") in San Francisco County
26 Superior Court. Dkt. 1. The Complaint alleges causes of action for: (1) failure to provide
27 meal and rest periods; (2) failure to pay wages (straight time, overtime, premium pay, and
28 minimum wage); (3) failure to provide accurate itemized or properly formatted wage

1 statements; (4) failure to pay wages upon termination or timely upon/after termination;
2 (5) unfair business practices in violation of Cal. Business and Professions Code section
3 17200, et seq; and (6) violation of the California Private Attorney General Act, Cal. Labor
4 Code section 2699 et seq. The Complaint also seeks waiting time penalties under Labor
5 Code section 203, pre-judgment interest, and attorneys' fees and costs. Plaintiff purports to
6 represent a class described as: "All persons who are and/or were employed as non-exempt
7 employees by The Sports Authority, Inc. in one of more of its California retail stores
8 between August 22, 2007 and the present." Compl. ¶ 20. The Complaint, however, does
9 not specify what job position Plaintiff held, what her job duties were, or whether she is a
10 current or former employee. Id. ¶¶ 1, 4.

11 Defendant removed the action to this Court on September 22, 2011, on the basis of
12 diversity jurisdiction, 28 U.S.C. § 1332(a), and the Class Action Fairness Act, id.
13 § 1332(d)(2). Dkt. 1. Following removal, Plaintiff served written discovery on
14 Defendants, but the parties subsequently agreed to stay discovery pending mediation.
15 Salassi Decl. ¶ 5, Dkt. 25. Instead, Plaintiff obtained data voluntarily produced by
16 Defendant concerning the number of class members, hours worked, the number of shifts,
17 pay rates and the average amount of hours worked per class member. Id. ¶ 15. On July 31,
18 2012, the parties participated in a mediation session with attorney Mark Rudy, and reached
19 a settlement in principle. Id. ¶¶ 6, 8. On August 31, 2012, the parties executed a written
20 settlement agreement. Id. ¶ 9.

21 Under the settlement, Defendant has agreed to pay a Gross Settlement Amount of
22 \$2,500,000. Salassi Decl. Ex. A ¶ 22, Dkt. 25-1. The Net Settlement Amount available to
23 pay claims by class members consists of the Gross Settlement Amount *less* attorneys' fees
24 (based on 25% of the Gross Settlement Amount), litigation costs, an enhancement award of
25 \$2,500 to the Plaintiff and settlement administration expenses. Id. ¶¶ 52, 53, 56. The
26 settlement provides for a reversion to Defendant of any unclaimed amounts from the Net
27 Settlement Amount. Id. ¶ 57. Within five days of preliminary approval of the settlement,
28 Defendant will provide the settlement administrator a database containing the contact

1 information for the settlement class in order to facilitate notice to the class. Id. ¶ 62.
2 Plaintiff proposes allowing class members thirty days to submit their claim form or opt out.
3 Id. ¶ 65.

4 Plaintiff has now filed a Motion for Preliminary Approval in which she seeks
5 preliminary approval of the settlement, conditional certification of the settlement class, the
6 appointment of class counsel, the appointment of Plaintiff Khanh Nielson as class
7 representative and authorization for Plaintiff’s counsel to solicit bids from prospective
8 claims administrators. Although Defendant has not filed any response to the motion, the
9 Court, based on its independent review of the matter, finds that Plaintiff has failed to satisfy
10 her burden of demonstrating that conditional certification of the settlement class under
11 Federal Rule of Civil Procedure 23(a) and (b)(3) or preliminary approval of the settlement
12 is appropriate. For that reason, the instant motion will be denied.

13 **II. DISCUSSION**

14 The Ninth Circuit has declared that a strong judicial policy favors settlement of class
15 actions. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992).
16 Nevertheless, where, as here, “parties reach a settlement agreement prior to class
17 certification, courts must peruse the proposed compromise to ratify both [1] the propriety of
18 the certification and [2] the fairness of the settlement.” Staton v. Boeing Co., 327 F.3d 938,
19 952 (9th Cir. 2003).

20 **A. CLASS CERTIFICATION**

21 The district court has discretion to certify a class action under Rule 23. Meyer v.
22 Portfolio Recovery Assocs., LLC, 696 F.3d 943, 947 (9th Cir. 2012). To obtain class
23 certification, the plaintiff must satisfy the four prerequisites identified in Rule 23(a) *as well*
24 *as* one of the three subdivisions of Rule 23(b). Amchem Prods., Inc. v. Windsor, 521 U.S.
25 591, 614 (1997). “The four requirements of Rule 23(a) are commonly referred to as
26 ‘numerosity,’ ‘commonality,’ ‘typicality,’ and ‘adequacy of representation’ (or just
27 ‘adequacy’), respectively.” United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied
28 Indus. & Serv. Workers Int’l Union, AFL-CIO v. ConocoPhillips Co., 593 F.3d 802, 806

1 (9th Cir. 2010). Certification under Rule 23(b)(3) is appropriate where common questions
2 of law or fact predominate and class resolution is superior to other available methods. Fed.
3 R. Civ. P. 23(b)(3). The party seeking class certification bears the burden of affirmatively
4 demonstrating that the class meets the requirements of Rule 23. Wal-Mart Stores, Inc. v.
5 Dukes, — U.S. —, 131 S.Ct. 2541, 2551 (2011).

6 In general, “[b]efore certifying a class, the trial court must conduct a ‘rigorous
7 analysis’ to determine whether the party seeking certification has met the prerequisites of
8 Rule 23.” Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012)
9 (citation and quotations omitted). When evaluating class certification in the context of a
10 proposed settlement, courts “must pay ‘undiluted, even heightened, attention’ to class
11 certification requirements” because, unlike in a fully litigated class action suit, the court
12 will not have future opportunities “to adjust the class, informed by the proceedings as they
13 unfold.” Amchem Prods., 521 U.S. at 620; accord Hanlon v. Chrysler Corp., 150 F.3d
14 1011, 1019 (9th Cir. 1998).

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

16 **a) Numerosity**

17 The numerosity requirement mandates that the class be “so numerous that joinder of
18 all members is impracticable.” Fed. R. Civ.P. 23(a)(1). In addition, the class should be
19 “ascertainable,” Mazur v. eBay Inc., 257 F.R.D. 563, 567 (N.D. Cal. 2009), meaning that
20 the class definition must be “definite enough so that it is administratively feasible for the
21 court to ascertain whether an individual is a member,” O’Connor v. Boeing N. Am., Inc.,
22 184 F.R.D. 311, 319 (C.D. Cal. 1998). Here, Defendant’s records establish that there are
23 9,518 class members who were classified as non-exempt employees during the class period.
24 See Solassi Decl. ¶ 11. This is facially sufficient to satisfy Rule 23’s numerosity and
25 ascertainability requirements. See Hanlon, 150 F.3d at 1019 (“The prerequisite of
26 numerosity is discharged if ‘the class is so large that joinder of all members is
27 impracticable.’”) (quoting in part Rule 23(a)(1)).

1 injured by the same course of conduct.” Hanon v. Dataproducts Corp., 976 F.2d 497, 508
2 (9th Cir. 1992) (citation and internal quotation marks omitted).

3 Plaintiff contends that “[t]ypicality is met here as the claims of the Settlement Class
4 are based on the same legal and factual claims as that of the Plaintiff.” Mot. at 10. Though
5 Plaintiff fails to elaborate further on this conclusory assertion, the Court presumes that
6 Plaintiff is alleging that she and the class suffered the same injury; that is, Defendant’s
7 misclassification of employees and concomitant failure to pay overtime and provide meal
8 and rest periods in violation of California law. Courts have found Plaintiff’s theory of
9 typicality acceptable—but only as to the positions that the plaintiff actually held. See
10 Campbell v. PriceWaterhouseCoopers, LLP, 253 F.R.D. 586, 603 (E.D. Cal. 2008); accord
11 Kelley, 1998 WL 1794379, at *15. In this case, Plaintiff fails to specify what position or
12 positions she held while employed by Defendant. Given the absence of this information,
13 the Court finds that Plaintiff has failed to establish that her claims are typical of those of the
14 class.

15 *d) Adequacy of Representation*

16 Members of a class may sue as representatives on behalf of the class only if they will
17 fairly and adequately protect the interests of the class as a whole. Fed. R. Civ. P. 23.
18 “Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and
19 their counsel have any conflicts of interest with other class members, and (2) will the
20 named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”
21 Hanlon, 150 F.3d at 1020. While there is nothing to indicate that Plaintiff or her counsel
22 has any conflicts of interest with putative class members or that their interest in the case is
23 insufficient to ensure vigorous representation, no specific information is provided about
24 Plaintiff beyond her being a non-exempt employee who worked at one or more of
25 Defendant’s retail stores. In the absence of such information, the Court cannot conclude, at
26 this juncture, that Plaintiff is an adequate class representative.

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

2 Finally, Plaintiff has not sufficiently demonstrated that it would be appropriate to
3 certify the settlement class under Rule 23(b)(3). This provision requires the Court to find
4 that: (1) “the questions of law or fact common to class members predominate over any
5 questions affecting only individual members,” and (2) “a class action is superior to other
6 available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.
7 23(b)(3). These provisions are referred to as the “predominance” and “superiority”
8 requirements. See Hanlon, 150 F.3d at 1022-23.

9 Plaintiff contends that the requirements of Rule 23(b)(3) are satisfied, ostensibly
10 because Plaintiff and class members seek the same relief as a result of the same policy of
11 misclassifying non-exempt employees. See Mot. at 11-12. But to secure certification
12 under Rule 23(b)(3), Plaintiff must offer more than vague references to “company-wide
13 common policies and procedures.” See Mot. at 11. “Whether such a policy is in place or
14 not, courts must still ask where the individual employees actually spent their time.” In re
15 Wells Fargo Home Mortg. Overtime Pay Litig., 571 F.3d 953, 959 (9th Cir. 2009). Since
16 Plaintiff’s motion provides no such elucidation, the Court finds that Plaintiff has failed to
17 satisfy the predominance and superiority requirements of Rule 23(b)(3).

18 In sum, the Court concludes that Plaintiff has failed to demonstrate that class
19 certification under Rule 23(a) and (b)(3) is warranted in this action.

20 **B. FAIRNESS OF THE SETTLEMENT**

21 Rule 23 requires judicial review of any settlement of the “claims, issues, or defenses
22 of a certified class.” Fed. R. Civ. P. 23(e). The decision of whether to approve a proposed
23 class action settlement entails a two-step process. See Manual for Complex Litig. § 21.632
24 (4th ed. 2004). The Court first conducts a preliminary fairness evaluation. Id. If the Court
25 preliminarily approves the settlement, notice to the class is then disseminated and a
26 “fairness” or final approval hearing is scheduled. Id. The second step of the process
27 culminates in a fairness hearing at which the proponent of the settlement must demonstrate
28 that the settlement is “fair, reasonable, and adequate.” Id.; Fed. R. Civ. P. 23(e)(2). “The

1 purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair
2 settlements affecting their rights.” In re Syncor ERISA Litig., 516 F.3d 1095, 1100 (9th
3 Cir. 2008) (citation omitted).

4 “The initial decision to approve or reject a settlement proposal is committed to the
5 sound discretion of the trial judge.” Officers for Justice v. Civil Serv. Comm’n of the City
6 and County of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982). Where, as here, a
7 settlement has been reached prior to formal class certification, “a higher standard of
8 fairness” applies due to “[t]he dangers of collusion between class counsel and the
9 defendant, as well as the need for additional protections when the settlement is not
10 negotiated by a court designated class representative[.]” Hanlon, 150 F.3d at 1026. In
11 undertaking a fairness inquiry, the settlement must be “taken as a whole, rather than the
12 individual component parts, that must be examined for overall fairness.” Id. The Court has
13 no power to “delete, modify or substitute certain provisions”—and the settlement “must
14 stand or fall in its entirety.” Id.

15 To make a fairness determination, the district court must balance a number of
16 factors, including: (1) the strength of plaintiff’s case; (2) the risk, expense, complexity, and
17 likely duration of further litigation; (3) the risk of maintaining class action status
18 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery
19 completed, and the stage of the proceedings; (6) the experience and views of counsel;
20 (7) the presence of a governmental participant; and (8) the reaction of the class members to
21 the proposed settlement. See Molski v. Gleich, 318 F.3d 937, 953 (9th Cir. 2003). Given
22 that some of these “fairness” factors cannot be fully assessed until the Court conducts the
23 final approval hearing, “a full fairness analysis is unnecessary at this stage.” See Alberto
24 v. GMRI, Inc., 252 F.R.D. 652, 665 (E.D. Cal. 2008) (citation omitted). Rather,
25 preliminary approval of a settlement and notice to the proposed class is appropriate: if
26 “[1] the proposed settlement appears to be the product of serious, informed, noncollusive
27 negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential
28 treatment to class representatives or segments of the class, and [4] falls with the range of

1 possible approval” In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1079 (N.D.
2 Cal. 2007) (citing Manual for Complex Litigation, § 30.44 (2d ed. 1985)).

3 In the instant case, the settlement was reached as a result of mediation, which “tends
4 to support the conclusion that the settlement process was not collusive.” Villegas v. J.P.
5 Morgan Chase & Co., No. C 09-261 SBA, 2012 WL 3542187 at *5 (N.D. Cal. Aug. 14,
6 2012). In addition, Plaintiff claims to have obtained some informal discovery prior to
7 participating in the mediation. Salassi Decl. ¶ 15. However, Plaintiff fails to proffer
8 sufficient information for the Court to determine whether the settlement falls within the
9 range of possible approval. “To evaluate adequacy, courts primarily consider plaintiffs’
10 expected recovery balanced against the value of the settlement offer.” In re Tableware
11 Antitrust Litig., 484 F. Supp. 2d at 1080. Here, Plaintiff alleges that “Class Counsel
12 evaluated the Settlement by weighing the maximum damages available to the class
13 members for their overtime and statutory break claims against the relevant risk factors.”
14 Salassi Decl. ¶ 20. However, Plaintiff does not specify the maximum recovery that
15 Plaintiff could have obtained if the action were concluded on the merits. Without that
16 information, the Court is unable to assess, at this juncture, whether the proposed settlement
17 is reasonable. See Villegas, 2012 WL 3542187 at *5.

18 The Court also has concerns regarding the parties’ agreement that class members
19 only have thirty days to submit claims forms. A shorter claims period is likely to decrease
20 the number of claims submitted. This undoubtedly benefits Defendant—particularly where,
21 as here, the settlement provides that unclaimed settlement funds revert to Defendant.
22 Salassi Decl. Ex. A at 14. Plaintiff’s concern, however, should be in protecting the interests
23 of the class, not those of Defendant or the attorney fee award sought by her counsel, which
24 will remain the same regardless of the number of class members submitting claim forms.
25 Thus, should Plaintiff attempt to renew her motion for preliminary approval, she should
26 ensure that class members are afforded at least sixty days to submit claim forms. C.f.
27 Sanchez v. Sephora USA, Inc., No. C 11-03396 SBA, 2012 WL 2945753 at *6 (N.D. Cal.

1 July 18, 2012) (noting that in Fair Labor Standard Act collective actions, courts generally
2 provide sixty to ninety days to opt in).

3 **III. CONCLUSION**

4 The Court concludes that Plaintiff has failed to demonstrate that conditional class
5 certification under Rule 23(a) and (b)(3) or preliminary approval of the class settlement is
6 warranted at this time. Accordingly,

7 IT IS HEREBY ORDERED THAT Plaintiff's Motion for Preliminary Approval is
8 DENIED.

9 IT IS SO ORDERED.

10 Dated: November 25, 2012


SAUNDRA BROWN ARMSTRONG
United States District Judge

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28