UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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JOSE ONTIVEROS,

Plaintiff,

v.

ROBERT ZAMORA; ZAMORA AUTOMOTIVE GROUP; STOCKTON AUTO CARS, INC., dba Stockton Honda & Stockton Mazda; AUTO TOWN, INC., dba Toyota Town & Stockton Scion; HAMMER LANE VOLKSWAGEN, INC.; QUALITY MOTOR CARS OF STOCKTON, dba Acura of Stockton, Go Hyundai, & Kia of Stockton; SATURN OF STOCKTON, dba Saturn of Modesto; LODI MOTORS INC., dba Lodi Honda; MERCED AUTO CARS, INC., dba Merced Toyota & Merced Scion; CLOVIS AUTO CARS, INC., dba Clovis Volkswagen; and COUNTRY NISSAN, dba Nissan Kia Country,

Defendants.

CIV. NO. 2:08-567 WBS DAD

MEMORANDUM AND ORDER RE: MOTION FOR PRELIMINARY SETTLEMENT APPROVAL

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Plaintiff Jose Ontiveros brought this wage-and-hour

action on behalf of himself and a putative class of similarly situated service technicians at automotive dealerships affiliated with defendant Zamora Automotive Group ("ZAG"), which operates numerous automotive dealerships located throughout the San Joaquin Valley. Over six years after the litigation commenced, the parties agreed to settle the action on a class-wide basis. Plaintiff now moves for preliminary approval of that settlement pursuant to Federal Rule of Civil Procedure 23(e).

I. Factual and Procedural History

Plaintiff worked at Stockton Honda, a ZAG-affiliated dealership, for seven months in 2007. (Ontiveros Decl. ¶ 2 (Docket No. 75-6).) Plaintiff alleges that he and other technicians employed at ZAG-affiliated dealerships were paid using a piece rate scheme that failed to compensate employees for the actual time they worked. (Id. ¶ 4; see also Feb. 20, 2009 Order re: Mot. for J. on Pleadings at 5 ("Although not pled in detail in plaintiff's complaint, plaintiff and defendants both agree that the corporate defendants used a 'flag rate' or 'piece rate' compensation system for the automobile mechanics they employed.") (Docket No. 29).)

In his Second Amended Complaint, plaintiff alleges that defendants' compensation practices violated both federal and state wage-and-hour statutes and asserts ten claims under California law.[1] While plaintiff does not assert a claim under

[1] Those claims include: (1) unlawful business practices under California Business & Professions Code sections 17200 et seq. based on violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq.; (2) failure to pay overtime wages under section 1194(a) of the California Labor Code; (3) failure to pay minimum wage under section 1194(a) of the

the FLSA, he does assert that defendants' failure to comply with the FLSA constitutes an unlawful business practice under California's Unfair Competition Law ("UCL), Cal. Bus. & Prof. Code §§ 17200 et seq.

This action was previously assigned to another district judge. Prior to reassignment, the court denied in part defendants' motion for judgment on the pleadings and held that plaintiff had stated plausible claims that defendants' compensation practices were unlawful. (Docket No. 29.) The court stayed the case in 2010 pending the resolution of a related insurance-coverage case in state court and subsequently lifted that stay on July 26, 2012. (Docket Nos. 51, 58, 64.) In December 2012, plaintiff moved for class certification and defendants moved to compel individual arbitration of plaintiff's claims. (Docket Nos. 72-73.) The court denied defendants' motion to compel arbitration, and defendants timely appealed. (Docket Nos. 104-105.) The court once again stayed the case pending the outcome of that appeal. (Docket No. 118.)

Before the Ninth Circuit could resolve defendants'

California Labor Code; (4) failure to provide rest periods under section 1194(a) of the California Labor Code; (5) unlawful kickback payments in violation of California Labor Code sections 221-223; (6) failure to pay timely wages due at termination in violation of California Labor Code sections 201-203; (7) failure to provide accurate employee wage statements in violation of sections 1174 and 1175 of the California Labor Code; (8) failure to pay reporting time wages in violation of California Labor Code section 1197; (9) unlawful and unfair business practices under California Business & Professions Code sections 17200 et seq. based on violations of the California Labor Code. In addition, plaintiff asserts a claim on his own behalf under the California Private Attorney General Act, Cal. Labor Code §§ 2698 et seq. (SAC ¶¶ 41-118 (Docket No. 18).)

appeal, the parties reached a settlement. (Mallison Decl. ¶¶ 30-36 (Docket No. 123-2); Mallison Decl. Ex. 1 ("Settlement Agreement") (Docket No. 123-3).) The settlement requires defendants to pay $2,000,000 to plaintiff and a class of similarly situated ZAG service technicians. (Id. ¶ 31.) After accounting for attorney's fees, civil penalties, taxes, a $20,000 incentive award to plaintiff, and other administrative expenses, the remainder of the settlement funds will be divided between the class members in proportion to the number of weeks worked during the class period. (Id. ¶ 31-32.) Any unclaimed settlement funds will be redistributed to class members on a pro rata basis; if there are funds left over after that point, the funds are to be redistributed to designated cy pres beneficiaries. (Settlement Agreement § III, ¶ E.) No portion of the settlement fund will revert to defendants. (Id.)

After the parties reached this settlement, plaintiff moved for preliminary approval of the settlement and conditional certification of a class of current and former service technicians pursuant to Federal Rule of Civil Procedure 23. (Docket No. 123.) The previously-assigned district judge recused himself on June 25, 2014, and the action was subsequently reassigned to the undersigned district judge for all further proceedings. (Docket No. 125.)

II. Discussion

Judicial policy strongly favors settlement of class actions. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). "To vindicate the settlement of such serious claims, however, judges have the responsibility of

ensuring fairness to all members of the class presented for certification." Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003). Where the "parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both [1] the propriety of the certification and [2] the fairness of the settlement." Id.

The approval of a class action settlement takes place in two stages. In the first stage of the approval process, the court preliminarily approves the settlement pending a fairness hearing, temporarily certifies a settlement class, and authorizes notice to the class. See Murillo v. Pac. Gas & Elec. Co., 266 F.R.D. 468, 473 (E.D. Cal. 2010). In this Order, therefore, "the court will only determine whether the proposed class action settlement deserves preliminary approval and lay the ground work for a future fairness hearing." Id. (citing Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004) (alterations and internal quotation marks omitted).

"Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members." Manual for Complex Litigation, Fourth, § 21.633 (2004). At the hearing, the court will entertain class members' objections to (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement. See Murillo, 266 F.R.D. at 473. Following the fairness hearing, the court will reach a final determination as to whether the parties should be allowed to settle the class action pursuant to the terms agreed

upon. See DIRECTV, 221 F.R.D. at 525.

A. Use of Opt-Out Class

In lieu of a claim under the FLSA, 29 U.S.C. §§ 201 et seq., plaintiff uses defendants' alleged violations of the FLSA as the predicate for a claim under the UCL. (See SAC ¶¶ 41-49.) The UCL permits courts to certify a class of plaintiffs alleging wage-and-hour violations as an "opt-out" class. See Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 340 (2004).

In contrast to the UCL, the FLSA requires that parties to a "collective action" must affirmatively "opt-in" to the suit. 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court where such action is brought."); Murillo, 266 F.R.D. at 470 ("The FLSA limits participation in a collective action to only parties who 'opt-in' to the suit."). And while the Ninth Circuit has held that the FLSA "does not preempt a state-law § 17200 claim that 'borrows' its substantive standard from FLSA," it has not explicitly held that a court may certify an opt-out class of plaintiffs asserting such a claim. Wang v. Chinese Daily News, Inc., 623 F.3d 743, 760 (9th Cir. 2010), vacated on other grounds, 132 S.Ct. 74 (2011); see also In re Wells Fargo Home Mortg. Overtime Pay Litig., 571 F.3d 953, 959 n.5 (9th Cir. 2009) (declining to "explore the question" of whether a plaintiff may bring a state law opt-out class action based on failure to pay overtime pay if that plaintiff does not assert an FLSA claim).

However, numerous district court decisions suggest that the FLSA does not bar certification of an opt-out UCL class

predicated on FLSA violations. For instance, in Tomlinson v. Indymac Bank, F.S.B., the defendant argued that certification of an opt-out UCL class alleging wage-and-hour violations would circumvent the FLSA's statutory prohibition on opt-out classes. 359 F. Supp. 2d 898, 899 (C.D. Cal. 2005). The court held otherwise: it characterized the FLSA's opt-in requirement as "merely a procedural hurdle," and held that a "claim under the UCL . . . is not precluded simply because it is procedurally barred by the underlying statute." Id. at 900. It reasoned that because the UCL makes violations of other wage-and-hour statutes independently actionable, a plaintiff need only satisfy the UCL's procedural requirements in order to assert class-wide UCL claims on an opt-out basis. Id.

In Bahramipour v. Citigroup Global Markets, Inc., the court likewise held that the FLSA did not foreclose the use of an opt-out UCL class. Civ. No. 04-4440 CW, 2006 WL 449132, at *6 (N.D. Cal. Feb. 22, 2006). Although the court acknowledged that there were "procedural differences between the FLSA and the UCL," it nonetheless held that the use of an opt-out class was appropriate because the plaintiff did not bring a freestanding FLSA claim and was therefore not bound by its procedural requirements. Id. at *3. While the defendant argued that the use of an opt-out class undermined the FLSA's policy of shielding employers from the "enormous liability" of facing "thousands of federal wage and hour claims," the court held that this concern was inapplicable because damages under the UCL are limited to restitution. Id. at *5.

As in Tomlinson and Bahramipour, the FLSA does not bar

certification of plaintiff's proposed opt-out class. Those decisions and others make clear that the UCL's procedural requirements, not the FLSA's, govern whether a plaintiff may seek to certify an opt-out UCL class even if the class's claims are substantively predicated on the FLSA. See id. at *3; Tomlinson, 359 F. Supp. 2d at 900; see also, e.g., Takacs v. A.G. Edwards & Sons, Inc., 444 F. Supp. 2d 1100, 1118 (S.D. Cal. 2006) (permitting plaintiff to certify an opt-out class asserting UCL claims based on FLSA violations).

Moreover, "the FLSA indicates that it does not preempt state law claims for wage violations." Thorpe v. Abbott Labs., Inc., 534 F. Supp. 2d 1120, 1124 (N.D. Cal. 2008) (citing 29 U.S.C. § 218(a)); accord Murillo, 266 F.R.D. at 472 ("Had Congress believed that allowing a state opt-out action to go forward . . . would undermine the statute, it would not have expressly indicated that the FLSA does not preempt state labor laws."). To the extent that the UCL serves to vindicate the interests of plaintiffs who are paid an unlawful wage, the use of opt-out class actions is a critical part of the statutory scheme that the California legislature designed to protect those interests. See Bahramipour, 2006 WL 449132, at *7 ("By allowing 'opt-out' class actions and a longer statute of limitations for UCL claims, California provides increased protections for its workers . . . ."); Campbell v. PricewaterhouseCoopers, Civ. No. 2:06-2376 LKK GGH, 2008 WL 3836972, at *9 (E.D. Cal. Aug. 14, 2008) (same); cf. Harris v. Vector Mktg. Corp., 753 F. Supp. 2d 996, 1018 (N.D. Cal. 2010) (describing procedural differences between the FLSA and Rule 23 and their effect on a plaintiff's

ability to vindicate rights created by state law). Barring an opt-out UCL class action "would in practical terms have a preemptive effect" on that claim and is therefore inconsistent with the FLSA's savings clause. Harris, 753 F. Supp. 2d at 1018.

This conclusion accords not only with precedent and the FLSA's savings clause, but also with ordinary conflict preemption principles.[2] As the Supreme Court has made clear, "state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." English v. Gen. Elec. Co., 496 U.S. 72, 90 (1990). Rather, state law is preempted only "where it is impossible to comply with both state and federal requirements" or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1152 (9th Cir. 2000). Because courts "presume[] that Congress does not cavalierly pre-empt state-law causes of action," preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (citation and internal quotation marks omitted).

No such conflict exists here. It is not impossible for defendants to comply with both the FLSA and the UCL. In fact, insofar as plaintiff's UCL claim is predicated on violations of

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[2] Although the Ninth Circuit declined to decide whether a plaintiff may maintain an opt-out class alleging a UCL claim predicated on FLSA violations, it explicitly characterized this issue as a "question of preemption." In re Wells Fargo, 571 F.3d at 959 n.5.

the FLSA, it incorporates exactly the same substantive standards that are supplied by federal law. See id. at 495 (holding that the presence of additional remedies under state law does not give rise to conflict preemption when those remedies "merely provide[] another reason . . . to comply with identical existing 'requirements' under federal law").

Nor does the use of an opt-out UCL class conflict with the animating purposes and objectives of the FLSA. Both "the Supreme Court and the Ninth Circuit have consistently found that the central purpose of the FLSA is to enact minimum wage and maximum hour provisions designed to protect employees." Williamson, 208 F.3d at 1154 (citations omitted). As explained earlier, permitting opt-out class actions is part of a statutory scheme that is designed to afford greater protection to workers than the FLSA affords alone. See Bahramipour, 2006 WL 449132, at *7. And even if the FLSA's opt-in requirement intended to "protect employers as well as employees," permitting plaintiffs to bring opt-out UCL claims--for which the only remedies are restitution or injunctive relief--would not expose employers to ruinous liability and thereby "upset the careful balance established by the statute." Williamson, 208 F.3d at 1153-54. Accordingly, the court will permit plaintiff to seek certification of an opt-out class.

B. Class Certification

"To be certified, the putative class . . . must meet the four threshold requirements of Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of representation. Moreover, the proposed class must

satisfy the requirements of Rule 23(b), which defines three different types of classes." Leyva v. Medline Indus. Inc., 716 F.3d 510, 512 (9th Cir. 2013) (citations omitted). These requirements "demand undiluted, even heightened attention in the settlement context . . . for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997).

1. Rule 23(a)

Rule 23(a) restricts class actions to cases where:

> (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.

Fed. R. Civ. P. 23(a). These requirements are more commonly known as numerosity, commonality, typicality, and adequacy of representation, respectively. Leyva, 716 F.3d at 512. While the court must evaluate Rule 23(a)'s requirements independently, they serve a common purpose of "ensur[ing] 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).

a. Numerosity

While Rule 23(a) requires that the class be "so numerous that joinder of all members is impracticable," Fed. R. Civ. P. 23(a)(1), it does not require "that the class must be so

numerous that joinder is impossible," Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D 439, 448 (N.D. Cal. 1994). "A proposed class of at least forty members presumptively satisfies the numerosity requirement." Avilez v. Pinkerton Gov't Servs., 286 F.R.D. 450, 456 (C.D. Cal. 2012); see also, e.g., Collins v. Cargill Meat Solutions Corp., 274 F.R.D. 294, 300 (E.D. Cal. 2011) (Wanger, J.) ("Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members."). The proposed class, which comprises approximately two hundred service technicians, easily satisfies this requirement. See Collins, 274 F.R.D. at 300 (conditionally certifying a class of 219 employees); Lymburner v. U.S. Fin. Funds, Inc., 263 F.R.D. 534, 539 (N.D. Cal. 2010) (certifying a class of 121 plaintiffs).

b. Commonality

Rule 23(a) also requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). It is not sufficient to show that the class members' allegations raise literally any common question; rather, commonality requires that the class members' claims "depend upon a common contention" 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." Dukes, 131 S.Ct. at 2551. But "all questions of fact and law need not be common to satisfy the rule," and the "existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon

v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

Generally, "the fact that an employee challenges a policy common to the class as a whole creates a common question whose answer is apt to drive the resolution of the litigation."[3] Pryor v. Aerotek Scientific, LLC, 278 F.R.D. 516, 525 (C.D. Cal. 2011). Here, plaintiff indicates that ZAG-affiliated automotive dealerships had a common policy of paying service technicians on a flat-rate, piece-work basis and alleges that this policy violated state and federal wage-and-hour laws. In his brief in support of his motion for class certification filed prior to settlement, plaintiff identified numerous common questions arising out of these allegations:

> a. Whether Zamora's flat-rate policy failed to pay for all time worked as recorded in Zamora's timekeeping system;
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> b. Whether Zamora's flat-rate policy properly failed to pay for rest breaks[;]
>
> c. Whether Zamora's flat-rate policy properly failed to pay for employee meetings;
>
> d. Whether Zamora's flat-rate policy properly failed to pay for cleaning time;
>
> e. Whether Zamora's flat-rate policy properly failed to pay for waiting time;

[3] As the Supreme Court made clear in Dukes, the existence of a common employment or wage policy is not always sufficient to satisfy the commonality requirement. See 131 S.Ct. at 2557. There, the Court held that a company-wide policy that committed discretion over employment decisions to individual store managers did not give rise to common issues of law or fact because plaintiffs had "not identified a common mode of exercising discretion that pervades the entire company." Id. at 2554-55. But there is no indication that the piece rate policy at issue in this case was implemented at the discretion of individual dealerships, and the existence of a company-wide policy of piece rate compensation therefore presents common issues of law or fact.

> f. Whether Zamora's flat-rate policy properly failed to pay for completing administrative tasks;
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> g. Whether Zamora's flat-rate policy properly failed to pay for diagnostic tasks;
>
> h. Whether Zamora's flat-rate policy properly failed to pay for free services to customers;
>
> i. Whether Zamora's flat-rate policy properly failed to pay for assisting or training junior mechanics;
>
> j. Whether Zamora's flat-rate policy properly failed to pay for conducting opening or closing tasks;
>
> k. Whether Zamora's flat-rate policy violated California minimum wage and overtime requirements, rest period requirements, wage statement requirements, timely payment of wage requirements, the Unfair [C]ompetition [L]aw and/or the California Labor Code Private Attorney General Act.

(Docket No. 76.)

Whether class members were subject to a policy of piece-work compensation, whether that policy was uniformly applied at ZAG-affiliated dealerships, and whether that policy was unlawful are common questions of law and fact that satisfy Rule 23(a)(2). See Pryor, 278 F.R.D. at 525; see also, e.g., Stiller v. Costco Wholesale Corp., --- F.R.D. ---, Civ. No. 3:09-2473 GPC BGS, 2014 WL 1455440, at *13 (S.D. Cal. Apr. 15, 2014) (holding that whether Costco had a policy of requiring employees to perform unpaid labor after closing, whether that policy was enforced on a company-wide basis, and whether Costco exercised control over employees during that time were common questions); Dilts v. Penske Logistics, LLC, 267 F.R.D. 625, 627 (S.D. Cal. 2010) (finding commonality when plaintiffs provided evidence that "the relevant policies were common across Defendant's California facilities"); Wren v. RGIS Inventory Specialists, 256 F.R.D. 180, 205 (N.D. Cal. 2009) (finding commonality where plaintiff

proffered evidence of a company-wide policy regarding donning and waiting time).

Plaintiff's claims not only implicate common questions of law and fact, but are also amenable to common methods of proof. In particular, the court could examine defendants' pay records to reconstruct the hours that class members worked and determine if their pay complied with applicable wage-and-hour laws. Several courts have held that the ability to resolve class-wide wage-and-hour claims by looking at the "wage statements themselves" militates in favor of finding commonality. Avilez, 286 F.R.D. at 465; see also, e.g., McKenzie v. Fed. Express Corp., 275 F.R.D. 290, 296 (C.D. Cal. 2011).

Accordingly, because plaintiff has shown that the class's claims implicate common issues of law and fact and are susceptible to common methods of proof, the putative class satisfies the commonality requirement.

c. Typicality

Rule 23(a) further requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This requires only that the named plaintiff's claims are "reasonably coextensive with those of absent class members" and does not mandate a showing that his claims are "substantially identical" to theirs. Hanlon, 150 F.3d at 1020. In other words, the test for 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 plaintiffs, and whether other class members have been injured by the same course of conduct." Hanon v.

Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citation and internal quotation marks omitted).

Here, plaintiff alleges that he suffered essentially the same injury as other service technicians employed at ZAG-affiliated dealerships--namely, that his employer calculated his pay using a fixed-rate, piece-work system that unlawfully failed to compensate him for the time he worked. Even if plaintiff only worked at Stockton Honda for seven months, the fact that he may have been underpaid for a different length of time than other class members does not show that his injuries were atypical of the class. See, e.g., Monterrubio v. Best Buy Stores, L.P., 291 F.R.D. 443, 450 (E.D. Cal. 2013) (England, J.) (holding that named plaintiff satisfied the typicality requirement in spite of "minor factual differences" amongst the size of class members' claims because he was "subject to the same policies and practices" as other class members); Kamar v. Radio Shack Corp., 254 F.R.D. 387, 396 (C.D. Cal. 2008) (noting that variation in "actual hours of work" between class members in a wage-and-hour class action "does not defeat typicality"); see generally Guido v. L'Oreal, USA, Inc., 284 F.R.D. 468, 479 (C.D. Cal. 2012) (emphasizing that, as a general rule, "differences in the amount of damages [are] insufficient to defeat class certification" (citing Stearns v. Ticketmaster Co., 655 F.3d 1013, 1026 (9th Cir. 2011)).

Nor is there any indication that plaintiff is subject to unique defenses that threaten his ability to represent the class. See Hanon, 976 F.2d at 508. Earlier in the case, defendants argued that plaintiff's claims were barred because he

had signed an agreement with Stockton Honda to arbitrate his employment-related disputes; however, the previously-assigned district judge concluded that this agreement did not bar plaintiff's claims and defendants have since dismissed their appeal of this determination. (See Docket Nos. 104, 124.) At this stage in the litigation, it does not appear that the uniqueness of this defense will overtake plaintiff's ability to assert claims typical of the class. Accordingly, plaintiff has satisfied the typicality requirement.

d. Adequacy of Representation

Finally, Rule 23(a) requires that "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. These inquiries require the court to consider a number of factors, including "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390 (9th Cir. 1992).

i. Conflicts of Interest

The first portion of the adequacy inquiry focuses on whether plaintiff's interests are aligned with those of a class, and is "especially critical when . . . a class settlement is tendered along with a motion for class certification." Hanlon,

150 F.3d at 1020. In most respects, plaintiff's interests appear to be aligned with those of the class: because the class is defined to include all service technicians who worked at defendant automotive dealerships from March 12, 2004, to the present and specifically excludes exempt supervisors or managers, it is unlikely that plaintiff's interests will conflict with those of the class. See, e.g., Murillo, 266 F.R.D. at 478 (finding that appropriate class definition ensured that "the potential for conflicting interests will remain low like the likelihood of shared interests remains high"); Alberto v. GMRI, Inc., 252 F.R.D. 652, 662 (E.D. Cal. 2008) (same); see generally Windsor, 521 U.S. at 625-26 ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.").

The settlement provides for an incentive award of $20,000 to plaintiff. (Settlement Agreement § 3, ¶ C.) Although the Ninth Circuit has specifically approved the award of "reasonable incentive payments" to named plaintiffs, the use of an incentive award nonetheless raises the possibility that plaintiff's interest in receiving that award will cause his interests to diverge from the class's interest in a fair settlement. Staton, 327 F.3d at 977-78 (declining to approve a settlement agreement where size of incentive award suggested that named plaintiffs were "more concerned with maximizing [their own] incentives than with judging the adequacy of the settlement as it applies to class members at large"). As a result, district courts must "scrutinize carefully the awards so that they do not undermine the adequacy of the class representatives." Radcliffe

v. Experian Info. Sys., Inc., 715 F.3d 1157, 1163 (9th Cir. 2013).

While incentive awards create the risk of a conflict of interest, the incentive award in this case does not appear to do so. While the aggregate amount of the award is high, it is not so high that it is per se unreasonable. See, e.g., Van Vranken v. Atl. Richfield Co., 901 F. Supp. 294, 300 (N.D. Cal. 1995) (holding that incentive award of $50,000 to each named plaintiff was fair and reasonable); Glass v. UBS Fin. Servs., Inc., Civ. No. 04-4068 MMC, 2007 WL 221862 (N.D. Cal. Jan. 26, 2007) (approving incentive award of $25,000 for each of four named plaintiffs).

Nor is the proposed incentive award grossly disproportionate to the recovery of the other class members. For instance, numerous judges in this district have disapproved of incentive awards that dwarf the average class member's recovery. See, e.g., Alberto, 252 F.R.D. at 669 (finding $5,000 incentive award unreasonable when average class member would receive $24.17); Monterrubio, 291 F.R.D. at 463 (finding $7,500 incentive award unreasonable when average class member would receive $65.79). By contrast, plaintiff's proposed incentive award of $20,000 is more closely proportional to the average class member's recovery of $6,000 than others that judges in this district have approved. See, e.g., Monterrubio, 291 F.R.D. at 463 (preliminarily approving incentive award of $2,500 when average class member would receive $65.79).

Additionally, plaintiff's incentive award appears justified in light of the time and effort that plaintiff has

devoted to this case. Class counsel represent that they have had regular discussions and meetings with plaintiff about the case during the six years since it was filed, that plaintiff actively participated in the investigation of the case, and that plaintiff was involved in mediation and settlement negotiations. (Mallison Decl. ¶¶ 41-42.) These are exactly the sort of tasks for which an incentive award is appropriate. See Rodriguez v. West Publishing Corp., 563 F.3d 948, 958-59 (9th Cir. 2009) (noting that incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general").

While the court determines at this stage that a $20,000 incentive award does not render plaintiff an inadequate representative of the class, it emphasizes that this is only a preliminary determination. An incentive award consisting of one percent of the common fund is unusually high, and some courts have been reticent to approve incentive awards that constituted an even smaller portion of the common fund. See, e.g., Ko v. Natura Pet Prods., Inc., Civ. No. 09-2619 SBA, 2012 WL 3945541, at *15 (N.D. Cal. Sep. 10, 2012) (holding that an incentive award comprising one percent of the common fund was "excessive under the circumstances"); Sandoval v. Tharaldson Emp. Mgmt., Inc., Civ. No. 08-482 VAP OPx, 2010 WL 2486346, at *10 (C.D. Cal. June 15, 2010) (citing cases). On or before the date of the final Fairness Hearing, the parties should present or be prepared to present evidence of plaintiff's substantial efforts taken as

class representative to justify the discrepancy between his award and those of the unnamed class members.

ii. Vigorous Prosecution

The second prong of the adequacy inquiry examines the vigor with which the named plaintiff and his counsel have pursued the class's claims. "Although there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation." Hanlon, 150 F.3d at 1021.

Here, class counsel indicate that they have extensive experience litigating wage-and-hour class actions; since starting their firm in 2005, they have litigated over sixty wage-and-hour class actions and have brokered seven-figure settlements in at least five of those cases. (Mallison Decl. ¶ 6.) Class counsel also indicate that they reached the decision to settle this case after considerable deliberation, review of over 100,000 pages of discovery, several all-day mediation sessions, and consideration of the risk presented by litigating this action further. (Id. ¶¶ 30, 37-40.) In light of these factors, "the court can safely assume that plaintiff's counsel has vigorously sought to maximize the return on its labor and to vindicate the injuries of the entire class." Murillo, 266 F.R.D. at 476. Accordingly, the court determines that plaintiff is an adequate class representative.

2. Rule 23(b)

An action that meets all the prerequisites of Rule 23(a) may only be certified as a class action if it also

satisfies the requirements of one of the three subdivisions of Rule 23(b). Leyva, 716 F.3d at 512. Plaintiff seeks certification under Rule 23(b)(3), which provides that a class action may be maintained only if (1) "the court finds that questions of law or fact common to class members predominate over questions affecting only individual members" and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. Predominance

"Because Rule 23(a)(3) already considers commonality, the focus of the Rule 23(b)(3) predominance inquiry is on the balance between individual and common issues." Murillo, 266 F.R.D. at 476 (citing Hanlon, 150 F.3d at 1022). Here, plaintiff's allegations implicate the "legality of a common method" for calculating service technician pay, id., and therefore demonstrate that a "common nucleus of facts and potential legal remedies dominates this litigation." Hanlon, 150 F.3d at 1022. In particular, the class's claims turn on the questions of whether ZAG-affiliated dealerships paid service technicians on a flat-rate, piece-work basis, whether that payment scheme was unlawful, and whether that policy was in fact common among ZAG dealerships. See supra II.B.1.b. Even if these claims were ultimately incorrect on the merits, that fact alone would not undermine a finding of predominance. See Amgen Inc. v. Conn. Retirement Plans & Trust Funds, 133 S.Ct. 1184, 1191 (2013) ("Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on

the merits, in favor of the class.").

Insofar as individualized issues remain in the litigation, those issues largely relate to the amounts that individual service technicians were allegedly underpaid as a result of the flat-rate system. Discrepancies in the amount of underpayment are damages questions that do not undermine a finding of predominance. See, e.g., Ortega v. J.B. Hunt Transp., Inc., 258 F.R.D. 361, 372 (C.D. Cal. 2009) (concluding that discrepancies in compensation under piece rate system did not undermine predominance when liability could be assessed on a class-wide basis); Kamar, 254 F.R.D. at 404 (finding that discrepancy in hours worked between class members "bears not on the predominance of common questions of liability, but on the amount of damages").

To the extent that any further individual issues may exist, there is no indication that those issues would be anything more than "local variants of a generally homogenous collection of causes" that derive from the named plaintiff's allegations. Hanlon, 150 F.3d at 1022. These idiosyncratic differences are therefore "not sufficiently substantive to predominate over the shared claims." Id. at 1022-23.

b. Superiority

In addition to the predominance requirement, Rule 23(b)(3) permits class certification only upon a showing that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). It sets forth four non-exhaustive factors that courts should consider in making this determination:

> (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.

Id. "Some of these factors, namely (D) and perhaps (C), are irrelevant if the parties have agreed to a pre-certification settlement." Murillo, 266 F.R.D. at 477 (citing Windsor, 521 U.S. at 620).

Here, the court is unaware of any concurrent litigation regarding the issues in this case.[4] Given that no class member has initiated any competing action in the six years since this case was filed, it is also unlikely that other individual class members have an interest in controlling the prosecution of this action or related actions--although objectors at the fairness hearing may reveal otherwise. In light of those factors, the class action appears at this stage to be the superior method for adjudicating this controversy.

c. Rule 23(c)(2) Notice Requirements

If the court certifies a class under Rule 23(b)(3), it

[4] In 2010, the previously-assigned judge stayed this action pending the resolution of a state-court lawsuit between defendants and their liability carrier regarding insurance coverage of the claims in this dispute. That lawsuit has since been resolved. Even if it were ongoing, it would not bear upon the superiority of class treatment because it does not involve claims "by or against members of the class." Fed. R. Civ. P. 23(b)(3)(B).

"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). Rule 23(c)(2) governs both the form and content of a proposed notice. See Ravens v. Iftikar, 174 F.R.D. 651, 658 (N.D. Cal. 1997) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172-77 (1974)). Although that notice must be "reasonably certain to inform the absent members of the plaintiff class," actual notice is not required. Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994) (citation omitted).

Here, the Settlement Agreement provides that the Settlement Administrator, Simpluris, will mail notice of the settlement to the last known address of all class members. (Settlement Agreement § III, ¶ G.2.) The Agreement also provides that Simpluris will use its best efforts to locate updated addresses for class members in the event that any class notice is returned as undeliverable. (Id.) The court is satisfied that this system of providing notice is reasonably calculated to provide notice to class members and is the best form of notice available under the circumstances. See Monterrubio, 291 F.R.D. at 443 (approving settlement in which Simpluris provided notice by mail to potential class members).

Likewise, the notice itself clearly identifies the options available to putative class members--do nothing, object, or opt out--and comprehensively explains the nature and mechanics of the settlement in a separate document. (See Mallison Decl. Ex. 2 (Docket No. 123-4).) The content of the notice is therefore sufficient to satisfy Rule 23(c)(2)(B). See Churchill

Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004) ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" (quoting Mendoza v. Tucson Sch. Dist. No. 1., 623 F.2d 1338, 1352 (9th Cir. 1980)).

C. Preliminary Settlement Approval

Having determined that the proposed class satisfies the requirements of Rule 23, the court must determine whether the terms of the parties' settlement appear fair, adequate, and reasonable.[5] Fed. R. Civ. P. 23(e)(2); Hanlon, 150 F.3d at 1026. In order to approve a final class-action settlement, the court must "balance 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 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.

Hanlon, 150 F.3d at 1026.

Because many of these factors cannot be considered until the final Fairness Hearing, the court need only conduct a preliminary review so as to resolve any "glaring deficiencies" in

[5] Because the proposed notice satisfies the more stringent requirements of Rule 23(c)(2)(B), the court concludes that it also meets the requirements of Rule 23(e), which provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1); see also Wright v. Linkus Enters., Inc., 259 F.R.D. 468, 475 (E.D. Cal. 2009) (England, J.) (finding that notice satisfying Rule 23(c)(2)(B) also satisfied Rule 23(e)(1)).

the Settlement Agreement before authorizing notice to class members. Murillo, 266 F.R.D. at 478. In other words, if:

> the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, the court should direct that the notice be given to the class members of a formal fairness hearing.

In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citations and internal quotation marks omitted).

1. Terms of Settlement Agreement

The key terms of the Settlement Agreement are as follows:

(1) **Settlement Class**: All nonexempt automotive technicians employed by one or more defendants at any time between March 12, 2004, and the date of preliminary approval. (Settlement Agreement § I, ¶ C.)

(2) **Notice**: Defendants will provide the Settlement Administrator with the address and contact information of each class member within ten days of the date of preliminary approval. The Settlement Administrator will send a packet containing a class notice, share and correction form, and opt-out form to all class members within five days of receiving the class members' addresses and contact information. In the event that a class notice packet is returned as undeliverable, the Settlement Administrator will work with class counsel and defendants' counsel to find a more current address and will re-send the packet to that address. (Id. § III, ¶ G.2.)

(3) **Opt-Out Procedure:** To opt out of the settlement, a class member must submit and sign an opt-out form and mail that form to the Settlement Administrator no later than forty-five days after the Settlement Administrator mails the class notice packet. A class member who does not do so will automatically become part of the settlement class and will be bound by all terms and conditions of the Settlement Agreement, including release of claims, if the court approves the Settlement Agreement at the final Fairness Hearing. (Id. § III, ¶ G.4.b.)

(4) **Objections to Settlement:** Any individual class member may object to or comment on the settlement so long as he or she files and serves a copy of the comment or objection no later than sixty days after the court grants preliminary approval. Any objection not filed by that deadline shall be deemed waived. (Id. § III, ¶ G.4.a.)

(5) **Settlement Amount:** Defendants have agreed to pay a gross settlement amount of $2,000,000. That amount shall be used to satisfy the claims of all participating settlement members, class counsel's litigation expenses, any award of attorney's fees to class counsel, an incentive award to plaintiff, a payment to the state of California in satisfaction of plaintiff's Private Attorney General Act claim, payroll taxes on the portion of the settlement fund designated as wages, and claims administration expenses. The total amount paid to class members will depend upon the number of class members who opt out and the amount of fees and expenses as determined by the court at the final Fairness Hearing. (Id. § III, ¶¶ B-C.)

(6) **Attorney's Fees and Incentive Award:** Plaintiff and class

counsel will apply for an attorney's fee award of no more than 33.3% of the settlement fund, expenses and costs of $50,000, and an incentive award of no more than $20,000. Defendants agree not to oppose these requests. (Id. § III, ¶ C.)

(7) **Settlement Distribution:** Settlement funds will be distributed on an individualized basis using a formula created by the parties. That formula will pay each class member a share of the settlement fund equivalent to the number of weeks that individual worked during the class period divided by the number of weeks worked by all class members over that period. One third of each class member's recovery is intended to settle claims for lost wages, and that portion of the recovery shall be subject to tax withholding. Class members shall be paid by check. After sixty days, any un-cashed checks will be cancelled and the remaining sum available will be distributed to those class members who did cash their checks. In the event that any class members fail to cash checks issued in the second round, those funds will be distributed to designated cy pres beneficiaries. (Id. § III, ¶ E.)

(8) **Release:** Class members will agree to release "any and all claims, debts, liabilities, guarantees, costs, expenses, attorney's fees, damages, actions, or causes of action set forth in the Second Amended Complaint." The release excludes "all other claims, including but not limited to retaliation, discrimination, unemployment, disability, and workers' compensation." In addition, plaintiff agrees to execute a general release of all claims against defendants and to waive any rights he may retain against defendants under section 1542 of the

California Civil Code. Defendants agree to execute a corresponding general release of any claims against plaintiff and to dismiss their pending appeal to the Ninth Circuit. (Id. § III, ¶ H.)

2. Preliminary Determination of Adequacy

A settlement agreement is most likely to be fair and adequate when it appears to be the product of informed, vigorous, arms-length bargaining. See Tableware, 484 F. Supp. 2d at 1080 (holding that this factor militates in favor of settlement approval). Class counsel indicate that their firm reviewed over 142,700 pages of documents and engaged in "numerous all day mediations" with defendants before reaching a settlement. (Mallison Decl. ¶¶ 27-30.) According to class counsel, the parties' decision to settle the case reflected not only the time and expense that both sides would incur in the course of further litigation, but the uncertainty posed by defendants' pending appeal before the Ninth Circuit, the risk that the California Supreme Court would grant review in several recent wage-and-hour cases on which plaintiff relies, and the prospect that this court may not certify a class for trial. (Id. ¶¶ 39-40.) In light of these considerations, the court will not second-guess counsel's determination that the settlement is in the best interest of the class. See Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 942 (N.D. Cal. 2013) (holding that a settlement reached after informed negotiations "is entitled to a degree of deference as the private consensual decision of the parties" (citing Hanlon, 150 F.3d at 1027)).

In determining whether a settlement agreement is

substantively fair to the class, a court must balance the value of plaintiffs' expected recovery against the value of the settlement offer. Tableware, 484 F. Supp. 2d at 1080. The settlement provides for an average recovery of approximately $6,000, a generous amount in a case of this nature. See, e.g., Vasquez v. Coast Valley Roofing, Inc., 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009) (Wanger, J.) (approving wage-and-hour settlement providing for an average recovery of $1,000); Barbosa v. Cargill Meat Solutions Corp., 297 F.R.D. 431, 440 (E.D. Cal. 2013) (Oberto, M.J.) (approving wage-and-hour settlement providing for an average recovery of $601.91). The value of the recovery is especially significant in light of the "significant amount of uncertainty" class members would face if the case were litigated to trial. Murillo, 266 F.R.D. at 480. The court therefore concludes that the substance of the settlement is fair to class members and thereby "falls within the range of possible approval." Tableware, 484 F. Supp. 2d at 1079.

Finally, the settlement has no "obvious deficiencies," id., that militate against preliminary approval. Simpluris, the settlement administrator, is an experienced claims administrator who has been appointed by several other judges of this district. See, e.g., Monterrubio, 291 F.R.D. at 443; Adoma v. Univ. of Phoenix, Inc., 913 F. Supp. 2d 964, 971-72 (E.D. Cal. 2012) (Karlton, J.). Class counsel indicates that Simpluris's expected fees are $9,700 and that it has agreed to cap its fee at $15,000. Those fees are consistent with those awarded by other judges of this district in similar cases. See, e.g., Adoma, 913 F. Supp. 2d at 985 (approving a $19,000 fee for Simpluris); Vasquez, 266

F.R.D. at 484 (approving a $25,000 fee for the settlement administrator). Likewise, class counsel's claimed expenses and costs of $50,000 do not appear unreasonable at this stage in the litigation. See, e.g., Hartless v. Clorox Co., 273 F.R.D. 630, 646 (S.D. Cal. 2011) (awarding $111,002.22 in costs); Loretz v. Regal Stone, Ltd., 756 F. Supp. 2d 1203, 1218 (N.D. Cal. 2010) (awarding a total of over $70,000 in costs to two law firms acting as class counsel).

For reasons discussed elsewhere in this Order, the amount of the attorney's fee award, see infra II.C.3, and the amount of plaintiff's incentive award, see supra II.B.1.d.i, do give the court pause. Nonetheless, the court cannot conclude at this stage that either award is excessive, let alone so grossly excessive that it imperils the fairness or adequacy of this settlement. Cf. Murillo, 266 F.R.D. at 480 (preliminarily approving settlement in spite of concerns that attorney's fee award was excessive). Accordingly, because the settlement appears "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), the court will preliminarily approve the settlement agreement pending a final Fairness Hearing.

3. Attorney's Fees

If a negotiated class action settlement includes an award of attorney's fees, that fee award must be evaluated in the overall context of the settlement. Knisley v. Network Assocs., 312 F.3d 1123, 1126 (9th Cir. 2002); Monterrubio, 291 F.R.D. at 455. The court "ha[s] an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." In re Bluetooth

Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011).

The Ninth Circuit has approved two methods of assigning attorney's fees in common fund cases: the "percentage of the fund" method and the "lodestar" method. Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002) (citing In re Wash. Pub. Power Supply Sys. Litig., 19 F.3d 1291, 1295-96 (9th Cir. 1994)). Under the percentage method, the court may award class counsel a percentage of the common fund recovered for the class. Id. The percentage method is particularly appropriate in common fund cases, where "the benefit to the class is easily quantified." Bluetooth, 654 F.3d at 942. The Ninth Circuit has approved a "benchmark" percentage of twenty-five percent, and courts may adjust this figure upwards or downwards if the record shows "'special circumstances' justifying a departure." Id. (quoting Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990)).

Under the lodestar method, the court determines an appropriate attorney's fee by multiplying the number of hours reasonably expended by class counsel by a reasonable hourly rate. Id. at 941. The court may then adjust the lodestar upwards or downwards based on a "host of 'reasonableness' factors." Id. at 942 (citing Hanlon, 150 F.3d at 1029). While the lodestar method is most often applied in class actions brought under fee-shifting statutes or those where the relief obtained is not easily monetized, it may be used in common fund cases as well. Id. at 941-42. In addition, the lodestar method may be used to "cross-check" the reasonableness of a percentage award. Vizcaino, 290 F.3d at 1050-51.

Here, class counsel request a percentage award of 33.3% of the common fund. While some courts have approved percentage awards as high as 33.3%, awards of that size are typically disfavored unless they are corroborated by the lodestar or reflect exceptional circumstances. See, e.g., Adoma, 913 F. Supp. 2d at 982-83 (rejecting class counsel's argument that a 33.3% award was appropriate and distinguishing cases); Monterrubio, 291 F.R.D. at 457-58 (same). Class counsel has not submitted any records of the time spent on this litigation to support their claim that a 33.3% award is appropriate. And while the court has no doubts about class counsel's competence or the vigor with which they have prosecuted this matter, it is unable to conclude at this stage in the litigation that the results class counsel obtained were sufficiently exceptional to merit a 33.3% award.

In spite of these reservations, the court need not reduce the fee award at this point in the case. See Murillo, 266 F.R.D. at 480 (granting preliminary approval of the settlement despite concerns that the proposed attorney's fee award was unreasonable). Instead, the court preliminarily approves the fee award on the understanding that class counsel must demonstrate, on or before the date of the final Fairness Hearing, that the proposed award is reasonable in light of the hours expended and the circumstances of the case. In the event that class counsel is unable to do so, the court would then be forced to reduce class counsel's fees to a reasonable amount or to deny final approval of this settlement. See Vizcaino, 290 F.3d at 1047; Alberto, 252 F.R.D. at 667-68.

IT IS THEREFORE ORDERED that plaintiff's motion for preliminary certification of a conditional settlement class and preliminary approval of the class action settlement be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED THAT:

(1) the following class be provisionally certified for the purpose of settlement: all nonexempt automotive technicians who have been employed by one or more defendants at any time between March 12, 2004, through the date on which this Order is signed. In the event that the proposed settlement is not consummated for any reason, the conditional certification shall be of no further force or effect and shall be vacated without further action or order of this court;

(2) the proposed settlement is preliminarily approved as fair, just, reasonable, and adequate to the members of the settlement class, subject to further consideration at the final Fairness Hearing after distribution of notice to members of the settlement class;

(3) for purposes of carrying out the terms of the settlement only:

(a) plaintiff Jose Ontiveros is appointed as the representative of the settlement class and is provisionally found to be an adequate representative within the meaning of Rule 23;

(b) the law firm of Mallison & Martinez is provisionally found to be a fair and adequate representative of the settlement class and is appointed as class counsel for the purposes of representing the settlement class conditionally certified in this Order;

(4) Simpluris, Inc. is appointed as the settlement administrator;

(5) the form and content of the proposed Notice of Class Action Settlement and Final Approval Hearing, Share and Correction form, and Request for Exclusion are approved, except to the extent that those forms reflect dates modified by this Order;

(6) no later than ten (10) days from the date this Order is signed, defendants' counsel shall provide the names and contact information of all settlement class members to Simpluris;

(7) no later than fifteen (15) days from the date this Order is signed, Simpluris shall mail a Notice of Class Action Settlement and Final Approval Hearing, a Share and Correction form, and a Request for Exclusion form to all members of the settlement class;

(8) no later than sixty (60) days from the date this Order is signed, any member of the settlement class who intends to object to, comment upon, or opt out of the settlement shall mail written notice of that intent to Simpluris pursuant to the instructions in the Notice of Class Action Settlement and Final Approval Hearing;

(9) a final Fairness Hearing shall be held before this court on Monday, October 6, 2014, at 2:00 p.m. in Courtroom 5 to determine whether the proposed settlement is fair, reasonable, and adequate and should be approved by this court; to determine whether the settlement class's claims should be dismissed with prejudice and judgment entered upon final approval of the settlement; to determine whether final class certification is

appropriate; and to consider class counsel's applications for attorney's fees, costs, and an incentive award to plaintiff. The court may continue the final Fairness Hearing without further notice to the members of the class;

(10) no later than twenty-eight (28) days before the final Fairness Hearing, class counsel shall file with this court a petition for an award of attorney's fees and costs. Any objections or responses to the petition shall be filed no later than fourteen (14) days before the final Fairness Hearing. Class counsel may file a reply to any objections no later than seven (7) days before the final Fairness Hearing;

(11) no later than twenty-eight (28) days before the final Fairness Hearing, class counsel shall file and serve upon the court and defendants' counsel all papers in support of the settlement, the incentive award for the class representative, and any award for attorney's fees and costs;

(12) no later than twenty-eight (28) days before the final Fairness Hearing, Simpluris shall prepare, and class counsel shall file and serve upon the court and defendants' counsel, a declaration setting forth the services rendered, proof of mailing, a list of all class members who have opted out of the settlement, a list of all class members who have commented upon or objected to the settlement, and copies of any Share and Correction forms and/or Notice of Exclusion forms received;

(13) any person who has standing to object to the terms of the proposed settlement may appear at the final Fairness Hearing in person or by counsel and be heard to the extent allowed by the court in support of, or in opposition to, (a) the fairness,

reasonableness, and adequacy of the proposed settlement, (b) the requested award of attorney's fees, reimbursement of costs, and incentive award to the class representative, and/or (c) the propriety of class certification. To be heard in opposition at the final Fairness hearing, a person must, no later than sixty (60) days from the date this Order is signed, (a) serve by hand or through the mails written notice of his or her intention to appear, stating the name and case number of this action and each objection and the basis therefore, together with copies of any papers and briefs, upon class counsel and counsel for defendants, and (b) file said appearance, objections, papers, and briefs with the court, together with proof of service of all such documents upon counsel for the parties. Responses to any such objections shall be served by hand or through the mails on the objectors, or on the objector's counsel if any there be, and filed with the court no later than fourteen (14) calendar days before the final Fairness Hearing. Objectors may file optional replies no later than seven (7) calendar days before the final Fairness Hearing in the same manner described above. Any settlement class member who does not make his or her objection in the manner provided herein shall be deemed to have waived such objection and shall forever be foreclosed from objecting to the fairness or adequacy of the proposed settlement, the judgment entered, and the award of attorney's fees, costs, and an incentive award to the class representative unless otherwise ordered by the court.

Dated: July 7, 2014

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE