UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KENNETH J. LEE, MARK G. THOMPSON, and DAVID C. ACREE, individually, on behalf of others similarly situated, and on behalf of the general public,

Plaintiffs,

vs.

JPMORGAN CHASE & CO.; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION; and DOES 1-10, inclusive,

Defendants.

CASE NO. SACV 13-511-JLS (JPRx)

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY SETTLEMENT APPROVAL OF CLASS ACTION SETTLEMENT (Doc. 67) AND SETTING A FINAL APPROVAL HEARING DATE FOR APRIL 3, 2015, AT 2:30 P.M.

Before the Court is an Unopposed Motion for Preliminary Approval of Class Action Settlement filed by Plaintiffs Kenneth J. Lee, Mark G. Thompson, and David C. Acree. (Mot., Docs. 67.) The Plaintiffs ask the Court to preliminarily approve the proposed settlement between the Plaintiffs and Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, National Association; conditionally certify the settlement class for settlement purposes only; name Bryan Schwartz Law and Goldstein Borgen Dardarian & Ho LLP as Class Counsel and CPT Group, Inc. as the Claims Administrator; approve the form and method of class notice; and schedule a final approval hearing date. Having read and considered the papers and taken the matter under submission, the Court GRANTS Plaintiffs' Motion and sets a final approval hearing date for April 3, 2015, at 2:30 p.m.

I. BACKGROUND

On March 29, 2013, Plaintiffs Kenneth Lee and Mark Thompson filed a Class and Collective Action Complaint against Defendants, alleging JPMorgan Chase violated California and federal statutory wage laws and engaged in unfair competition in violation of California Business and Professions Code § 17200 *et seq.* (Compl., Doc. 1.) According to the Complaint, JPMorgan Chase misclassified Plaintiffs and putative class members who were or are commercial and review appraisers as exempt employees under federal and California wage and hour laws. (Id. ¶¶ 1, 39-68.) Specifically, Plaintiffs allege that Defendants misrepresented to these employees that they were exempt and therefore were not entitled to overtime pay for hours worked in excess of forty hours a week. (Id. ¶ 19.) On April 5, 2013, Joel Cuthbert filed a written consent to join the collective action. (Settlement Agreement, Doc. 68-1, Ex. A, at 2.) On May 1, 2013, Plaintiffs filed a First Amended Complaint ("FAC"), adding claims for waiting time penalties under California Labor Code § 203 and civil penalties under the Private Attorneys General Act of 2004, Cal. Labor Code § 2698, *et seq.* ("PAGA"). (FAC, Doc. 10.)

On July 2, 2013, Plaintiffs filed their Second Amended Complaint ("SAC"), which also added David C. Acree as a class representative Plaintiff. (SAC, Doc. 38.). The SAC defines the Collective Class as:

> All persons who are or have been employed by Defendants as a commercial production appraiser ("Appraiser I;" Appraiser II;" "Senior Appraiser;" or positions consisting of similar job duties) in the CTL Appraisal division within the United States at any time from three years prior to the filing of this Complaint to the final disposition of this case.

(Id. ¶ 18.) The SAC defines the California Class similarly as:

> All persons who are or have been employed by Defendants as Appraisers in the CTL Appraisal division (including production appraisers and review appraisers, with such titles as "Appraiser I;" "Appraiser II;" "Senior Appraiser"; "Review Appraiser;" "Senior Review Appraiser;" and any other position consisting of similar duties) within the State of California at any time from four years prior to the filing of this Complaint to the final disposition of this case.

(Id. ¶ 32.) The proposed California Class includes two sub-classes for related penalty claims. (Id. ¶¶ 33-34.)

On August 16, 2013, the parties stipulated to dismiss Plaintiffs' claims and compel arbitration. (Stip., Doc. 46.) Plaintiffs and putative class members had signed arbitration agreements with Defendants for claims related to their employment. Some of the agreements explicitly required arbitration on an individual basis, others were silent on the question of class arbitration, and 21 putative class members had not signed arbitration agreements at all. (Mot. at 7-8.) On November 4, 2013, while this Court was considering whether the Court or an arbitrator should decide whether the agreements without express class waivers allowed arbitration to proceed on a class basis, Myles Norton filed a written consent to join the collective action. (Settlement Agreement at 3.) On November 14,

2013, this Court held that an arbitrator should decide whether the agreements prohibit class arbitration, and thus dismissed the action. (Id.)

Defendants appealed this ruling to the Ninth Circuit. (Notice of Appeal, Doc. 64.) Meanwhile, Plaintiffs filed demands to arbitrate their claims on either an individual or class-wide basis before the American Arbitration Association ("AAA"), depending on which arbitration agreement each Plaintiff had signed. (Settlement Agreement at 3.)

On June 17, 2014, the parties participated in a mediation session before wage and hour mediator Michael Dickstein. (Schwartz Amended Decl. ¶ 9, Doc. 75.) The original mediation session did not immediately result in a settlement, but the parties and mediator Dickstein conducted several follow-up conferences over the next several weeks. (Id. ¶¶ 9-10; Settlement Agreement at 5, n. 1.) On October 10, 2014, the parties finally executed the Settlement Agreement (Schwartz Amended Decl. ¶ 11), and Plaintiffs filed the present Unopposed Motion for Preliminary Approval of Class Action Settlement. (Mot., Doc. 67.)

The Settlement Agreement specifies that Defendants continue to deny (1) all claims as to wrongdoing or liability and (2) the collective and class allegations. (Settlement Agreement at 1-2, 4.) On the other hand, Plaintiffs continue to assert that the claims asserted in their SAC have merit and that the evidence supports their claims. (Id.) Due to the uncertainty and risk inherent in any litigation, however, and the fact that further litigation would be protracted and expensive, the parties have agreed to settle. Plaintiffs believe the Settlement Agreement is in the best interests of Plaintiffs and putative class members (Id. at 4-5), and Defendants do not oppose this Motion. (Id. at 4.)

The Settlement Agreement defines "Covered Positions" as "the following positions in JPMorgan Chase's CTL division that current and former employees who are covered by this Stipulation held: Appraiser I; Appraiser II; Senior Appraiser; Commercial Appraiser – Team Lead Commercial Production Appraiser; Senior Commercial Review Appraiser; Review Appraiser; and Senior Review Appraiser." (Id. § 1.11.) The Settlement Agreement further provides that "[f]or a position to be a Covered Position, an employee

must have worked in that position: (a) at any time from March 29, 2010 through the Preliminary Approval Date in any state other than California, and/or (b) at any time from March 29, 2009 through the Preliminary Approval Date in California." (Id.)

The Settlement Agreement provides for a settlement fund not to exceed the gross sum of $2,400,000.00. (Id. § 1.37.) No portion of the settlement fund will revert back to Defendants unless the Settlement fails or more than 5% of the California Class opts out. (Id. §§ 2.2.1, 2.11.1.) In addition to the settlement fund, Defendants agree to pay each Participating Claimant's share of payroll taxes for the share of his or her settlement payment deemed to be wages. (Id. § 2.2.1.)

The settlement fund will be used to pay for (1) Plaintiffs' attorneys' fees and costs, (2) reimbursement for actual litigation costs (not to exceed $25,000), (3) enhancement payments for the three named Plaintiffs and the two representatives who filed written consents to join the class action, (4) a payment of $7,500 to the California Labor Workforce Development Agency ("LWDA") for the PAGA claims, and (5) settlement administration expenses. (Id. §§ 2.2.6, 2.5.6, 2.9.1, 2.9.2.) More specifically, the Settlement Agreement allows Plaintiffs' counsel to apply for an award of one-third of the $2,400,000.00 ($800,000.00) as attorneys' fees, which they have done in Plaintiffs' Motion. (Id. § 2.9.1.; Mot. at 22-24.) In the event that this Court awards less than the one-third amount requested for attorneys' fees and/or costs, any amount not awarded will be distributed to the putative class members, with no portion reverting back to Defendants. (Settlement Agreement § 2.9.1.) The Settlement Agreement also allocates enhancement payments, totaling $45,000.00, to the Plaintiffs as follows: $15,000.00 to Kenneth Lee, $10,000.00 to Mark Thompson, $10,000.00 to David Acree, $5,000.00 to Joel Cuthbert, and $5,000.00 to Myles Norton (Id. § 2.9.2.) Expenses paid to the claims administrator are not to exceed $20,000.00. (Schwartz Amended Decl. ¶ 19.) The remainder of the settlement fund will be distributed to Class Members, and Plaintiffs' counsel estimates the

distribution to be approximately $9,500.00 to each of the potential 158 Class Members. (Mot. at 5.)

Participating Claimants will be allocated a share of the settlement fund based on the number of workweeks they worked for Defendants during the relevant time period. (Settlement Agreement § 2.2.2.) For those in the California Class, a 1.64 multiplier will be used to provide them with a larger pro rata share per workweek, as a result of the release of their additional claims for meal/rest period violations, PAGA penalties, waiting time violations, and wage statement violations under California law. (Id.) If fewer than all of the putative class members participate in the settlement distribution, the settlement payment to any Participating Claimant will increase on a pro rata basis, subject to the limitation that no Participating Claimant will be paid greater than twice the initial amount calculated to be paid to that Participating Claimant. (Id.) Any additional funds that cannot be paid to the Participating Claimants due to the above restriction "will be distributed by *cy pres* one-half to the Legal Aid Society – Employment Law Center and one-half to the Juvenile Advocacy Project, Mental Health Advocacy Services." (Id.)

In addition to the monetary benefits of the Settlement Agreement, the Commercial Appraiser I position at JPMorgan Chase will be reclassified as non-exempt, allowing employees in that position in the future to be compensated for their overtime and, in California, any missed meal/rest periods. (Id. § 2.12.6.)

In return for a share of the settlement fund and enhancement payments, the Plaintiffs agree to release any and all claims and causes of actions against Defendants, "whether or not acting in the course and scope of employment...."[1] (Id. § 1.9.) For the other Class Members, the federal law claims that they agree to release under the Settlement Agreement are "any and all federal wage and hour law claims...that accrued on any date

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[1] The parties have stipulated that nothing in the Settlement Agreement releases Plaintiff Thompson's separate claims as set forth in the individual complaint he filed against Defendants in this Court in Case No. SACV 14-01181 JLS (JPRx). (Settlement Agreement at 5 n.1.)

up through and including...final approval of the Settlement, for any type of relief...arising under the Fair Labor Standards Act of 1938 ("FLSA")." (Id. § 1.33.) The state law claims released are defined similarly to the federal law claims, but encompass any and all wage and hour claims Class Members may have against Defendants under the relevant California laws for Class Members in Covered Positions. (Id. § 1.34.) As a result, only the Plaintiffs receiving enhancement payments are required to execute a general release of *all* claims against Defendants existing up to the date of final approval.

Class Members who opt-in or do not opt-out (if they are in California) of the settlement will have 180 days to cash their settlement checks. (Id. § 2.6.4.) Any amounts represented by uncashed checks will be distributed to the other Participating Claimants on a pro rata basis, and any funds left over after that redistribution will be distributed by *cy pres*, as discussed above. (Id. § 2.12.1.) The back of the settlement check will have an endorsement that the Participating Claimant must sign to release their federal and state law claims, as defined above, and to receive his or her portion of the settlement fund. (Id. § 1.38.)

The Settlement Agreement provides that Class Notice shall be sent by the claims administrator, CPT Group, Inc., to the Class via first class mail, within 30 days of an order preliminarily approving the settlement. (Id. § 2.4.3, 2.5.1; Ex. 1 ("Class Notice"), Doc. 68.) The Settlement Agreement provides that the Class Notice will advise Class Members of their right to retain their own attorney(s) in connection with the settlement, that California Class Members may elect to opt-out of the Settlement Class, the process and time restrictions that apply to opting-out, how to object to the Settlement Agreement, and the process for disputing the compensation amount. (Id. §§ 2.6.1-2.6.5.) The deadline for submitting an opt-out (for California Class Members) or opt-in notification or objection is 60 days following the mailing of Class Notice. (Id. §§ 1.24, 2.6.2, 2.6.3.) The parties stipulate that the Settlement Agreement is the result of an arms'-length negotiation

between the parties and their counsel, and that each party and their counsel took part in the drafting and preparation of the Settlement Agreement. (Id. § 2.12.9.9; Class Notice at 2.)

II. CONDITIONAL CERTIFICATION OF THE CLASS

Plaintiffs ask the Court to conditionally certify the Class for settlement purposes only under Rule 23(a) and 23(b)(3). (Mot. at 13-25.)

A. Legal Standard

When conditionally certifying a class for settlement purposes, the court "must pay undiluted, even heightened, attention to class certification requirements." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)) (internal quotation marks omitted). "To obtain class certification, a class plaintiff has the burden of showing that the requirements of Rule 23(a) are met and that the class is maintainable pursuant to Rule 23(b)." *Narouz v. Charter Commc'ns, LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010). "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). "Under Rule 23(a), the party seeking certification must demonstrate, first, that:"

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. at 2548 (quoting Fed. R. Civ. P. 23(a)). "Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Id.* Plaintiff seeks certification only under Rule 23(b)(3), which is satisfied if:

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual

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

Fed. R. Civ. P. 23(b)(3). "Rule 23 does not set forth a mere pleading standard," thus "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 131 S. Ct. at 2551. This requires a district court to conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Id.*

B. Requirements Under Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "As a general rule, classes of forty or more are considered sufficiently numerous." *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 617 (C.D. Cal. 2008), *vacated on other grounds* 254 F.R.D. 610 (9th Cir. 2012). *See also Harris v. Palm Springs Alpine Estates*, 329 F.2d 909, 913-914 (9th Cir. 1964) ("'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class."). Here, the number of Class Members exceeds forty. Plaintiffs identify 158 Class Members. (*See* Schwartz Amended Decl. ¶ 7.) The Court concludes that Plaintiffs have satisfied the numerosity requirement.

2. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). "This does not mean merely that they have all suffered a violation of the same provision of law," but instead that their claim(s)

"depend upon a common contention . . . of such a nature that is capable of classwide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Although "for purposes of Rule 23(a)(2) [e]ven a single [common] question will do," *id.* at 2556 (quotation marks omitted) (alterations in original), "[w]hat matters to class certification...is not the raising of common 'questions' - even in droves - but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 2551 (second alteration in original) (quotation marks omitted). Here, the crux of Plaintiffs' claims is that Class Members were misclassified as exempt, but that in reality their job duties necessitated a non-exempt classification. (Mot. at 13-14.) As a result, Plaintiffs contend that whether an exemption applies to the Appraiser job can be resolved on a class-wide basis, and that their case will either be successful or fail with respect to the entire class. (Id. at 13.) Thus, the question of whether the Class Members' job duties are exempt or non-exempt is common to the Class. Plaintiffs have satisfied the commonality requirement.

3. Typicality

Rule 23(a)(3) requires "the claims or defenses of the representative parties [to be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Dukes v. Wal-Mart*, 603 F.3d 571, 613 (9th Cir. 2010) (en banc) (quoting *Hanlon v. Chrysler Corp*, 150 F.3d. 1011, 1020 (9th Cir. 1998)), *rev'd on other grounds*, 131 S. Ct. 2541 (2011). As to the representative, "[t]ypicality requires that the named plaintiffs be members of the class they represent." *Id.* at 613 (citing *Falcon*, 457 U.S. at 156). The commonality, typicality, and adequacy-of-representation requirements "tend to merge" with each other. *Dukes*, 131 S. Ct. at 2551 at n.5 (citing *Falcon*, 457 U.S. at 157-58, n.13).

Here, Plaintiffs' claims, like those of the Class, are based on their contention that Defendants misclassified them as exempt Appraisers rather than non-exempt employees, and that as a result they did not receive pay for overtime or breaks that they were entitled to. (Mot. at 13.) Plaintiffs' claims arise from the same alleged conduct of Defendants, and Plaintiffs are within the Class definition. Thus, typicality is met.

4. Adequacy

Rule 23(a)(4) permits certification of a class action only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020.

Plaintiffs' claims arise out of the same set of facts as the Class Members' claims, and their interest in obtaining the maximum recovery is coextensive with the interests of the Class Members. All Plaintiffs have also been actively involved in the case (Thompson Decl. ¶¶ 4-5; Lee Decl. ¶¶ 4-6; Cuthbert Decl. ¶ 4; Acree Decl. ¶¶ 4-5; Norton Decl. ¶ 4.) The Court finds no sign of any potential conflict between Plaintiffs and the rest of the Class. The Court concludes that Plaintiffs are adequate Class representatives.

As to the adequacy of Plaintiffs' counsel, the Court must consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Here, Bryan J. Schwartz, of Bryan Schwartz Law, and Laura L. Ho, of Goldstein Borgen Dardarian & Ho LLP, submitted declarations describing their experience litigating class actions and consumer lawsuits. (Schwartz Amended Decl. ¶¶ 21-22; Ho Decl. ¶¶ 3-5,

Doc. 69.) From this experience, it would appear that counsel have knowledge of the applicable law in this area. Schwartz and Ho have also identified the work they performed in this action, including preparing court filings, participation in mediation, and analysis of the risks of proceeding with arbitration and litigation. (Schwartz Amended Decl. ¶¶ 17-18, 22; Ho Decl. ¶¶ 5-7.) Based on Plaintiffs' counsels' experience and work in the matter thus far, the Court concludes that Plaintiffs' counsel have satisfied the adequacy requirement. Therefore, the Court appoints Bryan J. Schwartz and Laura L. Ho as Class Counsel in this matter.[2]

C. Requirements Under Rule 23(b)

In addition to establishing the elements of Rule 23(a), Plaintiff must also satisfy one of the three elements of Rule 23(b). Plaintiffs seek certification under Rule 23(b)(3), asserting that common questions predominate over any individual issues that may exist in this case. (Proposed Order ¶ 3, Doc. 67-1.) Under Rule 23(b)(3), a class action may be maintained if: "the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. R. 23(b)(3) (emphasis added). The Court may consider:

> (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims

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[2] Plaintiffs request that the Court name Bryan Schwartz Law and Goldstein Borgen Dardarian & Ho LLP as Class Counsel. However, Plaintiffs have not provided any information concerning any attorneys' experience and participation in this action, other than for Bryan J. Schwartz and Laura L. Ho. The Court therefore will appoint only Bryan J. Schwartz and Laura L. Ho as Class Counsel. The Court appoints attorneys, not law firms, to represent classes.

in the particular forum; and (d) the likely difficulties in managing a class action.

Fed. R. Civ. R. 23(b)(3). Plaintiffs' claims satisfy both the predominance and superiority requirements.

As to the predominance factor, the Supreme Court has explained that it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S at 623. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1778 (2d ed. 1986)). Here, as discussed above, Class Members' claims turn on whether Defendants misclassified Appraisers' job duties as exempt, resulting in a failure by Defendants to pay for overtime and breaks under federal and state wage and hour laws. This common question and the common legal remedies will predominate in this action.

The Court also finds that a class action would be a superior method of adjudicating Plaintiffs' and Class Members' claims. "The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." *Id.* at 1023. "This determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *Id.* Here, each member of the Class pursuing a claim individually would burden the judiciary and run afoul of Rule 23's focus on efficiency and judicial economy. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) ("The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy."). Further, litigation costs would likely "dwarf potential recovery" if each Class Member litigated individually. *Hanlon*, 150 F.3d at 1023. "[W]here the damages each plaintiff suffered are not that great, this factor weighs in favor of certifying a

class action." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1198 n.2 (9th Cir. 2001) (quoting *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 652 (C.D. Cal. 1996)).

Further, because Class Members signed different types of arbitration agreements, individuals who signed arbitration agreements that explicitly required arbitration on an individual basis would likely be forced to proceed in individual arbitrations, while individuals who signed arbitration agreements that were silent as to arbitration on a class-wide basis would have to pursue further the Ninth Circuit appeal that was pending prior to settlement. Additionally, 21 Class Members did not sign arbitration agreements, but they may not be able to meet the numerosity requirement under Rule 23(a)(1). As a result, there is significant justification for allowing all of the Class Members to proceed on a class-wide basis rather than having some Class Members proceed as a class and others on an individual basis.

Considering the non-exclusive factors under Rule 23(b)(3)(A)-(D), the Court finds that Class Members' potential interests in individually controlling the prosecution of separate actions and the potential difficulties in managing the class action do not outweigh the desirability of concentrating this matter in one litigation. *See* Fed. R. Civ. P. 23(b)(3)(A), (C). The Court does not foresee any likely difficulties in managing this case as a class action. Therefore, the Court conditionally certifies the Class for settlement purposes only.

III. PRELIMINARY APPROVAL OF CLASS SETTLEMENT

To preliminarily approve a proposed class-action settlement, Rule 23(e)(2) requires the Court to determine whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). In turn, review of a proposed settlement typically proceeds in two stages, with preliminary approval followed by a final fairness hearing. Federal Judicial Center, *Manual for Complex Litigation*, § 21.632 (4th ed. 2004).

"To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant;[3] and the reaction of the class members to the proposed settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (internal citation and quotation marks omitted). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness, and the settlement must stand or fall in its entirety." *Staton*, 327 F.3d at 960 (quoting *Hanlon*, 150 F.3d at 1026) (alterations omitted).

In addition to these factors, where "a settlement agreement is negotiated *prior* to formal class certification," the Court must also satisfy itself that "the settlement is not the product of collusion among the negotiating parties." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011) (quotation marks omitted). Accordingly, the Court must look for explicit collusion and "more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Id.* at 947. Such signs include (1) "when counsel receive a disproportionate distribution of the settlement," (2) "when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds," and (3)

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[3] This factor does not apply in the case.

"when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *Id.* (quotation marks omitted).

At this preliminary stage and because Class Members will receive an opportunity to be heard on the settlement, "a full fairness analysis is unnecessary . . . ." *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008). Instead, preliminary approval and notice of the settlement terms to the proposed class are appropriate where "[1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with the range of *possible* approval . . . ." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation marks and citation omitted) (emphasis added); *see also Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2009) ("To determine whether preliminary approval is appropriate, the settlement need only be *potentially* fair, as the Court will make a final determination of its adequacy at the hearing on the Final Approval, after such time as any party has had a chance to object and/or opt out.") (emphasis in original).

In any event, the Court evaluates all applicable factors below and finds that the Settlement Agreement should be preliminarily approved.

A. Strength of Plaintiff's Case

The crux of Plaintiffs' claims is that Appraisers working for Defendants during the relevant time period should have been classified as non-exempt employees, but were incorrectly classified as exempt employees. As a result, Plaintiffs and Class Members were entitled to overtime and break payments for which they were not paid. (Mot. at 7-9.) While Plaintiffs assert that they believe they would prevail at either arbitration or trial and upon any necessary appeal, Plaintiffs believe that they would meet strong resistance from Defendants in regards to efforts at class certification and in proving that Appraisers do not fall within an overtime exemption. (Id. at 8-9.) For example, Defendants have presented

numerous arguments for why Plaintiffs and Class Members fall within the administrative and professional exemptions. (Id. at 10-11.) Plaintiffs recognize that "[m]isclassification cases always present a significant risk of losing on the merits after extensive litigation." (Id. at 10.) The proposed settlement therefore strikes a balance between Plaintiffs' claims and Defendants' defenses. The parties have also agreed that the Commercial Appraiser I position at JPMorgan will be reclassified as non-exempt, allowing employees in that position to be compensated for their overtime and, in California, any missed meal/rest periods going forward. The Court concludes that the parties' decision to reach a settlement in this matter was reasonable.

As discussed above, Plaintiffs' attorneys seek an award of one-third of the settlement fund as attorneys' fees. (Mot. at 22-24.) Before final approval, the court will "scrutinize closely the relationship between attorneys' fees and benefit to the class" and will not "award[] unreasonably high fees simply because they are uncontested." *In re Bluetooth*, 654 F.3d at 948 (internal quotation marks and citation omitted). In Plaintiffs' motion for attorneys' fees, they will need to make a sufficient showing as to attorneys' fees, litigation expenses, other related costs, and a service award by the submitted declarations, especially since not all fees and expenses have been incurred. For example, as to attorneys' fees, Plaintiffs' counsel will need to submit evidence of the hours worked and billing rates. In the Ninth Circuit, the benchmark for fees is 25% of the common fund. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir.2011). Plaintiffs' counsel will have to justify any upward departure from the Ninth Circuit's fees benchmark in order to be awarded one-third of the settlement fund.

Finally, the amount of the settlement also appears fair, adequate, and reasonable in light of the claims released by the Participating Claimants and those Class Members who fail to exclude themselves from the Settlement Agreement. (Schwartz Amended Decl. ¶ 12.) The Settlement Agreement releases all of the claims, whether or not arising from

their employment, of the Plaintiffs,[4] but only releases the other Participating Claimants claims that are related to wage and hour violations. (Settlement Agreement §§ 1.33-1.34.) The enhancement awards proposed for these Plaintiffs not only seem reasonable in amount based on the involvement that each Plaintiff had in this matter, but also fairly compensates them for releasing additional claims that other Participating Claimants are not required to release against Defendants. The larger allocation to California Class Members based on a 1.64 multiplier is also fair because they are releasing more claims than non-California Class Members.

The Court concludes that this factor weighs in favor of preliminary approval.

B. Risk, Complexity, and Likely Duration of Further Litigation

This action settled at a relatively early stage in the proceedings, but not without significant issues related to the different types of arbitration agreements Class Members had signed. Plaintiffs note that, if this action proceeds, the parties face great uncertainty not only as to whether arbitration can proceed on a class-wide basis for certain Class Members, but also in terms of class certification and whether Appraisers fall within one of the federal or California exemptions. (Mot. at 7-12.) Given the risks inherent in the class certification process and arbitration or trial, the Class could recover nothing at all from these extensive further proceedings. This factor weighs in favor of preliminary approval.

C. Stage of the Proceedings and Extent of Discovery Completed

This factor requires the Court to evaluate whether "the parties have sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998). Discovery can be both formal and informal. *See Clesceri v. Beach City Investigations & Protective Servs, Inc.*, No. CV-10-3873-JST

[4] Except the specifically excluded claims for Plaintiff Thompson as outlined in the Settlement Agreement and discussed in footnote 1 of this Order.

(RZx), 2011 WL 320998, at *9 (C.D. Cal. Jan. 27, 2011). While extensive formal discovery has not been completed in this case, the parties "briefed in detail the merits of this action in their mediation briefs," "briefed to the Court their arguments on whether the 'silent' arbitration agreements prohibit class arbitration," appealed and fully briefed this Court's ruling to the Ninth Circuit, submitted declarations and exhibits during mediation "detailing the duties of Appraisers," and "provided extensive information consisting of class-wide data sufficient to assess the reasonableness of the settlement amount." (Mot. at 18; Schwartz Amended Decl. ¶¶ 4, 9.) Plaintiffs' counsel represents that the information exchanged was sufficient to allow the parties to be "well-informed and prepared to reach this Settlement." (Mot. at 18; Schwartz Amended Decl. ¶ 9.)

With the above in mind, the Court finds that the parties had sufficient information to make an informed decision about settlement. The Court recognizes that settlement occurred before class certification. However, the parties have shown that they have spent significant time investigating this action to allow for an informed decision, but not so much time that the settlement amount will be unnecessarily depleted by extensive costs and fees. As a result, the Court finds that this factor favors preliminarily approving the Settlement Agreement.

D. Risk of Maintaining Class Certification

This Court previously determined that the arbitrator would determine whether class-wide arbitration is available when an arbitration agreement is silent on that point. An appeal of this decision was pending in the Ninth Circuit prior to settlement. Therefore, there is some risk of maintaining class certification depending on how the Ninth Circuit and/or the arbitrator determine this issue. The Court considers this factor to weigh in favor of preliminarily approving the Settlement Agreement.

E. Amount Offered in Settlement

The Settlement Agreement provides for a settlement fund not to exceed $2,400,000.00. (Settlement Agreement § 1.37.) No portion of the settlement fund will revert back to Defendants unless the Settlement fails or more than 5% of the California Class opts out. (Id. §§ 2.2.1, 2.11.1.) In addition to the settlement fund, Defendants have agreed to pay each Participating Claimant's share of payroll taxes for the share of his or her settlement payment deemed to be wages. (Id. § 2.2.1.)

The Settlement Agreement further provides that Plaintiffs' counsel may apply for an award of attorneys' fees up to one-third of the settlement funds, as well as costs not exceeding $25,000, to be paid from the fund. (Id. § 2.9.1.) The Plaintiffs will be awarded enhancement payments as follows: $15,000.00 to Kenneth Lee, $10,000.00 to Mark Thompson, $10,000.00 to David Acree, $5,000.00 to Joel Cuthbert, and $5,000.00 to Myles Norton. (Id. § 2.9.2.) A payment of $7,500 will be awarded to the California Labor Workforce Development Agency ("LWDA") for the PAGA claims. (Id. § 2.2.6.) Up to $20,000 in administration costs may also be paid from the fund. (Schwartz Amended Decl. ¶ 19.)

Plaintiffs' counsel estimates that these costs, fees, and awards, and the establishment of a "reserve fund" of $40,000 to resolve disputes, could reduce the amount of the fund distributed to the Class to $1,512,500.00. (Id.) If all 158 Class Members participate, the estimated allocation per Class Member would be approximately $9,509.00. (Id.)

Considering the difficulties, uncertainty, and likely length of the proceedings in this case before any recovery could be obtained, the Court finds that the amount offered in settlement weighs in favor of preliminary approval.

F. Experience and Views of Counsel

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal.

2008) (quotation marks omitted). As discussed above, Plaintiffs' attorneys have experience serving as plaintiffs' counsel in consumer class actions, and have fully endorsed the settlement as fair, reasonable, and adequate. (Schwartz Amended Decl. ¶¶ 17-18, 21-22; Ho Decl. ¶¶ 3-7.) This factor favors preliminary approval.

G. Reaction of Class Members to Proposed Settlement

The Plaintiffs believe the settlement is fair and have submitted declarations in support of approval. (*See generally* Thompson Decl.; Lee Decl.; Cuthbert Decl.; Acree Decl.; Norton Decl.). As of yet, Plaintiff has not provided evidence of other Class Members' reactions to the proposed settlement. However, the Court recognizes that the lack of such evidence is not uncommon at the preliminary approval stage. Before the fairness hearing, Plaintiffs' counsel shall submit a sufficient number of declarations from Class Members discussing their reactions to the proposed settlement. Alternatively, a small number of objections at the time of the fairness hearing may raise a presumption that the settlement is favorable to the class. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008).

H. Signs of Collusion

The Court finds no signs, explicit or subtle, of collusion between the parties. The Court acknowledges that one-third of the settlement fund in attorney's fees and costs authorized by the agreement represents a substantial portion of the settlement fund. However, before final approval, the court will "scrutinize closely the relationship between attorneys' fees and benefit to the class" and will not "award[] unreasonably high fees simply because they are uncontested." *In re Bluetooth*, 654 F.3d at 948 (internal quotation marks and citation omitted). The enhancement payments the Plaintiffs are authorized to seek under the settlement do not seem disproportionate when all of the time spent on this action and the benefits that have inured to the Class Members as a result of this action are

considered. The Court will ultimately determine the amount of fees and costs awarded to Plaintiff's counsel and the amount of Plaintiff's incentive award. Unawarded amounts will remain in the settlement fund for the benefit of the Class. The Settlement Agreement provides that any funds that cannot be distributed to the Class as a result of certain restrictions in the Settlement Agreement will be awarded to the specified *cy pres* beneficiaries. However, the Court finds that the Juvenile Advocacy Project, Mental Health Advocacy Services is an organization that is not sufficiently related to this lawsuit to be a *cy pres* recipient. (Settlement Agreement § 2.2.2.); see *Dennis v. Kellogg Co.*, 697 F.3d 858, 866 (9th Cir. 2012) (reversing the district court's approval of a settlement because the *cy pres* awards in the settlement were "divorced from the concerns embodied" in the consumer protection laws that were at issue in the case). Because the Settlement Agreement provides that "[i]f the Court does not approve one of the two organizations to receive the *cy pres*, then the other shall receive the full amount," all funds that cannot be distributed to the Class will be awarded to the Legal Aid Society – Employment Law Center. (Settlement Agreement § 2.2.2.) With this change, the arrangement supports a finding that the agreement is non-collusive.

Moreover, as discussed above, this settlement is the result of a mediation held before an experienced wage and hour mediator, Michael Dickstein. The mediator's involvement in the settlement supports the argument that it is non-collusive. *See Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.").

Considering all of the factors together, the Court preliminarily concludes that the settlement is fair, reasonable, and adequate.

IV. PRELIMINARY APPROVAL OF CLASS NOTICE FORM AND METHOD

For a class certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). However, actual notice is not required. *See Silber v. Mabon,* 18 F.3d 1449, 1454 (9th Cir. 1994).

The Settlement Agreement provides that notice will be mailed by the Claims Administrator via first class mail to all Class Members "at their Last Known Addresses" at least 60 days prior to the last date for objections and exclusions. (Settlement Agreement, §§ 2.4.3, 2.5.1.) Prior to mailing the Class Notice, the Claims Administrator will consult the U.S. Postal Service's National Change of Address Database, or a similarly used search method, to review the accuracy and, if necessary, update a Class Member's mailing address. (Mot. at 24; Settlement Agreement § 1.32.) The Supreme Court has found notice by mail to be sufficient if the notice is "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). *Accord Sullivan v. Am. Express Publ'g Corp.*, No. SACV 09-142-JST (ANx), 2011 WL 2600702, at *8 (C.D. Cal. June 30, 2011) (quoting *Mullane*).

Plaintiffs have provided the Court with a copy of the proposed notice. (Class Notice, Doc. 68, Ex. 1.) Under Rule 23, the notice must include, in a manner that is understandable to potential class members: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). The amended proposed notice includes this necessary information. (*See* Class Notice.)

The Court, however, requires the Notice to be modified as follows: On page 6, the Class Notice states as follows:

> If you do not opt out of the Settlement but believe that the proposed Settlement is unfair or inadequate in any respect, you may object to the Settlement, either personally or through an attorney at your own expense, by filing a written objection with the Court and mailing a copy of your written objection to Class Counsel, Counsel for Chase, and the Claims Administrator at the following address....

(Class Notice at 6.) This statement should be modified to read as follows:

> If you do not opt out of the Settlement but believe that the proposed Settlement is unfair or inadequate in any respect, you may object to the Settlement, either personally or through an attorney at your own expense, by mailing a copy of your written objection to Class Counsel, Counsel for Chase, and the Claims Administrator at the following address....

Additionally, in the last paragraph on page 6, the Class Notice states as follows:

> All objections must be filed with the Court, and sent to Class Counsel, Counsel for Chase, and the Claims Administrator, no later than....

(Class Notice at 6.) This statement should be modified to read as follows:

> All objections must be sent to Class Counsel, Counsel for Chase, and the Claims Administrator, no later than....

Plaintiffs' counsel are responsible for filing, in connection with Plaintiffs' motion for final approval, any objections along with a brief responding to such objections.

Subject to the changes discussed above, the Court approves the form and method of class notice. The Court ORDERS the parties to file a revised version of the Full Notice within **10 days** of this Order.

Finally, the Court requires that the motion for final approval and any motion for attorneys' fees, litigation costs and expenses, and enhancement awards be filed with the

Court no later than 15 days *before* the Notice Response Deadline. In addition, the parties are required to file with the Court no later than 15 days *after* the expiration of the Notice Response Deadline a brief responding to any submitted objections and otherwise summarizing the Class Members' participation in the Settlement and the settlement administration to date.

In their papers for final approval of the settlement, the parties must include a declaration reflecting that they provided appropriate notice of the proposed settlement to relevant state and federal authorities per the terms of 28 U.S.C. § 1715(b) at least 90 days prior to the date for the final fairness hearing. 28 U.S.C. § 1715(d). *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1059 n.5 (C.D. Cal. 2010) (recognizing that the Class Action Fairness Act "requires that notice [of a proposed settlement] be sent to 'the appropriate State official of each State in which a class member resides and the appropriate Federal official.'" (quoting 28 U.S.C § 1715(b)).

V. CONCLUSION

For the reasons discussed above, the Court (1) conditionally certifies the Class for settlement purposes only, (2) preliminarily approves the settlement, (3) names Bryan J. Schwartz, of Bryan Schwartz Law, and Laura L. Ho, of Goldstein Borgen Dardarian & Ho LLP, as class counsel and CPT Group, Inc. as the Claims Administrator, and (4) approves the form and method of class notice, with the modifications outlined in this Order.

The Court sets a fairness hearing for April 3, 2015, at 2:30 p.m., to determine whether the settlement should be finally approved as fair, reasonable, and adequate to Class Members. Plaintiffs shall file their motion for final approval no later than March 6, 2015. Plaintiffs' counsel shall file any supplemental brief in support of their application for fees and costs no later than February 6, 2015.

The Court reserves the right to continue the date of the fairness hearing without further notice to Class Members. The Court retains jurisdiction to consider all further applications arising out of or in connection with the settlement agreement.

DATED: November 13, 2014

JOSEPHINE L. STATON

JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE