UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BARBARA GRADY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

RCM TECHNOLOGIES, INC.,

Defendant.

CASE NO. 5:22-cv-00842 JLS-SHK

ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT (Doc. 28)

Before the Court is an unopposed Motion for Preliminary Approval of Class Action and Private Attorneys General Act ("PAGA") Settlement filed by Plaintiff Barbara Grady ("Grady"). (Mot., Doc. 28.) The Court finds this matter appropriate for decision without oral argument, and the hearing set for May 5, 2023, at 10:30 a.m. is VACATED. Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. For the following reasons, the Court DENIES WITHOUT PREJUDICE Grady's Motion.

I. BACKGROUND

On February 7, 2022, Grady initiated this putative wage-and-hour class action by filing a complaint in San Bernardino County Superior Court. (*See* Notice of Removal ("NOR") ¶ 3, Doc. 1; Complaint, Doc. 1-1.) Grady alleges the following causes of action on her own behalf and on behalf of others similarly situated against Defendant RCM Technologies, Inc. ("RCM"): (1) unpaid overtime in violation of California Labor Code §§ 510, 1194 and 1198 and IWC Wage Order No. 5; (2) failure to provide meal periods in violation of California Labor Code §§ 226.7 and 512(a) and California Code of Regulations tit. 8, § 11040; (3) failure to provide rest breaks in violation of California Labor Code § 226.7 and California Code of Regulations tit. 8, § 11040; (4) failure to pay for all hours worked in violation of California Labor Code §§ 201, 202, 204 and 221–23; (5) failure to keep accurate payroll records in violation of California Labor Code §§ 1174 and 1174.5; (6) failure to furnish accurate wage statements in violation of California Labor Code § 226; (7) failure to timely pay all wages owed on separation under California Labor Code §§ 201–3; (8) unfair competition in violation of California Business & Professions Code §§ 17200, *et seq.*; and (9) enforcement of the California PAGA, California Labor Code §§ 2698, *et seq*. (*See* NOR ¶ 3; Complaint ¶¶ 36–109.) RCM answered the Complaint in Superior Court on May 7, 2022. (NOR ¶ 5; Answer, Doc. 1-2.) RCM then removed the action to this Court on May 19, 2022. (*See generally* NOR.)

On December 7, 2022, the parties engaged in mediation before Michael J. Loeb of Judicial Arbitration and Mediation Services, Inc. ("JAMS"). (Konecky Decl. ¶ 19, Doc. 18-1; Mot at 4.) Shortly thereafter, the parties reached an agreement to settle the case. (Konecky Decl. ¶ 20; Mot. at 4–5.) On December 16, 2022, the parties filed a stipulation to stay the case pending resolution of Plaintiff's motion for preliminary approval of the proposed class action and PAGA settlement (the "Settlement"). (Doc. 23.) On March 3, 2023, after the Court granted a request for additional time to finalize the terms of the Settlement and draft a motion for preliminary approval of the Settlement, Grady filed the instant Motion. (Konecky Decl. ¶ 21, Mot. at 5.)

The key terms of the Settlement are as follows. First, RCM has agreed to pay a total gross settlement amount of $1,600,000. (Settlement Agreement ¶¶ 15, 48, Doc. 28-2.) The gross settlement amount will be allocated as follows: (1) $200,000 will be allocated to the putative class's PAGA claims (*id.* ¶ 49); (2) up to one third of the gross settlement fund, or $533,333.33, will be allocated to attorneys' fees for class counsel (*id.* ¶ 4); (3) up to $15,000 will be allocated to compensate class counsel for litigation costs incurred in prosecuting this action (*id.*); (4) up to $15,000 will be allocated to Grady as a class representative service award (*id.* ¶ 8); (5) up to $31,050 will be allocated to the settlement administration costs (*id.* ¶ 57); (6) the remainder of the gross settlement amount—the "Net Settlement Amount"—will be distributed as payments to participating class members (*id.* ¶¶ 18, 56.e–f). No funds will revert to RCM. (*Id.* ¶ 48.)

Grady's counsel estimate that a net settlement amount of $805,616.67 will be distributed to participating class members. (Konecky Decl. ¶¶ 26, 41.) Each participating class member's individual share of the settlement fund will be proportional to the number of "Workweeks" that the class member worked for RCM during the "Class Period" and the "PAGA Period." (Settlement Agreement¶ 56.f–g.) The "Class Period" extends from October 8, 2017 to March 7, 2023, and the "PAGA Period extends from July 22, 2020 to March 7, 2023. (*Id.* ¶¶ 7, 23.) The Settlement defines the term "Workweek" as "any

workweek in which the Class Member worked at least one shift." (*Id.* ¶ 35.) Grady's counsel opine that "this is an objective, reasonable distribution formula because the value of an individual's claim will tend to increase proportionally with his or her length of service." (Konecky Decl. ¶ 27.)

In exchange, Grady and her counsel have agreed to release all of the class claims and PAGA claims alleged in the Complaint and arising during the applicable class and PAGA periods. (Settlement Agreement ¶¶ 25, 27.) The settlement class whose claims would be released under the Settlement is comprised of all current and former nonexempt employees of RCM who work or worked for RCM as a traveling nurse or similar hourly position in California during the Class and PAGA Periods. (*Id.* ¶¶ 6, 20.)

Last, Grady has agreed to an additional release and waiver that is broader than the class members' release under the Settlement because it includes "all claims, whether known or unknown" that she might have against RCM. (*Id.* ¶ 55.) Under the Settlement, 33% of Grady's proposed service award is consideration for her general release and the remaining 67% is an award for assuming the risks associated with prosecuting this case. (*Id.* ¶ 8.)

Grady now asks the Court to grant preliminary approval of the proposed settlement. (*See generally* Mot.) Specifically, she asks the Court to: (1) grant preliminary approval of the Settlement; (2) certify the proposed Class; (3) appoint Grady as Class Representative and her attorneys as Class Counsel; (4) appoint ILYM Group, Inc. as the Settlement Administrator; (5) approve the proposed Class Notice for distribution to the Class members; and (6) schedule a hearing for final approval of the settlement. (*See generally id.*)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) requires judicial review and approval of any class settlement. *See* Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified

class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval."). Preliminary approval and conditional certification are the first stage of the approval process. "To secure preliminary approval and condition[al] certification, the parties must provide sufficient information for the court to determine that it 'will likely be able to' grant final approval of the settlement under Rule 23(e)(2) and certify the class for a judgment on the settlement." *Lusk v. Five Guys Enterprises LLC* ("*Lusk II*"), 2021 WL 2210724, at *2 (E.D. Cal. June 1, 2021) (quoting Fed. R. Civ. P. 23(e)(1)(B)). A settlement may be approved only after the Court finds that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). And a class can only be certified if the Court is satisfied that it meets the prerequisites of Rule 23(a) and one of the three categories of Rule 23(b). *See* Fed. R. Civ. P. 23(a)–(b).

Under Ninth Circuit precedent, "a district court examining whether a proposed settlement comports with Rule 23(e)(2) is guided by the eight '*Churchill* factors'":

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

Kim v. Allison, 8 F.4th 1170, 1178 (9th Cir. 2021) (quoting *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)); *accord Cashon v. Encompass Health Rehab. Hosp. of Modesto, LLC*, 2022 WL 95274, at *2 (E.D. Cal. Jan. 10, 2022).

When settlement happens before formal class certification, approval is contingent not only on a thorough assessment of the *Churchill* factors, but also the district court's finding that the settlement "is not the product of collusion among the negotiating parties."

In re Bluetooth, 654 F.3d at 946–47 (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)); *accord In re Linkedin User Priv. Litig.*, 309 F.R.D. 573, 586 (N.D. Cal. 2015).

Rule 23(e), which Congress and the Supreme Court amended in 2018, also sets forth "specific factors to consider in determining whether a settlement is 'fair, reasonable, and adequate.'" *Briseño v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021); *see* Fed. R. Civ. P. 23(e)(2). In considering whether "the relief provided for the class is adequate," district courts in the Ninth Circuit must consider, in addition to the *Churchill* factors:

> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3)[.]

Fed. R. Civ. P. 23(e)(2)(C); *see Kim*, 8 F.4th at 1179; *Briseño*, 998 F.3d at 1023–24.

"At the preliminary approval stage, some of the factors cannot be fully assessed, [so] a full fairness analysis is unnecessary." *Rivera v. Western Express, Inc.*, 2020 WL 5167715, at *7 (C.D. Cal. 2020) (cleaned up). Instead, courts perform an abbreviated fairness analysis, examining whether "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." *Chen v. Chase Bank USA, N.A.*, 2020 WL 264332, at *6 (N.D. Cal. 2020) (cleaned up). "In determining whether the proposed settlement falls within the range of reasonableness, perhaps the most important factor to consider is plaintiffs' expected recovery balanced against the value of the settlement offer." *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016).

Further, because before a class is formally certified "there is an even greater potential for a breach of fiduciary duty owed the class during settlement[,]" pre-certification settlements demand "an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *In re Bluetooth*, 654 F.3d at 946 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)); *see also Briseño*, 998 F.3d at 1027–28 ("The district court . . . should give a hard look at the settlement agreement to ensure that the parties have not colluded at class members' expense."). "This more 'exacting review" is warranted 'to ensure that class representatives and their counsel do not secure a disproportionate benefit 'at the expense of the unnamed plaintiffs who class counsel had a duty to represent.'" *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 (9th Cir. 2019) (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)). District courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947.

III. DISCUSSION

A. The Extent of Discovery and the Scope of the Investigation

A plaintiff will not be able to broker a fair settlement without having been "armed with sufficient information about the case to have been able to reasonably assess its strengths and value." *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 396 (C.D. Cal. 2007). And for a court to be able to approve a settlement, "the parties must have engaged in sufficient investigation of the facts to enable the court to intelligently make an appraisal of the settlement." *Id.* (cleaned up). Therefore, a court considering a proposed settlement has

a duty "to evaluate the scope and effectiveness of the investigation plaintiffs' counsel conducted prior to reaching an agreement." *Id.* (citing *In re Mego*, 213 F.3d at 459).

Here, counsel for Grady appear to have conducted minimal discovery. According to Grady's counsel, initial sets of interrogatories and requests for production of documents were served on RCM on August 2, 2022. (Konecky Decl. ¶ 16.) What information and documents RCM provided to Grady's counsel is unclear, as they state only that "we met and conferred with Defense counsel regarding the production of informal discovery that would enable us to meaningfully evaluate potential liability and damages" and that "Defendant provided us with documents and data that assisted in evaluating the strengths and weaknesses of the claims and in preparing a liability and exposure analysis for mediation." (*Id.* ¶¶ 17–18.) The Court can only guess at what documents and data were produced here and how they were analyzed.

Further, how much information Grady's counsel were able to obtain from Grady is unclear, as she worked as a traveling nurse for RCM for less than two months—"from approximately August 30, 2020 through approximately October 17, 2020." (*Id.* ¶ 10.) And Grady's counsel do not appear to have interviewed others who worked as traveling nurses for RCM during the relevant period. Last, Grady's counsel appear to rely on RCM's "good faith and diligent review of their records"—not an independent, first-hand review of the records—as to the total number of class members and the total number of workweeks in the Class Period. (Mot. at 9; Settlement Agreement ¶ 63.) In sum, Grady's counsel have barely investigated the claims the putative class may assert against RCM, relying instead on RCM's representations about key data and documents.

A settlement that has been reached before plaintiffs' counsel "ha[ve] had the benefit of the discovery necessary to make an informed evaluation of the case and, accordingly, to strike a fair and adequate settlement" is inherently worthy of a court's skepticism. *Acosta*, 243 F.R.D. at 397; *cf. Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 113 (S.D.N.Y. 1999) ("An early settlement will find the court and class counsel less informed

than if substantial discovery had occurred. As a result, the court will find it more difficult to access the strengths and weaknesses of the parties' claims and defenses, determine the appropriate membership of the class, and consider how class members will benefit from settlement.").

When counsel "have taken few investigative steps that could reliably develop the extent of [the defendant's] liability[,]" denial of preliminary approval is appropriate. *Wilson v. J.B. Hunt Logistics, Inc.*, 2020 WL 11626082, at *3 (C.D. Cal. Nov. 13, 2020) (cleaned up). Further, in wage-and-hour class actions, putative class counsel often gather evidence of "company practices" and, for example, of "how often class members were denied breaks [or] forced to take late breaks[.]" *Id.*; *cf. Freeze v. PVH Corp.*, 2020 WL 5769085, at *6 (C.D. Cal. July 1, 2020) (granting preliminary approval when discovery included "production of all relevant policy and procedure documents, data points relevant to the potential damages, and time and payroll records for all Class Members for the entire relevant time period" as well as "interviews, background investigations, and analyses of employment records").

District courts often deny preliminary approval of wage-and-hour class settlements reached after far more extensive investigations than Grady's counsel appear to have undertaken here. *See, e.g.*, *Rivera*, 2020 WL 5167715, at *8 (denying preliminary approval where the plaintiff did not explain how analysis of "robust shift, pay and class aggregated wage data" and interviews of several class members showed that the defendant's policies encouraged missed breaks); *Wilson*, 2020 WL 11626082, at *3 ("While class counsel does appear to have conducted some interviews or depositions with class members, there is little indication of what was learned. There is no indication how many class members were interviewed or deposed, whether any class members provided information supporting Plaintiff's allegations, and whether any class members gave estimates of the frequency of the wage-and-hour violations at issue.") (cleaned up*); see also Smith v. Grundfos Pumps Mfg. Corp.*, 2021 WL 5298863, at *10 (E.D. Cal. Nov. 15,

2021), *R&R adopted sub nom. Smith v. Grundfos Pump Mfg. Corp.*, 2022 WL 446197 (E.D. Cal. Feb. 14, 2022) (recommending denial of preliminary approval when "no formal discovery was completed" and "no interviews [with anyone] other than Plaintiff were conducted"); *Millan v. Cascade Water Servs., Inc.*, 310 F.R.D. 593, 610–11 (E.D. Cal. 2015) (denying preliminary approval of a class settlement where class counsel relied heavily on information provided by the named plaintiff and defendant, assumed the number of violations, and did not present documentation regarding the extent of discovery).

Here, Grady's counsel have not stated with any specificity what documentation RCM produced and how it was sufficient to estimate RCM's practices and policies relevant to the class's claims. Nor have Grady's counsel provided any information about "how many employees were allegedly shortchanged, . . . the amount by which typical employees were allegedly shortchanged on an hourly or daily basis, and . . . the number of hours or days the employees were allegedly shortchanged." *Eddings v. DS Servs. of Am.*, 2016 WL 3390477, at *1 (N.D. Cal. 2016).

Accordingly, the extent of discovery and the scope of the investigation here favor denying preliminary approval.

B. The Adequacy of the Class Relief and the Settlement Process

"The amount offered in settlement is generally considered to be the most important consideration of any class settlement." *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1011 (E.D. Cal. 2019); *see also Bayat v. Bank of the West*, 2015 WL 1744342, at *4 (N.D. Cal. Apr. 15, 2015) ("[T]he critical component of any settlement is the amount of relief obtained by the class."). To determine whether the amount offered in settlement is fair, district courts in the Ninth Circuit must compare the settlement amount to what the parties estimate would be the maximum recovery in a successful litigation. *See Litty v. Merrill*

Lynch & Co., 2015 WL 4698475, at *9 (C.D. Cal. Apr. 27, 2015) (citing *In re Mego*, 213 F.3d at 459); *accord Carlin*, 380 F. Supp. 3d at 1011. As it performs this comparison, a district court must examine the relative strength of the plaintiff's case, since "[e]ven a fractional recovery of the possible maximum recovery amount may be fair and adequate in light of the uncertainties of trial and difficulties in proving the case." *Millan*, 310 F.R.D. at 611 (citing *In re Mego*, . 213 F.3d at 459).

To determine whether the amount offered in settlement is valued fairly, district courts—including this Court—require that motions for preliminary approval of class settlements include estimates of the defendant's maximum potential liability. *See, e.g.*, *Chen v. W. Digital Corp.*, 2020 WL 13587954, at *3 (C.D. Cal. Apr. 3, 2020) (Staton, J.) (noting that supplemental briefing was necessary when the initial motion for preliminary approval presented no estimate of the defendant's maximum potential liability); *Livingston v. MiTAC Digital Corp.*, 2019 WL 8504695, at *4 (N.D. Cal. Dec. 4, 2019) ("This Court has more than once denied motions for approval where the plaintiffs 'provide[d] no information about the maximum amount that the putative class members could have recovered if they ultimately prevailed on the merits of their claims.'") (quoting *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 969 (N.D. Cal. 2019); *K.H. v. Sec'y of Dep't of Homeland Sec.*, 2018 WL 3585142, at *5 (N.D. Cal. July 26, 2018)); *Custom Led, LLC v. eBay, Inc.*, 2013 WL 4552789, at *9 (N.D. Cal. Aug. 27, 2013) (denying preliminary approval in part because "the parties have provided the Court with no information as to the class members' potential range of recovery").

Additionally, damages calculations offered to demonstrate the fairness of a proposed settlement must be substantiated with detailed, reasoned analysis that explains how the defendant's maximum potential exposure has been calculated. *See, e.g., Louangamath v. Spectranetics Corp.*, 2021 WL 9274552, at *2 (N.D. Cal. May 19, 2021) (denying a second motion for preliminary approval partly because of significant "information gaps" in the damages analysis, which provided "equations to explain the

calculation behind the asserted values for each claim" but failed to "explain the source of many of the figures or, if they are based on assumptions, why those assumptions are reasonable"); *see also Kabasele v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 2023 WL 2918679, at *4 (E.D. Cal. Apr. 12, 2023) (explaining that calculations of maximum potential liability should represent "the factually grounded value of the claims that plaintiff could actually recover if successful in litigating the case" and denying preliminary approval in part because counsel had failed to present such estimates); *Lusk II*, 2021 WL 2210724, at *4 (E.D. Cal. June 1, 2021) (declining to find that the amount offered in settlement was fair because, even though the plaintiff had offered substantive analysis as to some of the claims brought against the defendant, the court had "considerable qualms about [his] analysis regarding the PAGA claim and the absence of analysis regarding other class claims and theories of liability that have been pleaded and are subject to release under the proposed settlement"); *Smith*, 2021 WL 5298863, at *11 (recommending denial of preliminary approval in part because "[t]he damages analysis submitted in support of Plaintiff's motion and supplemental briefing is unclear and does not explain many of the assumptions underlying counsel's calculations[,]" which were not substantiated by class member declarations filed in support of the motion).

Here, the parties have not presented any estimate of RCM's maximum potential liability. Given the minimal amount of discovery that Grady's counsel conducted before settlement, it is not even clear how a realistic assessment of the maximum potential value of the class claims against RCM could have been reached. Grady's counsel do not state whether an expert analyst was retained to examine the documents that RCM produced before mediation, or what analysis was performed on the information in those documents to estimate the amount that the class as a whole would have been able to recover from RCM if it prevailed at trial.

Not only is the Court completely in the dark as to how the value of the settlement measures against the class's maximum potential recovery here—*i.e.*, how deeply the

putative class's claims are being discounted—but it also has no information at all as to how an assessment of the strengths and weaknesses of the case warrants whatever discount has been applied. *Cf. Eddings*, 2016 WL 3390477, at *1 ("A party moving for preliminary approval should cite case law and apply it to explain why each claim or defense in the case is more or less likely to prove meritorious."). Without a "factual and evidentiary foundation" for how case-specific risk factors warrant the specific reduction from the maximum exposure that has been negotiated as the settlement consideration here, the Court cannot assess the settlement's fairness. *Smith*, 2021 WL 5298863, at *11; *see also Cotter*, 176 F. Supp. 3d at 935 ("[I]t may be reasonable to settle a weak claim for relatively little, while it is not reasonable to settle a strong claim for the same amount.").

With only generic recitations of the risks that are inherent and common to all wage-and-hour class actions, "the Court cannot determine whether [the applied] discounts are appropriate and the settlement provides adequate value to the class." *Smith*, 2021 WL 5298863, at *12. In other words, the Court cannot, on the information and evidence before it, decide that recovery under the settlement agreement is reasonable or "within the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

In light of the foregoing, the Court is unable conclude that negotiations, even if overseen by an experienced mediator, were "serious, informed, and non-collusive." *Wilson*, 2020 WL 11626082, at *4 (cleaned up); *see also Fraser v. Asus Computer Int'l, WHA*, 2012 WL 6680142, at *1, *5–6 (N.D. Cal. Dec. 21, 2012) (denying preliminary approval to a proposed settlement because, even though the parties had "engaged in mediation sessions over several months" with a magistrate judge, the record was inadequate "to determine whether the benefit under the proposed settlement to class members who submit a valid and timely claim form is fair and reasonable to those class members").

First, "collusion" in class action settlement negotiations means more than an agreement to disregard absent class members' rights—it goes to structural problems that are inherent in such negotiations. *See Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) ("Incentives inhere in class-action settlement negotiations that can . . . result in a decree in which the rights of class members . . . may not be given due regard by the negotiating parties.") (cleaned up); *see also* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 962–65 (2014) (arguing that the "collusion" problem is structural and refers to defendants' ability to exploit the weak bargaining position of plaintiff's counsel—not whether there is "a conspiracy to disserve the class"). Here, the timing of the settlement early in the litigation along with the limited scope of the investigation and minimal discovery raise a substantial concern that counsel may have held a weak bargaining position with little leverage to secure meaningful relief for the class.

That the settlement was negotiated with a mediator's assistance is not enough to allay this concern. An experienced and impartial mediator's supervision of negotiations is not a guarantee of settlement fairness and adequacy, as mediators may focus on what terms are most likely to prove acceptable to both sides rather than what is a fair and adequate outcome. *See, e.g.*, *In re Conagra Foods, Inc.*, 2021 WL 8153648, at *5, *9 (C.D. Cal. Dec. 22, 2021) (denying approval after the parties had accepted a magistrate judge's court proposal following extensive mediation efforts because the magistrate judge explained that the proposal represented his evaluation of what terms the parties were likely to accept rather than what he thought was "the 'right' outcome"); *Wilson*, 2020 WL 11626082, at *2 ("While courts often look to participation in mediation as evidence that negotiations were non-collusive, a mediated settlement is not guaranteed to serve the best interests of class members.") (cleaned up).

For all the Court knows, the settlement value here may represent "an overly aggressive discounting of the claims in this case[,]" which "raises concerns about whether

[Grady]'s counsel adequately represented the interests of the absent putative class members in settlement negotiations." *Murray v. Scelzi Enterprises,* 2019 WL 6045146, at *13 (E.D. Cal. Nov. 15, 2019), *R&R adopted*, 2019 WL 6840411 (E.D. Cal. Dec. 16, 2019). Accordingly, Grady's counsel's failure to provide adequate information about how the settlement valuation was reached and how the maximum value of the class's claims has been discounted weighs strongly in favor of denying preliminary approval.

C. The Proposed Attorney's Fees Award

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). At the preliminary approval stage, district courts "should assess the reasonableness of the attorney's fee award because an inordinate fee may be the sign that counsel sold out the class's claims at a low value in return for the high fee." *Lusk v. Five Guys Enterprises LLC* ("*Lusk I*"), 2019 WL 7048791, at *8 (E.D. Cal. Dec. 23, 2019) (quoting NEWBERG ON CLASS ACTIONS ("NEWBERG") § 13:54 (5th ed.)). "A defendant's willingness to pay high fees may also indicate that the relief in the settlement undervalues the class's claims, because otherwise it would not be in the defendant's interest to pay that much." *Id.* (quoting NEWBERG § 13:54). And where "fees are to be paid from a common fund, the relationship between the class members and class counsel 'turns adversarial.'" *Id.* (quoting *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994)). Therefore, the Court must protect the interests of the absent class members in a fiduciary-type role when "evaluating a request for an award of attorney fees from the common fund." *Id.* (quoting *In re Wash. Pub. Power Supply*, 19 F.3d at 1302); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 895 F.3d 597, 610 (9th Cir. 2018) (observing that "[a]n entire jurisprudence has grown up around the need to protect class members—who often lack the ability, positioning, or incentive to monitor

negotiations between class counsel and settling defendants—from the danger of a collusive settlement" and "we impose upon district courts a fiduciary duty to look after the interests of absent class members") (cleaned up); *Rodriguez v. Disner* ("*Disner*"), 688 F.3d 645, 655 (9th Cir. 2012) (stating that "the district court has a special duty to protect the interests of the class and must act with jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is") (cleaned up).

Here, the proposed attorneys' fees award is 33.3% of the $1,600,000 gross settlement amount: $533,333.33.[1] (Mot. at 7, 17 n.1.) But the benchmark for fees in the Ninth Circuit is 25% of the common fund. *See In re Bluetooth*, 654 F.3d at 942. The proposed fees award is therefore problematic as it represents a substantial upward departure from the standard benchmark without any justification. And the requested amount, $533,333.33, is shockingly high given that counsel have failed to demonstrate that they investigated the class's claims and there has been no significant discovery or motions practice in the case.

When a matter settles "prior to almost any discovery or law and motion practice" and plaintiffs' counsel request "above-benchmark compensation without explanation," that is "another basis for the Court's concern that the proposed settlement was arrived at without due consideration for the interests of absent class members." *Smith*, 2021 WL 5298863, at *14; *Wilson*, 2020 WL 11626082, at *6 (noting that "the unusually high attorney's fee in this case raises questions about whether the settlement as a whole serves the interests of class members"). Even a request for an award of fees consistent with the standard benchmark raises concerns when a case settles very early. *See, e.g.*, *Guthrie v. ITS Logistics, LLC*, 2023 WL 2784804 (E.D. Cal. Apr. 5, 2023) (recommending denial of preliminary approval when a case settled "in a private mediation, before formal discovery or motion practice" and counsel requested "the benchmark amount of fees, without

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[1] The value of the proposed fees is two thirds that of the estimated net settlement amount to be distributed to the class members: $805,616.67. (*See id.* at 17.)

specific fee and cost information" in spite of a "heavily discounted recovery to the class"). Combined with the Court's concerns about the scope of counsel's investigation and the lack of information as to whether the settlement amount has been properly valued, the exceptionally high fees award that Grady's counsel have proposed is troubling.

In light of the foregoing, the Court finds that Grady's counsel's proposed attorneys' fees award is unreasonable and that this is another factor that weighs in favor of denying preliminary approval.

D. Preferential Treatment in the Proposed Service Award to Grady

Service awards are "fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.* ("*Rodriguez*"), 563 F.3d 948, 958 (9th Cir. 2009) (cleaned up). Courts must "evaluate [class representatives'] awards individually, using 'relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation." *Staton*, 327 F.3d at 977. These factors should justify a proposed service award considered in terms of "the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015) (quoting *id.* at 977).

Rule 23 requires courts to consider whether a settlement "proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). In evaluating the equitable treatment of class members, courts consider whether the proposal "improperly grant[s] preferential treatment to class representatives or segments of the class." *In re Tableware*, 484 F. Supp. 2d at 1079.

Excessive payments to named class members can indicate that an agreement "was reached through fraud or collusion." *Staton*, 327 F.3d at 975. Further, "[i]f class

representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard." *Id.* (quoting *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D.N.Y. 1989)). That is, excessive service awards "may put the class representative in a conflict with the class and present a 'considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement for themselves and then trading on that leverage in the course of negotiations.'" *Rodriguez*, 563 F.3d at 960 (quoting *Staton*, 327 F.3d at 976–77).

Here, the proposed settlement would give Grady a service award of up to $15,000, which represents just under 1% of the gross settlement fund of $1,600,000. (Mot. at 7, 17 n.1.) By contrast, the average settlement share for each class member is estimated at $567. (*Id.* at 17.) Grady states that she intends to demonstrate that the $15,000 figure is reasonable by a separate motion to be heard during the final fairness hearing and asserts that "service awards of this size or even larger are common in class action cases." (*Id.* at 20, quoting *Andrews v. Plains All Am. Pipeline L.P.*, 2022 WL 4453864, at *5 (C.D. Cal. Sept. 20, 2022).)

Service awards of $15,000 are certainly not common in wage-and-hour class actions, especially those that settle at an early stage of the litigation. The case on which Grady relies to claim that such an award is within normal bounds is not comparable to this case: there, the parties had "engaged in almost seven years of hard-fought litigation in order to arrive at the $230 million Settlement[.]" *Andrews*, 2022 WL 4453864, at *1. There, "the parties conducted extensive discovery, which included among other things exchanging more than 360,000 documents, disclosing 17 experts and producing 52 expert reports, and taking over 100 depositions." *Id.* The plaintiffs there had also successfully moved for certification of two classes and defeated numerous attempts by the defendants to decertify the classes. *Id.* Here, by contrast, the gross settlement value is $1,600,000 and

the parties have not engaged in any substantial discovery or motions practice. The circumstances of this litigation do not justify a $15,000 service award.

Grady's proposed service award here indisputably exceeds typical awards in absolute terms. For reference, in a 2016 order granting final approval, this Court reduced a request for a $10,000 service award in a wage-and-hour class settlement to $6,000. *Ruiz v. JCP Logistics, Inc.*, 2016 WL 6156212, at *11–12 (C.D. Cal. Aug. 12, 2016) (Staton, J.). There, the Court observed that another court had awarded enhancement payments of $7,500 "when individual claimants receive[d] an average award of at least $4,000 in a wage and hour class action settlement," and at least one court "has determined that a $10,000 enhancement award is 'on the high end of the acceptable range' for a class action settlement that totaled $6.9 million for a class of approximately 2,752 members." *Ruiz v. JCP Logistics, Inc.*, 2016 WL 6156212, at *11–12 (C.D. Cal. Aug. 12, 2016) (Staton, J.) (first citing *Morales v. Stevco, Inc.*, 2012 WL 1790371, at *14, 16–19 (E.D. Cal. May 16, 2012); and then citing *Chu v. Wells Fargo Invs., LLC*, 2011 WL 672645, at *4, 5 (N.D. Cal. Feb. 16, 2011)). More recently, other federal district courts in California have similarly found that service awards substantially smaller than $15,000 were excessive in comparable wage-and-hour class action settlements. *See, e.g.*, *Wilson*, 2020 WL 11626082, at *4 (finding that the sole named plaintiff's proposed $7,500 service award exceeded typical awards in comparable wage-and-hour class actions, which ranged between $2,000 and $5,000); *see also Manzo v. McDonald's Restaurants of California, Inc.*, 2022 WL 4586236, at *13 (E.D. Cal. Sept. 29, 2022) (finding that a $10,000 award was excessive when there was no evidence that the plaintiff "contributed a significant amount of time" to the matter because she "was not deposed, did not have to respond to discovery, and did not appear for the final hearing" and reducing the award to $6,000); *Louangamath*, 2021 WL 9274552, at *5 (noting that, "absent compelling circumstances, [the Court] is unlikely to look favorably on an award greater than $5,000"). Thus, Grady's proposed service award plainly exceeds the norm in absolute terms.

Additionally, "concerns over potential conflicts may be especially pressing where . . . the proposed service fees greatly exceed the payments to absent class members." *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013) (cleaned up). When the putative class representative's proposed award is disproportionate to absent class members' recovery, its "disproportionality may 'eliminate a critical check on the fairness of the settlement for the class as a whole.'" *Chavez v. Lumber Liquidators*, 2015 WL 2174168, at *4 (N.D. Cal. May 8, 2015) (quoting *Staton*, 327 F.3d at 977). And, as this Court has noted previously, "significant disparity" between proposed incentive awards and other class members' recoveries "seriously jeopardizes the adequacy of [class representatives] to represent absent class members in settling their claims" even when the proposed award figure is a maximum subject to court approval. *Wallace v. Countrywide Home Loans, Inc.*, 2014 WL 5819870, at *4–5 (C.D. Cal. Apr. 14, 2014) (Staton, J.); *accord Chavez*, 2015 WL 2174168, at *4–5.

Here, Grady's proposed service award exceeds the average class member's recovery of $567 by a staggering factor of 26.5. Other courts have found proposed service awards excessive in employment class actions where they exceeded average class member recovery by far smaller factors. *See, e.g.*, *Wilson*, 2020 WL 11626082, at *4 (finding that the proposed service award of $7,500 was excessive when it "would be more than ten times the average class member's recovery of only $577"); *see also Gaffney v. City of Santa Clara,* 2020 WL 12182761, at *6 (N.D. Cal. Apr. 13, 2020) (denying preliminary approval in a FLSA collective action in part due to "concern regarding the discrepancy in liquidated damages the Settlement would pay to named Plaintiffs who had signed the Union Releases (100 percent of their overtime payment) versus putative Plaintiffs who had signed the same releases (20 percent of their overtime payment)"); *McDonald v. CP OpCo, LLC*, 2019 WL 2088421, at *8 (N.D. Cal. May 13, 2019) (finding, at the final approval stage of a $3 million settlement, that a $15,000 incentive award was outsized at 7.5 times the recovery of average class member, and reducing the award to $10,000); *Willner v.*

Manpower Inc., 2015 WL 3863625, at *9 (N.D. Cal. June 22, 2015) (rejecting a proposed $11,000 award for lack of proportionality, where the average expected payment to each class member was $605.02 and the maximum recovery for an individual class member was approximately $4,105.33, and awarding instead $6,000); *West v. Circle K Stores, Inc.*, 2006 WL 1652598, at *12 (E.D. Cal. June 13, 2006) (granting preliminary approval but expressing concern that proposed service awards of $15,000, which were "roughly six times the amount [class representatives] would likely receive as ordinary class members pursuant to the terms of their own settlement, raise[] the specter that the named plaintiffs have been 'bought out' to circumvent a more costly class action litigation").

Last, the fact that 33% of Grady's proposed service award is in consideration of the general release of any claims she might bring against RCM, which is more comprehensive than the class release, exacerbates the Court's concerns. (*See* Mot. at 7.) As another district court has explained, a named plaintiff's release of individual claims not shared with the class

> is not a proper basis for a service award, which comes from common fund monies that belong to the entire class. A service award is not intended to serve as consideration for the release of additional claims, but rather 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."

Louangamath, 2021 WL 9274552, at *5 (quoting *Rodriguez*, 563 F.3d at 958–59). One third of Grady's putative proposed service award is properly seen as consideration for a side deal between Grady and RCM, rather than a service award. Grady's agreement to release a broader set of claims she might bring against RCM in exchange of an unusually high service award therefore deepens the Court's concern that her interests are not properly aligned with the interests of absent class members.

In light of the foregoing, the Court concludes that the proposed service award gives Grady preferential treatment and raises a substantial risk that she is taking "a large personal payoff in exchange for agreeing to a small settlement for absent class members." *Wilson*, 2020 WL 11626082, at *5. The disproportionality of Grady's proposed service award compounds the Court's concerns about the adequacy of the settlement here, even if it does not show that Grady is irreparably inadequate or that a service award would not be appropriate in this case. *Cf. Chavez*, 2015 WL 2174168, at *5 (denying preliminary approval partly due to a disproportionate service award request without "suggesting" that the named plaintiff was "irretrievably inadequate" or that she would not be entitled to a proportionate award in the event a fair settlement received approval). Accordingly, the Court finds that Grady's proposed service award weighs in favor of denying preliminary approval.

E. The Fairness of the Distribution Formula

In determining whether a proposed settlement treats class members equitably relative to each other, courts also consider whether the method of distribution or allocation of the settlement proceeds is fair, reasonable, and adequate. *See, e.g.*, *Theodore Broomfield v. Craft Brew All., Inc.*, 2020 WL 1972505, at *9 (N.D. Cal. Feb. 5, 2020) (finding that the proposed distribution method was equitable); *Alvarez v. 9021PHO Fashion Square LLC*, 2016 WL 11757836, at *6 (C.D. Cal. Jan. 19, 2016) (finding that "the proposed distribution of settlement funds does not appear to grant undue preferential treatment to any class members"). "The purpose of developing a plan of allocation is to devise a method that permits the equitable distribution of limited settlement proceeds to eligible class members." *McHorney v. GameStop Corp.*, 2010 WL 11549399, at *4 (C.D. Cal. June 17, 2010).

"It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1045 (N.D. Cal. 2008); *see also McHorney*, 2010 WL 11549399, at *4 (noting that the "the adequacy of an allocation plan turns on whether counsel ha[ve] properly apprised [themselves] of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information"). To determine reasonableness and fairness, courts should evaluate, *inter alia*, "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *Lusk II*, at *9 (quoting Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note to 2018 amendment).

Here, the proposed distribution formula will allocate to each participating class member individual shares of the settlement proportional to the number of "Workweeks" each of them worked during the relevant periods. (Settlement Agreement¶ 56.f–g.) As defined in the Settlement, a "Workweek" is "any workweek in which the Class Member worked at least one shift." (*Id.* ¶ 35.) According to Grady's counsel, "this is an objective, reasonable distribution formula because the value of an individual's claim will tend to increase proportionally with his or her length of service." (Konecky Decl. ¶ 27.)

The Court has concerns about whether the proposed distribution formula adequately compensates participating class members for their injuries, as it may overlook significant differences between class members. For example, a traveling nurse who worked four shifts spread out over two weeks would be entitled to the same compensation as a traveling nurse who worked ten shifts within two weeks. Compensating participating class members based on "workweeks" as defined in the Settlement appears likely to overcompensate certain class members and undercompensate others. Thus, it is not clear, and Grady's counsel have not sufficiently explained, why the number of "Workweeks" each class member worked during the relevant periods is an adequate proxy for the extent to which he

or she was shortchanged. *Cf. McHorney*, 2010 WL 11549399, at *4 ("A plan of allocation that apportions the settlement fund among class members based on the extent of their injuries is reasonable, but the Parties have failed to adequately explain why the amount of time a person held a particular job title is a rational proxy for the amount of unreimbursed mileage expenses.")

The Court is also concerned that the proposed distribution formula is "equal"—but not "equitable"—insofar as it fails to "account for apparent distinctions amongst the class members based on the class claims." *Lusk II*, 2021 WL 2210724, at *9 (noting reservations about a similar distribution formula based on the number of weeks each class member had worked during the class period in the context of similar class claims). For example, the class claims include meal period and rest period claims, and "class members who worked longer shifts . . . could have disproportionately endured the statutory violations" that the Settlement seeks in part to compensate. *Id.* This alone raises a significant risk that the proposed distribution formula is too simple to compensate participating class members adequately according to their respective injuries.

Further, the class claims include waiting time penalties based on RCM's failure to pay certain class members all wages owed upon separation under California Labor Code §§ 201–3. (*See* Complaint ¶¶ 86–89.) But the putative class that Grady seeks to certify includes current employees who cannot bring such claims against RCM. (*See* Mot. at 5–6.) As the Settlement would extinguish all class claims and the proposed distribution formula treats current and former RCM employees equally, former employees with potential waiting time claims appear to receive inequitable treatment here: they give up their extra claims without a corresponding extra benefit. *Cf. Lusk II*, 2021 WL 2210724, at *9 (raising equitable treatment concerns where it was clear "more than 40% of the approximately 2,206 putative class members did not have a termination event during the class period that would entitle them to recovery under Labor Code § 203"). This too suggests that the proposed distribution formula does not "apportion[] the settlement fund

among class members based on the extent of their injuries." *McHorney*, 2010 WL 11549399, at *4. Thus, the Court is not persuaded that it would likely grant final approval to a settlement that distributes funds to participating class members based on this formula.

Recognizing significant class member differences would require a distribution formula more complex than the one proposed here. But added complexity may well be warranted based on virtually certain material differences between various class members and to ensure class members' equitable treatment. If a distribution formula that accounts for class member differences adequately would be unworkable or too costly to administer, then Grady's counsel will have to explain to the Court how the simple formula proposed provides equitable compensation in spite of material differences in class members' injuries. *Cf. Lusk II*, 2021 WL 2210724, at *9 (requiring such an explanation under similar circumstances).

Accordingly, although the Court does not at this time reject the proposed distribution formula, the significant risk that it fails to treat participating class members equitably weighs in favor of denying preliminary approval.

F. Weighing of the Factors

Considering all of the factors discussed above, the Court is unlikely to find the proposed settlement fair, reasonable, and adequate at a final fairness hearing. *See* Fed. R. Civ. P. 23(e)(2). The Court need not weigh the remaining *Churchill* factors and unaddressed Rule 23(e)(2)(C) factors when its consideration of a number of factors is enough to show that preliminary approval of the settlement would be improvident. *See, e.g.*, *In re Conagra Foods, Inc.*, 2021 WL 8153648, at *9 n.3 (observing that, having concluded that "the relief provided for the class was not fair, reasonable, and adequate given the terms of the proposed attorney fee award[,]" analyzing "the other factors in Rule 23(e)(2)(C), namely the costs, risks, and delay of trial and appeal, the effectiveness of any

proposed method of distributing relief to the class, including the method of processing class-member claims, or any agreement required to be identified under Rule 23(e)(3)" was unnecessary).

Grady's counsel have not shown that they adequately investigated the putative class's claims here, and settlement negotiations do not appear to have been informed by a properly supported and realistic examination of RCM's potential exposure. The record before the Court compels the conclusion that the settlement was reached without sufficient information, and there are subtle signs that neither Grady's counsel nor Grady have adequately protected absent class members' interests. Because the Court has ample grounds to be concerned that self-interest of the representative plaintiff and her counsel weighed too heavily in the negotiations, it denies the Motion.

G. Class Certification

When a district court denies preliminary approval of a class action settlement, it may decline to decide whether the proposed settlement class may be properly certified under Rule 23(a) and 23(b)(3). *See, e.g.*, *Shin v. Plantronics, Inc.*, 2019 WL 2515827, at *7 (N.D. Cal. June 17, 2019); *accord Fisher v. Osmose Utilities Servs.*, 2021 WL 1259731, at *9 (E.D. Cal. Apr. 5, 2021), *R&R adopted*, 2021 WL 3124602 (E.D. Cal. July 23, 2021); *Louangamath*, 2021 WL 9274552, at *5; *Livingston*, 2019 WL 8504695, at *4 n.2. Therefore, the Court does not decide at this time whether class certification would be appropriate in this case.

The parties are advised, however, that "[w]hen parties seek class certification only for the purposes of settlement," district courts "must pay undiluted, even heightened, attention to class certification requirements[.]" *Zwicky v. Diamond Resorts Mgmt. Inc.*, 343 F.R.D. 101, 113 (D. Ariz. 2022) (quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Thus, a district court retains "its duty to conduct its own inquiry" as to

whether class certification is appropriate "despite the parties' agreement that a class exists for the purposes of settlement" and the absence of "adversarial briefs on the class certification issue." *Id.* (citing *Mathein v. Pier 1 Imports (U.S.), Inc.*, 2017 WL 6344447, at *7 (E.D. Cal. Dec. 12, 2017)). Accordingly, any renewed motion for preliminary approval must show that the proposed class in fact meets the Rule 23(a) and 23(b)(3) requirements—generic recitations professing conformity with Rule 23 will not do.

IV. CONCLUSION

For the above reasons, Grady's Motion is DENIED. Any renewed motion for preliminary approval or motion for class certification is due to be filed within sixty (60) days from the issuance of this Order.

DATED: May 2, 2023

HON. JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE