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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DAVID LEVERAGE, et al.,  
Plaintiffs,  
v.  
TRAEGER PELLET GRILLS, LLC, et al.,  
Defendants.

Case No. 16-cv-00784-KAW

**ORDER RE SUPPLEMENTAL  
BRIEFING ON PLAINTIFFS' MOTION  
FOR PRELIMINARY APPROVAL**

Re: Dkt. No. 74

The Court has reviewed Plaintiffs' motion for preliminary approval, and hereby orders the parties to provide a joint supplemental brief regarding the following issues. The supplemental briefing should be filed no later than **May 17, 2017**.

**A. Attorney's Fees**

Plaintiff's counsel intend to seek an award of 25% of the Gross Settlement Fund as the Fee Award, plus reimbursement of reasonable and actual expenses, not to exceed \$60,000, as the Expense Award. (Settlement Agreement ¶ 98, Dkt. No. 74-1.) To assess the fee request, even for purposes of preliminary approval, the Court requires information as to the lodestar claimed, i.e., the number of hours incurred in the case and the hourly rates claimed.

**B. Range of Reasonableness**

At the preliminary approval stage, courts in this district "have stated that the relevant inquiry is whether the settlement falls within the range of possible approval or within the range of reasonableness." *Cotter v. Lyft*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (internal quotation omitted). "In determining whether the proposed settlement falls within the range of reasonableness, perhaps the most important factor to consider is plaintiff's expected recovery balanced against the value of the settlement offer." *Id.*; see also *O'Connor v. Uber Techs., Inc.*,

1 201 F. Supp. 3d 1110, 1120-21 (N.D. Cal. 2016). This determination "requires evaluating the  
2 relative strengths and weaknesses of the plaintiffs' case; it may be reasonable to settle a weak  
3 claim for relatively little, while it is not reasonable to settle a strong claim for the same amount."  
4 Cotter, 176 F. Supp. at 936 (citing *In re High-Tech Emp. Antitrust Litig.*, Case No: 11-cv-2509-  
5 LHK, 2014 WL 3917126, at \*4 (N.D. Cal. Aug. 8, 2014). Furthermore, the Ninth Circuit has  
6 recognized that where no class has been formally certified, "there is an even greater potential for a  
7 breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must  
8 withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest  
9 than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *In re*  
10 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). Signs of collusion that  
11 the Court must consider include: (1) whether counsel receives a disproportionate distribution of  
12 the settlement, (2) where the parties negotiate a "clear sailing" provision for payment of attorneys'  
13 fees separate and apart from class funds; and (3) when the parties arrange for fees not awarded to  
14 revert to the defendants. *Id.*

15 In the instant case, Plaintiffs bring employment misclassification claims, including claims  
16 for unpaid minimum wage and overtime wages under the Fair Labor Standards Act ("FLSA") and  
17 related state laws, as well as damages for meal and rest period violations, unlawful deductions,  
18 inaccurate wage statements, and waiting time penalties under various state laws. (Plfs.' Mot. at 1,  
19 Dkt. No. 74.) Plaintiffs also bring a California Private Attorneys General Act ("PAGA") claim.  
20 (*Id.*) The proposed settlement is for \$2,850,000; once the attorney's fees (\$712,500), costs  
21 (\$60,000), incentive award (\$65,000), class administrative costs (\$35,000), and PAGA penalty  
22 (\$66,666.67) are excluded, the net settlement fund is estimated to be \$1,910,833.33. (*Id.* at 19.)

23 Plaintiffs state that the "settlement represents a recovery of about 73% of the projected  
24 expected recovery if this case were to proceed through certification and trial." (Plfs.' Mot. at 10.)  
25 The "projected expected recovery," however, includes substantial discounts based on asserted  
26 risks of non-certification and loss on the merits. (*Id.* at 11 (discounting the unpaid overtime claim  
27 by 30% for risk of non-certification and an additional 60% for risk of losing on the merits), 12  
28 (discounting the unpaid minimum wage claim by 30% for risk of non-certification and 40% for

1 risk of losing on the merits), 13 (discounting the deductions claim by 25% for risk of non-  
2 certification and 55% for risk of losing on the merits), 14 (discounting the meal and rest periods  
3 claim by 50% for risk of non-certification and 70% for risk of losing on the merits), 15  
4 (discounting the waiting time penalties by 45% for risk of non-certification and 65% for risk of  
5 losing on the merits, and discounting the wage statement penalties by 45% for risk of non-  
6 certification and 70% for risk of losing on the merits.) Thus, the "projected expected recovery"  
7 after the discounts amounts to \$3,915,444, whereas the full verdict value -- without discounts -- is  
8 around \$16,234,210. The \$2,850,000 settlement represents an 82% discount from the full verdict  
9 value.

10 The Court finds that Plaintiffs have not adequately explained why an 82% discount is  
11 warranted in this case. For example, with respect to the meal and rest period claim, Plaintiffs  
12 point to Defendants' argument that class members could take meal and rest periods whenever they  
13 want, but cite no authority that shows this would defeat certification or the claim itself. But see  
14 *Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701, 726 (2013) ("the fact that  
15 individual inquiry might be necessary to determine whether individual employees were able to  
16 take breaks despite the defendant's allegedly unlawful policy (or unlawful lack of a policy) is not a  
17 proper basis for denying certification"). Plaintiffs also do not explain what risks of certification  
18 exist as to the classification claim, or what facts exist to show that Brand Ambassadors at Costco  
19 obtained nonbinding commitments from buyers. (See Plfs.' Mot. at 7.) Plaintiffs must fully  
20 explain the risks of non-certification and losing on the merits for each of their claims, citing to  
21 specific case law and facts, and why these risk warrant the proposed 82% discount.

22 **C. Settlement Formula**

23 The Settlement provides for three classes: (1) the "California Class," which consists of  
24 employees who worked for Defendants in California; (2) the "Non-California Rule 23 Class,"  
25 which consists of employees who worked for Defendants in states outside of California under<sup>1</sup>

26 \_\_\_\_\_  
27 <sup>1</sup> These states are: Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho,  
28 Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri,  
Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North  
Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, West Virginia,

1 whose laws Plaintiffs have alleged state-law claims in the proposed Fourth Amended Complaint;  
2 and (3) the "FLSA Class," which consists of employees who worked for Defendants in all other  
3 states. (Plfs.' Mot. at 2.) The California Class and Non-California Rule 23 Class are opt-out  
4 classes, while the FLSA Class is an opt-in class. (Id.)

5 Outside of California, the states are distributed into two tiers. "Tier 1 States" are Arizona,  
6 Colorado, Florida, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Nevada, New Mexico,  
7 New York, Oklahoma, Oregon, and Washington. (Settlement Agreement ¶ 49.) Tier 1 States "are  
8 states whose state law claims alleged in the Complaint (and released under the Settlement) afford  
9 protections greater than the FLSA, but not as protective as California." (Plfs.' Mot. at 3.) "Tier 2  
10 States" are all remaining states and the District of Columbia. (Settlement Agreement ¶ 51.) These  
11 two tiers do not match up with the Non-California Rule 23 Class and the FLSA Class; the Non-  
12 California Rule 23 Class includes states outside of the Tier 1 States. (See Settlement Agreement  
13 ¶¶ 31 (listing states included in the Non-California Rule 23 Class), 49 (listing states included in  
14 Tier 1).)

15 In distributing the Settlement fund, the Settlement Administrator is to calculate the "Base  
16 Weekly Payment," which is based on the number of weeks worked by all participating class  
17 members. (Settlement Agreement ¶ 86(a).) California Class members will receive a settlement  
18 payment equal to 2.2 times the Base Weekly Payment, multiplied by the number of weeks worked  
19 by that individual. (Settlement Agreement ¶ 86(b).) Individuals in Tier 1 States will receive a  
20 settlement payment equal to 1.3 times the Base Weekly Payment, multiplied by the number of  
21 weeks worked by that individual. (Settlement Agreement ¶ 86(b).) Finally, individuals in Tier 2  
22 States will receive a settlement payment equal to the base Weekly Payment, multiplied by the  
23 number of weeks worked by that individual. The multiplier is based on the greater protections and  
24 remedies available to individuals who work in California and Tier 1 states. (Settlement  
25 Agreement ¶ 86(b).)

26 The parties must explain how the 2.2 and 1.3 multipliers were chosen. The parties should  
27

28 Wisconsin, and Wyoming. (Settlement Agreement ¶ 31.)

1 also explain whether individuals who are in both the Tier 2 States and the Non-California Rule 23  
2 Class should be entitled to a multiplier, as they are giving up additional state law claims that  
3 individuals who are in both the Tier 2 States and the FLSA Class are not.

4 **D. Cy Pres**

5 "The cy pres doctrine allows a court to distribute unclaimed or non-distributable portions  
6 of a class action settlement fund to the 'next best' class of beneficiaries." *Nachshin v. AOL, LLC*,  
7 663 F.3d 1034, 1036 (9th Cir. 2011). Thus, a cy pres distribution "must account for the nature of  
8 the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class  
9 members, including their geographic diversity." *Id.* The Ninth Circuit has cautioned that "[w]hen  
10 selection of cy pres beneficiaries is not tethered to the nature of the lawsuit and the interests of the  
11 silent class members, the selection process may answer to the whims and self interests of the  
12 parties, their counsel, or the court." *Id.* at 1039.

13 Here, the proposed settlement will donate any uncashed settlement compensation from the  
14 Settlement Fund to The Road Home, "a charity that assists individuals with stepping out of  
15 homelessness, including by providing employment . . . ." (Plfs.' Mot. at 21.) The parties must  
16 explain how the proposed cy pres distribution: (1) addresses the objectives of the Fair Labor  
17 Standards Act and other labor laws at issue, (2) targets the Plaintiff class, including their  
18 nationwide geographic distribution, and (3) provides a reasonable certainty that any member will  
19 be benefited. See *Nachshin*, 663 F.3d at 1040. The parties shall also address whether uncashed  
20 settlement compensation from the Settlement Fund should be re-distributed to the class if above a  
21 certain amount, i.e., \$100,000.

22 **E. Incentive Payments**

23 The Settlement proposes incentive payments of \$20,000 each to Plaintiffs Lentini and  
24 Leverage, \$10,000 each to Plaintiffs Dana and Benhardus, and \$5,000 to Plaintiff Powell.  
25 (Settlement Agreement ¶ 46.) "It is well-established in this circuit that named plaintiffs in a class  
26 action are eligible for reasonable incentive payments, also known as service awards." *Harris v.*  
27 *Vector Mktg. Corp.*, No. C-08-5198 EMC, 2012 WL 381202, at \*6 (N.D. Cal. Feb. 6, 2012)  
28 (internal quotation omitted). "Several courts in this District have indicated that incentive

1 payments of \$10,000 or \$25,000 are quite high and/or that, as a general matter, \$5,000 is a  
2 reasonable amount." Id. at \*7. While Plaintiffs have provided declarations explaining the amount  
3 of time and work they have put into this case, the Court requires additional briefing on whether the  
4 work performed warrants the requested incentive awards, particularly when this district has  
5 typically considered \$5,000 to be the benchmark amount.

6 **F. Procedures for Objecting to the Settlement**

7 The Settlement requires that objections be submitted to the Court "either by mailing them  
8 to the Class Action Clerk,<sup>2</sup> United States District Court for the Northern District of California,  
9 Oakland Courthouse . . . or by filing them in person at any location of the United States District  
10 Court for the Northern District of California." (Settlement Agreement ¶ 72.) The Court will  
11 require that objections be sent to the Settlement Administrator, and that the parties file any  
12 objections with the court no later than fourteen (14) days before the final approval hearing. The  
13 parties shall revise the notices to the class members accordingly.

14 **G. Class Action Fairness Act ("CAFA") Notice**

15 CAFA requires that notice of a settlement be given to the appropriate government officials.  
16 28 U.S.C. § 1715(b). The parties should address whether CAFA notice was given.

17 **H. Class Notice (Exhibit B-1 of Settlement Agreement)**

18 **i. Overall Summary of Settlement Payments (Page 3)**

19 This section indicates that Tier 1 members will receive 1.5 times the base weekly payment,  
20 while California class members will receive 2.5 times the base weekly payment. This is  
21 inconsistent with the Settlement Agreement, which provides that Tier 1 members will receive 1.3  
22 times the base weekly payment, while California Class members receive 2.2 times the base weekly  
23 payment. (Settlement Agreement ¶ 86.)

24 **ii. What Do I Release Under the Settlement? (Page 5)**

25 This section lists claims that will be released under the Settlement. This section should  
26 also make clear that claims related to retaliation or for violation of equal pay provisions are  
27

28 <sup>2</sup> The Court does not have a "Class Action Clerk."

1 excluded. (Settlement Agreement ¶¶ 40-42.)

2 **iii. How Do I Object to the Settlement? (Page 6)**

3 The objection procedure should be updated so that objections are submitted to the  
4 Settlement Administrator, not the Court. Further, the objection procedure must make clear that the  
5 objection needs to "be accompanied by any documentary or other evidence and any factual or  
6 legal arguments that the objecting Participating Class Member intends to rely upon in making the  
7 objection," as required by the Settlement terms. (Settlement Agreement ¶ 72.)

8 **iv. How Do I Opt Out of the Settlement? (Page 6)**

9 The notice states that if an individual submits an exclusion letter and an objection, the  
10 "objection will be valid and be deemed to invalidate the Exclusion Letter." The parties should  
11 explain why this is appropriate, including citations to other cases that have found an objection to  
12 invalidate a request to be excluded.

13 **v. Where Can I get Additional Information? (Page 7)**

14 This section lists the website that will be available to class members. The parties shall  
15 confirm that the website will include the Settlement, Notice of Settlement, FLSA opt-in form,  
16 motions for approval (both preliminary and final) and for attorney's fees, as well as the operative  
17 complaint and significant Court orders.

18 **I. FLSA Notice (Exhibit B-2 of Settlement Agreement)**

19 **i. What Do I Release Under the Settlement? (Page 5-6)**

20 This section lists claims that will be released under the Settlement. This section should  
21 also make clear that claims related to retaliation or for violation of equal pay provisions is  
22 excluded. (Settlement Agreement ¶¶ 40-42.)

23 **ii. How do I Object to the Settlement? (Page 6)**

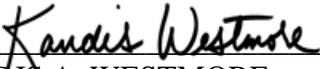
24 The objection procedure should be updated so that objections are submitted to the  
25 Settlement Administrator, not the Court. Further, the objection procedure must make clear that the  
26 objection needs to "be accompanied by any documentary or other evidence and any factual or  
27 legal arguments that the objecting Participating Class Member intends to rely upon in making the  
28 objection," as required by the Settlement terms. (Settlement Agreement ¶ 72.)

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The objection procedure also indicates that an individual who objects will be bound by the settlement agreement. The parties should explain why this is appropriate, and cite to cases which have deemed an objection to be an opt-in to a FLSA collective action.

IT IS SO ORDERED.

Dated: May 2, 2017

  
KANDISA. WESTMORE  
United States Magistrate Judge