UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

WILMA FOSTER, et al.

Plaintiff,

v.

ADVANTAGE SALES & MARKETING, LLC.,

Defendant.

Case No. 18-cv-07205-LB

FINAL APPROVAL ORDER

Re: ECF No. 51, 58

INTRODUCTION

This is an overtime-pay case under federal and California law: a nationwide collective action under the Federal Labor Standards Act ("FLSA") and a California class action under Federal Rule of Civil Procedure 23.[1] The plaintiffs claim that their employer, defendant Advantage Sales and Marketing, LLC, d/b/a Advantage Solutions, misclassified them as exempt under the FLSA and California law and so failed to pay requisite compensation. The parties entered into a settlement agreement, and the court previously granted the plaintiffs' unopposed motion for preliminary approval of the proposed settlement.[2] The plaintiffs moved for final approval of the settlement.[3]

[1] SAC – ECF No. 49 at 6–7. Citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] Order – ECF No. 48.

[3] Mot. – ECF No. 58.

The court held a fairness hearing on May 28, 2020, finds the settlement fair, adequate, and reasonable, and approves the final settlement, including fees, costs, and service awards.

STATEMENT

1. The Lawsuit

On November 28, 2018, named plaintiff Wilma Foster filed this wage-and-hours lawsuit on behalf of employees who worked for Advantage as Customer Development Managers-Retail ("CDMRs") as (1) a FLSA collective action on behalf of a nationwide collective and (2) a class action on behalf of a California class alleging violations of California law.[4] (Shortly after the plaintiff filed the complaint, Advantage reclassified CDMRs from exempt to non-exempt.[5]) The First Amended Complaint (filed on February 4, 2019) added a Private Attorney General Act ("PAGA") claim.[6] The Second Amended Complaint ("SAC") added Adam Thimons and Kimberly Schmidt as named plaintiffs.[7]

Advantage produced documents and data enabling the plaintiffs to make informed damage assessments, and on March 11, 2019, the parties met in person for a day-long settlement discussion, made progress, and ultimately were unable to settle that day.[8] On March 28, 2019, Advantage filed a motion to compel the opt-in plaintiffs to arbitration and to stay the PAGA claim.[9] The plaintiffs served requests for production relating to the motion to compel.[10] The parties ultimately agreed to a settlement conference and to postpone the plaintiffs' filing their opposition to the motion to compel, and the case was referred to Magistrate Judge Kandis

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[4] Compl. – ECF No. 1.

[5] Ho Decl. – ECF No. 58-1 at 2 (¶ 3).

[6] FAC – ECF No. 15 at 14–17 (¶¶ 87–93).

[7] SAC – ECF No. 49 at 2.; Consent Forms – ECF No. 14.

[8] Ho Decl. – ECF No. 42-1 at 3 (¶¶ 8–9).

[9] *Id.* (¶ 10); Mot. – ECF No. 25.

[10] Ho Decl. – ECF No. 42-1 at 3–4 (¶¶ 11–13).

Westmore for a settlement conference.[11] At the settlement conference on September 6, 2019, the parties reached a tentative agreement and memorialized the material terms on the record.[12] They finalized their long-form settlement agreement on November 7, 2019, and agreed to the filing of the SAC, and the plaintiffs thereafter filed the motion for preliminary approval of the settlement and leave to file the SAC.[13] The court granted the unopposed motion for preliminary approval and leave for plaintiffs to file the SAC.[14]

The plaintiffs moved for final approval of the settlement and for their attorney's fees and costs.[15] The court held a fairness hearing on May 28, 2020.

2. Settlement

2.1 Settlement Class

There are 59 California class members and 303 Non-California opt-in eligible plaintiffs.[16]

The California Rule 23 class is as follows:

> Individuals employed by Advantage Sales & Marketing LLC d/b/a Advantage Solutions as Customer Development Managers-Retail ("CDMR") in California during any workweek between January 1, 2017 and December 31, 2018 and who were classified as exempt.[17]

The nationwide FLSA collective is as follows:

> Individuals employed by Advantage Sales & Marketing LLC d/b/a Advantage Solutions as Customer Development Managers-Retail ("CDMR") outside of California during any workweek between January 1, 2017 and December 31, 2018 and who were classified as exempt, excluding, however, all California Class Members.[18]

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[11] Stipulation and Order – ECF No. 29.

[12] Minute Entry – ECF No. 37.

[13] Ho Decl. – ECF No. 42-1 at 4 (¶¶ 17–18); Settlement Agreement, Ex. A to *id.* at 19–45.

[14] Order – ECF No. 48.

[15] Mots. – ECF Nos. 51, 58.

[16] Longley Decl. – ECF No. 58-2 at 6 (¶ 16).

[17] Proposed Order – ECF No. 58-3 at 2; Settlement Agreement, Ex. A to Ho Decl. – ECF No. 42-1 at 21 (§ 1.3).

[18] Proposed Order – ECF No. 58-3 at 2; Settlement Agreement, Ex. A to Ho Decl. – ECF No. 42-1 at 23 (§§ 1.13–1.14).

The settlement agreement specifies the following definitions for the class:

> The "California Class" and "California Class Members" means all individuals who are identified by Defendant as having worked as exempt Customer Development Managers-Retail ("CDMR") for Defendant in California during any workweek between January 1, 2017 and December 31, 2018.
>
> . . .
>
> "Non-California Opt-in Eligible Plaintiffs" are the individuals identified by Defendant as having worked as CDMRs in any state other than California during any workweek between January 1, 2017 and December 31, 2018. Non-California Opt-in Eligible Plaintiffs will receive a Notice of Collective Action Settlement and, after, final approval of the settlement is granted, a check in the amount of their Individual Payment Amount minus any payroll taxes withheld.
>
> "Non-California Opt-in Plaintiffs" are all Non-California Opt-in Eligible Plaintiffs who elect to opt in to this action pursuant to 29 U.S.C. § 216(b) by cashing their settlement check, as set forth below.
>
> "Participating Claimants" means all California Class Members who do not timely request exclusion from California Class, and all Non-California Opt-in Plaintiffs.[19]

2.2 Settlement Amount and Allocation

The settlement fund is $1,209,652.[20] In the settlement agreement, it was $1,200,000, but 42 non-California CDMRs were inadvertently left off the mailing list, and Advantage funded an extra $9,652 that (with the reserve fund of $20,000) covered payments to them.[21] The $1,209,652 is allocated as follow: (1) $749,950 ($355,149 to the California class members and $394,801 to the Non-California opt-in eligible plaintiffs), with payments to individuals allocated pro rata based on work weeks; (2) $17,702 for administration costs; (3) $10,000 for the PAGA claim (deducted from the allocation to the California class members); (4) service awards to plaintiffs ($10,000 to Ms. Foster and $3,000 each to Mr. Thimons and Ms. Schmidt); (5) $400,000 for attorney's fees; and (6) $16,000 in costs.[22]

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[19] Settlement Agreement, Ex. A to Ho Decl. – ECF No. 42-1 at 21–23 (§§ 1.3, 1.13–1.15).

[20] Ho Decl. – ECF No. 58-1 at 3 (¶ 10).

[21] *Id.* (¶¶ 5–10); Settlement Agreement, Ex. A to Ho Decl. – ECF No. 42-1 at 30 (§ 2.7).

[22] Ho Decl. – ECF No. 58-1 at 3–4 (¶ 11); Longley Decl. – ECF No. 58-2 at 7 (¶ 22).

For the "Individual Payment Amounts" allocated based on workweeks, the payments will be allocated evenly (one-third each) to (1) wages (and Advantage will pay any employer payroll-tax obligations separately, in addition to the settlement fund), (2) interest, and (3) non-wage income (penalties, liquidated damages, and other non-wage recovery reported on an IRS Form 1099).[23]

For the 59 California Class members, the highest estimated individual award is $8,264.03, the lowest award is $612.99, and the median payment is $7,696.44.[24] For the 303 Non-California opt-in plaintiffs, the highest estimated individual award is $2,253.70, the lowest award is $3.10, and the median payment is $1,284.73.[25]

Funds from opt-out class members or their uncashed checks will be given to *cy pres* beneficiary Employee Rights Advocacy Institute for Law & Policy, a non-profit advocacy group for employee rights.[26] If the non-California CMDRs do not cash their checks, they will not be opting into the settlement, their claims will not be released, and Advantage will retain the funds.[27]

2.3 Release Provisions

The release is limited to the claims that were brought or could have been brought based on the facts alleged in the SAC.[28] The three named plaintiffs have a general release.[29]

2.4 Administration

The court appointed Atticus Administration to send the class notice, update addresses (including through skip traces on returned mail), and administer the settlement under the procedures in the settlement agreement.[30] Atticus complied with these procedures. On December 23, 2019, it sent the class notice and statements of workweeks by first-class mail to the 320

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[23] Settlement Agreement, Ex. A to Ho Decl. – ECF No. 42-1 at 33 (§ 2.7(e)).

[24] Longley Decl. – ECF No. 58-2 at 8 (¶ 25).

[25] *Id.*

[26] Settlement Agreement, Ex. A to Ho Decl. – ECF No. 42-1 at 34 (§ 2.7(g)).

[27] Ho Decl. – ECF No. 42-1 at 4–5 (¶ 20).

[28] Settlement Agreement, Ex. A to Ho Decl. – ECF No. 42-1 at 23–24 (§ 1.19), 39–40 (§ 4).

[29] *Id.* at 32 (§ 2.7(d)).

[30] Order – ECF No. 48.

settlement class members that Advantage identified.[31] The customized statements of workweeks had dates of employment and the estimated Individual Payment Amount.[32] If notices were returned as undeliverable, Atticus updated the addresses (through skip-tracing if necessary) and resent the notices.[33] In the end, Atticus mailed the notices to 318 California Class Members and non-California opt-in eligible plaintiffs (99.38% of the settlement class).[34]

In January 2020, four CDMRs contacted either plaintiff's counsel or Atticus and identified themselves as non-California opt-in eligible plaintiffs, and Atticus sent the notice packages to them in January 2020.[35] In February 2020, Advantage sent Atticus the data files for the 38 additional non-California opt-in eligible plaintiffs, and Atticus sent notice packages to them on February 5, 2020.[36] Of the 42 additional notices, three were undeliverable, and no address updates were identified.[37]

In sum, Atticus sent notices to 362 CDMRs: 59 California class members and 303 non-California opt-in eligible plaintiffs.[38] Of the 362 CDMRs, 357 (98.62%) received the notice packages.[39] No California class member objected or requested exclusion.[40]

ANALYSIS

1. Jurisdiction

The court has federal-question jurisdiction under 28 U.S.C. § 1331 for the FLSA claim and supplemental jurisdiction under 28 U.S.C. § 1367 for the state-law claims.

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[31] Longley Decl. – ECF No. 58-2 at 4 (¶¶ 7–8).
[32] *Id.* (¶ 9).
[33] *Id.* at 5 (¶ 10).
[34] *Id.*
[35] *Id.* (¶ 11).
[36] *Id.* (¶ 12).
[37] *Id.* at 6 (¶ 15).
[38] *Id.* (¶ 16).
[39] *Id.*
[40] *Id.* at 6 (¶ 18).

2. Certification of Settlement Class

The court determines whether the settlement classes meet the requirements for class certification first under Rule 23 and then under the FLSA.

2.1 Rule 23 Requirements

The court reviews the propriety of class certification under Federal Rule of Civil Procedure 23(a) and (b). When parties enter into a settlement before the court certifies a class, the court "must pay 'undiluted, even heightened, attention' to class certification requirements" because the court will not have the opportunity to adjust the class based on information revealed at trial. *Staton v. Boeing Co.*, 327 F.3d 938, 952–53 (9th Cir. 2003) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)); *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 557 (9th Cir. 2019).

Class certification requires the following: (1) the class is so numerous that joinder of all members individually is "impracticable;" (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and (4) the person representing the class will fairly and adequately protect the interests of all class members. Fed. R. Civ. P. 23(a); *Staton*, 327 F.3d at 953. Also, the common questions of law or fact must predominate over any questions affecting only individual class members, and the class action must be superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). All claims arise from the defendant's uniform practices, and thus liability can be determined on a class-wide basis. *Betorina v. Ranstad US, L.P.*, No. 15-cv-03646-EMC, 2017 WL 1278758, at *5 (N.D. Cal. Apr. 6, 2017).

The court finds (for settlement purposes only) that the proposed settlement classes meet the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy. Also, under Rule 23(b)(3) (and for settlement purposes only), common questions predominate over any questions affecting only individual members, and a class action is superior to other available methods.

First, there are 59 California Class Members.[41] The class is numerous. *Nelson v. Avon Prods., Inc.*, No. 13-cv-02276-BLF, 2015 WL 1778326, at *5 (N.D. Cal. April 17, 2015) ("Courts have repeatedly held that classes comprised of 'more than forty' members presumptively satisfy the numerosity requirement") (internal citations omitted).

Second, there are questions of law and fact common to the class that predominate over any individual issues. Common fact questions are that Advantage classified all CDMRs as exempt during the class period, the CDMRs had the same job duties, Advantage sent them schedules with no-meal-and-rest periods on the schedules, and they all had arbitration agreements. Common law questions include whether the arbitration agreements are valid and whether the CDMRs qualify for any of the exemptions under California law or the FLSA. The claims depend on common contentions that — true or false — will resolve issues central to the validity of the claims. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Betorina*, 2017 WL 1278758 at *4.

Third, the claims of the representative parties are typical of the claims of the class. The representative parties and all class members allege wage-and-hours violations based on similar facts. All representatives possess the same interest and suffer from the same injury. *Cf. Betorina*, 2017 WL 1278758 at *4.

Fourth, the representative parties fairly and adequately protect the interests of the class. The factors relevant to a determination of adequacy are (1) the absence of potential conflict between the named plaintiff and the class members, and (2) counsel chosen by the representative party who is qualified, experienced, and able to vigorously conduct the litigation. *In re Hyundai & Kia*, 926 F.3d at 566 (citing *Hanlon v. Chrysler Crop.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). The factors exist here: the named plaintiffs have shared claims and interests with the class (and no conflicts of interest), and they retained qualified and competent counsel who have prosecuted the case vigorously. *Cf. id.*; *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001); *Hanlon*, 150 F.3d at 1021–22.

[41] *Id.* at 6 (¶ 16).

Finally, a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

In sum, the prerequisites of Fed. R. Civ. P. 23(a) and (b)(3) are met. The court conditionally certifies the class under Federal Rule of Civil Procedure 23(b)(3) for settlement purposes only.

2.2 FLSA Class

The FLSA authorizes "opt-in" representative actions where the complaining parties are "similarly situated" to other employees. 29 U.S.C. § 216(b); *see generally Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1042 (2016). Here, all class representatives worked as CDMRs during the class period, and their wage-and-hour claims — and related issues such as the validity of the arbitration agreements — present common fact and law questions. The court certifies the FLSA class for settlement purposes only.

3. Approval of Settlement

Settlement is a strongly favored method for resolving disputes, particularly "where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *see, e.g., In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). A court may approve a proposed class-action settlement only "after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The court need not ask whether the proposed settlement is ideal or the best possible; it determines only whether the settlement is fair, free of collusion, and consistent with the named plaintiffs' fiduciary obligations to the class. *See Hanlon*, 150 F.3d at 1027 (9th Cir. 1998). In *Hanlon*, the Ninth Circuit identified factors relevant to assessing a settlement proposal: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class-action status throughout trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceeding; (6) the experience and views of counsel; (7) the presence of a government participant; and (8) the reaction of class members to the proposed settlement. *Id*. at 1026 (citation omitted).

When parties "negotiate a settlement agreement before the class has been certified, "settlement approval 'requires a higher standard of fairness' and 'a more probing inquiry than may normally be required under Rule 23(e).'" *Roes, 1–2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048 (9th Cir. 2019) (quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012)). "Specifically, 'such settlement 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) before securing the court's approval as fair.'" *Id*. at 1049 (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)).

The court has evaluated the proposed settlement agreement for overall fairness under the *Hanlon* factors and concludes that it is free of collusion and approval is appropriate.

First, as the plaintiffs point out, the settlement provides good value and is fair, and they collect cases in this district where courts have approved settlements at comparable or lower rates compared to the maximum recoverable at trial. [42] *See, e.g., Stovall-Gusman v. W.W. Granger, Inc.*, No. 13-cv-02540-HSG, 2015 WL 3776765, at *4–5 (N.D. Cal. June 17, 2015) (approving a final settlement representing 7.3% of the plaintiffs' estimated trial award in wage-and-hour class action); *Balderas v. Massage Envy Franchising, LLC*, No. 12-cv-06327-NC, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (granting preliminary approval of gross settlement representing 8% of the maximum recovery and net settlement representing 5% of the maximum recovery), *final approval*, 12-cv-06327-NC – ECF No. 78 (N.D. Cal. Mar. 15, 2015); *Nelson v. Avon Prods., Inc.*, No. 13-cv-02276-BLF, 2017 WL 733145, at *2–4 (N.D. Cal. Feb. 24, 2017) (approving settlement amount of $1,800,000, representing 12 to 24% of recovery rate, for 289 class members alleging claims for misclassification as exempt from overtime wages).

Second, a related point is that the value is significant compared to litigation risks and certainties. The plaintiffs identify the risks: (1) class certification could require individual

[42] Mot. – ECF No. 58 at 18–19; Ho Decl. – ECF No. 42-1 at 10–11 (¶¶ 47–50) (estimating a maximum exposure of $4,112,633 for the California Class with PAGA damages and a maximum exposure of $8,472,812 for the FLSA Collective (but discounting it to $4,236,406 given the potential fluctuating-workweek application for the FLSA overtime claim).

assessment of the CDMRs' duties and whether they were exempt from federal and state overtime laws; (2) the merits of Advantage's motion to compel individual arbitration; (3) uncertainties about the amounts of overtime; and (4) the relative short liability period.[43] In particular, if Advantage prevailed on a motion to compel arbitration, a "large portion of the class would be excluded from a class or collective action."[44] *Cf. In re Uber FCRA Litig.*, No. 14-cv-05200-EMC, 2017 WL 2806698, at *6 (N.D. Cal. June 29, 2017) ("[S]ome 40% of the class members are subject to arbitration . . . [thus] a large portion of the class would be excluded from this litigation, and would be forced to arbitrate their claims individually. Given the small amount of potential recovery per individual, there is strong likelihood that few would pursue individual arbitration. This fact alone accounts for a significant discount on the potential recovery"). Moreover, settlement allows payment to the CDMRs now, while litigation would be costly and protracted, possibly through an appeal.[45]

Third, a class action allows class members — who otherwise would not pursue their claims individually because costs would exceed recoveries — to obtain relief.

Finally, the settlement is the product of serious, non-collusive, arm's-length negotiations, reached the agreement after a settlement conference with Judge Westmore.[46]

In sum, the court finds that viewed as a whole, the proposed settlement is sufficiently fair, adequate, and reasonable. Fed. R. Civ. P. 23(e)(2). The court approves the settlement.

For the same reasons, the court approves the settlement of the FLSA collective action.

[43] *Id.* at 16–18; Ho Decl. – ECF No. 42-1 at 7 (¶ 29) ("Advantage claims the arbitration agreements are enforceable . . . and that 57 of the 59 California Class Members and 253 of the 261 Non-California Opt-in Eligible Plaintiffs are covered by the agreements").

[44] Mot. – ECF No. 58 at 18.

[45] *Id.* at 17.

[46] Minute Entry – ECF No. 37.

4. Class Representative, Class Counsel, and Claims Administrator

The court confirms its appointment of Ms. Foster as the class representative.[47] She has claims that are typical of members of the class generally, and she is an adequate representative of the other members of the proposed classes.

The court confirms its appointment of Laura Ho and Byron Goldstein of Goldstein, Borgen, Dardarian & Ho LLP and Andrew Horowitz of Obermayer Rebmann Maxwell & Hippel, LLP as class counsel for settlement purposes only. *See* Fed. R. Civ. P. 23(a) & (g)(1). They have the requisite qualifications, experience, and expertise in prosecuting class actions.

The court approves Atticus's expenses of $17,702.

5. Class Notice

The class administrator provided notice to the members of the class in the form that the court approved previously. The notice met all legal prerequisites: it was the best notice practicable, satisfied the notice requirements of Rule 23, adequately advised class members of their rights under the settlement agreement, met the requirements of due process, and complied with the court's order regarding court notice.[48] The form of notice fairly, plainly, accurately, and reasonably provided class members with all required information, including (among other things): (1) a summary of the lawsuit and claims asserted; (2) a clear definition of the class; (3) a description of the material terms of the settlement, including the estimated payment; (4) a disclosure of the release of the claims; (5) an explanation of class members' opt-out rights, a date by which they must opt out, and information about how to do so; (6) the date and location of the final fairness hearing (including how to check if the date of the hearing changes); and (7) the

[47] Order – ECF No. 48 at 11.

[48] *Id.* at 11–12.

identity of class counsel and the provisions for attorney's fees, costs, and class-representative service awards.[49]

6. CAFA and PAGA Notices

On February 27, 2020, the plaintiffs provided notice of the settlement and other information showing compliance with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, to the appropriate federal and state officials.[50] The court's final approval hearing is more than 90 days after service as required by 28 U.S.C. § 1715. The plaintiff also provided notice of the settlement of PAGA penalties to the California Labor and Workforce Development Agency.[51]

7. Attorney's Fees and Costs

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The court approves $400,000 in attorney's fees and $16,000 in costs.[52]

Fee provisions in class-action settlements must be reasonable. *In re Bluetooth.*, 654 F.3d at 941. The court is not bound by the parties' settlement agreement as to the amount of fees. *Id.* at 942–43. The court must review fee awards with special rigor:

> Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs. Accordingly, fee applications must be closely scrutinized. Rubber-stamp approval, even in the absence of objections, is improper.

Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1052 (9th Cir. 2002) (quotation omitted).

When counsel recovers a common fund that confers a "substantial benefit" on a class of

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[49] As part of the notice, class members and eligible plaintiffs received their estimated settlement amounts based on customized statements of weeks worked. Longley Decl. – ECF No. 58-2 at 4 (¶¶ 8–9); Notice Packets, Ex. B to *id.* at 13–31; Additional Notice, Ex. C to *id.* at 33–40.

[50] Ho Decl. – ECF No. 58-1 at 4 (¶ 13); Longley Decl. – ECF No. 58-2 at 3 (¶ 5); CAFA Notice, Ex. A to *id.* at 11–12.

[51] Ho Decl. – ECF No. 58-1 at 4 (¶ 12).

[52] Mot. – ECF No. 58 at 25; Fees Mot. – ECF No. 51 at 7.

beneficiaries, counsel is "entitled to recover their attorney's fees from the fund." *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1006 (9th Cir. 2002). In common-fund cases, courts may calculate a fee award under either the "lodestar" or "percentage of the fund" method. *Id.*; *Hanlon*, 150 F.3d at 1029.

Where the settlement involves a common fund, courts typically award attorney's fees based on a percentage of the settlement fund. The Ninth Circuit has established a "benchmark" that fees should equal 25% of the settlement, although courts diverge from the benchmark based on factors that include "the results obtained, risk undertaken by counsel, complexity of the issues, length of the professional relationship, the market rate, and awards in similar cases." *Morales v. Stevco, Inc.*, No. CIV-F-09-0704-AWI-JLT, 2013 WL 1222058, *2 (E.D. Cal. Mar. 25, 2013); *see also Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming 33% fee award); *In re Pac. Enter. Secs. Litig.*, 47 F.3d at 379; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

When determining the value of a settlement, courts consider the monetary and non-monetary benefits that the settlement confers. *See, e.g.*, *Staton*, 327 F.3d at 972–74; *Pokorny v. Quixtar, Inc.*, No. C-07-0201-SC, 2013 WL 3790896, *1 (N.D. Cal. July 18, 2013) ("The court may properly consider the value of injunctive relief obtained as a result of settlement in determining the appropriate fee."); *In re Netflix Privacy Litig.*, No. 5:11-CV-0379-EJD, 2013 WL 1120801, *7 (N.D. Cal. Mar. 18, 2013) (settlement value "includes the size of the cash distribution, the *cy pres* method of distribution, and the injunctive relief").

Finally, Ninth Circuit precedent requires courts to award class counsel fees based on the total benefits being made available to class members rather than the actual amount that is ultimately claimed. *Young v. Polo Retail, LLC*, No. C-02-4547-VRW, 2007 WL 951821, *8 (N.D. Cal. Mar. 28, 2007) (citing *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997) ("district court abused its discretion in basing attorney fee award on actual distribution to class" instead of amount being made available)).

If the court applies the percentage method, it then typically calculates the lodestar as a "cross-check to assess the reasonableness of the percentage award." *See, e.g.*, *Weeks v. Kellogg Co.*, No.

CV-09-8102-MMM-RZx, 2013 WL 6531177, *25 (C.D. Cal. Nov. 23, 2013); *see also Serrano v. Priest*, 20 Cal. 3d 25, 48–49 (1977); *Fed-Mart Corp. v. Pell Enters., Inc.*, 111 Cal. App. 3d 215, 226–27 (1980).[53] "The lodestar . . . is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate." *Lealao v. Beneficial Cal., Inc*., 82 Cal. App. 4th 19, 26 (2000). Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." *Id*.

Based on counsel's submissions, the court finds that the requested fees are appropriate as a percentage of the common fund, supported by a lodestar cross-check (with counsel's suggested multiplier). First, the settlement achieved significant relief, including a non-reversionary payment to the class members, Advantage's separate payment of payroll taxes, and (shortly after the lawsuit was filed), Advantage's reclassification of CDMRs from exempt to non-exempt.[54] No class member objected to the settlement or opted out, which supports the conclusion of reasonableness. Second, class counsel assumed significant litigation risk and litigated the case efficiently on a contingency basis, achieving a settlement in a year.[55] *Cf. Burden v. SelectQuote Ins. Servs.*, No. 10-cv-05966-LB, 2013 WL 3988771, at *5 (N.D. Cal. Aug. 2, 2013) (adjusting the benchmark 25% to 33% for these reasons); *see also In re Volkswagen 'Clean Diesel' Mktg., Sales Practices, & Prod. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2017 WL 1352859, at *6 (N.D. Cal. April 12, 2017) ("Class counsel, however, 'should not be 'punished' for efficiently litigating [the] action . . . [a] positive multiplier rewards [] Class Counsel for its efforts in achieving swift settlement"). Also, this is a smaller case, and courts award fees above the 25% benchmark, particularly when the benchmark would undercompensate counsel. *See, e.g., Cicero v. DirecTV, Inc.*, No. EDCV 07-

[53] Longley Decl. – ECF No. 58-2 at 6 (¶ 18).

[54] *Id.* at 8 (¶ 25); Ho Decl. – ECF No. 51-1 at 3 (¶ 7).

[55] Ho Decl. – ECF No. 51-1 at 3–4 (¶¶ 8–9).

1182, 2010 WL 2991486, at *6 (C.D. Cal. July 27, 2010) (collecting cases); *Burden*, 2013 WL 3988771 at *5.[56]

The lodestar cross-check supports this conclusion. The billing rates are normal and customary (and thus reasonable) for lawyers of comparable experience doing similar work.[57] *See Cuviello v. Feld Entm't, Inc.*, No. 13-cv-04951-BLF, 2015 WL 154197, at *2–3 (N.D. Cal. Jan. 12, 2015) ("court has broad discretion in setting the reasonable hourly rates used in the lodestar calculation") (citation omitted); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001) (court can rely on its own experience); *accord Open Source Sec. v. Perens*, 803 F. App'x 73, 77 (9th Cir. 2020). Counsel provided billing records justifying the hours worked in the case and allowing a conclusion about the multiplier.[58] The lodestar is more than the 25-percent benchmark.[59] The court applies the multiplier (based on the quality of the representation, the complexity and risk, the amounts at stake in the litigation, the efficiency of the litigation, and the result obtained) and awards 400,000 (33% of the common fund).[60]

The court also awards the reasonable out-of-pocket costs of up to $16,000. Fed. R. Civ. P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (attorneys may recover reasonable expenses that would typically be billed to paying clients in non-contingency matters); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (approving reasonable costs in class action settlement). Costs compensable under Rule 23(h) include "nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Costs were $15,106.38 on May 7, 2020.[61] Counsel estimates that total costs will be $16,000 (less than the maximum $20,000

[56] *See* Mot. – ECF No. 51 at 9 (collecting cases).

[57] Ho Decl. – ECF No. 51-1 at 5–7 (¶ 15); Fox Decl. – ECF No. 51-2 at 2–3 (¶¶ 6–8).

[58] Ho Decl. – ECF No. 51-1 at 8–12 (¶¶18–31); Fox Decl. – ECF No. 51-2 at 3–4 (¶¶ 9–15).

[59] Ho Decl. – ECF No. 58-1 at 5 (¶ 18).

[60] *See also* Proposed Order – ECF No. 58-3 at 6 (collecting cases).

[61] Ho Decl. – ECF No. 58-1 at 6 (¶ 20).

in the settlement agreement), and any excess costs will be redistributed to class and collective-action members.[62] The court approves costs of up to $16,000.

8. Service Awards

The settlement proposes service awards of $10,000 to Ms. Foster and $3,000 each to Mr. Thimons and Ms. Schmidt. The court reduces Ms. Foster's award to $6,000 and awards $2,000 each to Mr. Thimons and Ms. Schmidt.

District courts must evaluate proposed awards individually, using relevant factors that include "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, … [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Staton*, 327 F.3d at 977. "Such awards are discretionary . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009) (citation omitted). The Ninth Circuit has "noted that in some cases incentive awards may be proper but [has] cautioned that awarding them should not become routine practice." *Radcliffe v. Experian Info. Sols.*, 715 F.3d 1157, 1163 (9th Cir. 2013) (discussing *Staton*, 327 F.3d at 975–78). Also, district courts "must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives." *Id.* at 1164. In this district, a $5,000 incentive award is "presumptively reasonable." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 266 (N.D. Cal. 2015) (collecting cases).

Ms. Foster's request of $10,000 is double the presumptively reasonable award of $5,000. Her efforts in this case include gathering documents, explaining her work to her attorneys, reviewing Advantage's motion to compel arbitration, helping draft her declaration to oppose the motion, and participating in the settlement conference.[63] She played a "critical role" in developing the facts and

[62] *Id.*

[63] Foster Decl. – ECF No. 42-3 at 2–3 (¶¶ 4–8).

representing the class in settlement discussions, and she assumed the risk of being perceived as a "trouble-maker," possibly affecting her future employment in her industry.[64] In total, she spent 28.5 hours prosecuting the case.[65]

The plaintiffs' cases show that the proposed award is high, considering the hours Ms. Foster spent (in the context of the discovery landscape). *Cf. Harris v. Vector Mktg. Corp.*, No. 08-cv-5198-EMC, 2012 WL 381202, at *7–8 (N.D. Cal. Feb. 6, 2012) (awarding $12,500 where the plaintiff spent "more than 100 hours on this case (which included being deposed twice)" and the defendant "pursued disclosure of her private information"); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 335–36 (awarding $10,000 where the plaintiff was deposed, attended a four-day mediation (which required her to travel and miss work), and spent "more than 200 hours assisting in the case"); *Bellinghausen.*, 306 F.R.D. at 267–68 (awarding $15,000 where the plaintiff spent 73 hours on the case, attended mediation, and was rejected by potential employers because of his status as class representative); *Brawner v. Bank of Am. Nat'l Ass'n*, No. 14-cv-02702-LB, 2016 WL 161295, at *6 (N.D. Cal. Jan. 14, 2016) (approving $15,000 where the plaintiff spent between 80 to 100 hours in the case). Still, the plaintiffs observe, the proposed award is not disproportionate compared to the net recoveries (a median recovery for the California Class and the non-California opt-in eligible plaintiffs of $7,696.44 and $1,284, respectively).[66] *Cf. Bolton v. U.S. Nursing Corp.*, No. 12-cv-4466-LB, 2013 WL 5700403, at *6 (N.D. Cal. Oct. 18, 2013).

Given the hours spent, the recoveries here, and the points of reference from other cases, the court allows $6,000 for Ms. Foster and $2,000 each for Mr. Thimons and Ms. Schmidt. Mr. Thimons spent a total of ten hours in this case, including discussing his work as a CDMR with plaintiff's counsel, gathering relevant documents, and making himself available for the settlement conference.[67] Ms. Schmidt spent about nine hours total in similar fact-gathering and settlement

[64] Ho Decl. – ECF No. 58-1 at 4 (¶ 14); Foster Decl. – ECF No. 42-3 at 4 (¶ 12).

[65] Foster Decl. – ECF No. 42-3 at 3 (¶ 9)

[66] Longley Decl. – ECF No. 58-2 at 8 (¶ 25).

[67] Thimons Decl. – ECF No. 42-4 at 2 (¶¶ 2, 4), at 3 (¶ 7).

efforts.[68] Their awards are below the presumptively reasonable amount in this district. *Cf. Bellinghausen*, 306 F.R.D. at 266. Ms. Foster's $6,000 is about three times their awards, and the court finds this the reasonable service award for her based on the relative hours and the case.

9. *Cy Pres* Award

If there is a *cy pres* distribution to the beneficiary Employee Rights Advocacy Institute for Law & Policy, it accounts for and has a substantial nexus to the nature of the lawsuit, the objectives of the statutes, and the interest of the silent class members. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 818–22 (9th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038–41 (9th Cir. 2011).

10. Release of Claims[69]

As of the date the judgment becomes final (meaning that the time for appeal has expired with no appeal taken, all appeals are resolved, and none are left pending, or this judgment is affirmed in all material respects after completion of the appellate process), the named plaintiffs, California class members, and non-California plaintiffs who opt in by cashing their checks are barred from bringing or presenting any action or proceeding against any Released Parties that involves or asserts any of the Released Claims (as those terms are defined in the Settlement Agreement).

11. Post-Distribution Accounting

Within 21 days after the distribution of the settlement funds and payment of attorney's fees, the parties must file a post-distribution accounting, which provides the following information:

> The total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the methods of notice and the methods of

[68] Schmidt Decl. – ECF No. 42-5 at 2–3 (¶¶ 2, 4–8).

[69] The remaining provisions in this order are taken from the proposed order's identification of relevant provisions from the settlement agreement. Proposed Order – ECF No. 58-3 at 8–9.

> payment to class members, the number and value of checks not cashed, the amounts distributed to each *cy pres* recipient, the administrative costs, the attorney's fees and costs, the attorneys' fees in terms of percentage of the settlement fund, and the multiplier, if any.

Within 21 days after the distribution of the settlement funds and award of attorney's fees, the parties must post the post-distribution accounting, including the easy-to-read chart, on the settlement website. The court may hold a hearing following submission of the parties' post-distribution accounting.

12. Non-Admission

This order and the Settlement Agreement are not evidence of, or an admission or concession on the part of, the Released Parties with respect to any claim of any fault, liability, wrongdoing, or damages.

13. Order for Settlement Purposes

The findings and rulings in this order are made for the purposes of settlement only and may not be cited or otherwise used to support the certification of any contested class or subclass in any other action.

14. Use of Agreement and Ancillary Terms

The Settlement Agreement and any documents, actions, statements, or filings in furtherance of settlement (including matters associated with the mediation) are not admissible and cannot be offered into evidence in any action related or similar to this one for the purposes of establishing, supporting, or defending against any claims that were raised or could have been raised in this action or are similar to such claims.

CONCLUSION

The court (1) certifies the class and the FLSA collective for settlement purposes only, (2) approves the settlement and authorizes the distribution of funds (as set forth in this order), (3) appoints the class representative and class counsel, (4) approves $400,000 in attorney's fees, up to

$16,000 in costs, $17,702 for Atticus's administration costs, and service awards of $6,000 to Ms. Foster and $2,000 each to Mr. Thimons and Ms. Schmidt, (5) orders the post-distribution accounting, and (6) orders the parties and Atticus to carry out their obligations in the settlement agreement.

IT IS SO ORDERED.

Dated: May 28, 2020

LAUREL BEELER
United States Magistrate Judge

United States District Court
Northern District of California