UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 17-206 JGB (KKx)**	Date	January 22, 2020
Title	***Adriana Ortega v. The Spearmint Rhino Companies Worldwide Inc, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order GRANTING Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 87) (IN CHAMBERS)

Before the Court is Plaintiffs' motion for preliminary approval of class action settlement. ("Motion," Dkt. No. 87.) The Court held a hearing on this matter on January 13, 2020. After considering the papers filed in support of the matter, as well as the oral argument of the parties, the Court GRANTS the Motion.

I. BACKGROUND

Adriana Ortega ("Ortega") initiated this action against Spearmint Rhino Companies Worldwide, Inc., Spearmint Rhino Consulting Worldwide, Inc., and Midnight Sun Enterprises, LLC ("Defendants") on February 3, 2017. (Dkt. No. 1.) The action claims Defendants misclassified exotic dancers at Spearmint Rhino clubs as independent contractors, and in so doing, violated 29 U.S.C. §§ 201 et seq. ("FLSA") and various sections of the California Labor Code.

On March 29, 2017 Ortega moved to certify a collective action pursuant to § 216(b) of the Fair Labor Standards Act ("FLSA"). (Dkt. No. 16.) Shortly thereafter, Defendants moved to compel arbitration, (Dkt. No. 18), and to stay the case until the issuance of the then-pending decision by the United States Supreme Court in Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), (Dkt. No. 21). Plaintiff filed a First Amended Complaint on April 14, 2017, adding a California Private Attorney General Act ("PAGA") claim. ("FAC," Dkt. No. 34.) On June 12, 2017, the Court issued an order denying Defendants' motion to compel arbitration, denying

Plaintiff's motion for conditional certification, and granting in part Defendants' motion for a stay pending the resolution of Epic Systems. (Dkt. No. 48.)

While Ortega's case was stayed, two dancers opted in to the action. (Dkt. Nos. 61 (providing notice for Opt-in Plaintiffs Friedman and Avelar).) On December 14, 2018, the Court granted final approval of the settlement in Byrne v. Santa Barbara Hospitality, Inc., et al., Case No. 5:17-CV-00527 JGB (KKx), a nearly identical case in which Adriana Ortega was also a plaintiff. (See Byrne Dkt. No. 178.) The two Opt-in Plaintiffs in this action excluded themselves from the Byrne settlement, (Dkt. No. 75 at 5 n.3 (noting Friedman and Avelar filed opt-outs in Byrne so have individual claims in this action)), and a third Opt-in Plaintiff had continued to work for Defendants after the end of the Byrne settlement release period, (Dkt. No. 67-1 (noting McCrea worked through April 4, 2019)).

On May 15, 2019, after the Supreme Court issued its decision in Epic Systems, the Court granted Defendants' second motion to compel arbitration, granted Plaintiff's motion for preliminary certification and notice of a collective action under FLSA § 216(b), and stayed the PAGA claims of Ortega and Opt-in Plaintiffs pending the outcome of an appeal in Byrne. (See Dkt. No. 83.) However, counsel represented to the Court at the January 13, 2020 hearing that the FLSA collective action notice was never issued, and was put on pause as the parties negotiated the Settlement Agreement.

Plaintiffs filed the Motion on December 16, 2019. (Mot.) The Motion is unopposed. In support of the Motion Plaintiffs attached the following documents:

- Stipulation and Settlement Agreement Dated as of December 16, 2019, ("Agreement," Dkt. No. 87-2);
- Proposed Notice of Settlement of Class Action Lawsuit ("Class Notice," Dkt. No. 87-3);
- Proposed Class Action Claim Form, ("Claim Form," Dkt. No. 87-4).

On January 13, 2020, the Court held a hearing on the proposed settlement.

II. LEGAL STANDARD

Approval of a class action settlement requires certification of a settlement class. La Fleur v. Med. Mgmt. Int'l, Inc., 2014 WL 2967475, at *2–3 (C.D. Cal. June 25, 2014) (internal quotation marks omitted). A court may certify a class if the plaintiff demonstrates the class meets the requirements of Federal Rules of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b). See Fed. R. Civ. P. 23; see also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). Rule 23(a) contains four prerequisites to class certification: (1) the class must be so numerous that joinder is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims of the class representative must be typical of the other class members; and (4) the representative parties must fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a). Rule 23(b) requires one of the following: (1) prosecuting

the claims of class members separately would create a risk of inconsistent or prejudicial outcomes; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or declaratory relief benefitting the whole class is appropriate; or (3) common questions of law or fact predominate so that a class action is superior to another method of adjudication. Fed. R. Civ. P. 23(b).

Class action settlements must be approved by the court. See Fed. R. Civ. P. 23(e). At the preliminary approval stage, the Court "must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." Id. "The settlement need only be potentially fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval." Acosta v. Trans Union, LLC, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (emphasis in original). To determine whether a settlement agreement is potentially fair, a court considers the following factors: the strength of the plaintiff's 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; and the reaction of the class members to the proposed settlement. Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003).

III. CONDITIONAL CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS

The parties seek certification of the proposed settlement class for purposes of the Settlement Agreement. (Mot. at 10.) The proposed "California Class" includes dancers who worked at 14 clubs owned by Defendants:

> All individuals who performed as entertainers and in conjunction therewith have provided nude, semi-nude, and/or bikini entertainment for customers from October 30, 2017 through the date of entry of the Preliminary Approval Order as "LLC Members" or "independent contractors" during any portion of the foregoing time period at the Clubs owned by Brookhurst Venture, LLC (California Girls – Anaheim, CA); City of Industry Hospitality Venture, Inc. (Spearmint Rhino – City of Industry, CA); Farmdale Hospitality Services, Inc. (Blue Zebra – North Hollywood, CA); Inland Restaurant Venture I, Inc. (Spearmint Rhino – Van Nuys, CA); Midnight Sun Enterprises, Inc. (Spearmint Rhino – Torrance, CA); PNM Enterprises, Inc. (California Girls – Santa Ana, CA); Olympic Avenue Venture, Inc. (Spearmint Rhino – Los Angeles, CA); The Oxnard Hospitality Services, Inc. (Spearmint Rhino – Oxnard, CA); Rialto Pockets, Incorporated (Spearmint Rhino – Rialto, CA); Platinum SJ, Enterprise (Spearmint Rhino – San Jose); Rouge Gentlemen's Club, Inc. (Dames N Games – Van Nuys, CA); Santa Barbara Hospitality Services, Inc. (Spearmint Rhino – Santa Barbara, CA); Santa Maria Restaurant Enterprises, Inc. (Spearmint Rhino – Santa Maria, CA); and Washington Management, LLC (Dames N Games – Los Angeles, CA) during the California Class Period.

(Agreement ¶ 1.12.) The California Class also includes individuals who opted out of the Byrne Action who worked in California. (Id.) Importantly, California Class Members who sign a claim form and submit it to the settlement administrator will be deemed to have opted into a "FLSA Class." [1] (Agreement ¶ 7.2.) The Court first addresses the Rule 23(a) requirements and then turns to the Rule 23(b) requirements.

A. Requirements of Rule 23(a)

Rule 23(a) requires the following: (1) the class must be so numerous that joinder is impracticable (numerosity); (2) there must be questions of law or fact common to the class (commonality); (3) the claims of the class representative must be typical of the other class members (typicality); and (4) the representative parties must fairly and adequately protect the interests of the class (adequacy). See Fed R. Civ. P. 23(a).

1. Numerosity

A class satisfies the prerequisite of numerosity if it is so large that joinder of all class members is impracticable. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). To be impracticable, joinder must be difficult or inconvenient, but need not be impossible. Keegan v. Am. Honda Motor Co., 284 F.R.D. 504, 522 (C.D. Cal. 2012). There is no numerical cutoff for sufficient numerosity. Id. However, 40 or more members will generally satisfy the numerosity requirement. Id. Here the Settlement Class includes approximately 3,600 individuals, (Mot. at 8), and therefore the numerosity requirement is satisfied.

2. Commonality

The commonality requirement is satisfied when plaintiffs assert claims that "depend upon a common contention . . . capable of classwide resolution—which means that a 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." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

Plaintiffs argue the Court found commonality in Byrne, in which similar claims were asserted, and should do so here as well. (Mot. at 9 (citing Byrne v. Santa Barbara Hosp. Servs., Inc., 2017 WL 5035366, at *6 (C.D. Cal. Oct. 30, 2017).) The Court is satisfied that Plaintiff has met the commonality requirement, because as in Byrne, the basic question is whether Defendants misclassified its exotic dancers as members of an LLC rather than as employees, and whether those dancers were denied unpaid wages for hours worked. 2017 WL 5035366, at *6.

[1] A member of the FLSA Class is any member of the California Class that submits a valid claim. (Agreement ¶ 1.37.) Thus, all FLSA Class Members are California Class Members, but some California Class Members (those who do not submit a valid claim) are not FLSA Class Members.

3. Typicality

"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiff, and whether other class members have been injured by the same course of conduct." Wolin v. Jaguar Land Rover No. Am., 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting Hanon, 976 F.2d at 508). Because typicality is a permissive standard, the claims of the named plaintiff need not be identical to those of the other class members. Hanlon, 150 F.3d at 1020.

Here, Plaintiffs—Ortega, Friedman, Avelar, and McCrea—argue their claims are typical of the class because they were subject the same misclassification policy of Defendants, and suffered the same harms (non-payment of wages, etc.). (FAC ¶ 2). Thus, Plaintiffs have made an adequate showing of typicality.

4. Adequacy

In determining whether a proposed class representative will adequately protect the interests of the class, the court should ask whether the proposed class representative and her counsel have any conflicts of interest with any class member and whether the proposed class representative and her counsel will prosecute the action vigorously on behalf of the class. Johnson v. General Mills, Inc., 275 F.R.D. 282, 288 (C.D. Cal. 2011).

It appears Plaintiffs' counsel is qualified and possesses relevant experience in wage and hour litigation. (Mot. at 10 (citing as an example O'Connor v. Uber Techs., Inc., 2019 WL 1437101, at *15 (N.D. Cal. Mar. 29)).) Further, there is no obvious conflict between Thompson's interests and those of the class members. The Court does not detect a conflict of interest between the class representatives and putative class members, and believes they will adequately protect the class's interests. This satisfies the adequacy requirement.

B. Requirements of Rule 23(b)

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997). Here, Plaintiffs allege the Settlement Agreement satisfies the requirements of Rule 23(b)(3). (Mot. at 10-11.)

Rule 23(b)(3) requires (1) issues common to the whole class to predominate over individual issues and (2) that a class action be a superior method of adjudication for the controversy. See Fed. R. Civ. P. 23(b)(3). As to predominance, the "inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Hanlon, 150 F.3d at 1022 (quoting Amchem, 521 U.S. at 623). "[T]he examination must rest on 'legal or factual questions that qualify each class member's case as a genuine controversy, questions that

preexist any settlement.'" Id. (same). A class should not be certified if the issues of the case require separate adjudication of each individual class member's claims. Id.

Here, adjudication by representation is warranted because questions common to the Settlement Class can be resolved for all members of the class in a single adjudication. Specifically, Plaintiffs contend the settlement obviates the litigation of individual liability and damage issues. Plaintiffs do not provide any argument as to whether common issues predominate, other than to parrot the determination in determination in Byrne regarding this question. (Mot. at 10.) The Court finds that common issues predominate because the case is nearly identical to Byrne, and Plaintiffs were allegedly subject to the employment policies.

A class action must also be superior to other methods of adjudication for resolving the controversy. Fed. R. Civ. P. 23(b)(3). To determine superiority, a court's inquiry is guided by the following pertinent factors:

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

Fed. R. Civ. P. 23(b)(3)(A)-(D). However, "[confronted] with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." Amchem, 521 U.S. at 620.

Plaintiffs again point to the decision Byrne. (Mot. at 10-11.) The Court finds that a class action is superior to other available methods because the class mechanism provides an effective mechanism to aggregate the claims. Should any class members prefer to pursue their claim individually, they may opt out of the Settlement Agreement. Because the parties seek class certification only for settlement purposes, the Court ends its analysis here and concludes the superiority requirement is satisfied.

//
//
//
//
//
//
//
//
//

IV. SETTLEMENT AGREEMENT

A. Settlement Class

Below is an overview of the financial terms of the Settlement Agreement:

- Gross settlement amount: $3,650,000
- Attorneys' fees, not to exceed: $912,500
- Service award to class representatives: $10,000
- PAGA payment to LWDA $75,000[2]
- Net settlement amount: $2,600,000[3]

The $3,650,000 gross settlement amount is non-reversionary, so no amount will be returned to Defendants. (Agreement ¶¶ 5.1, 5.6.6) If a check remains uncashed 60 days after the final distribution, the settlement administrator will direct funds from the uncashed check to the Cy Pres beneficiary. (Id. ¶ 5.6.6.) The Cy Pres beneficiary will be specified prior to final approval and approved by the Court. (Id. ¶ 1.27.)

B. Financial Terms

1. Payment and Distribution of Funds

The settlement fund will be paid and distributed over several years. (Id. ¶ 5.1.2) Within thirty days of the effective date of the settlement, Defendants shall pay the first $800,000 towards their obligations under the Settlement, which shall thereafter be distributed on a pro rata basis for claiming class members, PAGA payment, and Court-approved attorney's fees and costs, with full payment of the Court-approved incentive awards. (Id. ¶¶ 5.1.1, 5.1.2(A); Mot. at 6.) The parties estimate that this first distribution will be in the summer of 2020, but it will be contingent on when the settlement obtains final approval. (Mot. at 6.)

Following the first Ortega payment and distribution, Defendants shall complete their payment obligations under the Byrne settlement, and then resume payments under the Ortega settlement in the amount of no less than $150,000 per month. (Agreement ¶¶ 5.1.1, 5.1.2(B)-(D).) Thus, it will take an additional 19 months to complete full payment of the Ortega settlement after the payment in Byrne is complete (comprised of the $800,000 initial payment, and then 19 monthly payments of $150,000, equaling the total $3,650,000 Ortega settlement fund. (Mot. at 6-7.) The second, third, and fourth Ortega distributions to Class Members will occur as Defendants' additional payments reach $900,000, a second $900,000, and a final $1,050,000. (Agreement ¶¶ 5.1.2(B)-(D).) Plaintiffs state the reason for this extended payment

[2] 75% of $100,000 award.

[3] Plaintiffs do not provide an estimate of actual litigation expenses but plan to request reimbursement in conjunction with their motion final approval. (Mot. at 5.)

period is to accommodate financial challenges faced by Defendants' clubs and the reality that Defendants would not be able to satisfy a larger judgment or settlement at this time. (Mot. at 7.) The Notice reflects the gross settlement amount and explains that the payments will occur in four payments. (Class Notice at 2.)

2. Class Members

The Settlement Class covers all individuals who are California Class Members (some of whom will become FLSA Class Members, upon the submission of a valid claim).[4] (See Agreement ¶ 1.57.) Class Members will be paid for their Dance Days. (Id. ¶ 5.6.) The amount for each Dance Day will be the net monetary settlement amount divided by the total number of Dance Days of claiming members. (Id.)

In order to receive their share of the Settlement, members must submit claims within ninety (90) days after the settlement administrator mails the Initial Settlement Notice. (Id. ¶ 3.2.1.) To be paid settlement benefits, members must complete and sign a claim form and a W-9 form. (Id. ¶ 5.6.) Late claims may be accepted by agreement of the parties and based on good cause, if there will be no delay to members who submit a valid claim form. (Id. ¶ 3.2.)

3. Class Representatives

The settlement provides that Plaintiffs Ortega, Friedman, Avelar, and McCrea may apply for an award of incentive fees up to $2,500 each. (Id. ¶ 5.5)

4. California Labor and Workforce Development Agency ("LWDA") Payment

The parties allocated $100,000 as a PAGA award, of which 75% ($75,000) will be paid to the LWDA with the remaining $25,000 going to the pool allocated for the California Settlement Class. (Id. ¶ 5.2.)

5. Settlement Administration Costs

The settlement administration will be paid for through the reversionary funds that had been made available in the Byrne settlement and will not come out of the $3,650,000 Ortega fund. (Id. ¶ 5.3.)

//
//

[4] The California and FLSA Classes, as defined in the Agreement, are coextensive in terms of the period and clubs covered. (Agreement ¶¶ 1.35, 1.37, 1.38). The only difference is that some California Class Members will not submit valid claims, and thus will not become FLSA Class Members. The claims form provides no way to opt into one class and not the other, though individuals may exclude themselves from the settlement and receive no benefits.

6. Attorneys' Fees and Costs

Class Counsel will apply for an attorneys' fees award not to exceed 25% of the gross cash settlement amount, which is $912,500. (Id. ¶ 5.4.2.) Class Counsel will apply for a separate amount to cover actual, reasonable, litigation costs. (Id.) The Class Notice reflects that no more than 25% in fees will be sought, excluding out-of-pocket litigation expenses. (Class Notice at 2.)

C. Injunctive Relief

The Settlement Agreement does not appear to include any injunctive relief.

D. Release

All California Class Members who do not request exclusion agree to release their claims as follows. Upon the effective date of the agreement, California Class members release California law claims if they do not timely and validly opt out. (Id. ¶¶ 1.10, 1.11, 7.1.) By submitting a claim form, California Class Members become FLSA Class Members, and on the effective date of the agreement release their FLSA claims. (Id. ¶¶ 1.36, 7.2.) The Class Notice reflects that California Class Members who do not exclude themselves by opting out will be bound by a release of their California law claims, and that California Class Members who submit valid claim forms will be deemed to have released their FLSA claims. (Class Notice at 2.)

E. Notice

The Settlement Agreement proposes the following procedure to notify class members of the settlement. (Agreement ¶ 3.1.) The settlement administrator will be provided with contact information for the California Settlement Class, and within 20 days, will mail and email a copy of class notice documents (Id. ¶ 3.1.1.) If the mail is returned with a forwarding address, the notice documents will be resent within 10 days to the forwarding address. (Id.) If returned without a forwarding address, the administrator will perform a skip trace. (Id.) Notice documents are due within 90 days of the mailing of the original notice. (Id.) Reminder notice will be sent by email 14 days before the end of the claims period. (Id. ¶ 3.1.2.) The administrator will also provide internet notice on its website, (id. ¶ 3.1.3), and existing clubs will post a copy of the class notice in dressing rooms, (id. 3.1.4), within five days of preliminary approval through the close of the period.

To obtain their distribution, class members must submit claims within 90 days of the mailing of the initial notice. (Id. ¶ 3.2.) Any objector must file written objections with the Court and mail the same to class counsel within the same deadline. (Id. ¶ 3.2.2.) Class representatives and Defendants may respond in writing no later than 5 days before the fairness hearing. (Id.) Objections can only be made by persons who are valid class members and have not opted out. (Id.) If a member of the settlement classes wants to object to the Settlement, but wishes to receive her share of the settlement payments in the event the settlement is approved, she must have filed a valid claim. (Id.) The Class Notice reflects these procedures, and will inform

individuals of the date, time, and location of the final hearing on fairness and adequacy of the settlement and of their right to appear with or without an attorney. (Class Notice at 3-4.)

Any member or potential member of the California Settlement Class who wishes to opt-out has to mail a signed request for exclusion from the Settlement Classes, postmarked no later than 90 days after the initial notice is mailed. (Agreement ¶ 3.2.3; Class Notice at 3-4.) Individuals can rescind their opt-outs within the 90-day period. The deadline applies notwithstanding contentions about non-receipt or late receipt of notice. (Agreement ¶ 3.2.3)

F. Administration Costs

The settlement administrator is Kurtzman Carson Consultants, LLC ("KCC"). (Id. ¶ 1.56.) All administration costs will be paid by Defendants out of the concurrent Byrne settlement as the cost of allocating said expenses would itself be prohibitively expensive. (Id. ¶ 5.3.) No amount shall be deducted from the gross cash settlement amount for costs of settlement administration in this case. (Id.) KCC will perform all necessary class administration duties without limitation. (Id.)

V. PRELIMINARY APPROVAL OF THE SETTLEMENT

"[Rule 23] requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." Hanlon, 150 F.3d at 1026. To determine whether a settlement agreement meets these standards, the court considers a number of factors, including "the strength of the plaintiff's case, the risk, expense, complexity, and likely duration of further litigation, the risk of maintaining class action status throughout 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, and the reaction of the class members to the proposed settlement." Stanton, 327 F.3d at 959 (internal citations omitted). The settlement may not be a product of collusion among the negotiating parties. In re Mego Fin, Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (citing Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1290 (9th Cir. 1992)).

"At the preliminary approval stage, some of the factors cannot be fully assessed. Accordingly, a full fairness analysis is unnecessary." Litty v. Merrill Lynch & Co., 2015 WL 4698475, *8 (C.D. Cal. Apr. 27, 2015). Rather, the court need only decide whether the settlement is potentially fair, Acosta, 243 F.R.D. at 386, in light of the strong judicial policy in favor of settlement of class actions. Class Plaintiffs, 955 F.2d 1276. "[T]he court's intrusion upon 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." Hanlon, 15 F.3d at 1027.

//

A. Extent of Discovery and Stage of the Proceedings

For a court to approve a proposed settlement, "[t]he parties must . . . have engaged in sufficient investigation of the facts to enable the court to intelligently make an appraisal of the settlement." Acosta, 243 F.R.D. at 396 (internal quotation marks omitted). In preparation for mediation, parties engaged in an informal discovery process, which helped Plaintiffs analyze the validity of their claims, the potential claims of all class members, and Defendant's defenses. (Id.) On September 5, 2018, the parties reached a settlement at mediation. (Id.)

Here, the Settlement was entered into after a day-long mediation session, at which improvements to the Byrne settlement were negotiated. (Mot. at 1, 4.) In this action, the settlement aims to resolve post-Byrne claims of California dancers at fourteen clubs. (Id. at 5.) Plaintiffs make no representations as to the likelihood of success of their claims, and do not state wither significant discovery has been propounded. Discovery was ongoing regarding the FLSA claims when settlement was reached in Byrne, (Mot. at 3), and that discovery in this matter was paused while the Court considered the Byrne settlement. Because Plaintiffs participated in mediation and the Court previously found each side maintains a clear idea of the strengths and weaknesses of their respective cases, the Court finds the extent of discovery and the stage of proceedings weighs in favor of preliminary approval. Byrne, 2017 WL 5035366 at *8.

B. Amount Offered in Settlement

In determining whether the amount offered in settlement is fair, a court compares the settlement amount to the parties' estimates of the maximum amount of damages recoverable in a successful litigation. In re Mego, 213 F.3d at 459.

The gross settlement amount is $3,600,000. Plaintiffs estimate the maximum liability of Defendants at $22,880,000, of which the settlement fund constitutes 16%. (Mot. at 15 (assuming 88,000 dance days, $60 per shift in wage damages, and $200 per shift house fees/unpaid gratuities).) Although the settlement amount represents a small fraction of the maximum value of this litigation, "'[i]t 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.'" In re Mego, 213 F.3d at 459 (quoting Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 628 (9th Cir. 1982)). In In re Mego, the Ninth Circuit considered the difficulties in proving the case and determined the settlement amount, which was one-sixth of the potential recovery, was fair and adequate. Id. The Court also observes the Byrne settlement was reversionary and provided less thorough notice, whereas this Agreement is non-reversionary. Considering these difficulties and the favorable comparison between the Agreement and Byrne, the Court finds the settlement amount is potentially fair.

C. Strength of Case and Risk, Expense, Complexity, and Likely Duration of Litigation

Plaintiffs acknowledge the risk of continued litigation, in particular the risk of some or all class members being compelled to arbitrate, affirmative defenses of Defendants, and the risk a

collective action would not be maintained through trial. (Mot. at 13.) The Agreement details further risks and hurdles which, by settling, the parties avoid, including offsets, and other defenses. (Agreement ¶ 2.3.)

The Court believes the risk, expense, complexity, and likely duration of further litigation weigh in favor of preliminary approval. Without the Settlement Agreement, the parties would be required to litigate class certification, as well as the ultimate merits of the case—a process which the Court acknowledges is long, complex, and expensive. These factors weigh in favor of preliminary approval.

D. Experience and Views of Counsel

"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004) (internal citation and quotation marks omitted). However, Plaintiffs' Counsel submit no affidavits regarding their experience or views regarding the potential outcome of the litigation based on the facts of the case and relative positions of the parties. On the point of adequacy, Plaintiffs' counsel did mention relevant experience in class action wage and hour litigation. (Mot. at 10 .) The Court finds this factor neutral, given the lack of briefing or evidence provided.

E. Collusion Between the Parties

"To determine whether there has been any collusion between the parties, courts must evaluate whether 'fees and relief provisions clearly suggest the possibility that class interests gave way to self interests,' thereby raising the possibility that the settlement agreement is the result of overt misconduct by the negotiators or improper incentives for certain class members at the expense of others." Litty, 2015 WL 4698475, at *10 (quoting Staton, 327 F.3d at 961).

As an initial matter, the Court notes that settlement negotiations were conducted at arms-length. The parties engaged in a mediation session with an experienced and respected mediator. (Mot. at 1.) The use of a mediator experienced in the settlement process tends to establish that the settlement process was not collusive. See, e.g., Satchell v. Fed Ex. Corp., 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007). The Court thus turns to the financial terms of the Settlement Agreement.

Plaintiffs request an incentive fee award of $2,500 each for each of the four Class Representatives. (Agreement ¶ 5.5.) A court may grant a modest incentive award to class representatives, both as an inducement to participate in the suit and as compensation for the time spent in litigation activities. See In re Mego, 213 F.3d at 463 (finding the district court did not abuse its discretion in awarding an incentive award to the class representatives). Here, Plaintiffs provide no information about their role in the mediation, participation in the litigation, or information regarding whether they were guaranteed to receive benefits. The Court therefore finds the requested service awards only potentially reasonable and may not grant them in full

should it finally approve the settlement. For final fairness approval, the Court advises Plaintiffs to provide greater detail of their involvement in the action, and an estimate of the time each spent pursuing their claims in relation to the different service awards requested. See Clesceri v. Beach City Investigations & Protective Servs., Inc., 2011 WL 320998, at *2, 9, 12 (C.D. Cal. Jan. 27, 2011) (preliminarily approving an incentive award of $3,000 each to the two named plaintiffs when the gross settlement amount was $100,000); Vanwagoner v. Siemens Indus., Inc., 2014 WL 1922731, at *2 (E.D. Cal. May 14, 2014) (preliminarily approving $5,000 as an incentive award when the maximum settlement amount was $225,000).

Generally, courts in the Ninth Circuit find that a benchmark of 25% of the common fund is a reasonable fee award. Hanlon, 150 F.3d at 1029 ("This circuit has established 25% of the common fund as a benchmark award for attorney fees."); Paul, Johnson, Alston & Hunt v. Graulty, 866 F.3d 258, 272 (9th Cir. 1989) (the 25% benchmark can be adjusted in either direction "to account for any unusual circumstances[,]" but the justification for adjustment must be apparent); Monterrubio v. Best Buy Stores, L.P., 291 F.R.D. 443, 455 (E.D. Cal. 2013) (citing Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990)) ("In applying this method, courts typically set a benchmark of 25% of the fund as a reasonable fee award, and justify any increase or decrease from this amount based on circumstances in the record.").

The Court, in its discretion, may award attorneys' fees in a class action by applying either the lodestar method or the percentage-of-the-fund method. Fischel v. Equitable Life Assurance Soc'y of U.S., 307 F.3d 997, 1006 (9th Cir. 2002). The Court determines the lodestar amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. McGrath v. Cnty. of Nev., 67 F.3d 248, 252 (9th Cir. 1995). The hourly rates used to calculate the lodestar must be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). Next, the Court must decide whether to adjust the 'presumptively reasonable' lodestar figure based upon the factors listed in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69–70 (9th Cir. 1975), abrogated on other grounds by City of Burlington v. Dague, 505 U.S. 557 (1992), that have not been subsumed in the lodestar calculation. See Caudle v. Bristow Optical Co., Inc., 224 F.3d 1014, 1028–29 (9th Cir. 2000).[5]

[5] In Kerr, the Ninth Circuit adopted the 12–factor test articulated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) which identified the following factors for determining reasonable fees: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Kerr, 526 F.2d at 70.

Here, Plaintiffs seek attorneys' fees not to exceed 25% of the gross settlement amount, but fail to specify an upper limit on their costs. (Mot. at 18; Agreement ¶ 5.4.2.) Plaintiffs do not offer a lodestar calculation. Although this award is potentially fair, without justifying documentation regarding costs, the Court may need to adjust the amount at the final approval stage.

F. Remaining Factors

In addition to the factors discussed above, the Court may consider the risk of maintaining class action status throughout the trial, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. Staton, 327 F.3d at 959 (internal citations omitted). At this stage, the Court cannot fully analyze the remaining factors. For example, there is no governmental participant in this action. Additionally, the Settlement Class members have yet to receive notice of the Settlement Agreement and have not had an opportunity to comment or object to its terms. The Court directs Plaintiffs, in their motion for final approval, to provide fulsome briefing on each of the factors and not to over-rely on comparisons to the Byrne settlement.[6]

//
//
//
//
//
//
//
//

[6] The Court remains concerned by Plaintiffs' lack of briefing on the relevance of the FLSA claims. The Court cannot ascertain from the financial terms that any separate value is being paid for the FLSA claims. As a result, "Class Members are assessed a penalty (in the full amount of their share of the settlement) for not opting-into the FLSA class." Sharobiem v. CVS Pharmacy, Inc., 2015 WL 10791914, at *3 (C.D. Cal. Sept. 2, 2015). As discussed in Sharobiem, the legality of this opt-in structure has sometimes been questioned. See also Daniels v. Aeropostale West, Inc., 2014 WL 2215708, at *3 (N.D. Cal. May 29, 2014); Selk v. Pioneers Mem. Healthcare Dist., 159 F. Supp. 3d 1164, 1178 (S.D. Cal. 2016) ("Only when opt-in plaintiffs receive independent compensation, or provide specific evidence that they fully understand the breadth of the release, will a broad release of claims survive a presumption of unfairness.") Courts that have approved settlements releasing both FLSA and Rule 23 claims generally do so when the parties expressly allocate settlement payments to FLSA claims. See, e.g., Khanna v. Intercon Sec. Systems, Inc., 2014 WL 1379861, at *2 (E.D. Cal. Apr. 8, 2014) (approving hybrid settlement that allocated two-thirds of net settlement amount to state claims and one-third of net settlement amount to FLSA claims); Pierce v. Rosetta Stone, Ltd., 2013 WL 1878918, at *3 (N.D. Cal. May 3, 2013) (same). Plaintiffs are therefore directed to provide briefing on FLSA in their motion for final approval.

VI. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's Motion for Preliminary Approval. The Court ORDERS as follows:

1. The Settlement Agreement is preliminarily approved as potentially fair, reasonable, and adequate for members of the Settlement Class. However, in their motion for final approval, Plaintiffs shall address each of the concerns raised above.

2. The following Settlement Class is certified for settlement purposes only:

   All individuals who performed as entertainers and in conjunction therewith have provided nude, semi-nude, and/or bikini entertainment for customers from October 30, 2017 through the date of entry of the Preliminary Approval Order as "LLC Members" or "independent contractors" during any portion of the foregoing time period at the Clubs owned by Brookhurst Venture, LLC (California Girls – Anaheim, CA); City of Industry Hospitality Venture, Inc. (Spearmint Rhino – City of Industry, CA); Farmdale Hospitality Services, Inc. (Blue Zebra – North Hollywood, CA); Inland Restaurant Venture I, Inc. (Spearmint Rhino – Van Nuys, CA); Midnight Sun Enterprises, Inc. (Spearmint Rhino – Torrance, CA); PNM Enterprises, Inc. (California Girls – Santa Ana, CA); Olympic Avenue Venture, Inc. (Spearmint Rhino – Los Angeles, CA); The Oxnard Hospitality Services, Inc. (Spearmint Rhino – Oxnard, CA); Rialto Pockets, Incorporated (Spearmint Rhino – Rialto, CA); Platinum SJ, Enterprise (Spearmint Rhino – San Jose); Rouge Gentlemen's Club, Inc. (Dames N Games – Van Nuys, CA); Santa Barbara Hospitality Services, Inc. (Spearmint Rhino – Santa Barbara, CA); Santa Maria Restaurant Enterprises, Inc. (Spearmint Rhino – Santa Maria, CA); and Washington Management, LLC (Dames N Games – Los Angeles, CA) during the California Class Period. The Settlement Class also includes individuals who opted out of the Byrne Action who worked in California.

3. The Court appoints Shannon Liss-Riordan, of Lichten & Liss-Riorden, to serve as counsel on behalf of the Settlement Class for purposes of settlement only.

4. Plaintiffs Adriana Ortega, Roberta Friedman, Adriana Avelar, and Sheyenne McCrea are appointed as the representatives of the Settlement Class for purposes of settlement only.

5. The Court appoints Kurtzman Carson Carlson, LLC, and Co. as the settlement administrator.

6. The Notice of Proposed Settlement of Class Action, Conditional Certification of Settlement Class, Preliminary Approval of Settlement, and Hearing Date for Final Court Approval is approved.

7. The Court authorizes mailing of Class Notice to the Settlement Class members by first-class regular mail and pursuant to the Settlement Agreement.

8. The hearing date for the Final Fairness Hearing is hereby set for **Monday, May 4, 2020** at 9:00 a.m. in Courtroom 1 of the United States District Court for the Central District of California, Eastern Division located at 3470 12th Street, Riverside, California 92501.

IT IS SO ORDERED.