UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SIMONA MONTALVO, on behalf of herself and all others similarly situated, Plaintiffs, vs. WERNER ENTERPRISES, INC., d/b/a "C.L. WERNER, INC.," a Nebraska corporation; and DOES 1 to 100, inclusive, Defendants.	CASE NO. CV 11-00294 MMM (OPx) ORDER GRANTING FINAL SETTLEMENT APPROVAL AND MOTION FOR AWARD OF ATTORNEYS' FEES, COSTS, AND INCENTIVE PAYMENTS

On January 18, 2011, Simona Montalvo filed this class action in San Bernardino Superior Court against Werner Enterprises.[1] Werner removed the action to federal court on February 16, 2011.[2] On May 23, 2012, Montalvo filed a first amended complaint, alleging failure to pay minimum wages in violation of California Labor Code § 1197;[3] failure to pay employees with a

[1]Notice of Removal ("Removal"), Docket No. 1 (February 16, 2011), Exh. A (Class Action Complaint ("Complaint")).

[2]*Id*.

[3]First Amended Complaint ("FAC"), Docket No. 126 (May 23, 2012), ¶¶ 32-40.

fully negotiable instrument drawn on a California bank in violation of Labor Code § 212;[4] failure to pay all wages due and owing to employees who were discharged, or who quit Werner's employ in violation of California Labor Code § 203;[5] failure to furnish accurate, itemized wage statements in a timely fashion in violation of California Labor Code § 226;[6] violation of California Labor Code § 2699;[7] and unfair business practices in violation of California Business and Professions Code § 17200 et seq.[8] Prior to that, on January 23, 2012, the court had certified an "orientation class" comprised of all individuals who attended new-hire orientation sessions between January 18, 2007 and January 23, 2012.[9]

On March 26, 2012, the parties notified the court that a preliminary settlement agreement had been reached.[10] The court granted plaintiff's motion for preliminary approval of the settlement on May 18, 2012.[11] As part of its preliminary approval, the court certified two settlement classes: class members who attended but did not complete orientation ("Settlement Class 1"), and class members who attended and completed the orientation ("Settlement Class 2"). It also granted Montalvo leave to file a first amended complaint contemplated by the settlement.[12]

---

[4] *Id.*, ¶¶ 41-46.

[5] *Id.*, ¶¶ 47-54.

[6] *Id.*, ¶¶ 55-63.

[7] *Id.*, ¶¶ 64-72.

[8] *Id.*, ¶¶ 73-84.

[9] Order Granting in Part and Denying in Part Plaintiff's Motion for Class Certification, Docket No. 109 (Jan. 23, 2012).

[10] Stipulation to Vacate All Pending Hearings, Deadlines, and Trial, Docket No. 119 (March 26, 2012).

[11] Order Granting Preliminary Approval of Class Action Settlement ("Order"), Docket No. 123 (May 18, 2012).

[12] *Id.*

On August 6, 2012, plaintiff filed a motion for final approval of the settlement.[13]

I. FACTUAL BACKGROUND

A. The Parties and the Complaint

Montalvo alleges that after being hired to work as a driver for Werner, she attended a three-day workplace orientation from June 25 to June 27, 2010 at the La Quinta Hotel in Fontana,

---

[13]Motion for Settlement Approval of Class Action Settlement ("Motion"), Docket No. 133 (Aug. 6, 2012); see also Notice of Errata Correcting Motion for Settlement Approval, Docket No. 134 (Aug. 13, 2012) (substituting a new page two). Plaintiff also filed a motion seeking an award of attorneys' fees, costs, and an incentive award for the lead plaintiff. (Motion for Attorney' Fees and Costs ("Fees Motion"), Docket No. 128 (June 20, 2012). Werner filed a notice of non-opposition to the motion for final approval. (Notice of Non-Opposition to Motion for Settlement Approval ("Non-Opp."), Docket No. 135 (Aug. 20, 2012).

On August 6, 2012, Werner advised the court that notice of the proposed settlement had not been served on the United States Attorney General and the appropriate regulatory body or attorney general of each state where a class member resides as required by 28 U.S.C. § 1715. That statute provides that "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement." On August 30, 2012, the court directed the parties to file a joint status report addressing whether, due to this failure, the court had authority to approval the settlement under § 1715. (Order Directing Parties to File Joint Report, Docket No. 136 (Aug. 30, 2012). The parties filed a report on September 6, 2012, attaching proofs of service upon appropriate officials and citing authority concluding that late notice is not fatal to the court's ability to enter approve the settlement and enter judgment, so long as the officials are given ninety days to object to the proposed settlement. (Joint Report, Docket No. 137 (Sept. 6, 2012)). See *In re Processed Egg Products Antitrust Litigation*, 284 F.R.D. 278, 287 n. 10 (E.D. Pa. 2012) ("Although Sparboe served notice of the settlement to the appropriate officials, it did not do so promptly after the Agreement was filed, as required by 28 U.S.C. § 1715(b). . . . Over ninety days have elapsed since Sparboe served the appropriate state or federal officials with the CAFA notice, and there have been no requests for hearings or objections to the settlement. It follows that, although the notice requirements under CAFA have not been fully met on a technical basis, the substance of the requirements have been satisfied insofar as giving federal and state officials sufficient notice and opportunity to be heard concerning the Sparboe Settlement"); *Kay Co. v. Equitable Prod. Co.*, No. 06 Civ. 00612, 2010 WL 1734869, *4 (S.D.W.Va. Apr. 28, 2010) ("Since more than 100 days have passed since service was perfected and since there have been no adverse comments from any of the aforesaid State or Federal officials, the Court FINDS that compliance with CAFA is satisfactory").

California.[14] Following the orientation, Montalvo worked for Werner from July 1 through September 30, 2010.[15] Montalvo contends that Werner failed to pay minimum wage for her attendance at the orientation. She asserts that instead, she was paid a flat rate which, when divided by the number of hours she spent at the orientation, "resulted in a wage that fell below California's minimum wage requirements."[16] Montalvo alleges that Werner has failed to pay minimum wage for the orientation "within . . . four (4) years preceding the filing of the [action], . . . up to and through the time of trial. . . ."[17]

B. The Parties' Settlement Negotiations and Terms of the Settlement Agreement

On March 1, 2012, the parties participated in a mediation session with Michael Loeb of JAMS.[18] Prior to mediating, the parties had completed all merits and damages discovery, and each had "prepared a thorough exposure analysis."[19] Although the parties did not settle on March 1, they continued to discuss settlement and came to agreement on March 6, 2012.[20]

The parties agreed to a total payment of $575,000, with no residual to Werner, on behalf of all persons employed as drivers who attended orientation sessions between January 18, 2007 and May 21, 2012.[21] Under the agreement, the following amounts, which are discussed in greater detail below, will be deducted from this total: (1) one-third of the total settlement fund ($191,666.66) will go to attorneys' fees; (2) $160,000 will reimburse litigation costs and claims

---

[14]FAC, ¶ 8.

[15]*Id.*

[16]*Id.*, ¶ 38.

[17]*Id.*, ¶ 3.

[18]Motion at 1.

[19]*Id.* See also Declaration of Kevin T. Barnes ("Barnes Fee Decl."), Docket No. 128 (June 20, 2012), ¶ 4.

[20]Motion at 2.

[21]*Id.*

administration fees; and (3) $15,000 will be given to class representative Montalvo as an incentive award.[22] Werner has agreed not to oppose any motion for attorneys' fees that seeks an award of no more than one-third of the gross settlement amount and that it is deducted from the common fund.[23]

The net settlement amount, $208,333.34, will be distributed to two separate settlement classes: drivers who attended but did not complete orientation, and drivers who attended and completed orientation.[24] Drivers in Settlement Class 1 will receive approximately $20 under the proposed settlement, while drivers in Settlement Class 2 will receive approximately $29.67.[25] Class members will not be required to submit a claim form to receive their award; rather, the funds will be dispersed in their entirety to all class members who decline to opt out.[26] Any residual funds resulting from uncashed checks will be donated to the California Labor & Workforce Development Agency ("LWDA"), a government agency devoted to investigating claims made by employees under the California Labor Code.[27]

C. Notice to the Settlement Class

After the court preliminarily approved the class settlement, Werner gave the claims administrator, Rust Consulting, the name, last known address, and social security number of all

---

[22] *Id.* at 3; Fees Motion at 12.

[23] Notice of Non-Opposition to Motion for Attorneys' Fees and Costs, Docket No. 129 (June 25, 2012).

[24] Motion at 2-3.

[25] *Id.*

[26] *Id.* at 2.

[27] Designation of New Cy Pres ("Cy Pres"), Docket No. 139 (Feb. 26, 2013). The parties initially proposed that any residual funds be paid to the United Way. The court expressed concern that while a worthy charity, the United Way was not sufficiently linked to the class members' claims, and thus the donation did not serve the interests of the class. At the fairness hearing, counsel for both parties stipulated to substitute LWDA as the new beneficiary. They subsequently filed a pleading naming LWDA as the *cy pres* recipient. The court discusses the appropriateness of LWDA as a *cy pres* beneficiary *infra*.

7,523 class members.[28] On June 26, 2012, Rust sent notice to every class member via first-class mail.[29] 954 notices were returned as undeliverable; 682 of these were ultimately delivered to updated addresses.[30] Of the 682, 88 were again returned as undeliverable.[31] Rust also established a toll-free telephone number that class members could call with questions regarding the settlement.

The notice sent to class members advised them that they could take no action and participate in the settlement, or could submit an exclusion form postmarked on or before July 26, 2012.[32] In total, Rust received 107 valid exclusion forms.[33] As of the date the motion for final approval was filed, there are 7,144 class members who did not submit a valid exclusion form and for whom Rust has a valid mailing address; this represents 94.96% of the total class.[34] Rust received no objections to the settlement.[35]

II. DISCUSSION

A. Final Approval of a Class Action Settlement

In its order on March 18, 2012, the court certified two orientation classes for settlement

---

[28] *Id.* See also Declaration of Kevin T. Barnes ("Final Barnes Decl."), Docket No. 133 (Aug. 6, 2012), Exh. 1 (Declaration of Stacy Roe of Rust Consulting ("Roe Decl.")), ¶ 7.

[29] Roe Decl., ¶ 9.

[30] *Id.*, ¶ 10.

[31] *Id.*

[32] *Id.*, ¶ 9.

[33] *Id.*, ¶ 12. According to Roe, 136 exclusion forms were returned, but 35 of them were missing required information. Rust contacted these 35 individuals via letter and requested the missing information; six class members cured the deficiency, and 29 failed to respond. (Roe Decl., ¶ 12). Thus, a total of 107 individuals effectively opted out of the settlement.

[34] *Id.*, ¶ 13.

[35] *Id.*, ¶ 14.

purposes.[36] Rule 23(e)(1)(A) of the Federal Rules of Civil Procedure requires that the court "approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." Approval under Rule 23(e) involves a two-step process "in which the [c]ourt first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *National Rural Telecommunications Cooperative v. DIRECTV, Inc.* ("*NRTC*"), 221 F.R.D. 523, 525 (C.D. Cal. 2004) (citing MANUAL FOR COMPLEX LITIGATION, THIRD, § 30.14, at 236-37 (1995)). The Ninth Circuit has noted that, in considering whether to give final approval to a class settlement, "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Synocor ERISA Litigation*, 516 F.3d 1095, 1101 (9th Cir. 2008); see *id.* ("This policy is also evident in the Federal Rules of Civil Procedure and the Local Rules of the United States District Court, Central District of California, which encourage facilitating the settlement of cases"); *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983) ("[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation").

1. Notice Requirements

Rule 23(e) requires that "notice of the proposed dismissal or compromise [of a class action] shall be given to all members of the class in such manner as the court directs." FED.R.CIV.PROC. 23(e). The notice given must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); see also

---

[36]Order at 2 ("After considering fully the parties' stipulation and agreement for settlement of the class action, the court certifies two settlement classes, as defined in the stipulation, consisting of all those classified as student drivers or co-drivers who attended defendant's Fontana, California orientations during the settlement period (January 18, 2007 through preliminary approval or June 8, 2012, whichever is earlier). The two settlement classes are: class members who attended but did not complete the orientation ('Settlement Class 1'), and class members who attended and completed the orientation ('Settlement Class 2')").

Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 835 (9th Cir. 1976) ("To comply with the spirit of [Rule 23(e)], it is necessary that the notice be given in a form and manner that does not systematically leave an identifiable group without notice").

The court's role in reviewing a proposed settlement is to represent those class members who were not parties to the settlement negotiations and agreement. See *San Francisco NAACP v. San Francisco Unified School District*, 59 F.Supp.2d 1021, 1027 (N.D. Cal. 1999) ("The purpose of Rule 23(e) is to protect 'unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are unable to secure satisfaction of the individual claims by a compromise,'" quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). One aspect of the court's role is to ensure that all class members receive adequate notice of the proposed settlement.

As noted, Werner gave Rust contact information for 7,523 potential class members; this information was updated using the National Change of Address Database.[37] On June 26, 2012, notices were mailed via first class mail to all identified class members, advising that they could submit a request for exclusion form or object to the settlement if they wished to do so.[38] If a notice packet was returned because the individual had no forwarding address, Rust performed an address trace and mailed the notice to any new address obtained.[39] If the notice packet was returned with a forwarding address, notice was promptly mailed to the new address.[40] As of August 3, 2012, notices sent to 272 class members were undeliverable because Rust was unable to locate a valid mailing address for the individuals.[41] In addition to mailing notice forms, Rust established a telephone number that class members could call to obtain information concerning the

---

[37]Roe Decl., ¶¶ 7-8.

[38]*Id.*, ¶ 9. See also Prelim. Barnes Decl., Exh. 2 ("Class Notice"), at 2-4.

[39]Roe Decl., ¶ 10.

[40]*Id.*, ¶ 11.

[41]*Id.*, ¶ 10.

settlement.[42] It also obtained set up a mailing address where exclusion forms, undeliverable class notices, and other communications regarding the settlement could be sent.[43]

The court is satisfied that these efforts were effective to provide notice of the settlement to potential class members. The parties not only mailed notice to a complete list of known class members, but also worked to verify current address information and resent notices to class members they were initially unable to contact. They also established a telephone line to field calls from any class member who had questions regarding the settlement. Consequently, the court finds that unnamed class members had adequate notice of the settlement and adequate opportunity to file a valid claim form, to opt out, or to object to the settlement. It concludes, therefore, that the notice requirement of Rule 23(e) has been met.

2. Fairness of the Proposed Settlement

"The role of a court . . . reviewing the proposed settlement of a class action under Fed.R.Civ.P. 23(e) is to assure that the procedures followed meet the requirements of the rule and comport with due process and to examine the settlement for fairness and adequacy." *Vaughns v. Board of Education of Prince George's County*, 18 F.Supp.2d 569, 578 (D. Md. 1998). The district court's role, in reviewing "what is otherwise a private consensual agreement negotiated between the parties to a lawsuit, must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625.

The parties assert that the settlement is presumptively fair because it is the result of an arms-length negotiation.[44] See *NRTC*, 221 F.R.D. at 528 ("A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair," citing *City Partnership Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)). The parties note that

---

[42] *Id.*, ¶ 5.

[43] *Id.*, ¶ 4.

[44] Motion at 5.

(1) they engaged in substantial investigation and discovery; (2) counsel is experienced in this field; and (3) objectors are non-existent.[45] It appears that the agreement was reached in good faith after a well-informed arms-length negotiation and that it is entitled to a presumption of fairness. Nonetheless, the court must examine the terms of the settlement, considering relevant factors, to determine whether the settlement is indeed fair.

In making this assessment, the court balances:

> "(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

This list of factors is not exclusive, "and different factors may predominate in different factual contexts." *Torrisi v. Tuscon Electric Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). See also *Churchill Village*, 361 F.3d at 576 n. 7 ("Because the settlement evaluation factors are non-exclusive, discussion of those factors not relevant to this case has been omitted"); *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2007 WL 951821, *3 (N.D. Cal. Mar. 28, 2007) (adding as relevant factors "(9) the procedure by which the settlements were arrived at, see MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.6 (2004), and (10) the role taken by the plaintiff in that process").

a. Strength of Plaintiffs' Case

Montalvo acknowledges that she faced serious obstacles proving her claims. She notes that while she survived summary judgment, the court indicated that it had serious questions regarding the "core issue" in the case – whether orientation attendees were employees and thus were

---

[45] *Id.*

protected by the relevant laws.[46] She acknowledges that of the six factors used to determine whether a participant in a training program is an "employee," a number "militate[d] against a finding that [she] was an employee during the orientation."[47] The fact that this issue, which was at the heart of Montalvo's case, was the subject of serious doubt favors a finding that the settlement is fair. See *In re Portal Software, Inc. Securities Litigation*, No. C-03-5138 VRW, 2007 WL 4171201, *3 (N.D. Cal. Nov. 26, 2007) ("Factor (1), the strength of plaintiffs' case, somewhat favors settlement because plaintiffs' remaining claims are tenuous. Plaintiffs assert that establishing liability and damages at trial would be difficult because of the uncertainties associated with proving its claims, which are 'exacerbated by the unpredictability of a lengthy and complex jury trial'"). The court therefore concludes that this factor weighs in favor of final approval of the settlement.

b. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

The parties contend that the "risks in a wage and hour class action" are "significant," that litigating such cases is "very expensive," and that this matter would likely "have continued for years" absent a settlement agreement, as any verdict would likely have been appealed.[48] As a result, the parties assert, this factor weighs in favor of approval. The court agrees. As the court stated in *Glass v. UBS Financial Services, Inc.*, No. C-06-4068 MMC, 2007 WL 221862 (N.D. Cal. Jan. 26, 2007):

"In light of the above-referenced uncertainty in the law, the risk, expense,

---

[46]*Id.* at 6-7.

[47]Order Denying Defendant's Motion for Summary Judgment, Docket No. 99 (Nov. 12, 2011), at 33. In its notice of non-opposition, Werner argues that the settlement is fair because "[t]his Court has already determined that three of the six relevant factors in determining employment status point to orientation attendees being trainees, not employees, during orientation. Plaintiff would therefore start trial at a significant disadvantage that she is unlikely to overcome." (Non-Opp. at 3).

[48]Motion at 7.

> complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. 'The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement.' See *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further litigation is substantial." *Id.* at *4.

See *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D. Cal. 2010) (in weighing the risk of future litigation, "a court may 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" (internal quotation marks omitted)); *Young*, 2007 WL 951821 at *3 ("Because this litigation has terminated before the commencement of trial preparation, factor (2) also militates in favor of the settlement"); see also *Officers for Justice*, 688 F.2d at 626; *Milstein v. Huck*, 600 F.Supp. 254, 267 (E.D.N.Y. 1984) ("The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of this settlement").

Because both Montalvo and Werner would have had to engage in extensive, expensive pretrial activities, because both faced the prospect that they would not prevail due to the uncertainty surrounding class members' status as employees, and because any outcome would likely have been appealed, this factor supports approval of the settlement. See *In re Portal Software, Inc. Securities Litigation*, No. C-03-5138 VRW, 2007 WL 4171210, *3 (N.D. Cal. Nov. 26, 2007) (recognizing that the "inherent risks of proceeding to . . . trial and appeal also support the settlement").

c. The Risk of Maintaining Class Action Status Throughout Trial

Whether or not the action would have been tried as a class action is also relevant in assessing the fairness of the settlement. Here, the court had already certified an orientation class prior to the parties entering into this settlement agreements. Although Montalvo asserts that there

was a risk of de-certification at trial or on appeal,[49] she does not explain what that risk was. The court did not express concerns as to whether it would have to reconsider certification at a later stage of the proceedings. While it is of course true that "the court may revisit its prior grant of certification at any time before final judgment," and therefore "it is possible that the class could [have been] decertified or modified before the conclusion of trial," Montalvo advances no specific argument as to why there was a risk of decertification in this case. *Adoma v. University of Phoenix, Inc.*, __ F.Supp.2d __, 2012 WL 6651141, *8 (E.D. Cal. Dec. 20, 2012). Although Werner "would [have] surely challenge[d] class certification on appeal" in the event of an adverse judgment, *Rodriguez v. West Pub. Corp.*, No. CV05-3222, 2007 WL 2827379, *8 (C.D. Cal. Sept. 10, 2007) (finding the likelihood that a certification decision would be appealed tipped this factor in favor of approval) , rev'd on other grounds in 563 F.3d 948 (9th Cir. 2009), it, like Montalvo, does not identify why there was a serious possibility of reversal. Other courts addressing similarly sparse arguments have declined to consider whether this factor favors approval of the settlement agreement. See *Alberto v. GMRI, Inc.*, No. CIV. 07-1895 WBS DAD, 2008 WL 4891201, *9 (E.D. Cal. Nov. 12, 2008) ("[Plaintiff] does not reference any specific future development that would upset certification. Accordingly, the court will not consider this factor for settlement purposes"); *In re Veritas Software Corp. Sec. Litig.*, No. 03-0283, 2005 WL 3096079, *5 (N.D.Cal. Nov.15, 2005) ("[T]he Court is unaware of any risk involved in maintaining class action status in the instant action. Accordingly, this factor favors neither approval nor disapproval of the settlement"), aff'd in relevant part, 496 F.3d 962 (9th Cir. 2007). Because the parties identify no specific risk of decertification, the court finds this factor neutral.

d. The Amount Offered in Settlement

As the Ninth Circuit has noted, "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is [thus] not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625 (emphasis original).

---

[49]Motion at 7.

Rather, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Id.* at 624 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). "'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'" *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n. 2 (2d Cir. 1974)). Estimates of what constitutes a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years).

As noted, Werner has agreed to pay $575,000 in full settlement of this matter. All class members who did not opt out will automatically receive $20 to $30, depending on whether or not they completed the orientation session.[50] Montalvo states that based on the number of class members and the amount each was underpaid, Werner's total exposure at trial would have been $297,601.80 on the Labor Code § 1197 claim.[51] She also states avers that Werner faced the potential of $251,351.35 in damages on her Labor Code § 226 claim.[52] Finally, Werner faced a potential penalty of $1 million under California Labor Code § 203.[53] Montalvo thus suggests that damages could have been as high as $1,548,953.15.

While it is possible that litigating the claims could have led to a higher payout for class members, the settlement has the benefit of providing a guaranteed recovery for each class member without the risk or further expense of litigation. Montalvo acknowledges, for example, that she had "very little chance of prevailing on the [Labor Code §] 203 claim," and thus that the $1

---

[50]Motion at 2-3.

[51]Prelim. Barnes Decl., ¶ 8.

[52]*Id.*, ¶ 10.

[53]*Id.*, ¶ 9.

million penalty likely would not have been recovered at trial.[54] This means that the common fund approximates a realistic recovery at trial. Further, Werner will transfer the settlement funds to Rust within thirty days of the settlement's effective date, eliminating the possibility that class members will have to wait years to receive compensation and that the class will incur additional costs due to further litigation.[55] The compensation contemplated by the settlement represents a compromise reached following extensive arms-length negotiations and takes into account the risks the class faced. For these reasons, the court finds that the settlement amount is fair and adequate, and will provide immediate monetary relief to the class. See *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that, given the difficulties inherent in complex securities litigation, one-sixth of the potential recovery was fair and adequate); *Officers for Justice*, 688 F.2d at 628 ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair"); *Jaffe v. Morgan Stanley & Co.*, No. C 06-3903 TEH, 2008 WL 346417, *9 (N.D. Cal. Feb. 7, 2008) ("The settlement amount could undoubtedly be greater, but it is not obviously deficient, and a sizeable discount is to be expected in exchange for avoiding the uncertainties, risks, and costs that come with litigating a case to trial"). For these reasons, the court finds that the settlement amount is fair and adequate, and will provide immediate monetary relief.

e. The Stage of the Proceedings and Extent of Discovery Completed

"'The extent of discovery may be relevant in determining the adequacy of the parties' knowledge of the case.'" *NRTC*, 221 F.R.D. at 527 (quoting MANUAL FOR COMPLEX LITIGATION, THIRD, § 30.42 (1995)). "'A court is 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.'" *Id.* (quoting 5 W. Moore, MOORE'S FEDERAL PRACTICE, § 23.85[2][e] (Matthew Bender 3d ed.)). The more the

[54] *Id.*

[55] Settlement Agreement at 7.

discovery completed, the more likely it is that the parties have "'a clear view of the strengths and weaknesses of their cases.'" *Young*, 2007 WL 951821 at *4 (quoting *In re Warner Communications Securities Litigation*, 618 F.Supp. 735, 745 (S.D.N.Y. 1985)).

The parties conducted "extensive" pretrial litigation activities; they fully briefed both Werner's motion for summary judgment and Montalvo's motion for class certification.[56] See *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052, 1078 (C.D. Cal. 2010) (finding, where "class counsel reviewed 'thousands of pages of relevant documents,'" that "discovery has been sufficient to permit the parties to enter into a well-informed settlement, and this factor weighs in favor of approval"). The parties report that they had completed "all merits and damages discovery," and deposed most of the designated experts prior to conducting the mediation that ultimately led to settlement of the case.[57] The action had reached a stage where the parties had a "clear view of the strengths and weaknesses of their cases." This factor therefore weighs in favor of approving the settlement.

f. The Presence of a Governmental Participant

This factor does not apply because no government entity participated in the case. The court notes, however, that despite notice to the relevant federal and state authorities, none advised the court that it objected to the settlement or submitted adverse comments about it. If the court were going to consider this factor, therefore, it would conclude that it favored a finding that the settlement is fair and reasonable.

g. The Experience and Views of Counsel

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979) (citations omitted). "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995). The attorneys representing

---

[56]Motion at 8.

[57]*Id.*

the class are "very experienced class action counsel . . . specializing in the area of wage and hour issues."[58] They represent that the "recovery for each Class Member in the present [settlement] is very generous on account of the close proximity to the Class Members' recovery to what they would have received had they received overtime compensation while they were working."[59] As a consequence, they believes that the settlement is "fair, adequate, and reasonable and in the best interests of the Class."[60] While the weight to be given to this factor is tempered somewhat by counsel's "obvious pecuniary interest in seeing the settlement approved," *Young*, 2007 WL 951821 at *5, the court nonetheless concludes that the views of counsel weigh in favor of approving the settlement. See *Fernandez v. Victoria Secret Stories*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, *7 n. 32 (C.D. Cal. Jul. 21, 2008) ("While the court agrees that this factor must be discounted to some degree in recognition of the personal interest of class counsel in having the settlement approved, it declines to discount the well-considered views of counsel entirely").

h. Class Members' Reaction to the Proposed Settlement

In order to gauge the reaction of class members under the eighth factor, it is appropriate to evaluate the number of requests for exclusion, as well as the objections submitted. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 812 (3d Cir.1995) ("In an effort to measure the class's own reaction to the settlement's terms directly, courts look to the number and vociferousness of the objectors," quoting *Pallas v. Pacific Bell*, No. C-89-2373 DLJ, 1999 WL 1209495, *6 (N.D. Cal. July 13, 1999) ("The greater the number of objectors, the heavier the burden on the proponents of settlement to prove fairness")).

As noted, Werner gave the claims administrator contact information for 7,523 class members; of these, Rust was unable to locate a valid mailing address for 272. Rust therefore

---

[58]Barnes Fees Decl., ¶ 9.

[59]*Id.*, ¶ 10.

[60]*Id.*

delivered 7,251 notice forms. In return, it received 136 exclusion forms.[61] Of these, 35 were missing required information; Rust contacted these class members in the hope of curing the deficiencies.[62] Six of the 35 class members responded and supplied the missing information.[63] As a result, there are 107 valid opt-outs from the class.

Depending on how one views class members who filed a deficient exclusion form and failed to respond to the administrator's follow-up communication, either 1.5 percent (107/7,251) or 1.9 percent (136/7,251) of the class members who received notice opted out. No class members objected to the settlement. The relatively low number of opt-outs, and the lack of any objections, imply that the class generally approves of the settlement. Compare *Chun-Hoon v. McKee Foods Corp.*, 716 F.Supp.2d 848, 852 (N.D. Cal. 2010) (in a case where "[a] total of zero objections and sixteen opt-outs (comprising 4.86% of the class) were made from the class of roughly three hundred and twenty-nine (329) members," the court concluded that the class's reaction "strongly supports settlement"); *Glass*, 2007 WL 221862 at *5 (approving a settlement where the opt-out rate was 2%). This factor, therefore, weighs in favor of approving the settlement.

i. Other Factors

As noted, the *Young* court considered two additional factors: the process by which settlement was reached and the involvement of the named plaintiff in the process. The parties here reached agreement after intensive arms-length negotiations facilitated by a neutral mediator.[64] Class counsel notes that Montalvo "remained in contact . . . throughout the litigation and settlement process;" that she "reviewed thousands of pages of documents related to this case;" and that she "personally helped to prepare for and traveled to San Francisco to attend the all-day

---

[61]Roe Decl., ¶ 12.

[62]*Id.*

[63]*Id.*

[64]Motion at 1-2.

Mediation."[65] Both factors thus weigh in favor of approving the settlement.

j. Signs of Collusion

The Ninth Circuit has explained that, in addition to evaluating the fairness of the settlement terms, the district court should be watchful for "subtle signs" that class counsel and the class representative have permitted self-interest to outweigh their obligation to ensure a fair settlement for the class as a whole. *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 947 (9th Cir. 2011). In *Bluetooth*, the Ninth Circuit identified three possible signs of such collusion:

> "(1) when the settlement terms result in class counsel receiving a disproportionate share of the settlement, or when the class receives no monetary compensation but counsel receive an ample award of attorneys' fees;
>
> (2) the presence of a clear sailing agreement that carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for . . . accepting an unfair settlement; and
>
> 3) when the parties arrange for fees not awarded to revert to defendants, rather than being paid into the class fund." *Id.* (citations and quotation marks omitted).

The Ninth Circuit noted that this list is not exclusive, but felt that it offered some guidance to lower courts regarding the type of provisions that require "greater scrutiny than ordinarily demanded" as to the overall fairness of the settlement. *Id.* at 949.

The second of the signs of collusion noted in *Bluetooth* is present here.[66] The parties'

---

[65]Final Barnes Decl., ¶ 4.

[66]The first and third signs of collusion are largely absent. First, the attorneys' fees sought are not nearly as disproportionate as was the fee award at issue in *In re Bluetooth*. There, "the amount awarded was 83.2% of the total amount defendants were willing to spend to settle the case." *Id.* at 945. The agreement here specifies that defendants will not object to an attorneys' fee award equal to 33⅓% of the maximum settlement amount. (Settlement Agreement at 2.) If such an award were made, it would represent $191,666.66 of the $575,000 Werner has agreed to pay. From the remaining $383,333.34, the following expenses would have to be deducted: court-approved litigation costs; the administrator's fees and expenses; and a court-approved incentive award for the named plaintiff. This leaves a net settlement amount for class members of $208,333.34, which is larger than the amount that is contemplated class counsel will receive.

settlement agreement contains an explicit "clear sailing" provision. "In general, a clear sailing agreement is one where the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 520 n. 1 (1st Cir. 1991) The parties' agreement states:

> "Defendant agrees that the amount of attorneys' fees to be allocated from the Settlement Payment to Plaintiff's Counsel shall be determined by the Court. . . . Defendant will not object to Plaintiff's Counsel's request for attorneys' fees not to exceed one-third (33.3%), or $191,666.66 of the total Settlement Payment."[67]

Clear sailing provisions are troubling on several levels. "[T]he very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." *In re Bluetooth*, 654 F.3d at 948 (citation omitted)*;* see also *Malchman v. Davis*, 761 F.2d 893, 908 (2d Cir. 1985) (Newman, J., concurring) ("It is unlikely that a defendant will gratuitously accede to the plaintiffs' request for a 'clear sailing' clause without obtaining something in return. That something will normally be at the expense of the plaintiff class"), abrogated on other grounds in *Amchem*, 521 U.S. at 619. "Such a clause deprives the court of the advantages of the adversary process. The source of the proposed payment renders it improbable that class members will come forward to challenge the reasonableness of the requested fee. Meanwhile, the payor is bound by contract not to contest the application." *Weinberger*, 925 F.2d at 525.

Here, despite the clear sailing provision, the class stands to receive a sufficiently large

---

This is not an situation in which the award of fees is so disproportionate that it suggests collusion. Compare *Harris v. Vector Marketing Corp.*, No. C–08–5198 EMC, 2011 WL 4831157, *6 (N.D. Cal. Oct. 12, 2011) (rejecting a class settlement in which "class counsel seeks an unopposed award roughly four times greater than the actual and expected payout to the class (approximately $4 million compared to approximately $1 million)"). Second, the settlement agreement does not contain a reversion clause. Rather, any unclaimed funds will be donated to the LWDA. (Settlement Agreement at 3).

[67]Settlement Agreement at 2.

monetary award. As the Ninth Circuit has noted, moreover, the inference of collusion drawn from a clear sailing provision is reduced when the agreement lacks a reversionary or "kicker provision." *In re Bluetooth*, 654 F.3d at 949 ("For this same reason, a kicker arrangement reverting unpaid attorneys' fees to the defendant rather than to the class amplifies the danger of collusion already suggested by a clear sailing provision. . . . The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees"). The absence of a "kicker provision" in the parties' settlement reduces the likelihood that plaintiffs and defendants colluded to confer benefits on each other at the expense of class members. While clear sailing agreements must be scrutinized to ensure that they do not result in unfair awards of attorneys' fees, see *Weinberger*, 925 F.2d at 523 ("[T]he approval function has routinely been extended to embrace fees, whether or not pre-negotiated, in those cases where the plaintiffs' attorneys are to be paid out of a common fund (and where, consequently, there is an inherent tension between the interests of the class and the interests of the lawyers"), the court concludes that the provision at issue here does not raise an inference of collusion that warrants invalidation of the class settlement as a whole. Rather, the court considers the attorneys' fees provision in its analysis of the reasonableness of the fee award sought, so as to ensure that class members are afforded adequate relief, and that the fees their lawyers receive are proportionate to the value of the classes' recovery.

k. Balancing the Factors

"Ultimately, the district court's determination [of the fairness and adequacy of a proposed settlement] is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (citation omitted). "[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation." *Id.* Having considered the relevant factors, the court concludes that the circumstances surrounding the settlement tend to weigh in favor of a finding that it is fair and adequate.

The court also approves the parties' designated *cy pres* beneficiary, LWDA. "Not just any worthy recipient can qualify as an appropriate *cy pres* beneficiary." *Dennis v. Kellogg Co.*, 697

F.3d 858, 865 (9th Cir. 2012). Rather, the Ninth Circuit requires that there be "a driving nexus between the plaintiff class and the *cy pres* beneficiaries." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). A *cy pres* award must be "guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members." *Id.* at 1039. Stated differently, the award must not benefit a group "too remote from the plaintiff class." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990).

The settlement agreement provides that all settlement funds will be distributed to class members who do not opt out; there is no claim form requirement. In the event some class members do not cash their checks, however, the agreement provides that the residual funds will be donated to the LWDA. Such a proposed use of residual funds is acceptable, as it appears likely that only minimal funds will remain and the cost of mailing a second set of checks to class members would not be economical. See, e.g., *Lymburner v. U.S. Financial Funding, Inc.*, No. C–08–00325 EDL, 2012 WL 398816, *4 (N.D. Cal. Feb. 7, 2012) (approving a settlement agreement in which the parties "agreed that the amount of any undeliverable and uncashed checks will become part of a cy pres fund for The National Consumer Law Center"). Stated differently, a *cy pres* donation of any remaining funds may well be a more efficient method of furthering the interests of the class than attempting to distribute additional amounts to class members. Moreover, a *cy pres* award to the LWDA "serves a purpose as near as possible to the legitimate objectives underlying the lawsuit." *Id.* Montalvo's claims involved California workers' right to receive fair wages. The LWDA is a government agency formed to investigate wage-related claims filed by employees as private attorneys general under the California Labor Code.[68] The agency directly serves the interests of the class at issue here. Moreover, the LWDA is a California agency dedicated to investigating claims made by California workers. It is therefore geographically appropriate, as the class consists only of California employees. See *Nachshin*, 663 F.3d at 1040 (a *cy pres* distribution must "account for the broad geographic distribution of the class"). Given this, there is a "driving nexus" between the class and the LWDA, and it is thus a permissible *cy*

[68]Cy Pres at 2.

pres beneficiary.

For all of the reasons stated, the court approves the final settlement agreement.

B. Motion for Attorneys' Fees, Costs and an Incentive Award

The court now turns to class counsel's motion for fees, costs, and an incentive payment. The procedure for requesting attorneys' fees is set forth in Rule 54(d)(2) of the Federal Rules of Civil Procedure. While the rule specifies that requests shall be made by motion "unless the substantive law governing the action provides for the recovery of . . . fees as an element of damages to be proved at trial," the rule does not itself authorize the awarding of fees. "Rather, [Rule 54(d)(2)] and the accompanying advisory committee comment recognize that there must be another source of authority for such an award . . . [in order to] give[ ] effect to the 'American Rule' that each party must bear its own attorneys' fees in the absence of a rule, statute or contract authorizing such an award." *MRO Communications, Inc. v. AT&T*, 197 F.3d 1276, 1281 (9th Cir. 1999).

In class actions, statutory provisions and the common fund exception to the "American Rule" provide authority for awarding attorneys' fees.[69] See Alba Conte and Herbert B. Newberg, NEWBERG ON CLASS ACTIONS, § 14.1 (4th ed. 2005) ("Two significant exceptions [to the "American Rule"] are statutory fee-shifting provisions and the equitable common-fund doctrine"). Under normal circumstances, once it is established that a party is entitled to attorneys' fees, "[i]t remains for the district court to determine what fee is 'reasonable.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

The parties' settlement agreement provides that the court may approve, and Werner will not oppose, an attorneys' fees award of as much as $191,666.66, representing 33⅓% of the settlement fund. It further provides that class counsel may seek reimbursement for costs incurred.

[69]The common fund exception recognizes that attorneys' fees can be collected from a fund preserved, protected, collected or realized by attorneys' efforts on behalf of the class of persons benefitted by or entitled to the fund. See 38 A.L.R.3d 1384, § 4(a) & (b).

Finally, the agreement provides for an incentive award to Montalvo of as much as $15,000.[70]

1. Attorneys' Fees

In "common-fund" cases such as this one, "where the settlement or award creates a large fund for distribution to the class, the district court has discretion to use either a percentage or lodestar method." *Hanlon*, 150 F.3d at 1029 (citing *In re Washington Public Power Supply System Securities Litigation ("WPPS")*, 19 F.3d 1291, 1295 (9th Cir. 1994)). "Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *In re Bluetooth*, 654 F.3d at 942(citing *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997). As respects selection of the lodestar or percentage-of-the-fund method, the Ninth Circuit has observed:

> "Despite the recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases, . . . we require only that fee awards in common fund cases be reasonable under the circumstances. Accordingly, either the lodestar or the percentage-of-the-fund approach 'may, depending upon the circumstances, have its place in determining what would be reasonable compensation for creating a common fund.'" *State of Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (quoting *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)).

In cases where courts apply the percentage method to calculate fees, they should use a rough calculation of the lodestar as a cross-check to assess the reasonableness of the percentage award. See *In re Bluetooth*, 654 F.3d at 943 (encouraging "comparison between the lodestar amount and a reasonable percentage award"); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("Calculation of the lodestar, which measures the lawyers' investment of time in

---

[70]Settlement Agreement at 2-3.

the litigation, provides a check on the reasonableness of the percentage award").[71] By the same token, "a court applying the lodestar method to determine attorney's fees may use the percentage-of-the-fund analysis as a cross-check." *Grays Harbor Adventist Christian School v. Carrier Corp.*, No. 05-05437 RBL, 2008 WL 1901988, *5 (W.D. Wash. Apr. 24, 2008) (citing *Wing v. Asarco Inc.*, 114 F.3d 986, 988-90 (9th Cir. 1994)). "The object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible." *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992). This is particularly true here, where, as noted, the parties have entered into a clear sailing agreement.

Class counsel request that the court use the percentage-of-the-fund method and award one-third of the common fund. The court, in its discretion, finds that using this method of calculating fees is appropriate under the circumstances.

2. Whether Counsel's Fee Request is Reasonable Under the Percentage-of-the-Fund Method

The Ninth Circuit has established 25% of the common fund as a benchmark for attorneys' fees awards calculated according to the percentage-of-the-fund method. See *Fischel v. Equitable Life Assurance Society of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); see also *Pincay Investments*

---

[71]Judge Walker explored the utility of the lodestar method as a cross-check in percentage cases in some detail in *Young*. Citing an article he had co-authored, Judge Walker noted the weaknesses inherent in comparing the percentage award requested to the 25% benchmark established in the Ninth Circuit. See *Young*, 2007 WL 951821 at *5 ("the court has serious reservations about the adequacy of such a comparison to test the reasonableness of a fee award"). Instead, he opined that using the lodestar as a cross-check was the preferable way to proceed:

> "Indeed, the court's independent research into fee award practice in other courts convinces it that the best practice is to assess a percentage fee award not only by using the usual litany of factors bearing on the reasonableness of a fee [citing *Vizcaino*], but also by cross-checking the percentage fee award against a rough fee computation under the lodestar method. See, e.g., *In re GMC Pick-Up Tuck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 820-21 & n. 40 (3d Cir. 1995) (Becker, J). See also *Vizcaino*, 290 F.3d at 1050-51 (approving district court's use of a lodestar cross-check); *In re HPL Tech., Inc., Sec. Litig.*, 366 F.Supp.2d 912 (N.D. Cal. 2005)." *Id.*

Co. v. Covad Communications Group, 90 Fed. Appx. 510, 511-12 (9th Cir. Feb. 18, 2004) (Unpub. Disp.) ("This court has established twenty-five percent as a benchmark in percentage-of-the-fund cases that can be adjusted upward or downward to account for any unusual circumstances presented by a particular case"); *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379 (9th Cir. 1995) ("Twenty-five percent is the 'benchmark' that district courts should award in common fund cases"); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("The benchmark percentage should be adjusted, or replaced by a lodestar calculation, [however,] when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors"). In evaluating the reasonableness of a fee award, the court must take into account all the circumstances of the case. *Vizcaino*, 290 F.3d at 1048.

As noted, class counsel seek attorneys' fees of $191,666.66, or one third of the settlement fund. Courts in this circuit have recognized that an award of fees even greater than one third may be appropriate in wage and hour class actions resulting in relatively small settlements. See *Cicero v. DirecTV, Inc.*, No. EDCV 07-1182, 2010 WL 2991486, *6 (C.D. Cal. July 27, 2010) ("Indeed, California cases in which the common fund is small, tend to award attorneys' fees above the 25% benchmark. . . . More particularly, a review of California cases in other districts reveals that courts usually award attorneys' fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under $10 million" (citations omitted); *Vasquez*, 266 F.R.D. at 492 (collecting cases and finding that attorneys' fees of 33.3% of the common fund were reasonable). This does not make class counsel's request reasonable as a matter of law, however. In determining whether to depart upward or downward from the 25 percent benchmark, courts must look to "(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2008)(citing *Vizciano*, 290 F.3d at 1048-50); see also *Vasquez*, 266 F.R.D. at 492.

a. The Results Achieved

"The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d at 1046. Here, plaintiff's counsel obtained a successful result for the class. Under the settlement, approximately $200,000 will be distributed to class members. This is approximately 13% of the possible $1.5 million in damages estimated by plaintiff.[72] See *id.* (finding a "substantial achievement on behalf of the class" where a settlement constituted "approximately 9% of the possible damages"); *In re General Instr. Sec. Litig.*, 209 F.Supp.2d 423, 431, 434 (E.D. Pa. 2001)(one-third fee awarded based on a $48 million settlement fund that was 11% of the plaintiffs' estimated damages). Each class member will receive his or her respective share of benefits without having to submit a claim form.

Moreover, class counsel have handled the case well from its inception, filing a successful class certification motion and successfully opposing Werner's motion for summary judgment. See *In re Heritage Bond Litigation*, 02-ML-1475-DT(RCx), 2005 WL 1594389, *10 (C.D. Cal. June 10, 2005) (finding a 33% fee appropriate in part because the case was "marked by extensive motion practice," including successful motions for class certification and partial summary judgment); compare *Lo v. Oxnard Euro. Motors, LLC*, No. 11CV1009 JLS (MDD), 2012 WL 1932283, *3 (S.D. Cal. May 29, 2012) (expressing concern "over awarding attorneys' fees in excess of twenty-five percent of the settlement fund given the short duration of the action and the fact that the complaint appears to be a boilerplate complaint that Plaintiff's counsel need only amend slightly in each case it files alleging a TCPA violation, of which there are many").

Given the factual and legal difficulties the class faced proving its claims, specifically as it concerns the employee status of orientation attendees, the court believes the settlement represents a significant recovery. See *Vizcaino*, 290 F.3d at 1048 (noting that a substantial risk that the plaintiff class would not recover supported the district court's conclusion that the results achieved

---

[72]The $1.5 million figure does not reflect the attorneys' fees and costs that would ultimately have been deducted from the total if the class had successfully tried the case and received a verdict in this amount.

by class counsel were exceptional). Because the settlement conferred a significant benefit on class members, this factor supports a fee award equal to 33⅓% of the common fund. See *id.* ("Exceptional results are a relevant circumstance"); *Torrisi v. Tucson Electric Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993) (considering counsel's "expert handling of the case"); *Six (6) Mexican Workers*, 904 F.2d at 1311 (noting plaintiffs' "substantial success").

b. The Risk of the Litigation

Plaintiffs' counsel argue that they faced considerable risk litigating the case because it presented "unique and risky" claims, and Werner "vigorously contested liability, the amount of claimed damages, and the propriety of [c]lass certificat[ion]."[73] The court agrees. See *In re Pacific Enterprises Sec. Litig.*, 47 F.3d at 379 (holding that fees were justified "because of the complexity of the issues and the risks"). The risk that plaintiff would have been unable to demonstrate that orientation attendees were employees, and the possibility that Werner would have appealed the class certification decision, the summary judgment decision, a final verdict, or all of the above, weigh in favor of awarding a 33⅓% fee. See *In re Omnivision Technologies*, 559 F.Supp.2d at 1046-47 ("The risk that further litigation might result in Plaintiffs not recovering at all . . . is a significant factor in the award of fees").

c. The Skill Required and the Quality of Work

The prosecution and management of a class action undoubtedly requires a certain degree of skill, and the court found nothing deficient about the work performed by plaintiff's counsel. Rather, as noted, class counsel vigorously litigated the case for more than two years, engaging in extensive motion practice, completing significant amounts of discovery, and participating in a successful mediation. See *id.* at 1047 ("That Plaintiffs' case withstood two [motions to dismiss] . . . is some testament to Lead Counsel's skill"). Consequently, the court concludes that this factor favors an upward departure from benchmark fees.

[73]Fees Motion at 7-8.

d. The Contingent Nature of the Fee and the Financial Burden Carried by Plaintiffs

"The importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee." *Id.* (citing *Vizcaino*, 290 F.3d at 1050). Plaintiff's counsel handled this case on a contingency fee basis, "has never been paid any money for attorneys' fees on this case, and has advanced all costs for over one and a half years."[74] Counsel asserts that he and his colleagues expended 966.1 hours on the case,[75] and incurred a total of $122,873.17 in litigation costs.[76] For three small law firms, this represents a significant commitment of time and resources; this type of "substantial outlay, when there is a risk that [no money] will be recovered, further supports the award of the requested fees." *Id.* Given the amount of effort expended, it is possible that class counsel's work impeded their ability to take on other matters. See *Vizcaino*, 290 F.3d at 1050 (noting that the representation had required counsel "to forgo significant other work," which was a relevant factor in evaluating an appropriate fee award); *WPPS*, 19 F.3d at 1299 ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases"). Accordingly, the court finds that this factor weighs in favor of awarding the requested fees.

e. Awards Made in Similar Cases

The fee sought by plaintiff's counsel is comparable to awards in similar cases. Courts regularly award attorneys' fees equal to 30-40% of the settlement fund in wage and hour class actions that result in recoveries of less than $10 million. See *Vasquez*, 266 F.R.D. at 491-92 (approving counsel's request for 33.3% of the $300,000 obtained and noting five recent wage and hour class actions where federal district courts had approved attorney fee awards of 30 to 33%);

---

[74]Barnes Fees Decl., ¶ 8.

[75]*Id.*, ¶ 11.

[76]*Id.*, ¶ 12.

Singer v. Becton Dickinson and Co., No. 08-CV-821-IEG (BLM), 2010 WL 2196104, *5, 8 (S.D. Cal. June 1, 2010) (approving an attorneys' fees award of 33.33% of a $619,167 common fund, and noting "the request for attorneys' fees in the amount of 33.33% of the common fund falls within the typical range of 20% to 50% awarded in similar cases," citing *Ingalls v. Hallmark Mktg. Corp.*, 08cv4342 VBF (Ex), Doc. No. 77, ¶ 6 (C.D. Cal. Oct. 16, 2009) (awarding 33.33% of the common fund in a $5.6 million wage and hour class action); *Birch v. Office Depot, Inc.*, Case No. 06cv1690 DMS (WMC), Doc. No. 48, ¶ 13 (S.D. Cal. Sept. 28, 2007) (awarding a 40% fee in a $16 million wage and hour class action); *Rippee v. Boston Mkt. Corp.*, Case No. 05cv1359 BTM (JMA), Doc. No. 70, at 7-8 (S.D. Cal. Oct. 10, 2006) (awarding a 40% fee in a $3.75 million wage and hour class action). Based on the amount typically awarded in similar cases, therefore, the court finds that a 33⅓% award is reasonable.

f. The Lodestar Cross-Check

When a court exercises its discretion to use a percentage-of-the-fund calculation to determine the reasonableness of attorneys' fees, checking that figure against the lodestar is appropriate. See *Vizcaino*, 290 F.3d at 1050; *Young*, 2007 WL 951821 at *5 ("[T]he best practice is to assess a percentage fee award not only by using the usual litany of factors bearing on the reasonableness of a fee, but also by cross-checking the percentage fee award against a rough fee computation under the lodestar method" (internal citations omitted)). The lodestar figure is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. Over approximately the last two years, class counsel have expended some 966.1 hours on this matter. Kevin Barnes states that his firm spent a total of 841.9 hours on the case.[77] He asserts that his standard hourly rate for class action litigation is $750.00, and that his partner, Gregg Lander, regularly bills at $600 per hour.[78] Joseph Antonelli, co-class

[77] *Id.*, ¶ 11.

[78] *Id.*

counsel, asserts that he spent 62.5 hours on the matter, billed at $750.00 per hour.[79] Sahag Majarian, another co-counsel for plaintiffs, reports that he spent a total of 61.70 hours on the action, and that he bills at $700 per hour.[80]

Despite class counsel's reports regarding the total hours worked, they offer little evidence as to how the hours were spent. The court can award attorneys' fees only for the number of hours it concludes were *reasonably* expended on the litigation. *Hensley*, 461 U.S. at 434 ("[Counsel] should make a good faith effort to exclude . . . hours that are excessive, redundant, or otherwise unnecessary"). As respects the 841.9 hours recorded by the Law Offices of Kevin T. Barnes, it is unclear how that time was allotted between Barnes, Lander, and other attorneys or paralegals in the firm. There is, additionally, no information as to how the time was spent. Without billing records showing the specific work performed by individual attorneys, Barnes' evidence is of little help in assessing the reasonableness of the fees. Similarly, while Antonelli and Majarian provide the number of hours that each worked, they do not describe the specific tasks they performed. Furthermore, while plaintiff's fee motion cites evidence purportedly showing that the hourly rates charged by class counsel are reasonable, the evidence cited was not submitted to the court.[81]

Despite these deficiencies, the evidence submitted supports a conclusion that a one-third contingency fee is appropriate here. "In contrast to the use of the lodestar method as a primary tool for setting a fee award, the lodestar cross-check can be performed with a less exhaustive cataloging and review of counsel's hours." *Young*, 2007 WL 951821 at *6. See *In re Immune Response Sec. Litig.*, 497 F.Supp.2d 1166, 1176 (S.D.Cal. 2007) ("Although counsel have not

---

[79]Declaration of Joseph Antonelli ("Antonelli Decl."), Docket No. 128 (June 20, 2012), ¶ 6.

[80]Declaration of Sahag Majarian ("Majarian Decl."), Docket No. 128 (June 20, 2012), ¶¶ 4, 8.

[81]Plaintiff's motion references a survey conducted by the National Law Journal concerning the billing rates of California lawyers, as well as the declaration of Richard Pearl, an attorneys' fees specialist. (Fees Motion at 9-10). These documents are referenced as exhibits two and three to the declaration of Kevin Barnes; there is only one exhibit attached to the Barnes' declaration submitted with plaintiff's motion, which contains a breakdown of costs incurred by his firm.

provided a detailed cataloging of hours spent, the Court finds the information provided to be sufficient for purposes of lodestar cross-check."); see also *In re Rite Aid Corp. Sec Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting"); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) ("Of course, where [the lodestar method is] used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized").

Antonelli proffers evidence that other courts have determined that a rate of $750 an hour is reasonable for his services.[82] Similarly, Majarian states that while he has worked exclusively on a contingency fee basis for 22 years, the fee awards he has received average more than $700 per hour.[83] See *Sutter Health Uninsured Pricing Cases*, 171 Cal.App.4th 495, 512 (2009) (where the lodestar is used to cross-check a percentage award, documentation of the lodestar figure is often submitted in summary or declaration form, without submission of full time records). While plaintiff neglects to submit Pearl's declaration, her motion cites the case law on which Pearl relied in determining reasonable rates for counsel's services. These cases approved the use of hourly rates comparable to those requested here.[84] The court is concerned that three such senior lawyers, aided by one who is himself rather senior (Lander), apparently performed the bulk of the work on the case, thereby inflating fees. That said, the court accepts that the hourly rates the attorneys charged were reasonable given their years in practice and experience.

The court also accepts the number of hours billed – 966.1 – as reasonable. Counsel have been working on this case for almost two years. During that time, there has been extensive motion practice, including a motion to remand, a motion for class certification, and a motion for

---

[82]Antonelli Decl., ¶ 5 ("[M]y office has regularly been approved at $750.00 per hour for Joseph Antonelli from California Superior Courts, including from the following Los Angeles Superior Court judges: the Honorable William A. MacLaughlin, the Honorable Emilie Elias, the Honorable William Highberger, [the] Honorable Carle West, and the Honorable Victoria Chaney").

[83]Majarian Decl., ¶ 4.

[84]Fees Motion at 10.

summary judgment. Counsel have also engaged in a significant amount of discovery, completing both merits and damages discovery. Finally, they prepared for and conducted a mediation. Compare *Schiller v. David's Bridal, Inc.*, No. 1:10–cv–00616–AWI–SKO, 2012 WL 2117001 (E.D. Cal. June 11, 2012) ("The Court finds the 596.2 hours expended on the litigation to be reasonable in light of law and motion practice with respect to subject matter jurisdiction, the amount of discovery conducted, the number of Defendant's employees included in the Settlement Classes, and the mediation preparation required").

Accepting the rates and hours proffered by counsel, the total lodestar calculation amounts to $624,920, which exceeds the one third percentage fee requested.[85] Even when this is adjusted downward to take into account the fact that so much work was done by senior lawyers, the lodestar check favors an upward departure from the 25% benchmark; an upward adjustment also acknowledges the fact that generally attorneys working on a contingency fee basis receive a multiplier that results in fees *exceeding* the lodestar to compensate them for their risk. See *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) ("It is an abuse of discretion to fail to apply a risk multiplier, however, when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky," citing *In re WPPS*, 19 F.3d at 1301-02). See also *Vizcaino*, 290 F.3d at 1050 (stating that a survey of decisions in common fund class actions showed that multipliers between 2 and 4 are common); *Behrens v. Wometco Enterpr., Inc.*, 118 F.R.D. 534, 549 (S.D. Fla. 1988) (applying a multiplier of 3.0 and noting that "the range of lodestar multipliers in class actions runs from a low of 2.26 to a high of 4.5"), aff'd, 899 F.2d 21 (11th Cir. 1990); *In Re Equity Funding Corp. of Am. Securities Litig.*, 438 F.Supp. 1303, 1334 (C.D. Cal. 1977) ("A review of prior judicial precedent disclosed the use of multipliers up to 5.0 times the normal hourly rates charged"); see also *Bernardi v. Yeutter*, 951 F.2d 971, 975 (9th Cir. 1991) (stating that the district court abused its discretion in failing to apply a 2.0 multiplier to counsel's lodestar figure in light of "the presence of a risky contingent fee"). The

[85]Barnes Decl., ¶ 11.

$191,666.66 fee class counsel seek represents a negative multiplier. A "negative multiplier suggests that, despite exceeding the 25% benchmark used by some courts, the fees sought here are reasonable based on the time and effort expended by plaintiff's counsel." *Young*, 2007 WL 951821 at *8. The fact that counsel seek a payment below the lodestar cross-check supports an upward departure from the 25% benchmark.[86]

g. Conclusion Regarding Attorneys' Fees

In sum, considering the overall circumstances of the case, including the results class counsel achieved and the risks they assumed, and comparing the lodestar and percentage methods of calculating the fee, the court concludes that awarding a fee equal to 33⅓% of the common fund is reasonable. The court awards counsel $191,666.66 in fees.

3. Incentive Award

An individual who joins his claims with those of a class "disclaim[s] any right to a preferred position in the settlement [of those claims]." *In re Oracle Securities Litigation*, No. C-90-0931-VRW, 1994 WL 502054, *1 (N.D. Cal. June 18, 1994) (quoting *Officers for Justice*, 688 F.2d at 632). Nonetheless, it is well-established that the court may grant a modest incentive award to class representatives, both as an inducement to participate in the suit and as compensation for time spent in litigation activities, including depositions. See *In re Mego Financial Corp. Securities Litig.*, 213 F.3d at 463 (the district court did not abuse its discretion in awarding an incentive award to the class representatives); *Matter of Continental Illinois Securities Litig.*, 962 F.2d 566, 571 (7th Cir. 1992) (stating that an incentive award in such amount "as may be necessary to induce [the class representative] to participate in the suit" is appropriate).

The settlement agreement provides for an incentive payment to lead plaintiff Montalvo of

---

[86]Even if the court failed to credit counsel's evidence regarding the reasonableness of their rates, and used lower hourly rates to calculate the lodestar, there would have to be a significant downward departure in rates to achieve a lodestar at or below counsel's requested fee. Based on the 966.1 hours worked, a $191,666.66 fee reflects an average hourly rate of only $198.39. This number includes no upward multiplier compensating counsel for the risk of accepting the representation proceeding on a contingency fee basis.

up to $15,000.[87] While this proposed award is consistent with what some courts have awarded in the past, most incentive awards are lower. See, e.g., *In re Mego Financial Corp.*, 213 F.3d at 463 (approving a $5,000 incentive award for each class representative); *Faigman v. AT & T Mobility LLC*, No. C06-04622 MHP, 2011 WL 672648, *5 (N.D. Cal. Feb. 16, 2011) (approving an incentive payment of $3,333.33 for each of three class representatives, and noting that "[i]n [the Northern] [D]istrict, incentive payments of $5,000 are presumptively reasonable"); *Clesceri v. Beach City Investigations & Protective Services, Inc.*, No. CV-10-3873-JST (RZx), 2011 WL 320998, *2 (C.D. Cal. Jan. 27, 2011) (preliminarily approving an award of $3,000 for two named plaintiffs); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 646-47 (S.D. Cal. 2011) (approving an award of $4,000 for one named plaintiff and $2,000 for another); *Dennis v. Kellogg Co.*, No. 09-CV-1786-IEG (WMc), 2010 WL 4285011, *3 (S.D. Cal. Oct. 14, 2010) (preliminarily approving an incentive award of $5,000); *Aguayo v. Oldenkamp Trucking*, No. F04-6279 AWI LJO, 2006 WL 3020943, *10 (E.D. Cal. Oct. 17, 2006) (preliminarily approving a settlement agreement, which provided that class counsel would apply for an incentive award of no more than $5,000 for the named plaintiff).

Where larger incentive awards have been approved, courts have generally noted unusual circumstances justifying an increased award. See *Rausch v. Hartford Financial Servs. Group*, No. 01-CV-1529-BR, 2007 WL 671334, *3 (D. Or. Feb. 26, 2007) ("the Court finds Reynolds is entitled to $10,000 as a reasonable incentive award, particularly in light of his perseverance in pursuing this matter to a successful outcome in the Ninth Circuit"); see *Cook v. Niedert*, 142 F.3d 1004, 1016 (9th Cir. 1998) (upholding a $25,000 incentive payment in a case with more than a $13,000,000 settlement because the class representative spent "hundreds" of hours with class counsel); *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D. Cal. 1995) (awarding $50,000 to a named plaintiff where the total settlement amount was $76,723,213.26).

Whether to authorize an incentive payment to a class representative is a matter within the court's discretion. The criteria courts consider in determining whether to approve an incentive

---

[87]Settlement Agreement at 3.

award include "1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation[;] and[ ] 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *Van Vranken*, 901 F.Supp. at 299.

a. The Risk to the Class Representative in Commencing Suit

When a class representative shoulders some degree of personal risk in joining the litigation, such as workplace retaliation or financial liability, making an incentive award is especially important. See *Staton*, 327 F.3d at 977 (noting that fear of workplace retaliation is a relevant factor in evaluating the propriety of an incentive award). The record contains no evidence that Montalvo risked workplace retaliation as a result of her involvement in this case. Class counsel assert, however, that "California law states that the losing party must pay the prevailing party's cost," and as such "Montalvo would have been subjected to a cost award in the tens of thousands of dollars" if she was not successful.[88] Because counsel entered into a contingency fee agreement with Montalvo, it is unclear whether she would ultimately have been responsible for shouldering these costs. Some contingency fee contracts place that burden on the plaintiff while others do not. Because the potential risk faced by Montalvo is uncertain, this factor is neutral.

b. The Notoriety and Personal Difficulties Encountered by the Class Representative

There is no particular notoriety associated with this litigation, nor is there any indication that Montalvo has been subjected to media attention as a result of her involvement in the case.

---

[88]Motion at 10. Counsel fail to cite authority for the proposition that Montalvo would have had to pay Werner's costs, although presumably they reference Rule 54(d)(1) of the Federal Rules of Civil Procedure, which provides that "costs – other than attorney's fees – should be allowed to the prevailing party." See *Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342 F.3d 1016, 1022 (9th Cir. 2003) ("An award of standard costs in federal district court is normally governed by Federal Rule of Civil Procedure 54(d), even in diversity cases. Rule 54(d)(1) creates a presumption in favor of awarding costs to a prevailing party, but the district court may refuse to award costs within its discretion") (internal citation omitted).

See, e.g., *Wilson v. Airborne, Inc.*, No. EDCV 07-770-VAP (OPx), 2008 WL 3854963, *13 (C.D. Cal. Aug. 13, 2008) (finding that the media attention class representatives attracted supported incentive awards). The fact that there was no media attention, however, does not preclude approval of an incentive payment. See *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466-BR, 2006 WL 3312024, *4 (D. Or. Nov. 13, 2006) (approving an incentive award of $10,000 despite a lack of notoriety or demonstration of personal difficulties). As no significant media attention or other difficulties have been identified, however, this factor favors authorizing a smaller incentive payment.

c. The Amount of Time and Effort Expended by the Class Representative

An incentive award is appropriate where, as here, the "class representatives remained fully involved and expended considerable time and energy during the course of the litigation." *Razilov*, 2006 WL 331204 at *4. Class counsel assert that it was Montalvo who approached them regarding Werner's alleged illegal compensation scheme; that she "spent countless hours in consultation with [counsel] from the initial investigation and pleading stage;" that she spent "numerous hours in consultation with [counsel's office] regarding the issues raised in the action and the initial Complaint;" that she "reviewed thousands of pages of documents related to this case;" and that she "had her Deposition taken for a full day."[89] Counsel praise Montalvo's cooperation and involvement, stating that she "has been diligent and acted above and beyond that of which is expected of a Class Representative throughout all stages of the litigation, up to and including preliminary approval of a class action settlement."[90] This factor, therefore, weighs in favor of granting an incentive award. See *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, *17 (N.D. Cal. Apr. 22, 2010) (approving a $20,000 award where plaintiff "made herself available for deposition on two separate occasions, wherein she was subjected to questioning regarding her personal financial affairs and other sensitive

[89]Final Barnes Decl., ¶ 4.

[90]*Id.*

subjects; met with Class Counsel on six separate occasions; attended the full-day Court-ordered appraisal hearing; spoke with Class Counsel and their staff on many occasions; reviewed all major pleadings; and repeatedly responded to interrogatories and document requests); *In re Heritage Bond Litigation*, 2005 WL 1594403 at *14 (activities such as "responding to discovery, preparing for, traveling to and attending their depositions and maintaining contact with Plaintiffs' counsel to monitor the litigation" gave rise to an inference that class representatives were "actively involved in every aspect of . . . litigation").

d. The Duration of the Litigation

When a litigation has been particularly protracted, an incentive award is especially appropriate. See *Van Vranken*, 901 F.Supp. at 299 (finding that a class representative's participation through "years of litigation" supported an incentive award). This case was filed in February 2011, and has been litigated for approximately two years. Montalvo has been actively involved during this period. Given the active nature of her involvement and her significant participation, the court concludes that this favors an incentive award for Montalvo.

e. The Personal Benefit Enjoyed by the Class Representative as a Result of the Litigation

An incentive award may be appropriate when a class representative will not gain any benefit beyond that she would receive as an ordinary class member. See *Razilov*, 2006 WL 331204 at *4 (approving the payment of an incentive award where the only benefit a class representative was going to receive from a settlement was the same statutory damages that other class members would receive); *Van Vranken*, 901 F.Supp at 299 (where a class representative's claim made up "only a tiny fraction of the common fund," a substantial incentive award was appropriate). There is no evidence here Montalvo has received or will receive any unusual or extraordinary benefit from the settlement; rather, it appears that absent an incentive award she will receive the $20 to $30 payment that is due all class members. This factor, therefore, favors approval of an incentive award.

f. Weighing the Factors

Considering all relevant factors, the court concludes that an incentive award of $5,000 for

Montalvo's service as a class representative is "just and reasonable under the circumstances." *Van Vranken*, 901 F.Supp at 299. While this is less than the amount she seeks, it is in line with other awards approved in this circuit. It is particularly appropriate to decrease the award in light of the large disparity between the requested award ($15,000) and the average recovery per class member (around $20 to $30 dollars). Some award is appropriate, however, as Montalvo expended substantial time and effort on pretrial activities. Her diligence demonstrates her commitment to the class, a commitment she took seriously despite the fact that she stood to receive no more than any other class member from the settlement fund. The court therefore approves a $7,500 incentive award. The remaining $7,500 that had been earmarked for Montalvo's incentive award should be added to the net settlement fund for distribution to the class.

4. Whether Counsel's Request for Litigation Costs is Reasonable

The district court also has discretion to determine an appropriate award of costs and expenses. See *Trans Container Services v. Security Forwarders, Inc.*, 752 F.2d 483, 488 (9th Cir. 1985). One court has noted that, in evaluating the reasonableness of costs, "the judge has to step in and play surrogate client." See *In re Continental Illinois Securities Litig.*, 962 F.2d at 572. In keeping with this role, the court must examine prevailing rates and practices in the legal marketplace to assess the reasonableness of the costs sought. *Missouri v. Jenkins*, 491 U.S. 274, 286-87 (1989).

Counsel has requested $160,000 in costs,[91] which includes $120,000 in litigation costs, and $40,000 in claims administration costs.[92] Each of the three co-counsel have proffered a line item breakdown of their costs.[93] The court has reviewed the detailed accountings submitted. While most of the expenses appear to have been reasonably and necessarily incurred during the course

---

[91]Motion at 3.

[92]Fees Motion at 12.

[93]Barnes Fees Decl., Exh. 1; Antonelli Decl., Exh. 1; Majarian Decl., Exh. A. Barnes seeks to recover a total of $106,376.46. Antonelli claims costs of $15,072.29. Majarian has total costs of $1,424.42.

of the litigation, there are some troubling areas. Specifically, it appears that counsel are seeking to double recover many of their expenses.

In Barnes' summary of costs, he reports expert fees of $61,734.12.[94] Co-counsel Antonelli's cost sheet, however, indicates that he has already reimbursed Barnes for a portion of those fees. Barnes, however, seeks to recover the full amount, while Antonelli seeks to recover the amount he reimbursed Barnes. Barnes, for example, requests that the court award two payments he made to Phillips Fractor Gorman, on January 25 and February 2, 2012, totaling $19,500.[95] It appears, however, that Antonelli paid Barnes $9,750 on February 9, 2012, for "[Antonelli's] Portion of Dr. Phillips – Expert Fee."[96] Barnes also made two subsequent payments to Phillips Fractor Gorman on February 22, 2012, totaling $7,399.58.[97] According to Antonelli's records, however, he paid Barnes $3,699.79 on March 5, 2012, for "½ of Phillips Fractor Gorman – Consulting."[98] This same pattern appears with respect to the JAMS mediation fee[99] and a consulting fee paid to TASA Consulting.[100] Indeed, the only cost listed on Antonelli's breakdown that was not a reimbursement of expenses paid by Barnes is a $3.50 photocopying expense.[101] Accordingly, the court will reduce the award of costs by $15,068.79, which is the total amount sought by Barnes for which he has already been paid by Antonelli. The court thus

---

[94]Barnes Fees Decl., Exh. 1.

[95]*Id.*

[96]Antonelli Decl., Exh. 1. Dr. Phillips appears to be a principal in the firm of Phillips Fractor Gorman.

[97]Barnes Fees Decl., Exh. 1.

[98]Antonelli Decl., Exh. 1.

[99]Barnes seeks $2,525 in mediation fees, while Antonelli claims $1,262.50 for "½ of Mediation Fee." (Barnes Decl., Exh. 1; Antonelli Decl., Exh. 1).

[100]Barnes seeks $713 for payments to the TASA Group, while Antonelli claims $356.50 for "½ of TASA Consulting." (Barnes Decl., Exh. 1; Antonelli Decl., Exh. 1).

[101]Antonelli Decl., Exh. 1.

awards class counsel $104,931.21 in litigation costs.

Counsel also seek $40,000 for claims administration costs. They proffer the declaration of Roe, a senior project administrator at Rust, who states that this is an accurate estimate of the total cost of administering the settlement, including fees already incurred and future costs of completing administrative duties.[102] Given the number of class members and the notice procedures utilized, including maintenance of a telephone hotline, the court concludes that these expenses are reasonable and have been necessarily incurred. The court authorizes the payment of settlement administration fees in the amount of $40,000.

III. CONCLUSION

In conclusion, the court grants the motion for final approval and the motion for attorneys' fees, costs, administrative expenses and an incentive award, with the exception that it will award costs of $144,931.21 rather than the $160,000 requested and an incentive award of $7,500 rather than $15,000.

DATED: February 28, 2013

Margaret M. Morrow

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

[102]Roe Decl., ¶ 15.