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28UNITED 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 GRANTING MOTION FOR
PRELIMINARY APPROVAL**

Re: Dkt. No. 74

Plaintiffs bring the instant putative class and collective action against Defendants Traeger Pellet Grills LLC and Xen 2, Inc., alleging violations of the Fair Labor Standards Act ("FLSA") and various state labor laws. (See Third Am. Compl. ("TAC"), Dkt. No. 51.) Pending before the Court is Plaintiffs' motion for preliminary approval of a settlement agreement between the parties. (Plfs.' Mot., Dkt. No. 74.) Upon consideration of the parties' filings, as well as the arguments presented at the June 15, 2017 motion hearing, and for the reasons set forth below, Plaintiffs' motion for preliminary approval is GRANTED.

I. BACKGROUND**A. Factual Background**

Defendant Traeger manufactures and sells high-performance grills throughout the country. (TAC ¶ 13.) Defendant Xenium is a staffing agency who was Plaintiffs' W-2 employer for tax purposes. (TAC ¶ 8.) Through Defendant Xenium, Plaintiffs worked for Defendant Traeger as "Direct Sales Demonstrators," demonstrating Defendant Traeger's grills to the public. (TAC ¶ 13.) All Direct Sales Demonstrators were required to go through several days of training, referred to by Defendants as an "audition," in Utah. (TAC ¶ 18.) Some Plaintiffs were not paid for any regular or overtime for this training period. (Id.) Direct Sales Demonstrators were divided into three

1 groups: (1) the Wholesale Group (also known as "Brand Ambassadors"), (2) mall kiosk managers
2 and assistant managers (also known as the "Mall Group"), and (3) the Direct Sales Group. (TAC
3 ¶¶ 14, 16, 17.)

4 Brand Ambassadors worked in wholesale clubs such as Costco, setting up and manning a
5 booth. (TAC ¶ 14.) Plaintiffs allege that Brand Ambassadors would "perform promotional
6 activities within the booth, but would not make any actual sales, or receive any direct customer
7 payments." (Id.) Plaintiffs also allege that they were typically required to work more than eight
8 hours a day during these events, and that they were not allowed lunch breaks or rest breaks during
9 the shows. (TAC ¶ 20.) Brand Ambassadors were routinely threatened with termination if they
10 left the store for any non-emergency reason during store hours. (TAC ¶ 25.) Brand Ambassadors
11 were purportedly required to set up the booth on the day prior to the show, which could take up to
12 six hours, and breaking down the booth, which typically took at least four hours. (TAC ¶ 21.)

13 They were not compensated for this time. Brand ambassadors were also not compensated for their
14 travel time to and from Costco, although some travel expenses were reimbursed. (TAC ¶ 22.)

15 Brand Ambassadors were not paid by the hour, but on commission; the commission was "based on
16 a sliding percentage of the net amount of sales and returns of Traeger products during the
17 roadshow after deducting amounts paid to Costco from the net amount of sales and returns."

18 (TAC ¶ 14.) Plaintiffs assert that returns were not always individually tracked for commission
19 payments, and that compensation could be reduced by returns from stock purchased before the
20 road show had begun, or from other stores. Defendants would also deduct a flat 5% for
21 anticipated returns in the future, but never rendered an accounting for actual returns. (Id.)

22 Plaintiffs also allege that they were required to promote local dealers, but did not receive
23 commissions for sales made by local dealers. (TAC ¶ 24.) Commissions generally varied from
24 show to show, "but commonly amounted to less than minimum wage for time spent." (TAC ¶ 19.)

25 Brand Ambassadors were also not offered any benefits including health insurance, sick days, and
26 vacation days. (TAC ¶ 15.) Defendants, however, classified Brand Ambassadors as "exempt"
27 under the FLSA and California labor law, using the "outside sales exemption." (TAC ¶ 26.)

28 The Mall Group worked at permanent kiosks within retail shopping centers. (TAC ¶ 17.)

1 Unlike Brand Ambassadors, the Mall Group received customer payments, and were paid based on
2 recoverable commission. Plaintiffs allege that the Mall Group was classified as management
3 employees, treated as "exempt," and not paid overtime despite typically working in excess of
4 sixty-five hours per week. (TAC ¶¶ 17, 35.)

5 Finally, the Direct Sales Group made direct sales at trade shows, fairs, expos, conventions,
6 and home shows. (TAC ¶ 16.) Like the Mall Group, the Direct Sales Group collected payment
7 directly from purchasing customers. (Id.)

8 **B. Procedural History**

9 On February 16, 2016, Plaintiffs filed the instant putative class and collective action
10 complaint for violation of various federal and California labor laws. (Compl., Dkt. No. 1.) On
11 March 25, 2016, Plaintiffs filed an amended complaint, adding additional claims under California
12 labor laws. (First Amended Compl. ("FAC"), Dkt. No. 17.) On May 26, 2016, the parties
13 stipulated to allow Plaintiffs to file a second amended complaint, which added an unlawful
14 deductions claim. (Dkt. No. 37.) On June 8, 2016, Plaintiffs filed their second amended
15 complaint. (Second Amended Compl., Dkt. No. 39.)

16 On June 22, 2016, Defendants filed a motion, seeking dismissal pursuant to Federal Rules
17 of Civil Procedure 12(b)(3) based on improper venue, or, in the alternative, to transfer the case
18 pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the District of Utah. (Dkt.
19 No. 41.) Defendants also sought dismissal under Rule 12(b)(6). Id. After Defendants' motion
20 was fully briefed, the parties stipulated to allow Plaintiffs to file the operative third amended
21 complaint, which added a new plaintiff. (Dkt. No. 49.) On October 4, 2016, Plaintiffs filed a
22 motion to conditionally certify a class under 29 U.S.C. § 216(b). (Dkt. No. 56.)

23 On October 19, 2016, the Court filed an order, requiring supplemental briefing on
24 Defendants' motion to dismiss the case for improper venue or transfer to Utah. (Dkt. No. 58.)
25 Specifically, the Court requested briefing on why the case should not be transferred to the Central
26 District or Eastern District of California, where the named Plaintiffs reside. (Id.) The following
27 day, the parties filed a stipulation to modify the supplemental briefing date so that they could
28 attend mediation. (Dkt. No. 59.) On October 28, 2017, the parties again stipulated to an extension

1 of the motion and hearing dates in order to continue settlement discussions. (Dkt. No. 61.)

2 On December 6, 2017, the parties filed a notice of settlement, and requested that all
3 pending hearings and deadlines be taken off-calendar. (Dkt. No. 63.) The parties also requested
4 that the Court set a deadline for Plaintiffs to file their motion for preliminary approval. Following
5 a number of extensions, on April 7, 2017, Plaintiffs filed the instant motion for preliminary
6 approval on April 7, 2017. On April 14, 2017, Defendants filed a statement of non-opposition.
7 (Dkt. No. 75.) On May 2, 2017, the Court issued an order requiring supplemental briefing on the
8 motion for preliminary approval. (Ord., Dkt. No. 76.) On May 31, 2017, the parties filed a joint
9 supplemental brief in support of the motion for preliminary approval. (Supp. Brief., Dkt. No. 79.)

10 The Court held a hearing on Plaintiffs' motion for preliminary approval on June 15, 2017.
11 At the hearing, the parties agreed to make certain changes to the settlement agreement. (Dkt. No.
12 83.) On June 23, 2017, the parties filed a supplemental brief, which attached a revised settlement
13 agreement and notices. (Dkt. No. 84.)

14 **C. Settlement Agreement**

15 Under the terms of the settlement agreements, Defendants agree to pay a "Maximum
16 Settlement Amount" of \$2,850,000. (Settlement Agreement ¶ 27.) Of the Maximum Settlement
17 Amount, Plaintiff's counsel intends to seek an award of 25%, or \$712,500.00, as well as expenses
18 not to exceed \$60,000. (Id. ¶ 19.) The Maximum Settlement Amount also includes \$65,000 in
19 incentive payments to the named Plaintiffs,¹ and an estimated \$35,000 for administration costs.²
20 (Id. ¶¶ 46.) Finally, the Maximum Settlement Amount includes \$66,666.67 in penalties under
21 California's Private Attorneys General Act ("PAGA"); \$50,000 shall be paid to the California
22 Labor and Workforce Development Agency ("LWDA"), and \$16,666.67 shall be distributed to
23 California members based on the number of weeks each member worked in California between
24

25 ¹ The proposed allocation is as follows: \$20,000 to Plaintiff Lentini, \$20,000 to Plaintiff Leverage,
26 \$10,000 to Plaintiff Dana, \$10,000 to Plaintiff Benhardus, and \$5,000 to Plaintiff Powell.
(Settlement Agreement ¶ 46.)

27 ² At the hearing, the parties confirmed that this was a capped fee, and that the amount would not
28 go above \$35,000. The parties also stated that if it did appear that the amount would go over
\$35,000, the parties would notify the Court and get approval.

1 February 16, 2015 and the date of preliminary approval.³ (Id. ¶ 34.) This leaves a "Net Settlement
2 Amount" of \$1,910,833.33 for distribution to an estimated 909 class members. (Plfs.' Mot. at 19;
3 see also Settlement Agreement ¶¶ 27, 83.)

4 The Settlement provides for three classes: (1) the "California Class," which consists of
5 employees who worked for Defendants in California; (2) the "Non-California Rule 23 Class,"
6 which consists of employees who worked for Defendants in states outside of California⁴ under
7 whose laws Plaintiffs have alleged state-law claims in the proposed Fourth Amended Complaint;
8 and (3) the "FLSA Class," which consists of employees who worked for Defendants in all other
9 states. (Plfs.' Mot. at 2.) The California Class and Non-California Rule 23 Class are opt-out
10 classes, while the FLSA Class is an opt-in class. (Settlement Agreement ¶ 86a.)

11 Outside of California, the states are distributed into two tiers. "Tier 1 States" are Arizona,
12 Colorado, Florida, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Nevada, New Mexico,
13 New York, Oklahoma, Oregon, and Washington. (Settlement Agreement ¶ 49.) Tier 1 States "are
14 states whose state law claims alleged in the Complaint (and released under the Settlement) afford
15 protections greater than the FLSA, but not as protective as California." (Plfs.' Mot. at 3.) "Tier 2
16 States" are all remaining states and the District of Columbia. (Settlement Agreement ¶ 51.) These
17 two tiers do not match up with the Non-California Rule 23 Class and the FLSA Class; the Non-
18 California Rule 23 Class includes states outside of the Tier 1 States. (See Settlement Agreement
19 ¶¶ 31 (listing states included in the Non-California Rule 23 Class), 49 (listing states included in
20 Tier 1).)

21 In distributing the Settlement fund, the Settlement Administrator is to calculate the "Base
22 Weekly Payment," which is based on the number of weeks worked by all participating class
23 members. (Settlement Agreement ¶ 86(a).) California Class members will receive a settlement
24

25 ³ On June 12, 2017, Plaintiffs filed a supplemental brief stating that the settlement agreement was
26 submitted to the LWDA on April 10, 2017, but that they received no comments or
communications from the LWDA since. (Dkt. No. 81.)

27 ⁴ 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,
Wisconsin, and Wyoming. (Settlement Agreement ¶ 31.)

1 payment equal to 2.2 times the Base Weekly Payment, multiplied by the number of weeks worked
2 by that individual. (Id. ¶ 86(b).) Individuals in Tier 1 States will receive a settlement payment
3 equal to 1.3 times the Base Weekly Payment, multiplied by the number of weeks worked by that
4 individual. (Id.) Finally, individuals in Tier 2 States will receive a settlement payment equal to
5 the base Weekly Payment, multiplied by the number of weeks worked by that individual. The
6 multiplier is based on the greater protections and remedies available to individuals who work in
7 California and Tier 1 states. (Id.)

8 Once the Court grants preliminary approval, the Settlement Administrator is responsible
9 for giving notice of the Settlement to the covered class members via e-mail and physical mail.
10 (Settlement Agreement ¶ 70.) The Settlement Administrator will re-send notice packets that are
11 returned as undelivered and bearing a forwarding address. As to notice packets that are returned
12 as undelivered and not bearing a forwarding address, the Settlement Administrator will conduct a
13 computer/SSN and "skip trace" search to find an updated address to mail the notice packet to.
14 (Id.)

15 The California Class and Non-California Rule 23 Class are bound by the settlement unless
16 they timely submit an exclusion letter. (Settlement Agreement ¶ 73.) If the submitted exclusion
17 letter has any defects, the Settlement Administrator will advise the individual about the defects
18 and request that those defects be cured. (Id. ¶ 73(f).) Failure to cure will result in the exclusion
19 letter being considered invalid, and that individual will be bound by the settlement. (Id. ¶ 73(g).)
20 Members of the FLSA Class must submit an opt-in form in order to participate in the settlement.
21 (Id. ¶ 87.) Participating class members may also submit objections. (Id. ¶ 72.)

22 All California Class and Non-California Rule 23 Class members who do not timely opt
23 out, as well as all individuals who opted into the FLSA Class, will receive a settlement check. (Id.
24 ¶ 86a.) The settlement check will bear a disclaimer stating: "By cashing this check you are
25 agreeing to the terms of the settlement reached in Leverage, et al. v. Traeger Pellet Grills LLC, et
26 al. Case No. 16-cv-784 (N.D. Cal.) and are waiving any claims you may have under the Fair Labor
27 Standards Act." (Id. (all caps omitted).) Cashing the settlement check will be deemed an opt-in
28 for purposes of settling and releasing FLSA claims, as to California Class and Non-California

1 Rule 23 Class members. If California Class and Non-California Rule 23 Class members do not
2 cash the settlement check, they will still be bound by the settlement and release their state claims,
3 but not their FLSA claims. (Id.) Checks must be cashed within 180 days. (Id. ¶ 95.) The
4 Settlement Administrator is responsible for mailing and e-mailing reminders to individuals who do
5 not cash their checks 60 days before the checks become void. (Id. ¶ 96.) Pursuant to the parties'
6 revised settlement agreement, the Court and the parties will determine if funds from uncashed
7 checks should be redistributed to the participating class members on a pro rata basis, or if the
8 funds should be sent to the cy pres beneficiary The Employee Rights Advocacy Institute for Law
9 & Policy, "an organization that advocates for employee rights in the American workplace."
10 (Revised Settlement Agreement ¶ 95, Dkt. No. 84-1.) No money reverts to Defendants.

11 As part of the settlement, Plaintiffs agree to file a Fourth Amended Complaint, which will
12 add Mr. Tracy Powell as a named plaintiff and will add labor claims from the following states:
13 Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa,
14 Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada,
15 New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma,
16 Oregon, Pennsylvania, Rhode Island, Virginia, Washington, West Virginia, Wisconsin, and
17 Wyoming. (Settlement Agreement ¶ 61; see also Settlement Agreement, Exh. A ("Proposed
18 Fourth Amended Compl.") ¶ 1.) The Settlement Agreement will release: (1) "Released California
19 Claims," or "any and all claims that were or could have been asserted under California law by
20 California Class members based on the factual allegations in the Complaint, including but not
21 limited to claims for unpaid overtime wages, unpaid minimum wages . . . , meal period premiums,
22 rest period premiums, wage statement penalties, unlawful deductions from wages, waiting time
23 penalties, civil penalties under the PAGA, and unfair competition under California Business &
24 Professions Code § 17200;" (2) "Released FLSA Claims," or "any and all claims that were or
25 could have been asserted under the Fair Labor Standards Act . . . by FLSA Class Members based
26 on the factual allegations in the Complaint, including but not limited to claims for non-payment of
27 wages, minimum wages, overtime wages; liquidated damages; attorney's fees, costs and expenses;
28 pre- and post-judgment interest;" and (3) "Released Non-California Rule 23 Claims," or "any and

1 all claims that were or could have been asserted under the wage and hour laws and regulations of
2 all state laws (other than California) invoked in the [Fourth Amended] Complaint . . . and arising
3 from the factual allegations in the Complaint, including all state or common law claims under the
4 non-California wage and hour laws invoked in the [Fourth Amended] Complaint that could have
5 been asserted by Covered Class Members based on the misconduct alleged in the complaint,
6 including but not limited to claims for unpaid wages, attorneys' fees, costs and expenses;
7 liquidated damages; civil penalties; equitable remedies; pre- or post-judgment interest; or damages
8 or relief of any kind available under the non-California wage and hour laws invoked in the
9 Complaint." (Settlement Agreement ¶¶ 40-42.) The released claims do not include claims for
10 retaliation or violation of equal pay provisions. (Id.)

11 II. LEGAL STANDARD

12 Per Federal Rule of Civil Procedure 23(e), "[t]he claims, issues, or defenses of a certified
13 class may be settled, voluntarily dismissed, or compromised only with the court's approval." The
14 purpose of requiring court approval "is to protect the unnamed members of the class from unjust
15 or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th
16 Cir. 2008). Thus, before approving a settlement, the Court must conclude that the settlement is
17 "fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026
18 (9th Cir. 1998). This inquiry:

19 requires the district court to balance a number of factors: the
20 strength of the plaintiff's case; the risk, expense, complexity, and
21 likely duration of further litigation; the risk of maintaining class
22 action status throughout the trial; the amount offered in settlement;
23 the extent of discovery completed and the stage of the proceedings;
24 the experience and views of counsel; the presence of a government
25 participant; and the reaction of the class members to the proposed
26 settlement.

27 *Id.*; see also *Churchill Vill. L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (same).

28 Furthermore, the Ninth Circuit has recognized that where no class has been formally
certified, "there is an even greater potential for a breach of fiduciary duty owed the class during
settlement. Accordingly, such agreements must withstand an even higher level of scrutiny for
evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e)

1 before securing the court's approval as fair." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d
2 935, 947 (9th Cir. 2011); see also Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012)
3 ("when . . . the settlement takes place before formal class certification, settlement approval
4 requires a 'higher standard of fairness'"). This more "exacting review" is required "to ensure that
5 class representatives and their counsel do not secure a disproportionate benefit at the expense of
6 the unnamed plaintiffs who class counsel had a duty to represent." Lane, 696 F.3d at 819 (internal
7 quotation omitted); see also Hanlon, 150 F.3d at 1026 ("The dangers of collusion between class
8 counsel and the defendant, as well as the need for additional protections when the settlement is not
9 negotiated by a court[-]designated class representative, weigh in favor of a more probing inquiry
10 than may normally be required under Rule 23(e)").

11 When applying Rule 23(e), the courts use a two-step process for the approval of class
12 action settlements. First, the Court decides whether the class action settlement deserves
13 preliminary approval. Second, after notice is given to class members, the Court determines
14 whether final approval is warranted. See O'Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110,
15 1121-22 (N.D. Cal. 2016). At the preliminary approval stage, courts in this district "have stated
16 that the relevant inquiry is whether the settlement falls within the range of possible approval or
17 within the range of reasonableness." Cotter v. Lyft, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016)
18 (internal quotation omitted). "In determining whether the proposed settlement falls within the
19 range of reasonableness, perhaps the most important factor to consider is plaintiff's expected
20 recovery balanced against the value of the settlement offer." Id.; see also O'Connor, 201 F. Supp.
21 3d at 1122. This determination "requires evaluating the relative strengths and weaknesses of the
22 plaintiffs' case; it may be reasonable to settle a weak claim for relatively little, while it is not
23 reasonable to settle a strong claim for the same amount." Cotter, 176 F. Supp. at 936 (citing In re
24 High-Tech Emp. Antitrust Litig., Case No: 11-cv-2509-LHK, 2014 WL 3917126, at *4 (N.D. Cal.
25 Aug. 8, 2014).

26 In addition to considering whether the settlement falls within the range of reasonableness,
27 courts in this district also consider whether the settlement: "(1) appears to be the product of
28 serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; [and] (3) does not

1 improperly grant preferential treatment to class representatives or segments of the class." In re
2 Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation
3 omitted). With respect to the level of scrutiny applied to this determination, "district courts often
4 state or imply that scrutiny should be more lax." Cotter, 193 F. Supp. 3d at 1035-36. Several
5 courts in this district have begun to question that "lax review" as "mak[ing] little practical sense."
6 Id. at 1036. Instead, these courts suggest that "scrutinizing the agreement carefully at the initial
7 stage and identifying any flaws that can be identified . . . allows the parties to decide how to
8 respond to those flaws (whether by fixing them or opting not to settle) before they waste a great
9 deal of time and money in the notice and opt-out process." Id.

10 III. DISCUSSION

11 A. Class and Collective Action Certification

12 i. Rule 23 "Opt-Out" Class Action

13 Before determining the fairness of a class action settlement, the Court must as a threshold
14 matter "ascertain whether the proposed settlement class satisfies the requirements of Rule 23(a)
15 of the Federal Rules of Civil Procedure applicable to all class actions, namely: (1) numerosity, (2)
16 commonality, (3) typicality, and (4) adequacy of representation." Hanlon, 150 F.3d at 1019. The
17 Court must also find that at least one requirement of Rule 23(b) is satisfied. Id. at 1022.

18 The Court finds that for the purposes of approval of the class action settlement, the Rule
19 23(a) requirements are satisfied. First, numerosity exists because the settlement class includes
20 approximately 909 class members. See *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 536
21 (N.D. Cal. 2012) ("While there is no fixed number that satisfies the numerosity requirement, as a
22 general matter, a class greater than forty often satisfies the requirement, while one less than
23 twenty-one does not"). Second, commonality exists because there are "questions of fact and law
24 which are common to the class," namely whether Defendants improperly classified the class
25 members as "exempt," and failed to provide meal and rest periods, resulting in violations for
26 waiting time and wage statement penalties. Fed. R. Civ. P. 23(a)(2); see also Hanlon, 150 F.3d at
27 1019-20 (noting that the commonality requirement is "permissive" and "has been construed
28 permissively"). Third, typicality exists because the named Plaintiffs' claims are "reasonably co-

1 extensive with those of absent class members," as the named Plaintiffs were employed by
2 Defendants in the same positions as the absent class members, and were subject to the same
3 classification policies. See Hanlon, 150 F.3d at 1020. Finally, adequacy exists because there is no
4 evidence that the named Plaintiffs and Plaintiffs' counsel have any conflicts of interest with the
5 proposed classes, or that Plaintiffs and Plaintiffs' counsel will not vigorously prosecute the case on
6 behalf of the classes. See *id.* ("Resolution of two questions determines legal adequacy: (1) do the
7 named plaintiffs and their counsel have any conflicts of interest with other class members and (2)
8 will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the
9 class?").

10 The Court also concludes that the Rule 23(b)(3) requirement is satisfied. Under Rule
11 23(b)(3), the Court must find that "the questions of law or fact common to class members
12 predominate over any questions affecting only individual members, and that a class action is
13 superior to other available methods for fairly and efficiently adjudicating the controversy." Here,
14 the Court finds that predominance is satisfied because Plaintiffs' claims arise from Defendants'
15 alleged policies of misclassifying workers as being "exempt," as well as policies of not providing
16 meal and rest periods. Further, the Court finds that superiority is satisfied because the alternative
17 method to a class action likely involves "individual claims for a small amount of . . . damages,"
18 resulting in most cases involving "litigation costs [that] dwarf potential recovery." Hanlon, 150
19 F.3d at 1023.

20 The Court therefore provisionally certifies the California Class and Non-California Rule 23
21 Class under Rule 23 for settlement purposes.

22 **ii. FLSA "Opt-In" Class**

23 If an employer fails to comply with the FLSA, 29 U.S.C. § 216(b) allows an aggrieved
24 employee to bring a collective action on behalf of herself and "similarly situated" employees.
25 Most courts in this Circuit use a two-step approach for determining whether employees are
26 similarly situated under § 216(b). At the first step, "the court determines whether the proposed
27 class should be conditionally certified for the sole purpose of sending out notice of the proposed
28 action to the potential class members." *Feaver v. Kaiser Found. Health Plan, Inc.*, Case No. 15-

1 cv-890-EMC, 2016 WL 324176, at *3 (N.D. Cal. Jan. 27, 2016). "The standard for the first step is
2 a lenient one that typically results in certification." *Woods v. Vector Mktg. Corp.*, No. C-14-264-
3 EMC, 2015 WL 1198593, at *3 (N.D. Cal. Mar. 16, 2015) (internal quotations and citations
4 omitted). To satisfy this standard, the plaintiff must simply establish that an "identifiable factual
5 or legal nexus binds together the various claims of the class members in a way that hearing the
6 claims together promotes judicial efficiency and comports with the broad remedial policies
7 underlying the FLSA." *Russell v. Wells Fargo Co.*, No. C07-3993 CW, 2008 WL 4104212, at *5
8 (N.D. Cal. Sept. 3, 2008) (internal quotation omitted). At the second step, the party opposing
9 certification moves to decertify the class after discovery is completed, at which point the Court
10 makes factual determinations regarding the "propriety and scope" of the class. *Feaver*, 2016 WL
11 324176, at *4.

12 For purposes of approval of a FLSA settlement, courts in this district have applied the
13 lenient first step standard. E.g., *Viceral v. Mistras Grp., Inc.*, Case No. 15-cv-2198-EMC, 2016
14 WL 5907869, at *5 (N.D. Cal. Oct. 11, 2016) (applying the conditional certification standard and
15 granting provisional certification of a FLSA class for approval of a settlement); see also *Bower v.*
16 *Cycle Gear, Inc.*, Case No. 14-cv-2712-HSG, 2015 WL 13025767, at *1 (N.D. Cal. Dec. 8, 2015)
17 (noting that the Court had previously conditionally certified a FLSA collective action in granting
18 preliminary approval of a settlement agreement). Here, there is an identifiable factual and legal
19 nexus that binds together the claims of the class, namely Defendants' alleged policies of
20 misclassifying workers as being "exempt," as well as policies of not providing meal and rest
21 periods. The Court therefore conditionally certifies the FLSA collective action for settlement
22 purposes.

23 **B. Preliminary Approval Factors**

24 **i. Range of Reasonableness**

25 In considering whether the Settlement Agreement falls within the range of possible
26 approval, the Court "primarily consider[s] plaintiffs' expected recovery balanced against the value
27 of the settlement offer." *Viceral*, 2016 WL 5907869, at *7. Here, the Settlement Agreement
28 results in a significant discount on the claims being released, as the "Maximum Settlement

1 Amount" of \$2,850,000 represents approximately 18% of the potential "full-verdict value" of
2 Plaintiffs' claims. Thus, the Settlement Agreement results in an 82% discount.⁵

3 Courts in this district have approved settlements with similar discounts, depending on the
4 strength of the plaintiff's case and the risks in pursuing further litigation. See *Viceral*, 2016 WL
5 5907869, at *7 (approving case which represented 8.1% of the total verdict value). In the instant
6 case, the parties have identified a number of risks that make the proposed settlement fall within a
7 range of reasonableness.

8 a. Misclassification

9 Significantly, the parties identify risks with Plaintiffs' underlying misclassification theory.
10 Plaintiffs' lawsuit challenges Defendants' practice of classifying Brand Ambassadors as exempt
11 under the "outside sales" exemption. Under federal law, an outside salesperson is exempt where
12 the employee: (1) makes sales or "obtain[s] orders or contracts for services or for the use of
13 facilities for which a consideration will be paid by the client or customer," and (2) is customarily
14 and regularly engaged away from the employer's place of business. 29 C.F.R. § 541.500(a).
15 Under California law, an employee is considered an exempt outside salesperson if the person
16 "customarily and regularly works more than half the time away from the employer's place of
17 business selling tangible or intangible items or obtaining orders or contracts for products, services,
18 or use of facilities." 8 C.C.R. § 11040(2)(M). Plaintiffs' misclassification theory turns on their
19 arguments that: (1) workers are engaged in "promotional" rather than "sales" work, (2) Costco
20 should be considered Defendant Traeger's "place of business," and (3) workers' hours and conduct
21 were controlled to such an extent that it undermined their exempt status. (Supp. Brief at 5.)

22 With respect to the first argument, Plaintiffs face the risk that the Court could disagree that
23 they were engaged in "promotional" rather than "sales" work, following *Christopher v. SmithKline*
24 *Beecham Corp.*, 567 U.S. 142 (2012). There, the Supreme Court considered the definition of
25 "sale," which was defined by the statute as "'any sale, exchange, contract to sell, consignment for
26 sale, shipment for sale, or other disposition.'" *Id.* at 2162 (quoting 29 U.S.C. §203(k).) The

27 _____
28 ⁵ The Net Settlement Amount is \$1,910,833.33, which represents approximately 12% of the
estimated full verdict value, or an 88% discount.

1 Supreme Court rejected the Department of Labor's interpretation that a "sale" requires a transfer of
2 title, finding that limiting the definition of "sale" to "contract[s] for the exchange of goods or
3 services in return for value" would be "much too narrow." *Id.* at 2169, 2171. Instead, the
4 Supreme Court noted that the definition of "sale" included "other disposition," a catchall phrase
5 that "represent[s] an attempt to accommodate industry-by-industry variations in methods of selling
6 commodities." *Id.* at 2171. The Supreme Court applied this understanding to the petitioners, who
7 were pharmaceutical salespersons who would obtain nonbinding commitments from physicians to
8 prescribe their employer's drugs. *Id.* at 2172. In finding that these salespersons fell within the
9 exempt salesperson status, the Supreme Court reasoned that obtaining nonbinding commitments
10 was the most that could be done given "the unique regulatory environment within which
11 pharmaceutical companies must operate" *Id.* The Supreme Court also looked to other
12 external indicia that supported a salesperson status, including that the petitioners were hired for
13 their sales experience, were trained to obtain the maximum commitment possible, worked away
14 from the office, had minimal supervision, and were rewarded with incentive compensation. *Id.* at
15 2172-73. While the Supreme Court did focus on the "unique regulatory environment" that the
16 pharmaceutical salespersons were operating in, Plaintiffs in the instant case ran the risk that the
17 Supreme Court's general reasoning could apply to their circumstance as well, which would result
18 in Plaintiffs obtaining no or limited monetary relief.

19 Plaintiffs also ran the risk that a jury would find that they were not controlled to such an
20 extent that it would undermine exempt status. While Plaintiffs allege that their hours and
21 activities were controlled by Defendant Traeger, Defendants point to the fact that no Traeger
22 employees were present to supervise Brand Ambassadors, and that there are other Brand
23 Ambassadors who would dispute Plaintiffs' claim that breaks were discouraged or not allowed.
24 (Supp. Brief at 9.) Such factual disputes create a risk of an adverse verdict. Defendants also argue
25 that federal courts consider five factors which determine whether an employee is an outside
26 salesperson, specifically: (1) whether the job was advertised as a sales position and the worker
27 recruited based on sales experience; (2) whether the employee received specialized sales training;
28 (3) whether compensation was based on commissions; (4) whether the employee independently

1 solicits new business; and (5) the level of supervision. *Barnick v. Wyeth*, 522 F. Supp. 2d 1257,
2 1262 (C.D. Cal. 2007). Defendants contend many of these factors support exempt status because:
3 (1) the job was expressly advertised as an "Outside Sales Professional;" (2) applicants participated
4 in 3- to 5-day trainings where they received specialized sales training; (3) compensation was based
5 solely on commissions; (4) Brand Ambassadors could solicit new business by attending special
6 events; and (5) Brand Ambassadors were not supervised while working at roadshows or special
7 events. (Supp. Brief at 10.) This too created a significant risk that Plaintiffs would not be able to
8 establish that they were misclassified, which would result in no or very limited class recovery.

9 Plaintiffs also challenge Defendants' policy of classifying the Mall Group as exempt. This
10 too, ran significant risks. Under federal law, a commissioned employee working at a "retail or
11 service establishment" who is paid on a commission basis does not need to be paid at an overtime
12 rate if "[t]he 'regular rate' of such employee [is] more than one and one-half times the" applicable
13 minimum wage, and more than half of his compensation in a "representative period" is
14 commissions. 29 C.F.R. § 779.412. California law also provides for an inside sales exemption
15 where an employee's earnings exceed one and one-half times the minimum wage if more than half
16 that employee's compensation is made up of commissions. 8 C.C.R. § 11040(3)(D). Defendants
17 argue that the Mall Group satisfies both requirements, a point that Plaintiffs do not appear to
18 dispute.⁶ (Supp. Brief at 11.)

19 In addition to risks on the merits, the parties point to risks with class certification on these
20 issues, noting that there was "anticipated divergent testimony over the nature of putative class
21 members' job duties and the reasonable expectations of the job." (Supp. Brief at 13.) As noted by
22 the Ninth Circuit, "the fact that an employer classifies all or most of a particular class of
23 employees as exempt does not eliminate the need to make a factual determination as to whether
24 class members are actually performing similar duties." *In re Wells Fargo Home Mortg. Overtime*
25 *Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009) (internal quotation omitted). Using the federal

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28 ⁶ In their complaint, Plaintiffs did not identify the legal basis underlying the exempt status for Mall
Group workers, stating that "the exact rationale for the classification is unknown to Plaintiffs."
(TAC ¶ 38.)

1 outside salesperson exemption as an example, the Ninth Circuit observed that even if there was a
2 uniform exemption policy, "courts must still ask where the individual employees actually spent
3 their time." *Id.*; see also *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946-47 (9th Cir.
4 2009) (agreeing with district court decision to not certify a class, finding that the "[p]laintiffs'
5 claims will require inquiries into how much time each individual [consultant] spent in or out of the
6 office and how the [consultant] performed his or her job; all of this where the [consultant] was
7 granted almost unfettered autonomy to do his or her job," and that this could result in "several
8 hundred mini-trials with respect to each [consultant]'s actual work performance"). These risks of
9 certification being denied were not minimal.

10 b. Specific Violations

11 Even if Plaintiffs succeeded in certifying the misclassification question and establishing
12 that they were misclassified, Plaintiffs faced other risks. For example, with respect to Plaintiffs'
13 meal and rest period claims, Plaintiffs confirmed at the hearing that their claim was based solely
14 "on an unwritten policy/practice of discouraging meal and rest periods," which Defendants were
15 prepared to counter with testimony from other putative class members stating that there was no
16 such policy and that they were free to take meal and rest periods. (Supp. Brief at 15.) Plaintiffs
17 submit that such "testimony would be difficult to overcome, particularly given that Plaintiffs and
18 other putative class members generally were not supervised directly by any Traeger employee, and
19 . . . were typically working independently." (*Id.*)

20 As to Plaintiffs' derivative California waiting time and wage statement penalties, the
21 parties dispute whether non-California class members would be entitled to such penalties. (*Id.* at
22 19.) While there is California Supreme Court authority that held that California's overtime laws
23 apply to nonresident workers temporarily in California who are employed by California
24 employers, that same authority observed that the assumption that "if out-of-state employers must
25 pay overtime under California law, they must also comply with every other technical aspect of
26 California wage law" as being "of doubtful validity." *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191,
27 1202 (9th Cir. 2011). As applied in this case, where Defendants are not California employers,
28 there is risk to Plaintiffs that non-California class members would not be able to obtain waiting

1 time and wage statement penalties. Moreover, even if non-California class members could obtain
2 penalties, waiting time and wage statement penalties are available only in the absence of a "good
3 faith dispute" as to whether wages are owed. See *Woods v. Vector Mktg. Corp.*, No. C-14-264-
4 EMC, 2015 WL 2453202, at *2-5 (granting summary judgment to the employer on the penalty
5 claims because there was a good faith dispute as to whether such wages were owed, such that the
6 plaintiffs could not as a matter of law establish a "knowing and intentional" violation of § 226
7 (wage statement penalties) and a "willful" violation of § 203 (waiting time penalties)). Thus, there
8 were substantial risks of no recovery to any Plaintiffs on the penalty claims, which altogether were
9 estimated to be worth over \$4.4 million, or approximately one-fourth of the full verdict value.
10 (See Plfs.' Mot. at 14-15; Ord. at 3.)

11 In addition, Defendants point to possible overestimating of the damages, which lowers the
12 value of the claims even if Plaintiffs were to succeed on the merits. (See Supp. Brief at 14
13 (arguing that Plaintiffs overestimated the overtime damages by 15-20%); 17 (arguing that
14 Plaintiffs overestimated the minimum wage claim by 33%).

15 In total, given the risks both to the underlying misclassification theory and the specific
16 claims themselves, the Court finds that the proposed settlement -- which represents 18% of the
17 estimated full verdict value -- falls within the range of reasonableness. This factor thus weighs in
18 favor of preliminary approval.

19 **ii. Serious, Informed Negotiations**

20 Next, the Court considers how the parties arrived at the settlement, specifically whether the
21 settlement was "the product of an arms-length, non-collusive, negotiated resolution." *Rodriguez v.*
22 *W. Publ'g Co.*, 563 F.3d 948, 965 (9th Cir. 2009). Here, the parties' settlement was conducted
23 after Defendants provided extensive payroll records, schedules, class numbers, total commissions,
24 locations worked, employee handbooks, wage and hour policies, and other records and data to
25 Plaintiffs' counsel, which allowed Plaintiffs' counsel to evaluate the claims on a class wide basis.
26 (Haines Decl. ¶ 11, Dkt. No. 74-1.) After this production, the parties attended mediation with Mr.
27 Mark S. Rudy, during which each party "supplied Mr. Rudy with detailed mediation statements
28 outlining their views of the strengths and weaknesses of each claim and defense." (Haines Decl. ¶

1 12.) Although the parties did not resolve the case at mediation, they continued their settlement
2 discussions and ultimately agreed, in principle, to the instant agreement, with the help of a formal
3 mediator's proposal from Mr. Rudy. (Id.) The Court finds that the parties reached the settlement
4 via an arms-length, non-collusive, negotiated resolution, and that this factor weighs in favor of
5 preliminary approval.

6 **iii. No Obvious Deficiencies**

7 In its order for supplemental briefing, the Court raised concerns about the cy pres
8 beneficiary, the amount of attorney's fees and incentive payments, and the objection procedures.

9 First, as to the cy pres beneficiary, the Court questioned whether the parties' original
10 selection of The Road Home -- a Utah-focused organization -- was appropriate, given the Ninth
11 Circuit's requirement that a cy pres distribution "must account for the nature of the plaintiffs'
12 lawsuit, the objectives of the underlying statutes, and the interests of the silent class members,
13 including their geographic diversity." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir.
14 2011) (emphasis added). At the hearing, the parties agreed to select The Employee Rights
15 Advocacy Institute for Law & Policy as an alternative cy pres beneficiary, which is reflected in the
16 revised settlement agreement. (See Revised Settlement Agreement ¶ 95.) The Court finds that
17 selection of this alternative is appropriate.

18 The Court also questioned whether uncashed settlement funds should be donated to the cy
19 pres beneficiary, rather than being distributed to the class if that amount was significant, i.e., over
20 \$100,000. (Ord. at 5.) The parties responded that such a redistribution could result in a "windfall
21 to certain class members," but did not explain how. (Supp. Brief at 25.) At the hearing, the
22 parties proposed that following final approval, the parties would provide a declaration which
23 explains how many checks were uncashed. Based on the amount, the parties and the Court could
24 then decide if a redistribution was appropriate, or if the amount should go to the cy pres
25 beneficiary. The parties have reflected this change in the revised settlement agreement. (Revised
26 Settlement Agreement ¶¶ 86a, 95.)

27 Second, the Court raised concerns about the amount of the attorney's fees and incentive
28 payments. With regard to the attorney's fees, Plaintiffs assert that their lodestar to date is

1 approximately \$474,000. (Supp. Brief at 1.) As Plaintiffs' counsel intends to seek \$712,500, this
2 represents an approximately 1.5 multiplier on the lodestar. (See Plfs.' Mot. at 19.) The Court has
3 some concerns over whether such a multiplier is warranted given that the settlement represents
4 approximately 18% of the full verdict value, but will reserve this consideration for Plaintiffs'
5 motion for attorney's fees. See *Viceral*, 2016 WL 5907869, at *10 ("while the Court has serious
6 concerns about the fee award, the requested award is not a basis for denial of settlement approval
7 at this juncture. The motion for fees will be dealt with at the appropriate time"). Likewise, the
8 Court will review the incentive payments at the final approval stage; the Court notes, however,
9 that other courts in this Circuit have raised concerns where an incentive award consisted of one
10 percent of the common fund. *Ontiveros v. Zamora*, 303 F.R.D. 356, 365-66 (E.D. Cal. 2014) ("A
11 \$20,000 incentive award consisting of one percent of the common fund is unusually high, and
12 some courts have been reluctant to approve incentive awards constituting such a great portion of
13 the common fund"); *Ko v. Natura Pet Prods., Inc.*, No. C 09-2619 SBA, 2012 WL 3945541, at
14 *15 (N.D. Cal. Sept. 10, 2012) (reducing requested incentive award of \$20,000 to \$5,000).

15 Third, the Court raised concerns regarding objections to the Settlement Agreement. The
16 parties have modified the notices to indicate that objections should be submitted to the Settlement
17 Administrator, rather than the Court, and that these objections should be filed with the Court no
18 later than fourteen days before the hearing. (Supp. Brief at 30; see also Supp. Haines Decl., Exhs.
19 2-A at 6, 3-A 6, Dkt. No. 79-1.) In addition, the Court requested further briefing on whether it
20 was appropriate to, for class action members who submitted both an objection and an opt-out,
21 disregard the opt-out and consider only the objection. (Ord. at 7.) The parties proposed
22 "remov[ing] this language from the Notice altogether, and to deal with any objection/opt-out on a
23 case-by-case basis by having the Settlement Administrator contact the Settlement Class member to
24 determine whether the Settlement Class members wishes [sic] (a) for the objection to be heard or
25 (b) to exclude himself/herself from the settlement." (Supp. Brief at 32.) This change is reflected
26 in the revised settlement agreement and the class action notice. (Revised Settlement Agreement ¶
27 73; Dkt. No. 84-3 at 6.)

28 The Court also questioned language in the FLSA notice, which states: "If you submit an

1 objection, you will remain bound by the settlement if finally approved. If you do not want to be
2 bound by the settlement if finally approved, you must not opt in or object to the settlement." The
3 Court asked why an objection should be deemed to be an opt-in to the collective action. (Ord. at
4 8.) In their supplemental brief, the parties stated that this sentence "does not transform an
5 objection into an FLSA opt-in," but "simply reiterates to potential FLSA Class members that they
6 may not object to the Settlement unless they opt-in to the FLSA collective action, and that, if they
7 so object and their objection is overruled, they will still be deemed an FLSA opt-in and will
8 remain a part of (and bound by the releases in) the FLSA collective action settlement." (Supp.
9 Brief at 33.) At the hearing, the Court proposed modifying the language to state: "If you opt-in
10 and submit an objection, you will still remain bound by the settlement if finally approved. If you
11 do not want to be bound by the settlement if finally approved, you must not opt in to the
12 settlement." The parties agreed to the change, and modified the FLSA notice accordingly. (See
13 Dkt. No. 84-5 at 6.)

14 The Court finds that the parties' changes have addressed the Court's main concerns, and
15 thus this factor weighs in favor of preliminary approval.

16 **iv. Preferential Treatment**

17 Finally, the Court considers whether the Settlement Agreement provides preferential
18 treatment to any class members. The Court concludes that the Settlement Agreement does not.
19 Although the Settlement Agreement provides for multipliers depending on if individuals worked
20 in California or certain other states, those multipliers reflect the additional claims -- and thus, the
21 additional value of those claims -- that the class members are releasing as part of this Settlement.
22 The parties have also adequately explained the rationale for the multipliers, which is based on the
23 value of the claims depending on whether the individual worked a particular work week in
24 California, a Tier 1 State, or a Tier 2 State. (Supp. Briefing at 22-23.) Moreover, although
25 individuals in Tier 2 States do not receive a multiplier, despite releasing claims under state
26 statutes, those state statutes do not provide additional protections beyond those offered by the
27 FLSA, such that the release of those claims would not require a multiplier. (Id. at 23.) Thus, the
28 proposed multipliers do not result in preferential treatment, but instead reflect the different values

1 of the claims at issue, and this factor weighs in favor of preliminary approval.

2 **v. Notice Procedure**

3 The Court has reviewed the content of the proposed notices, including the redline changes
4 submitted with the parties' supplemental brief, and finds that they are adequate to inform the
5 putative class and collective action members of the terms of the Settlement Agreement and their
6 ability to object. (See Dkt. No. 84.) The Court therefore approves the proposed notice procedures.

7 **IV. CONCLUSION**

8 The Court finds that based on the above factors, preliminary approval is warranted, subject
9 to the additional changes to the notices being made. The Court therefore GRANTS preliminary
10 approval of the parties' proposed Settlement Agreement, including the provisional certification of
11 the class and collective action, as well as the filing of the proposed Fourth Amended Complaint.

12 Plaintiffs shall file the proposed Fourth Amended Complaint on the docket as a separate entry.

13 The Court APPOINTS, for settlement purposes only, David Leverage, Michael Lentini, Peter
14 Dana, Chris Benhardus, and Tracy Powell as class representatives; Haines Law Group, APC and
15 Kilgore & Kilgore, PLLC as class counsel; and Simpluris, Inc. as Settlement Administrator. The
16 Court APPROVES the notice provided by the parties. (See Dkt. No. 84.) The Court sets the

17 following schedule:

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Action:	Date:
Defendants to provide Class Member list to Settlement Administrator	7 business days from the date of this order
Settlement Administrator to mail Notice Packets	10 business days after receiving Class Member List
Class Counsel to file Motion for Attorney's fees, costs, and class representative service awards	14 days before Response Deadline
Deadline for Class Members to opt-in (FLSA class members), opt-out (California and Non-California Rule 23 class members), and/or object to the Settlement Agreement	60 days after mailing of Notice Packets
Plaintiffs to file Motion for Final Settlement Approval	October 12, 2017
Final Approval Hearing	November 16, 2017 at 11:00 a.m.

IT IS SO ORDERED.

Dated: June 28, 2017


KANDIS A. WESTMORE
United States Magistrate Judge