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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROY VAN KEMPEN,
Plaintiff,
v.
MATHESON TRI-GAS, INC.,
Defendant.

Case No. [15-cv-00660-HSG](#)

**ORDER GRANTING MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT AND MOTION
FOR ATTORNEYS’ FEES AND COSTS**

Re: Dkt. Nos. 73, 75

United States District Court
Northern District of California

Pending before the Court is Plaintiff Roy Van Kempen’s (“Plaintiff”) motion for final approval of a class action settlement, individually and on behalf of the settlement class as defined herein, as well as Plaintiff’s unopposed motion for attorneys’ fees, costs, and an enhancement award. Dkt. Nos. 73, 75. The proposed settlement will resolve Plaintiff’s wage-and-hour claims against Defendant Matheson Tri-Gas, Inc. (“Defendant”) under the Fair Labor Standards Act, 29 U.S.C. § 207, et seq. (“FLSA”), and various California statutes. Having carefully considered the arguments of the parties, the Court **GRANTS** Plaintiff’s motions for the reasons set forth below.

I. BACKGROUND

A. Factual Allegations and Procedural History

Defendant employed Plaintiff as an hourly, non-exempt delivery driver of industrial and medical gases. Dkt. No. 48 (“Van Kempen Decl.”) ¶¶ 3-4. In his operative complaint, Plaintiff alleges that Defendant intentionally failed to include the non-discretionary bonuses he received in calculating his rate of overtime pay. On that basis, Plaintiff claims that Defendant systematically underpaid his overtime wages in violation of § 207(a)(1) of the FLSA and § 510 of the California Labor Code. Dkt. No. 26 (“Am. Compl.”) ¶¶ 38-39, 49. Plaintiff further alleges that Defendant had a “use-it-or-lose it” vacation time policy by which accrued vacation time was automatically

1 forfeited if not used within a specified time period. *Id.* ¶ 65. Plaintiff claims that this vacation-
 2 time policy violated California Labor Code § 227.3. *Id.* ¶ 66.¹ These claims are asserted in both
 3 Plaintiff’s individual capacity and on behalf of all other persons similarly situated. *Id.* ¶ 9.

4 Defendant removed this action from state court under federal question, diversity, and Class
 5 Action Fairness Act jurisdiction. Dkt. No. 1 & Ex. A. In this Court, Plaintiff amended his initial
 6 complaint to add new state law claims and propounded formal and informal written discovery on
 7 Defendant. *See* Dkt. Nos. 26 & 49 (“Hague Decl.”) ¶¶ 4, 13. The parties then participated in a
 8 private mediation before a retired state court judge, and the case settled. *Id.* ¶ 5; Dkt. No. 42.

9 Plaintiff filed an unopposed motion for preliminary approval of class and collective action
 10 settlement on January 10, 2016. *See* Dkt. No. 45. The Court denied Plaintiff’s motion on August
 11 1, 2016. *See* Dkt. No. 57. In its decision, the Court (1) granted provisional class certification of
 12 the nationwide FLSA overtime class, and California overtime and vacation classes, *see id.* at 12;
 13 (2) appointed Plaintiff as class representative, *id.*, and Sutton Hague Law Corporation as class
 14 counsel, *id.* at 13; and (3) denied preliminary settlement approval due to the proposed FLSA opt-in
 15 agreement and release language, *id.* at 14, 16. The Court also noted problems with several other
 16 portions of the proposed settlement agreement, including its (1) provision of preferential treatment
 17 to Plaintiff, *id.* at 16-17; (2) failure to explain whether the California overtime class would receive
 18 settlement payments within the range of possible approval, *id.* at 17; (3) failure to specify whether
 19 certain claims fall within the related class action settlement described below, *id.* at 18; and
 20 (4) failure to specify which putative class members would receive the proposed notice forms and
 21 why, *id.* at 20.

22 **B. Related Class Action Settlement**

23 Before turning to the terms of the proposed settlement agreement, the Court addresses the
 24 class action settlement in a partially overlapping lawsuit, *Ambriz v. Matheson Tri-Gas, Inc.*, No.
 25 2:14-cv-04546 (C.D. Cal. Feb. 4, 2016).² In that case, the plaintiffs, who were also employed as
 26

27 ¹ Plaintiff’s other asserted claims are not included in the proposed settlement, as explained below.

28 ² Plaintiff previously requested judicial notice of materials from the *Ambriz* action, including the motion for preliminary approval of class action settlement, the operative complaint, and a declaration filed in support of preliminary approval. Dkt. No. 50 & Exs. 1-3. Plaintiff also

1 delivery drivers by Defendant, asserted a variety of wage-and-hour claims under California law.
 2 Dkt. No. 50, Ex. 2. The parties entered into a class action settlement, as to which the Court
 3 granted final approval before the original settlement motion in this case was heard by this Court.
 4 Dkt. No. 54 ¶ 4.

5 The *Ambriz* settlement class includes “all current and former drivers who were employed
 6 by Defendant from March 5, 2010 through June 25, 2015.” Dkt. No. 55, Ex. 1 ¶ 2. It releases, by
 7 the account of the parties to this action, every claim asserted in the operative complaint except for
 8 “those causes of action related to unpaid accrued vacation days and unpaid overtime based on a
 9 miscalculation of the regular rate of pay.” Dkt. No. 46 at 7; *see also* Dkt. No. 50, Ex. 3 ¶¶ 52-53;
 10 *see also* Dkt. No. 66 at 7. The instant settlement, therefore, purportedly functions only to “fill
 11 gaps” in the *Ambriz* settlement. *See* Dkt. No. 46 at 1, 7.

12 C. Overview of the Proposed Settlement

13 With this background in mind, the Court now describes the key terms of the proposed class
 14 action settlement in this case. *See* Dkt. No. 60, Ex. 1 (“SA”).

15 Class Definitions: There are three groups of proposed class members: (1) an FLSA
 16 overtime group, comprised of all current and former non-exempt employees of Defendant
 17 nationwide who worked overtime while entitled to non-discretionary bonus pay and who opt in to
 18 the group; (2) a California overtime class, comprised of all current and former non-exempt
 19 employees of Defendant in California who worked overtime while entitled to non-discretionary
 20 bonus pay and who do not opt out of the settlement; and (3) a California vacation-time class,
 21 comprised of all persons employed by Defendant in California who accrued vacation time but
 22 forfeited it. *Id.* ¶ 8. The class period for all three proposed classes runs from January 9, 2011,
 23 through the date that the Court enters final approval of the collective and class action settlement.
 24 *Id.* ¶ 10. In total, the parties estimate that there are approximately 2,400 putative class members.

25
 26
 27 submitted two supplemental declarations of counsel that attach the minute order and order
 28 granting final approval of the class action settlement in *Ambriz*. Dkt. Nos. 54 & 55, Exs. 1-2. In
 its previous order denying the parties’ motion for preliminary approval, the Court took judicial
 notice of these materials to the extent they explained the procedural posture of this case, but not
 for the truth of the matters asserted therein. *See* Dkt. No. 57 at 2 n.2.

1 *Id.* ¶ 9.

2 Monetary Relief: Defendant will pay a gross total of \$370,000 to resolve this action, less
 3 attorneys' fees up to \$103,600 and up to \$15,000 in litigation costs, a \$5,000 incentive award for
 4 Plaintiff, settlement administration costs not anticipated to exceed \$25,000, and 75% of the \$5,000
 5 penalty under the Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2699. *Id.* ¶¶ 23-28.
 6 Based on these assumptions, the parties estimate that the putative classes will receive a total of
 7 \$217,650. *Id.* ¶ 34(a). Fifty-two percent of this amount is allocated to the FLSA nationwide and
 8 California overtime classes. *Id.* ¶ 33. The remaining 48% is allocated to the California vacation
 9 class. *Id.* Each individual putative class member's payment within each proposed class will be
 10 calculated by dividing the net settlement amount by the total number of weeks that all members of
 11 the relevant proposed class worked during the class period and then multiplying that number of
 12 compensable workweeks that the individual worked. *Id.* ¶ 34(b)(i). Regardless of the outcome of
 13 this formula, each putative class member will receive a monetary payment of at least \$25. *Id.*

14 Cy Pres Recipients: Settlement checks left uncashed for 180 days by California class
 15 members will revert to California's Division of Labor Standards Enforcement unclaimed wage
 16 fund. *Id.* ¶ 34(b)(vii). Settlement checks similarly left uncashed by FLSA class members will
 17 revert in equal part to the Employee Rights Advocacy Institute for Law & Policy and the UCLA
 18 Institute for Research on Labor and Employment. *Id.*

19 Release: There is both a class and individual component to the proposed release. Putative
 20 class members would release "any and all applicable claims . . . which were asserted in the Action
 21 or could have been asserted against the Released Parties based on the claims, matters, transactions
 22 or occurrences referred to in the operative Complaint during the Claims Period (hereinafter
 23 "Released Claims"). *Id.* ¶ 66. Released Claims also include "claims under or pertaining to the
 24 Fair Labor Standards Act . . . any and all PAGA penalties or other relief under California Business
 25 and Professions Code Section 17200 et seq. [that could have been raised in the operative
 26 Complaint] . . . and all rights under California Civil Code Section 1542." *Id.* Plaintiff, as class
 27 representative, would release these same claims. *Id.* ¶ 69. In addition, the agreement states that
 28 "[i]t is understood and agreed that the [settlement] will not release Named Plaintiff from claims, if

any, for worker’s compensation, unemployment, or disability benefits of any nature.” *Id.* ¶ 69.

Class Notice: The parties intend to send class notice packages to all last-known addresses of putative class members by US mail within fourteen calendar days of the Court’s order granting preliminary approval. *Id.* ¶¶ 38, 39. As part of that class notice package, there are two different class notice forms. *See* Dkt. No. 66 Exs. 1 & 2. One notice is for nationwide FLSA overtime putative class members and the other is for California putative class members. *Id.* at 9-10.

Opt-Out & Opt-In Procedures: Putative members of the California overtime and vacation classes have the right to opt out of the settlement by submitting a request for exclusion form within 60 days after the settlement administrator transmits class notice. SA ¶ 47. If five percent of either the California overtime or vacation putative classes opt out of the settlement, Defendant shall have the unilateral right to terminate the settlement agreement. *Id.* ¶¶ 42.

Putative members of the FLSA class must affirmatively opt in to participate in the FLSA settlement, as required by 29 U.S.C. § 216(b). *Id.* ¶ 43. FLSA overtime putative class members must opt in by submitting a Claim Form to the Claims Administrator not later than 60 calendar days from the mailing of the Notice Packet. *Id.*; *see also id.* ¶ 32.

Class Representative and Class Counsel: Plaintiff has been appointed class representative and Sutton Hague Law Corporation has been appointed class counsel. *See* Dkt. No. 57 at 12-13.

Incentive Award: Plaintiff seeks a \$5,000 incentive award as class representative. SA ¶ 26.

Attorneys’ Fees and Costs: Class counsel will seek attorneys’ fees equal to 28% of the gross settlement amount and litigation costs up to \$15,000. *Id.* ¶¶ 24, 25. Defendant does not oppose this request. *Id.* If the Court awards attorneys’ fees and costs equal to less than the requested amount, the difference will revert to the net settlement amount. Dkt. No. 82 ¶ 23(a)(4).

II. ANALYSIS

A. Final Settlement Approval

i. Class Certification

Final approval of a class action settlement requires, as a threshold matter, an assessment of whether the class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019–1022 (9th Cir. 1998). Because no facts that

1 would affect the Court’s reasoning have changed since the Court provisionally certified the
2 nationwide FLSA overtime and California overtime and vacation classes under FRCP 23(a) and
3 (b) on August 1, 2016, this order incorporates by reference its prior analysis under Rules
4 23(a) and (b). *See* Dkt. No 57 at 12. This order also incorporates by reference its previous
5 provisional certification of Plaintiff as class representative, and Sutton Hague Law Corporation as
6 class counsel. *Id.* at 13. The Court affirms its previous findings and certifies the aforementioned
7 settlement classes, class representative, and class counsel. *See id.* at 13.

8 **ii. The Settlement**

9 “The claims, issues, or defenses of a certified class may be settled . . . only with the court’s
10 approval.” Fed. R. Civ. P. 23(e). The Court may finally approve a class settlement “only after a
11 hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *Officers*
12 *for Justice v. Civil Serv. Comm’n of the City and Cnty. of San Francisco*, 688 F.2d 615, 625 (9th
13 Cir. 1982) (“The district court’s role in evaluating a proposed settlement must be tailored to fulfill
14 the objectives outlined above. In other words, the court’s intrusion upon what is otherwise a
15 private consensual agreement negotiated between the parties to a lawsuit must be limited to the
16 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
17 overreaching by, or collusion between, the negotiating parties . . .”). To assess whether a
18 proposed settlement comports with Rule 23(e), the Court “may consider some or all” of the
19 following factors: (1) the strength of plaintiff’s case; (2) the risk, expense, complexity, and likely
20 duration of further litigation; (3) the risk of maintaining class action status throughout the trial;
21 (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the
22 proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
23 participant; and (8) the reaction of the class members to the proposed settlement. *Rodriguez v.*
24 *West Publ’g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009); *see also Hanlon*, 150 F.3d at 1026. “The
25 relative degree of importance to be attached to any particular factor” is case specific. *Officers for*
26 *Justice*, 688 F.2d at 625.

27 In addition, “[a]dequate notice is critical to court approval of a class settlement under Rule
28 23(e).” *Hanlon*, 150 F.3d at 1025. As discussed below, the Court finds that the proposed

1 settlement is fair, adequate, and reasonable, and that class members received adequate notice.

2 a. Adequacy of Notice

3 Under Federal Rule of Civil Procedure 23(e), the Court “must direct notice in a reasonable
4 manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1).
5 Rule 23(c)(2)(B) requires “the best notice that is practicable under the circumstances, including
6 individual notice to all members who can be identified through reasonable effort.” The notice
7 must “clearly and concisely state in plain, easily understood language” the nature of the action, the
8 class definition, and the class members’ right to exclude themselves from the class. Fed. R. Civ.
9 P. 23(c)(2)(B). Although Rule 23 requires that reasonable efforts be made to reach all class
10 members, it does not require that each class member actually receive notice. *See Rannis v.*
11 *Recchia*, 380 F. App’x 646, 650 (9th Cir. 2010) (noting that “due process requires reasonable
12 effort to inform affected class members through individual notice, not receipt of individual
13 notice”).

14 The Court finds that the notice and notice plan previously approved by the Court, Dkt. No.
15 67 at 11; Dkt. No. 70 at 2, was implemented and complies with Rule 23(c)(2)(B). The Court
16 ordered that third-party settlement administrator, Simpluris, send class notice via first-class mail to
17 each class member at their last known address, as provided by Defendants. Dkt. No. 67 at 11. In
18 addition, the Court ordered Simpluris to prepare individualized class notice forms, perform an
19 initial national change of address search, use standard skip-tracing devices to obtain forwarding
20 addresses for old addresses, track undelivered notices, process any exclusion requests, establish a
21 settlement fund, administer payments, and establish a toll-free number to take inquiries from class
22 members. *Id.* Simpluris states that class notice was provided as directed, having mailed notice
23 packets to 2,348 class members via first class mail on April 19, 2017. *See* Dkt. No. 75-3 ¶ 7. Of
24 the 2,348 packets disseminated, 96 notices were returned as undeliverable. *Id.* ¶ 8. Simpluris then
25 performed skip-tracing on those 96 addresses and located updated addresses for 85 class members.
26 *Id.* Simpluris was ultimately unable to locate current addresses for 11 class members. *Id.*
27 Simpluris received no objections to the settlement and eleven valid requests for exclusion from the
28 California opt-out only class, equal to 2.81% of that class. *Id.* ¶ 10. In addition, Simpluris

1 received 220 valid claims to opt-in to the FLSA settlement class, equal to 11.21% of that class. *Id.*
 2 ¶ 9. In total, “there are 498 Participating Class Members who will be paid their portion of the Net
 3 Settlement Amount.” *Id.* ¶ 12. In light of these facts, the Court finds that the parties have
 4 sufficiently provided the best practicable notice to the class members.

5 b. Fairness, Adequacy, and Reasonableness

6 Having found the notice procedures adequate under Rule 23(e), the Court next considers
 7 whether the entire settlement comports with Rule 23(e).

8 1. Strength of Plaintiff’s Case, Risk of Further Litigation, and Risks of
 9 Maintaining Class Action Status

10 Approval of a class settlement is appropriate when plaintiffs must overcome significant
 11 barriers to make their case. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D.
 12 Cal. 2010). Courts “may presume that through negotiation, the Parties, counsel, and mediator
 13 arrived at a reasonable range of settlement by considering Plaintiff’s likelihood of recovery.”
 14 *Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-cv-1365-CW, 2010 WL 1687832, at *9 (N.D.
 15 Cal. Apr. 22, 2010). Additionally, difficulties and risks in litigating weigh in favor of approving a
 16 class settlement. *Rodriguez*, 563 F.3d at 966. “Generally, unless the settlement is clearly
 17 inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with
 18 uncertain results.” *Ching v. Siemens Indus., Inc.*, No. 11-cv-04838-MEJ, 2014 WL 2926210, at *4
 19 (N.D. Cal. June 27, 2014) (quotation omitted).

20 This action reached settlement before the Court had an opportunity to consider the merits
 21 of the claims. Yet “Plaintiff’s counsel estimates that if Plaintiff were to prevail on all his claims at
 22 trial, the probable expected recovery for the Settlement Class would not be likely to exceed
 23 approximately \$400,000 before attorneys’ fees and costs.” Dkt. No. 75-1 at 9. “The \$370,000
 24 Gross Settlement Amount [therefore] represents approximately 90 percent of the Settlement
 25 Class’s total potential recovery in this case, and the \$217,650 Net Settlement Amount represents
 26 approximately 54 percent of the total potential recovery, and is offered without the risk of
 27 continued litigation.” *Id.* Furthermore, “Plaintiff acknowledges the difficulties of proving
 28 damages, recognize[s] the uncertainty of the outcome, . . . believe[s] defendant would appeal in

1 the event of adverse judgment,” and recognizes the “risk that the Court may not have certified
2 some or all of Plaintiff’s claims for class treatment.” *Id.* at 10, 11. In reaching a settlement,
3 Plaintiff has thus ensured a favorable recovery for the class. *See Rodriguez*, 563 F.3d at 966
4 (finding litigation risks weigh in favor of approving class settlement). Accordingly, these factors
5 weigh in favor of approving the settlement. *See Ching*, 2014 WL 2926210, at *4 (favoring
6 settlement to protracted litigation).

7 2. Settlement Amount

8 The amount offered in the settlement is another factor that weighs in favor of approval.
9 The class here will receive a “\$370,000 Gross Settlement Amount represent[ing] approximately 90
10 percent of the Settlement Class’s total potential recovery in this case, and [a] \$217,650 Net
11 Settlement Amount represent[ing] approximately 54 percent of the total potential recovery.” Dkt.
12 No. 75-1 at 9. This is in line with another recent wage and hour class action settlement in this
13 district. *See Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) (finally
14 approving “\$1,000,000 settlement fund represent[ing] between 25.4 percent and 8.5 percent of
15 Defendant’s total potential liability exposure.”). Based on the facts in the record and the parties’
16 arguments at the preliminary approval and final fairness hearings, the Court finds that the
17 settlement amount thus weighs in favor of final approval.

18 3. Extent of Discovery Completed and Stage of Proceedings

19 The Court finds that class counsel had sufficient information to make an informed decision
20 about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir.
21 2000). “Settlement in this case was only reached after extensive discovery and exchange of
22 information” over a “roughly two-and-a-half year[.]” period. Dkt. No. 75-1 at 3. Throughout that
23 time, “Plaintiff conducted extensive written discovery,” “exchanged thousands of pages of
24 documents that were used to evaluate the strengths and weaknesses of the case and the potential
25 Class damages,” and “participated in an intensive, arms-length mediation” with highly qualified
26 mediators. *Id.* The Court thus finds that the parties have received, examined, and analyzed
27 information, documents, and materials that sufficiently enabled them to assess the likelihood of
28 success on the merits. This factor weighs in favor of approval.

1 4. Experience and Views of Counsel

2 The Court next considers the experience and views of counsel, and finds that this factor
3 also weighs in favor of approval. “[P]arties represented by competent counsel are better
4 positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in
5 litigation.” *Rodriguez*, 563 F.3d at 967 (internal quotation marks omitted). Accordingly, “[t]he
6 recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.” *In re*
7 *Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). The Court has previously
8 evaluated class counsel’s qualifications and experience and concluded that counsel is qualified to
9 represent the classes’ interests in this action. *See* Dkt. No. 57 at 13. “After thorough discovery,
10 investigation and briefing regarding Plaintiff’s claims, Class Counsel believes the instant
11 settlement is in the best interests of the Settlement Class Members.” Dkt. No. 75-1 at 12. The
12 Court notes, however, that courts have taken divergent views as to the weight to accord counsel’s
13 opinions. *Compare Carter v. Anderson Merch., LP*, 2010 WL 1946784, at *8 (C.D. Cal. May 11,
14 2010) (“Counsel’s opinion is accorded considerable weight.”) *with Chun-Hoon*, 716 F. Supp. 2d at
15 852 (“[T]his court is reluctant to put much stock in counsel’s pronouncements, as parties to class
16 actions and their counsel often have pecuniary interests in seeing the settlement approved.”).
17 Accordingly, although the Court finds that this factor weighs in favor of approval, the Court
18 affords only modest weight to counsel’s views.

19 5. Governmental Participation

20 This factor is irrelevant to the Court’s analysis because no governmental entity participated
21 in this matter.

22 6. Reaction of Class Members

23 The reaction of the class members supports final approval. “[T]he absence of a large
24 number of objections to a proposed class action settlement raises a strong presumption that the
25 terms of a proposed class settlement action are favorable to the class members.” *Nat’l Rural*
26 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D. Cal. 2004); *In re LinkedIn*
27 *User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) (“A low number of opt-outs and
28 objections in comparison to class size is typically a factor that supports settlement approval.”).

1 Class notice, which was served on each class member in accordance with the methods
 2 approved by the Court, advised the class of the requirements regarding objections and exclusions.
 3 See Dkt. Nos. 67 at 10-12, 75-3. The deadline to file opt-outs, opt-ins, and objections was May 1,
 4 2017. Dkt. No. 67 at 12. Simpluris received no objections to the settlement, but did receive
 5 eleven valid requests for exclusion from the California opt-out only class, equal to 2.81% of that
 6 class. Dkt. No. 75-3 ¶¶ 10, 11. In addition, Simpluris received 220 valid claims to opt in to the
 7 FLSA settlement class, equal to 11.21% of that class. *Id.* ¶ 9. The Court finds that the absence of
 8 objections and low number of opt-outs indicates support among the class members, constitutes a
 9 positive reaction, and weighs in favor of approval. See, e.g., *Churchill Village LLC v. Gen. Elec.*,
 10 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement where 45 of approximately 90,000 class
 11 members objected); *Rodriguez v. West Publ. Corp.*, Case No. CV05–3222 R, 2007 WL 2827379,
 12 at *10 (C.D. Cal. Sept. 10, 2007) (finding favorable class reaction where 54 of 376,301 class
 13 members objected). The relatively low response as to the FLSA class also does not weigh against
 14 approval, as those individuals who chose not to opt in to the settlement will not release any claims.
 15 In addition, as Plaintiff notes, “the FLSA opt-in rate does not change the non-reversionary
 16 structure of the Settlement, in that all of the Net Settlement Amount will [nevertheless] be
 17 distributed to the participating Settlement Class Members.” Dkt. No. 75 at 13. The Court thus
 18 finds that this factor weighs in favor of approval.

19 * * *

20 After considering and weighing the above factors, the Court finds that the settlement
 21 agreement is fair, adequate, and reasonable, and that the settlement class members received
 22 adequate notice. Accordingly, Plaintiffs’ motion for final approval of class action settlement is
 23 **GRANTED.**

24 **B. Motion for Attorneys’ Fees and Costs**

25 In its second unopposed motion, class counsel asks the Court to approve an award of
 26 \$103,600 in attorneys’ fees and \$7,674.55 in costs. Dkt. Nos. 74 at 4, 78 at 5. Class counsel also
 27 seeks a \$5000 incentive award for the named Plaintiff for his assistance in this case. *Id.*
 28

1 **i. Attorneys' Fees**

2 “In a certified class action, the court may award reasonable attorney’s fees . . . that are
3 authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). The Court has discretion
4 in a common fund case to choose either the (1) percentage-of-the-fund, or (2) lodestar method
5 when calculating reasonable attorneys’ fees. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047
6 (9th Cir. 2002).

7 Under the percentage-of-recovery method, twenty-five percent of a common fund is the
8 benchmark for attorneys’ fees awards. *See, e.g., In re Bluetooth*, 654 F.3d at 942 (“[C]ourts
9 typically calculate 25% of the fund as the ‘benchmark’ for a reasonable fee award, providing
10 adequate explanation in the record of any ‘special circumstances’ justifying a departure.”); *Six*
11 *Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

12 Under the lodestar method, a “lodestar figure is calculated by multiplying the number of
13 hours the prevailing party reasonably expended on the litigation (as supported by adequate
14 documentation) by a reasonable hourly rate for the region and for the experience of the lawyer.”
15 *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (*citing Staton v.*
16 *Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003)). Whether the Court awards the benchmark amount
17 or some other rate, the award must be supported “by findings that take into account all of the
18 circumstances of the case.” *Vizcaino*, 290 F.3d at 1048.

19 “[T]he established standard when determining a reasonable hourly rate is the rate
20 prevailing in the community for similar work performed by attorneys of comparable skill,
21 experience, and reputation.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008)
22 (internal quotation marks omitted). Generally, “the relevant community is the forum in which the
23 district court sits.” *Id.* (*citing Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)). Typically,
24 “affidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees in the
25 community and rate determinations in other cases . . . are satisfactory evidence of the prevailing
26 market rate.” *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir.
27 1990). “In addition to affidavits from the fee applicant, other evidence of prevailing market rates
28 may include affidavits from other area attorneys or examples of rates awarded to counsel in

1 previous cases.” *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 687 (N.D. Cal.
2 2016).

3 Although “the choice between lodestar and percentage calculation depends on the
4 circumstances, . . . either method may . . . have its place in determining what would be reasonable
5 compensation for creating a common fund.” *Id.* To guard against an unreasonable result, the
6 Ninth Circuit has encouraged district courts to cross-check any calculations done in one method
7 against those of another method. *Vizcaino*, 290 F.3d at 1050–51.

8 Here, class counsel seeks twenty-eight percent of the settlement amount, which is slightly
9 above the twenty-five percent benchmark for a reasonable fee award. *See* Dkt. No. 74 at 4. To
10 justify this upward departure, class counsel states that this figure is still less than its attorneys’ fees
11 would be under the lodestar method. *See id.* at 5.

12 To calculate its lodestar, class counsel contends that it has expended a combined 314.2
13 hours on this case. Dkt. No. 73-2 at 6.³ One attorney requests a billing rate of \$800 per hour for
14 40.3 hours of work, one attorney requests a billing rate of \$580 per hour for 168.4 hours of work,
15 and two attorneys request billing rates of \$300 per hour for 92.1 and 13.4 hours of work
16 respectively. *Id.* Applying these rates to these hours, Plaintiffs calculate the lodestar to be
17 \$172,922. *Id.* However, by the Court’s calculation, 40.3 hours of work at a rate of \$800 per hour
18 equates to \$32,240, and a total lodestar of \$161,612. Nevertheless, class counsel seeks an award
19 of \$103,600, and “assert[s] that the fees sought are reasonable because they represent a discount
20 compared to the [] lodestar in this matter—in other words, a negative multiplier.” *Schuchardt*,
21 314 F.R.D. at 690; *see also* Dkt. No. 74 at 5. Class counsel initially based its support for each
22 attorney’s hourly rates on the *Laffey* matrix—“a chart reflecting the market rates for attorneys’
23 fees incurred in complex litigation in the District of Columbia”—and other state court actions. *See*
24 Dkt. No. 74; *Ruiz v. JCP Logistics, Inc.*, NO. SACV 13-1908-JLS (ANx), 2016 WL 6156212, at

25 _____
26 ³ While class counsel indicated that it had spent a combined 327.75 hours on this case as of
27 August 8, 2017, counsel did not indicate how the additional hours were spent. The Court declines
28 to award attorneys’ fees for the preparation of class counsel’s supplemental declaration addressing
attorneys’ fees, however, Dkt. No. 80, as the information in that declaration should have been
provided as part of the original motion for attorneys’ fees. The Court will therefore only consider
the original fees request for 314.2 hours of work.

1 *9 (C.D. Cal. Aug. 12, 2016). The Court thus requested supplemental briefing, Dkt. No. 77,
2 which class counsel provided, Dkt. Nos. 78, 80, 82.

3 Having reviewed class counsel's supplemental filings, the Court finds that the billing rates
4 used by class counsel to calculate the lodestar are reasonable and generally in line with prevailing
5 rates in this District for personnel of comparable experience, skill, and reputation. *See Guerrero v.*
6 *California Dept. of Corrs. and Rehabilitation*, No. C 13-05671 WHA, 2016 WL 3360638 (N.D.
7 Cal. June 16, 2016) (awarding hourly rates between \$750-\$775 for partners and lead counsel in
8 complex federal litigation case with approximately thirty years of experience, \$658 per hour for a
9 partner with eighteen years of experience, and \$325-\$358 per hour for associates with five and six
10 years of experience, respectively). In addition, having carefully reviewed the documentation
11 provided by class counsel, the Court finds that the number of hours expended in this action was
12 reasonable given the length of the case and its procedural posture. While class counsel's proposed
13 hourly rates may be slightly above average for this district, the Court finds that any concerns
14 regarding the rates class counsel used to calculate its lodestar are tempered by the fact that class
15 counsel's actual fee request is significantly lower—by approximately forty percent—than the
16 calculated lodestar. The Court thus **GRANTS** class counsel's request for attorneys' fees in the
17 amount of \$103,600.⁴

18 **ii. Attorneys' Costs**

19 Class counsel is also entitled to recover "those out-of-pocket expenses that would normally
20 be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (quotation
21 marks omitted). Class counsel seeks reimbursement of \$7,674.55 in litigation costs. *See* Dkt.
22 Nos. 74 at 4, 78 at 5.

23 Plaintiff originally submitted the declaration of Brett Sutton, a partner with class counsel,
24 indicating that class counsel incurred a total of \$7,667.35 in litigation-related costs and expenses.
25 Dkt. No. 73-2 ¶ 23. But class counsel did not initially itemize their purported expenses incurred

26 _____
27 ⁴ While the Court awards class counsel attorneys' fees in the amount of \$103,600, due to an
28 oversight with regard to administrative costs, class counsel proposed defraying any additional
administrative costs in part by reducing their total awarded attorneys' fees. The Court grants that
request, and reduces class counsel's total awarded attorneys' fees to \$98,432, as discussed below.

1 during this case to allow the Court to evaluate whether the costs were reasonable and properly
2 expended. *See Gaudin v. Saxon Mortgage Servs., Inc.*, No. 11-CV-01663-JST, 2015 WL
3 7454183, at *9 (N.D. Cal. Nov. 23, 2015). Consequently, the Court ordered class counsel to file
4 an itemization of class counsel's expenses. *See* Dkt. No. 77. Class counsel filed an itemized list
5 on August 2, 2017 that included one additional copying cost, bringing the total costs requested to
6 \$7,674.55. Dkt. No. 78 at 5. Having reviewed the additional documentation, the Court is satisfied
7 that these costs were reasonably incurred and **GRANTS** in full the motion for costs in the amount
8 of \$7,674.55.

9 **iii. Settlement Administration Costs**

10 Class counsel seeks \$37,500 for the costs of class administration conducted by Simpluris,
11 despite having informed class members in the notice that administration costs "not to exceed
12 \$25,000" would be deducted from the \$370,000 settlement fund. Dkt. Nos. 75-1 at 14, 75-3 at 3.
13 Simpluris' duties included: sending class notice via first-class mail to each class member at their
14 last known address, as provided by Defendants, preparing individualized class notice forms,
15 performing an initial national change of address search, using standard skip-tracing devices to
16 obtain forwarding addresses for old addresses, tracking undelivered notices, processing any
17 exclusion requests, establishing a settlement fund, administering payments, and establishing a toll-
18 free number to take inquiries from class members. Dkt. No. 67 at 11. Class counsel contends that
19 "the costs of administration slightly exceeded the anticipated \$25,000 threshold due to the costs
20 associated with tax filings in the various states in which the FLSA Group is location," which class
21 counsel and the settlement administrator failed to initially account for. Dkt. No. 75-1 at 4.
22 Because "Class Counsel's costs are approximately \$7,332 below the \$15,000 threshold" initially
23 allocated for them, class counsel proposes that "\$7,332 of the \$12,500 difference between the
24 \$25,000 threshold for administration costs and the \$37,500 final amount be allocated from the
25 amount [set] aside for Class Counsel's costs." *Id.* "With respect to the remaining \$5,168 of
26 administration costs, Plaintiff proposes that such amounts be deducted from Class Counsel's
27 attorneys' fees." *Id.* Defendant does not oppose these proposals, *id.*, and the Court finds them
28 reasonable.

1 Courts regularly award administrative costs associated with providing notice to the class.
2 *See, e.g., Smith v. Am. Greetings Corp.*, No. 14-CV-02577-JST, 2016 WL 2909429, at *11 (N.D.
3 Cal. May 19, 2016); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 266 (N.D. Cal. 2015).
4 Given the scope of Simpluris’ administrative duties in this case, the Court concludes that
5 Simpluris’ costs were reasonably incurred for the benefit of the class and grants the full amount of
6 \$37,500, with \$7,332 awarded from the attorneys’ costs allocation, and \$5,168 awarded from class
7 counsel’s attorneys’ fees award of \$103,600.

8 **iv. Incentive Award**

9 Class counsel requests a service award of \$5000 for named Plaintiff, which Defendants
10 also do not oppose. *See* Dkt. No. 74 at 4. “[N]amed plaintiffs . . . are eligible for reasonable
11 incentive payments.” *Staton*, 327 F.3d at 977; *Rodriguez*, 563 F.3d at 958 (“Incentive awards are
12 fairly typical in class action cases.”). They are designed to “compensate class representatives for
13 work done on behalf of the class, to make up for financial or reputational risk undertaken in
14 bringing the action, and, sometimes, to recognize their willingness to act as a private attorney
15 general.” *Rodriguez*, 563 F.3d at 958–59. Nevertheless, the Ninth Circuit has cautioned that
16 “district courts must be vigilant in scrutinizing all incentive awards to determine whether they
17 destroy the adequacy of the class representatives” *Radcliffe v. Experian Info. Solutions, Inc.*,
18 715 F.3d 1157, 1165 (9th Cir. 2013) (quotation omitted). This is particularly true where “the
19 proposed service fees greatly exceed the payments to absent class members.” *Id.* The district
20 court must evaluate an incentive award using “relevant factors includ[ing] the actions the plaintiff
21 has taken to protect the interests of the class, the degree to which the class has benefitted from
22 those actions, . . . [and] the amount of time and effort the plaintiff expended in pursuing the
23 litigation” *Id.* at 977.

24 Here, the Court finds that Plaintiff added substantial value to this case. Class counsel
25 asserts that Plaintiff has been “instrumental in securing the immediate settlement by actively
26 participating in pre-litigation investigative efforts, [and] propounding and responding to
27 discovery.” Dkt. No. 74 at 4. In addition, class counsel contends that Plaintiff has spent more
28 than 25 hours working on the case since it was filed in 2015, and that Plaintiff participated in

1 regular meetings with class counsel to discuss case strategy and to review drafts of pleadings,
 2 discovery, and settlement documents. Dkt. No. 73-1 ¶ 10. Because numerous courts have found
 3 that a \$5,000 incentive award is “presumptively reasonable” in the Ninth Circuit, the Court grants
 4 Plaintiff the \$5,000 award. *See, e.g., Smith*, 2016 WL 362395, at *10 (rejecting \$7,500 incentive
 5 award where class members were estimated to receive \$1,608.16); *Willner v. Manpower Inc.*, No.
 6 11-CV-02846-JST, 2015 WL 3863625, at *9 (N.D. Cal. June 22, 2015) (rejecting \$11,000
 7 incentive award where class members were estimated to receive between \$600 and \$4,000); *Ko v.*
 8 *Natura Pet Prod., Inc.*, No. C 09-02619 SBA, 2012 WL 3945541, at *15 (N.D. Cal. Sept. 10,
 9 2012) (awarding \$5,000 incentive award for 50–100 hours in contributions over two-year
 10 litigation).

11 **v. PAGA Fees**

12 The Settlement Agreement allocates \$5,000 to settle PAGA claims, with 75% of that
 13 amount to be paid to the LWDA, and 25% to be distributed as part of the settlement awards. Dkt.
 14 No. 75-1 at 14. This allocation is in line with another case in this district. *See Chu v. Wells Fargo*
 15 *Investments, LLC*, Case Nos. C 05–4526 MHP, C 06–7924 MHP, 2011 WL 672645 (N.D. Cal.
 16 Feb. 16, 2011) (approving \$7,500 PAGA allocation out of \$6.9 million common fund settlement,
 17 with 75% to be paid to the LWDA and 25% to be paid to the fund). The Court therefore approves
 18 the proposed \$5,000 PAGA allocation.

19 //

20 **III. CONCLUSION**

21 For the foregoing reasons it is hereby ordered that:


- 22 1. Plaintiff’s Motion for Final Approval of Class Action Settlement and Plaintiff’s
 23 Motion for Attorneys’ Fees and Costs are hereby **GRANTED**.
- 24 2. The Court approves the settlement amount of \$370,000, including payments of
 25 attorneys’ fees in the amount of \$98,432; costs in the amount of \$7,674.55;
 26 administration fees in the amount of \$37,500; an incentive fee for the named
 27 Plaintiff in the amount of \$5,000; and a \$5,000 PAGA allocation.

28 The parties and settlement administrator are directed to implement this Final Order and the

1 settlement agreement in accordance with the terms of the settlement agreement. The parties are
2 directed to submit a joint proposed judgment for approval by September 1, 2017.

3 **IT IS SO ORDERED.**

4 Dated: 8/25/2017

5 
6 HAYWOOD S. GILLIAM, JR.
7 United States District Judge

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United States District Court
Northern District of California