UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

SANDRA MEDINA, individually and on behalf of herself and all others similarly situated, **Plaintiff,** **v.** **EVOLVE MORTGAGE SERVICES, LLC,** **Defendant.**	**Case No.: SACV 21-01338-CJC (JDEx)** **ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF FLSA COLLECTIVE ACTION AND PAGA REPRESENTATIVE ACTION SETTLEMENT AND CONDITIONAL COLLECTIVE CERTIFICATION OF SETTLEMENT [Dkt. 32]**

I. INTRODUCTION

Plaintiff Sandra Medina brings this putative collective and class action suit against her former employer, Defendant Evolve Mortgage Services, LLC. (*See* Dkt. 19 [First Amended Complaint, hereinafter "FAC"].) Defendant is "a full-service, onshore provider of outsourced mortgage services and technologies." (*Id.* ¶ 7.) Plaintiff worked for Defendant as a mortgage underwriter from approximately August 2020 until

February 2021. (*See id.* ¶ 6.) She brings seven claims against Defendant, including (1) failure to pay overtime wages in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. Section 201, (2) failure to pay overtime wages, Cal. Lab. Code Sections 510, 1194, and 1998, (3) failure to pay proper meal period premiums, Cal. Lab. Code Sections 226.7 and 512, (4) failure to provide itemized wage statements, Cal. Lab. Code Section 226(a), (5) failure to pay earned and unpaid wages within 30 days of discharge, Cal. Lab. Code Sections 201–203, (6) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code Section 17200, and (7) civil penalties pursuant to the Private Attorney General Act ("PAGA"), Cal. Lab. Code Section 2698. (*Id.* at 1–2.)

Plaintiff initially filed a motion for conditional class and collective certification and preliminary settlement approval on August 29, 2022. (*See* Dkt. 27 [Notice of Motion and Motion for Settlement Approval of Class and Collective Settlement – Preliminary].) At that time, the proposed settlement agreement contained both an "FLSA Collective" and a Rule 23 class of California employees. (*See* Dkt. 32 [Notice of Motion and Motion for Settlement Approval of Class and Collective Settlement, hereinafter "Mot."] at 1.) The Court denied Plaintiff's motion without prejudice, in part due to issues with the putative class lacking numerosity and the potential for opt-out class members to improperly release their FLSA claims. (*See* Dkt. 29 at 3–5, 7–8.)

Now before the Court is Plaintiff's renewed motion for conditional collective certification and preliminary settlement approval. (*See* Mot. at 1.) For the following reasons, Plaintiff's motion is **GRANTED**.[1]

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[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for November 28, 2022, at 1:30 p.m. is hereby vacated and off calendar.

II. BACKGROUND

To address the Court's concerns with its initial motion for preliminary settlement approval, the parties re-structured the settlement to remove the class component, such that the current agreement contains only an opt-in FLSA Collective. (*See id.*) The proposed FLSA Collective is made up of approximately 217 underwriters who worked for Defendant as non-exempt employees eligible for commission or other non-discretionary incentive pay, and who were paid overtime and non-discretionary incentive pay in the same pay period at least once between August 13, 2018, and December 31, 2021. (*See* Mot. at 3.) Defendant paid Plaintiff and the Collective Members "a per file production payment using a points-based schedule (e.g., $55 per file for the first 5 files completed per day and $75 per file for additional files completed in a day)" and "extracted Plaintiff's $13.00 hourly rate payment from the production payment, and paid the rest of the production payment as commission earnings." (FAC ¶ 12.)

Under the FLSA and California law, covered employers must compensate all non-exempt employees at a rate of not less than 1.5 times their "regular rate of pay" for overtime work. (*Id.* ¶ 13.) According to Plaintiff, an employee's "regular rate" includes both the employee's hourly rate as well as any non-discretionary incentive compensation, such as commission payments. (*Id.* ¶ 14.) Plaintiff alleges that Defendant's overtime payments to Plaintiff and the FLSA Collective were based only on the hourly rate, without considering non-discretionary incentive pay. (*Id.* ¶ 17.) As a result, Plaintiff and the FLSA Collective did not receive proper overtime pay. (*Id.*) Plaintiff alleges that the same calculation error was made in determining payments for missed meal periods. (*Id.* ¶ 19.) Due to these errors, Plaintiff alleges that the wage statements furnished by Defendant were inaccurate. (*Id.* ¶ 23.) Plaintiff further alleges that Defendant "failed to pay all wages that were due" within thirty days of the termination of employment, "including legally required overtime and meal period

premiums at the appropriate rate." (*Id.* ¶ 24.) Plaintiff alleges that Defendant did this knowingly, intentionally, and in bad faith. (*Id.* ¶ 26.)

After engaging in two lengthy mediation sessions, the parties entered into a settlement agreement (the "Settlement Agreement"). (*See* Dkt. 32-2, Ex. A [Settlement Agreement, hereinafter "SA"].) Under the proposed Settlement Agreement, Defendant will pay up to $575,000.00 allocated as follows: (1) an FLSA Settlement Fund with a maximum value of $383,750 to pay claims for all FLSA Collective Members who submit timely and valid opt-in claim forms, (2) a PAGA payment of $4,000, with $3,000 to be distributed to California's Labor Workforce Development Agency ("LWDA") and $1,000 to remain part of the settlement for distribution to eligible Collective Members, (3) administration costs, not to exceed $16,500, (4) litigation costs, not to exceed $9,500, (5) attorneys' fees equivalent to 25% of the amount that is ultimately paid out by Defendant, not to exceed $143,750, and (6) an incentive award of $7,500 to Plaintiff. (*See* Mot at 3.) Individuals who opt in "will receive an allocation that covers approximately 105% of their allegedly unpaid wages (100% of the disputed overtime wages plus 5% for liquidated damages)." (*Id.* at 4.) Of the twenty-one FLSA Collective Members who worked in California, (*see id.* at 22), those who participate in the settlement will receive additional compensation for the California state law claims, specifically the claims for missed meal period payments, wage statement penalties, waiting time penalties, and PAGA penalties. (*See* SA ¶ 47(d).)

Based on data produced by Defendant, Plaintiff's Counsel calculated potential overtime damages on a pay period basis for each individual member of the FLSA Collective. This was accomplished by dividing an employee's non-discretionary incentive pay by the total number of hours worked in each pay period, multiplying that hourly rate by 0.5, and then multiplying that overtime rate by the number of overtime hours worked in the pay period. (*See* Mot. at 5.) Using this formula, Counsel determined

that the total wage loss for the entire group was $352,183.34, and the total overtime claim amount, including liquidated damages, was $698,850.73.[2] Counsel conducted a similar calculation for individuals who worked in California, and determined that Defendant's total exposure for the unpaid meal period premiums was $5,721.94. (*See id*. at 5–6.) The total exposure for the waiting time penalties was $90,512.21 and the total exposure for the wage statement penalties was $19,610.15. (*See id*.)

Individual settlement payments for those who opt in to the FLSA Collective will be allocated based on Counsel's damages calculations, with claims weighted differently based on an evaluation of the reasonable likelihood of success: (1) overtime claims will be weighted at 100%, with approximately 5% additional weighting to account for potential liquidated damages, (2) California meal period premiums will be weighted at approximately 10%, (3) waiting time and wage statement penalties will be weighted at approximately 10% each, and (4) PAGA penalties will be weighted at approximately 5%.[3] (*See id.* at 6.) The weighted settlement amounts will be distributed on a *pro rata* basis. (*See id.*)

III. FLSA COLLECTIVE CERTIFICATION

The FLSA was enacted to protect workers from substandard wages and oppressive working hours. *See Barrentine v. Arkansas–Best Freight System*, 450 U.S. 728, 739 (1981). Under the FLSA, "one or more employees" may file a civil action—termed a collective action—"in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Unlike a class action under Rule 23, to participate in a collective action, an employee is required to give consent in writing. *See* 29 U.S.C.

[2] This calculation reflects a three-year period for FLSA claims, a four-year period for California employees, and similar calculations to capture daily overtime for Californians.
[3] Plaintiff notes that these "numbers may fluctuate as counsel finalizes the allocation." (*Id.*)

§ 216(b); *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (rights in a collective action under the FLSA are dependent on the employee receiving accurate and timely notice about the pendency of the collective action, so that the employee can make informed decisions about whether to participate). "If an employee does not file a written consent, then that employee is not bound by the outcome of the collective action." *Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 989 (C.D. Cal. 2006).

"When the parties seek settlement approval of an FLSA collective action claim before seeking certification of a collective action, courts in this circuit first consider whether certification is appropriate and then whether the proposed settlement is substantively acceptable." *Kempen v. Matheson Tri-Gas, Inc.*, 2016 WL 4073336, at *4 (N.D. Cal. Aug. 1, 2016). In *Campbell v. City of Los Angeles*, 903 F.3d 1090 (9th Cir. 2018), the Ninth Circuit specified a two-step approach for determining whether an FLSA collective action should be certified. The first step requires the Court to "make an initial 'notice-stage' determination of whether potential opt-in plaintiffs are 'similarly situated' to the represented plaintiffs." *Id.* at 1110. "The purpose of this initial step is to determine whether the collective action should be certified for the sole purpose of sending notice of the action to potential class members." *Id.* (citing *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013)). According to the Ninth Circuit, "[p]arty plaintiffs are similarly situated, and may proceed in a collective, to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." *Campbell*, 903 F.3d at 1117. After the collective has received notice and discovery has been concluded, the second step allows employers to move for decertification by showing that the 'similarly situated' requirement has not been satisfied. At that point, the court "engages in a more stringent inquiry into the propriety and scope of the collective action." *Labrie v. UPS Supply Chain Solutions, Inc.*, 2009 WL 723559, at *4 (N.D. Cal. Mar. 18, 2009).

Applying the *Campbell* framework, the Court finds that preliminary certification of the proposed FLSA Collective is appropriate. Plaintiff defines the FLSA Collective as "those individuals who are or were employed by [Defendant] in the United States as non-exempt employees eligible for commission or other non-discretionary incentive pay, and who were paid overtime and nondiscretionary incentive pay in the same pay period at least once, at any time between August 13, 2018[,] and December 31, 2021." (SA ¶ 16). Plaintiff asserts that the FLSA Collective contains approximately 217 individuals who were employed by Defendant as mortgage underwriters. (*See* Mot. at 3.) The members of the FLSA Collective are thus similarly situated, because they were all employed in similar positions (as mortgage underwriters), and were all subject to Defendant's alleged pattern, practice, and policy of failing to include non-discretionary incentive payment in overtime and meal period premium payments. (*See id.* at 8.) The Court is satisfied as a preliminary matter that the "putative 'party plaintiffs are alike in ways that matter to the disposition of their FLSA claims,' as they held similar jobs with similar functions and were uniformly subject to [Defendant's] compensation policies that led to the alleged FLSA violations here, presenting 'similar issue[s] of law or fact material to the disposition of their FLSA claims.'" *Smothers v. NorthStar Alarm Servs., LLC*, 2019 WL 280294, at *8 (E.D. Cal. Jan. 22, 2019) (quoting *Campbell*, 903 F.3d at 1117). Accordingly, the action may proceed as a collective.

IV. FLSA COLLECTIVE ACTION SETTLEMENT

Employees may not settle and release FLSA claims against an employer without obtaining the approval of either the Secretary of Labor or a district court. *See Seminiano v. Xyris Enter., Inc.*, 602 F. App'x 682, 683 (9th Cir. 2015); 29 U.S.C. §§ 216(b), (c). The Ninth Circuit has not set forth specific criteria for courts to consider when evaluating an FLSA settlement. As a result, district courts in the Ninth Circuit frequently rely on the Eleventh Circuit's standard in *Lynn's Food Stores v. United*

States, 679 F.2d 1350 (11th Cir. 1982). *See, e.g.*, *McClure v. Waveland Servs., Inc.*, 2021 WL 5204151, at *2 (E.D. Cal. Nov. 9, 2021); *Hernandez v. Dutton Ranch Corp.*, 2021 WL 5053476, at *3 (N.D. Cal. Sept. 10, 2021); *Pike v. Cty. of San Bernardino*, 2019 WL 8138439, at *2 (C.D. Cal. Nov. 25, 2019); *Dunn v. Teachers Ins. & Annuity Ass'n of Am.*, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016). Under that standard, a court may not approve an FLSA settlement unless (1) the employee's claim involves a "bona fide dispute" over FLSA liability, and (2) the settlement is a fair and reasonable resolution of that dispute. *Lynn's Food Stores*, 679 F.2d at 1353.

A. Bona Fide Dispute

"A bona fide dispute exists when there are legitimate questions about the existence and extent of the defendant's FLSA liability." *Jennings v. Open Door Mktg., LLC*, 2018 WL 4773057, at *4 (N.D. Cal. Oct. 3, 2018); *see also Kerzich v. Cty. of Tuolumne*, 335 F. Supp. 3d 1179, 1184 (E.D. Cal. 2018); *Selk v. Pioneers Mem'l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1174 (S.D. Cal. 2016).

Plaintiff's claims involve a bona fide dispute over whether Defendant violated the FLSA by failing to provide full compensation for overtime hours and meal period premiums. The parties have conducted an investigation of Plaintiff's claims through informal discovery, informal disclosures between the parties, and other investigations undertaken by Plaintiff's Counsel. (*See* SA ¶ 44.) Defendant denies any wrongdoing and maintains that it complied at all times with its obligations under state and federal laws. (*See id.* ¶ 43.) Defendant further asserts that Plaintiff's damages calculation is flawed because the reported number of hours worked by employees was artificially inflated. (*See* Mot. at 12.) This assertion is based on Defendant's review of employee computer activity data, which it contends demonstrates that Collective Members actually worked fewer hours than they reported on their timecards. (*See id.*) There are thus "legitimate

questions about the existence and extent of [D]efendant's FLSA liability." *Jennings*, 2018 WL 4773057, at *4.

B. Fair and Reasonable Resolution

The Court next considers whether the Settlement Agreement reflects a fair and reasonable resolution of the asserted claims. In making this determination, courts "often apply factors for assessing a proposed class action settlement pursuant to Federal Rule of Civil Procedure 23," while "recogniz[ing] that some of the Rule 23 factors do not apply because of the inherent differences between class actions and FLSA actions." *Dashiell v. Cty. of Riverside*, 2018 WL 3629915, at *2 (C.D. Cal. July 19, 2018). Under Federal Rule of Civil Procedure 23(e)(2), a proposed settlement must be "fair, reasonable, and adequate." In considering whether this standard is met, courts consider whether (A) the class representatives and class counsel have adequately represented the class, (B) the proposal was negotiated at arm's length, (C) the relief provided for the class is adequate, and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(A–D).

Because applying only the Rule 23 factors "runs the risk of not giving due weight to the policy purposes behind the FLSA," district courts in this circuit have also "adopted a totality of circumstances approach that emphasizes the context of the case and the unique importance of the substantive labor rights involved." *Selk*, 159 F. Supp. 3d at 1173. This approach considers many of the factors relevant to Rule 23 class action settlements, "but adjusts or departs from those factors when necessary to account for the labor rights at issue." *Id.* The factors courts consider are (1) the plaintiff's range of possible recovery, (2) the stage of proceedings and amount of discovery completed, (3) the seriousness of the litigation risks faced by the parties, (4) the scope of any release provision in the settlement agreement, (5) the experience and views of counsel and the

opinion of participating plaintiffs, and (6) the possibility of fraud or collusion. *Id*. Ultimately, the Court must be "satisfied that the settlement's overall effect is to vindicate, rather than frustrate, the purposes of the FLSA." *Kerzich*, 335 F. Supp. 3d at 1185 (quoting *Selk*, 159 F. Supp. 3d at 1173).

Here, both the Rule 23 factors and the totality of the circumstances support approval of the Settlement Agreement.

1. Rule 23 Analysis

a. Adequate Representation

Adequacy of representation requires that class representatives (1) have no interests antagonistic to the interests of the collective and (2) are represented by counsel that is capable of vigorously prosecuting their interests. *See Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 618 (N.D. Cal. 2015); Fed. R. Civ. P. 23(e)(2)(A).

Plaintiff and Counsel have adequately represented the interests of the Collective. *See* Fed. R. Civ. P. 23(e)(2)(A). There is no indication that Plaintiff has any interests antagonistic to the interests of the Collective. Plaintiff and the Collective are also represented by counsel that is capable of, and has, vigorously prosecuted their interests. The Nichols Kaster firm has been advocating for employee and consumer rights for over three decades, and has represented "thousands of employees in hundreds of cases." (Dkt. 32-1 [Declaration of Daniel S. Brome, hereinafter "Brome Decl."] ¶ 6.) This factor weighs in favor of approval.

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b. Arm's Length Negotiations

The Court next considers whether that the Settlement Agreement was the result of arm's length negotiations. *See* Fed. R. Civ. P. (e)(2)(B). This factor reflects a "procedural concern[ ], looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes. While not dispositive, participation in mediation prior to a settlement "tends to support the conclusion that the settlement process was not collusive." *Palacios v. Penny Newman Grain, Inc.,* 2015 WL 4078135 (E.D. Cal. July 6, 2015) (citation omitted).

Here, the parties participated in a full day mediation "facilitated by a skilled employment law mediator." (Mot. at 15.) When the case did not settle, the parties continued informal discussions and negotiations, with some assistance from the mediator. (*See* Brome Decl. ¶ 2.) The parties ultimately reached an agreement during a second mediation session. (*See id.*) "In preparation for mediation, the Parties exchange[d] significant compensation and employment history information," which allowed Counsel to prepare a detailed damages model. (*Id.*) At this time, the Court is sufficiently satisfied that the Settlement Agreement was negotiated at arm's length. Accordingly, this weighs in favor of approval. *See Silveira v. M&T Bank*, 2021 WL 2403157, at *5 (C.D. Cal. May 6, 2021) (concluding that factor weighed in favor of approval when "[t]he parties thoroughly investigated their claims and engaged in two full-day, in-person mediations before a respected retired judge"); *Martinez v. Helzberg's Diamond Shops*, 2021 WL 4730914, at *7 (C.D. Cal. Apr. 12, 2021) ("The time and effort spent on settlement negotiations, as well as mediation . . . are evidence that the settlement was not collusive and thus weigh in favor of preliminary approval of the Settlement Agreement.")

c. Equitable Treatment

Courts must also consider whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment.

The proposed Settlement Agreement treats class members equitably relative to each other. It describes a process for calculating each individual's potential damages for each pay period within the relevant statute of limitations using the total number of hours worked in the pay period. (*See* SA ¶ 47(d).) This is a fair way to divide the settlement proceeds, as it ensures that those who worked more (and thereby suffered more injury due to Defendant's alleged conduct) recover more. This weighs in favor of approving the settlement. *See McClure v. Waveland Servs., Inc.*, 2021 WL 5204151, at *4 (E.D. Cal. Nov. 9, 2021) (finding equitable treatment in FLSA settlement when the amount each member received was "determined by the number of weeks each worked for defendant"); *In Re Snap Inc. Sec. Litig.*, 2021 WL 667590, at *2 (C.D. Cal. Feb. 18, 2021) (concluding that this factor favored approving the settlement when "there [was] no indication that the settlement favors certain members over others").[4]

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[4] Because the Court's analysis of whether the relief provided for the class is adequate under Rule 23(e)(2)(C) is encompassed by the Court's analysis under the totality of the circumstances approach, the Court does not perform a separate analysis under Rule 23(e)(2)(C).

2. Totality of the Circumstances Analysis

a. Range of Possible Recovery

"A district court evaluates the plaintiff's range of potential recovery to ensure that the settlement amount agreed to bears some reasonable relationship to the true settlement value of the claims." *Selk*, 159 F. Supp. 3d at 1174. "The settlement amount need not represent a specific percentage of the maximum possible recovery," but rather "in comparing the amount proposed in the settlement with the amount that plaintiffs could have obtained at trial, the court must be satisfied that the amount left on the settlement table is fair and reasonable under the circumstances presented." *Id.*

Plaintiff asserts that the estimated maximum recovery on the Collective's claims would have been approximately $900,000.[5] (*See* Mot. at 13.) Although the individual payouts under the Settlement Agreement will vary depending on the number of hours worked in the statutory period, (*see* SA ¶ 47(d)), Collective Members would recover an average of $1,764.91. (*See* Brome Decl. ¶ 7.) The maximum settlement value ($575,000) represents approximately 64% of the maximum possible recovery. (*See id.* ¶ 8.) The Court concludes that the settlement amount is reasonable and in keeping with the range of reasonableness. *See Julio v. Anthony, Inc.*, 2015 WL 13919364, at *5 (C.D. Cal. June 24, 2015) (finding reasonable class award representing approximately 55% of the forecasted recovery); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) (finding reasonable a settlement amount "represent[ing] approximately 10% of what [the] class might have been awarded had they succeeded at trial"); *Ma v. Covidien Holding, Inc.*, 2014 WL 360196, at *5 (C.D. Cal. Jan. 31, 2014)

[5] This figure assumes a three-year statute of limitations, which would require a showing that Defendant acted willfully.

(finding a settlement worth 9.1% of the total value of the action "within the range of reasonableness").

b. Stage of Proceedings and Amount of Discovery Completed

Courts are "more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case." *Adoma v. University of Phoenix, Inc.*, 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012) (quotation omitted). Here, Counsel conducted an extensive investigation into the facts of the case and the strength of the asserted claims, including through "informal discovery, informal disclosures between the Parties, and other investigations undertaken by counsel for Plaintiff." (SA ¶ 44.) The Parties also "engaged in extensive negotiations and exchange of data, documents, and information in connection with the mediation." (*Id.*) This weighs in favor of approval.

c. Litigation Risks

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (quoting 3 Newberg on Class Actions § 11:50 (4th ed. 2012)). In assessing the risk, expense, complexity, and likely duration of further litigation, courts should consider "the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation." *Id.* (quoting *Oppenlander v. Standard Oil Co. (Indiana)*, 64 F.R.D. 597, 624 (D. Colo. 1974)).

The seriousness of the litigation risks faced by the parties weighs in favor of approval. According to Plaintiff, "[s]ubstantial uncertainty remains as to whether the FLSA claims would receive conditional certification, how many underwriters would opt-in, and whether the FLSA claims would remain certified." (Mot. at 11.) Even if Plaintiff succeeded in obtaining certification and establishing liability, she would need to prove that Defendant's alleged violations were willful to obtain the maximum possible recovery. (*Id.* at 12.) Further, "Defendant indicated that it would challenge Plaintiff's damages calculations (which are based on Defendant's records of hours worked) by asserting that its time records were not accurate and actually inflated the hours employees worked, based on Defendant's review of computer activity data which Defendant contends demonstrates that putative collective members actually worked fewer hours than they reported on their timecards. (*Id.*) While Plaintiff disputes the merits of this challenge, she recognizes that such a dispute would add uncertainty and delay to the litigation. (*Id.*)

These facts indicate that "there is a significant risk that litigation might result in a lesser recovery for the class or no recovery at all." *Jennings*, 2018 WL 4773057, at *5 (internal citation omitted); *see Selk*, 159 F. Supp. 3d at 1175 (finding that this factor weighed in favor of approval when there was a strong argument that the defendant had not violated the FLSA and a "real possibility that Defendant would successfully decertify one or both of the classes"). Accordingly, this factor weighs in favor of approval.

d. Scope of Settlement Agreement's Release Provision

An FLSA release should not go beyond the specific FLSA claims at issue in the lawsuit itself. *See Slezak v. City of Palo Alto*, 2017 WL 2688224, at *4 (N.D. Cal. June 22, 2017). Indeed, courts "routinely reject FLSA settlements when the scope of the release goes beyond the overtime claims asserted in the complaint." *Dunn*, 2016 WL

153266, at *5. The goal is to "ensure that class members are not pressured into forfeiting claims, or waiving rights, unrelated to the litigation." *Selk*, 159 F. Supp. 3d at 1178.

The Settlement Agreement's release is limited to claims that could have been asserted in this case. (*See* Mot. at 7.) Specifically, FLSA Collective Members agree to release claims that "may have [been] brought against the Released Parties based on the facts alleged in the Complaint and/or First Amended Complaint during the FLSA Collective Period for unpaid overtime in violation of the Fair Labor Standards Act, 29 U.S.C. section 201 *et seq*. and the corresponding Department of Labor Regulations, 29 C.F.R. section 785 *et seq*. and 778 *et seq*., including, but not limited to, any claims for unpaid wages, economic damages, liquidated damages, other monies, or other relief." (SA ¶ 18.) Members who worked in California will also release claims that "may have [been] brought against the Released Parties based on the facts alleged in the Complaint and/or First Amended Complaint during the California Period for unpaid overtime, meal period premiums, wage statement penalties, waiting time penalties, PAGA penalties, statutory liquidated damages, and attorneys' fees and costs . . . ." (*Id.* ¶ 4.) The limited scope of the release provisions weighs in favor of approval.

e. Counsel's Experience and Views

"In determining whether a settlement is fair and reasonable, the opinions of counsel should be given considerable weight both because of counsel's familiarity with the litigation and previous experience with cases." *Slezak*, 2017 WL 2688224, at *5 (cleaned up). "As the Ninth Circuit has emphasized, parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Selk*, 159 F. Supp. 3d at 1176 (cleaned up).

As previously noted, counsel for Plaintiff and the Collective has nearly three decades of experience advocating for employee and consumer rights and has represented "thousands of employees in hundreds of cases." (Brome Decl. ¶ 6.) "Counsel has concluded that the Settlement Agreement is fair, reasonable, and adequate and is in the best interest of the FLSA Collective in light of all known facts and circumstances, including the likely damages, risk of significant delay, risk that the Action would not proceed on a collective or class action basis, defenses asserted by Defendant, and numerous potential appellate issues." (SA ¶ 44.) This factor weighs in favor of approval.

f. Attorneys' Fees and Costs

"Where a proposed settlement of FLSA claims includes the payment of attorney's fees, the court must also assess the reasonableness of the fee award." *Selk*, 159 F. Supp. 3d at 1180 (citing 29 U.S.C. § 216(b) [providing that, in a FLSA action, the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action"]). The Ninth Circuit has held that 25% of a common fund is the "benchmark" for a reasonable fee award, and courts must provide adequate explanation in the record of any "special circumstances" to justify a departure from this benchmark. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942–43 (9th Cir. 2011); *see also Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989) ("We note with approval that one court has concluded that the 'bench mark' percentage for the fee award should be 25 percent. That percentage amount can then be adjusted upward or downward to account for any unusual circumstances involved in this case." (internal citation omitted)).

The Settlement Agreement provides that Counsel may seek attorneys' fees of up to 25% of the Gross Settlement Value, plus litigation costs. (*See* SA ¶ 47(h).) Further, Counsel will seek approval of attorneys' fees based only on the amount that is actually

claimed, not the maximum potential settlement amount. (*See id.*) The Court finds that Counsel's requested fees are both fair and reasonable, and grants preliminary approval of the 25% fee award.

Turning to costs, Counsel requests approval of up to $9,500 in out-of-pocket litigation costs. (*See* Brome Decl. ¶ 12.) "[A]ttorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters." *Cunha v. Hansen Nat. Corp.*, 2015 WL 12697627, at *5 (C.D. Cal. Jan. 29, 2015) (awarding $318,207 in costs). Plaintiff asserts that "Counsel has incurred unreimbursed costs during this litigation, which it advanced on behalf of Plaintiffs" and that it "will incur additional costs in finalizing and administering the settlement." (Mot. at 20.) Plaintiff further states that "Counsel will provide details of these costs in subsequent briefing." (*Id.*) While the Court finds as a preliminary matter that the requested costs are within the range of reasonableness, it will require further details about Counsel's specific expenses before granting final approval.

g. Possibility of Fraud or Collusion

In assessing whether there is the possibility of fraud or collusion, courts often look to considerations the Ninth Circuit highlighted in *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). *See Jennings*, 2018 WL 4773057, at *8; *Selk*, 159 F. Supp. 3d at 1180; *Slezak*, 2017 WL 2688224, at *5. In that case, the Ninth Circuit explained that courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Bluetooth*, 654 F.3d at 947; *see also Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1060 (9th Cir. 2019); *Briseno v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021). Those signs include (1) when counsel receives a disproportionate distribution of the settlement, (2) when the

parties negotiate a "clear sailing arrangement," under which the defendant agrees not to challenge a request for an agreed-upon attorney fee, and (3) when the agreement contains a "kicker" or "reverter" clause that returns unclaimed funds to the defendant rather than to the class. *Bluetooth*, 654 F.3d at 947; *Roes,* 944 F.3d at 1060; *see also Briseño*, 998 F.3d at 1023. But these are just signs of *possible* collusion, not automatic bases for rejection of a settlement. *See Briseño*, 998 F.3d at 1027. When they are present, courts must scrutinize the settlement more closely to look for signs that self-interest—even if not purposeful collusion—has seeped its way into the settlement terms. *See Roes,* 944 F.3d at 1060.

Here, Counsel does not receive a disproportionate distribution of the settlement. Indeed, Counsel requested only the *Bluetooth* benchmark amount of fees. Nor is there any concern about reverter, because unawarded fees go to Collective Members, not Defendant. (*See* SA ¶ 47(h) ["Should the Fee and Expense Award approved by the Court be less than the amount sought, the difference shall be distributed, pro rata, prior to distribution of settlement funds to Claimants"].) Finally, the Settlement Agreement does not contain a clear sailing arrangement. The Court therefore finds no evidence that the Settlement Agreement resulted from, or was influenced by, fraud or collusion.

h. Settlement Administration Costs

The Settlement Agreement provides for the payment of "Administration Costs," made up of "the actual and direct costs reasonably charged by the Settlement Administrator, CPT Group, for its services in administering the Settlement." (SA ¶ 2.) It states that such costs "are currently projected by the Parties not to exceed Sixteen Thousand Five Hundred Dollars ($16,500.00)." (*Id.*) The Court will preliminarily approve the $16,500 in administration costs as set forth in the Settlement Agreement.

i. Incentive Awards

"At its discretion, a district court may award an incentive payment to the named plaintiffs in a FLSA collective action to compensate them for work done on behalf of the class." *Selk*, 159 F. Supp. 3d at 1181. In determining whether an incentive award is appropriate, courts consider "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." *Id.* Incentive awards typically range from $2,000 to $10,000. *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015) (collecting cases); *see In re Toys R Us-Del., Inc.-Fair & Accurate Credit Transactions Act Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014) (explaining that California district courts typically approve incentive awards between $3,000 and $5,000). A $5,000 payment is "presumptively reasonable." *Bellinghausen*, 306 F.R.D. at 266.

The Settlement Agreement provides that "Plaintiff requests the Court's approval of an incentive payment of $7,500 to the Named Plaintiff, amounting to only 1.3% of the gross settlement amount." (Mot. at 16.) Counsel asserts that a $7,500 award for Plaintiff is appropriate because she risked retaliation for her participation, and yet despite that, she was "substantially involved in the litigation" and spent time "educating Counsel about Defendant's policies and procedures." (Brome Decl. ¶ 10.) The Court is persuaded that the evidence presented justifies awarding Plaintiff an incentive award slightly higher than the "presumptively reasonable" amount of $5,000. *See Hernandez v. Dutton Ranch Corp.*, 2021 WL 5053476, at *7 (N.D. Cal. Sept. 10, 2021) (finding requested service awards of $7,000 to be reasonable); *see also Sandoval v. Tharaldson Emp. Mgmt., Inc.*, 2010 WL 2486346, at *10 (C.D. Cal. June 15, 2010) (awarding $7,500). Accordingly, the Court will preliminarily approve a $7,500 incentive award for Plaintiff.

V. PAGA SETTLEMENT

Under PAGA, an "aggrieved employee" may bring an action for civil penalties for labor code violations on behalf of herself and other current or former employees. Cal. Lab. Code § 2699(a). A plaintiff suing under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies." *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009). A judgment in a PAGA action "binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government." *Id.* Although there is no binding authority setting forth the proper standard of review for PAGA settlements, California courts often look to the LWDA's guidance that relief "be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public . . . ." *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016) (citing the LWDA's guidance with approval).

The parties have agreed that Defendant will pay a PAGA penalty of $4,000. (*See* Mot. at 21.) Seventy-five percent ($3,000) will go to the LWDA, and twenty-five percent ($1,000) will remain part of the Settlement for distribution to eligible Collective Members. *See id.*; *see also* Cal. Lab. Code § 2699(i) (providing that 75% of civil penalties recovered by aggrieved employees should be distributed to the LWDA). The $4,000 PAGA allocation represents 4.7% of the estimated value of the PAGA claims, (*see* Brome Decl. ¶ 9), and 0.7% of the gross settlement value, (*see* Mot. at 21). Plaintiff asserts that this "is substantial given that most of the case concerned non-California workers." (*Id.*) !!!

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The Settlement Agreement's PAGA allocation is comparable to other settlements approved by district courts in this circuit and is a minimal but acceptable amount to vindicate the LWDA's interest in enforcing California's labor laws. *See Smith v. Kaiser Found. Hosps.*, 2020 WL 5064282, at *17 (S.D. Cal. Aug. 26, 2020) (finding that PAGA

award which was 2.4% of maximum estimated value of PAGA claims was not "unfair, inadequate, or unreasonable given the risks of continued litigation"); *Gilmore v. McMillan-Hendryx Inc.*, 2022 WL 184004, at *4 (E.D. Cal. Jan. 20, 2022) (PAGA award of 4.2% of the maximum estimated value of PAGA claims and 2.3% of the total settlement amount was "not unreasonable and weighs in favor of settlement"); *Merante v. Am. Inst. for Foreign Study, Inc.*, 2022 WL 2918896, at *6 (N.D. Cal. July 25, 2022) (PAGA award of between 0.27% and 2% of the maximum estimated value of PAGA claims was "small" but "within the range of reasonableness").[6] This is especially true given the fact that only twenty-one of the 217 Collective Members worked in California and thus were eligible to seek penalties under PAGA. (*See* Mot. at 22.)

VI. CONCLUSION

For the foregoing reasons, Plaintiff's renewed motion for conditional collective certification and preliminary settlement approval is **GRANTED**. The Court **ORDERS** the following:

A. The Court appoints Sandra Medina as the Settlement Collective Representative.

B. The Court appoints Nichols Kaster, LLP, as Settlement Collective Counsel.

C. The Court appoints the CPT Group as the Settlement Administrator.

D. The Court preliminarily approves the Settlement Agreement and the terms and conditions of settlement set forth therein, subject to further consideration at a Final Approval Hearing.

E. The Court authorizes the mailing of notice to the Collective as described in the Settlement Agreement.

[6] Additionally, the LWDA has not objected to the settlement. (*See* Brome Decl. ¶ 9.)

F. The Court sets the Final Approval Hearing for **Monday, April 3, 2023, at 1:30 p.m.**

DATED: November 18, 2022

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE