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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

NADINE RUSSELL, Plaintiff and Respondent, v. EF INTERNATIONAL LANGUAGE SCHOOLS, INC., Defendant and Respondent, ANDREA JESSE et al. Objectors and Appellants.	B263612 (Los Angeles County Super. Ct. No. BC481435)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dalila C. Lyons, Judge. We affirm.

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Adams | Nye | Becht, David J. Becht, Michael Sachs, and Mythily Sivarajah for Objectors and Appellants Andrea Jesse et al.

Seyfarth Shaw, Christian J. Rowley for Defendant and Respondent EF International Language Schools, Inc.

The Spivak Law Firm, David Spivak, and Louis Benowitz for Plaintiff and Respondent Nadine Russell.

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Plaintiff Nadine Russell filed a class action against her former employer, defendant EF International Schools, Inc., alleging violations of wage and hour laws. After plaintiff and defendant settled, 11 members of the class objected to the settlement. The court overruled the objections and approved the settlement. Nine of the objectors appealed.[1] Because the trial court's approval of the settlement was not an abuse of discretion, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

Defendant employs teachers who provide English language instruction to foreign students. Most of its classes are scheduled to last 80 minutes.

Teachers are paid a combination of a piece work rate and an hourly rate. Piece work is calculated by multiplying a pay rate (usually $28) by the number of classes the teacher teaches during the pay period. Although defendant allocates 25 percent of this number to class preparation and 75 percent to classroom instruction, the rate is unrelated to the amount of time the teacher actually spends preparing for and teaching a class; a teacher who spends one hour preparing is paid the same as a teacher who spends no time preparing for the same class.

The hourly rate component of the teachers' pay is for "administrative" work, which is calculated (in part) by multiplying an hourly rate (usually $11) by a certain amount of time assigned to particular types of work. For some tasks, such as grading student work, the amount of time is calculated automatically based upon the number of classes taught and is, therefore, unrelated to the actual time, if any, the teacher spends on the task. Each teacher is also automatically credited with a fixed amount of 25 minutes at the hourly rate for administrative time per week to compensate for arriving at the classroom five minutes before class begins (even when the teacher does not arrive early or does not teach a class every day). In addition, teachers are paid the administrative pay rate for time doing other activities, such as attending teacher meetings and lectures.

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[1] Appellants are Andrea Jesse, Ruben Adery, Reid Allison, Ceana Botts, Galin Franklin, Cara Phillips, Tesla Schaeffer, Sandy Teixeira, and Stephen Zannis.

In addition to the administrative time that is automatically calculated, teachers can receive the administrative pay rate for other work they perform by specifying on timesheets the work performed and the amount of time.

Teachers are also paid for rest breaks, calculated at the rate of 3.33 minutes of break time for each 80-minute class taught—the equivalent of 10 minutes per four hours of class time.

Defendant's employee handbook provides that employees are entitled to overtime pay at the rate of one and one-half the regular pay rate for work in excess of either eight hours in one day or 40 hours in one week.

Defendant's computerized timesheets do not automatically calculate employee overtime. According to defendant, because most teachers are employed part-time, it is unusual for a teacher to work overtime. Defendant asserts that it does, however, pay overtime based on "a careful hands-on review of timesheets." According to defendant's payroll coordinator's declaration, "it is theoretically possible that very rarely, an employee could work a small amount of overtime and [defendant] would not catch it."

On March 23, 2012, plaintiff filed a putative class action complaint against defendant. The complaint alleged the following causes of action: (1) Failure to pay employees for all hours worked under California law (Lab. Code, §§ 510, 1194, 1194.2, 1198)[2]; (2) Waiting time penalties (§§ 201-203); (3) Failure to provide accurate wage statements (§ 226); (4) Failure to indemnify (§§ 2800-2802); (5) Unfair Competition (Bus. & Prof. Code, § 17200 et seq.); and (6) Civil penalties under the Private Attorneys General Act of 2004 (§ 2698 et seq.) (PAGA). The alleged class consisted of defendant's "hourly teachers" employed since March 23, 2008. Defendant answered the complaint on May 23, 2012.

Between the filing of the complaint and a mediation session held on February 1, 2013, plaintiff propounded written interrogatories, requests for admissions, and requests

[2] Unless otherwise indicated, all statutory references are to the Labor Code.

for production of documents. Defendant served similar discovery requests and took plaintiff's deposition. Plaintiff's counsel reviewed the documents defendant produced, including "sample time and payroll records for approximately 20% of the [class]." Plaintiff did not take any depositions. In answer to the objectors' contention that plaintiff's counsel did not communicate with other class members, plaintiff stated that she herself "contact[ed] absent class members to gather information" in connection with her role as lead plaintiff.

During mediation, the parties "reached an agreement in principle" to settle the matter. At that time, the parties expected that there were about 610 class members.

About 11 months later, in January 2014, the parties executed a written settlement agreement. Under the agreement, defendant agreed to pay a maximum amount of $575,000, up to one-third of which would be paid to plaintiff's attorneys. The agreement allocated approximately $18,000 for litigation costs and claims administration expenses. Plaintiff would receive a "reasonable [e]nhancement [a]ward" of $15,000, and $1,000 was designated as PAGA penalties. The total amount available to the class was approximately $349,000. Each class member who submitted a valid claim would receive a pro rata share of the available settlement amount based upon his or her gross wages during the class period.

As part of the settlement, the parties stipulated to the filing of a first amended complaint. The new pleading re-alleged the original six causes of action and added two more: (1) Failure to pay employees for all hours worked under the Fair Labor Standards Act (29 U.S.C. § 201 et seq.), and (2) Failure to provide meal and rest periods (§§ 226.7, 512, 1198). The settlement agreement included a general release by the class members of claims related to the allegations asserted in the first amended complaint. The release applies to all such claims "arising at any point prior to" the court's "preliminary approval of the Settlement."

On January 22, 2014, plaintiff filed a motion for preliminary approval of the settlement. In support of the motion, plaintiff's counsel submitted a declaration of his estimates of defendant's "liability exposure." According to these estimates,

defendant was potentially liable for $275,177.14 in unpaid wages and related damages or, if overtime pay is included, $668,671.24. Potential liability for rest period violations was $439,618.43, plus an equal amount for meal period violations. Plaintiff's counsel estimated that civil penalties due under PAGA and for waiting time and wage statement violations could equal approximately $5,417,213. Defendant's total estimated exposure was between $6,880,429.58 and $7,394,464.48. According to plaintiff's counsel, the civil penalties, which comprised approximately 75 percent of the total exposure, were "purely derivative of the wage claims in this case."

Plaintiff's counsel also described "significant risks" to continuing the litigation, which supported "a downward departure" from defendant's estimated exposure. These included: (1) The possibility that plaintiff might not be able to certify the class, or maintain certification through trial; (2) The "core wage claims" were dependent on unsettled law and subject to individualized defenses that may defeat class certification; (3) The factual basis for the rest break and meal break claims was weak; (4) The claims for civil penalties might be difficult to prove and were subject to "good faith" defenses; and (5) Even if plaintiff was successful, the court could exercise its discretion to reduce any PAGA penalties.

While the motion for preliminary approval was pending, Andrea Jesse filed a putative class action complaint against defendant in San Francisco Superior Court alleging violations of wage and hour laws. At that time, neither Jesse nor her counsel, Michael Sachs, were aware of plaintiff's action.

On March 21, 2014, the court granted preliminary approval of the settlement. Notice of the settlement, which provided class members with the opportunity to opt out of the class and to object to the settlement, was sent to 503 class members in May 2014. Approximately 67 percent of the class—336 members—submitted claims. Based on the claims made, the payments would range from $7.48 to $6,144.44, and the average settlement payment would be $879.93.

One person opted out of the class and 11 class members, including Jesse, objected to the settlement. The objectors, whom Sachs represented, objected to the settlement

on several grounds, including: (1) The settlement amount was unreasonably low given the relative risks and potential recovery; (2) Plaintiff failed to seek damages based upon unpaid wages, overtime violations, and rest period violations; (3) The one-year delay between the mediated settlement and the court's approval of the settlement resulted in the release of claims that existed during that year without any additional compensation; and (4) The amount allocated for attorneys' fees is unsupported by lodestar information or a statement as to how fees are split between counsel.

Each objector filed a declaration. Six of the 11 objectors did not claim that they were not paid for work they performed or that they worked overtime or without a required break. Instead, they stated, in essence, the declarant's address and dates of employment with defendant, and that the declarant is a member of the class, had not opted out of the class, and objected to the settlement. Two of the objectors stated that they worked overtime without being paid overtime pay on "several occasions"; two stated that they "routinely" worked overtime without receiving overtime pay; and one, Jesse, stated that she "frequently worked more than 8 hours in a day, yet . . . never received overtime pay." None stated that they had requested to be paid overtime.

Plaintiff, with defendant's support, filed a response to the objections and moved for final approval of the settlement.

After a hearing, the court overruled the objections and approved the settlement, finding that it was entered into in good faith and was "fair, reasonable and adequate." After judgment was entered, the objectors timely appealed.

DISCUSSION

I. *General Principles And Standard Of Review*

"The settlement of a class action requires court approval to prevent fraud, collusion, or unfairness to the class." (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1117.) In deciding whether to approve a class action settlement, the trial court must "ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing

the litigation." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129 (*Kullar*).) Although "[d]ue regard should be given to what is otherwise a private consensual agreement between the parties" (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 (*Dunk*)), the court " 'has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement.' " (*Kullar*, *supra*, 168 Cal.App.4th at p. 129.)

In determining whether to approve a settlement, the court employs a presumption of fairness when "(1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Dunk*, *supra*, 48 Cal.App.4th at p. 1802.) Courts have cautioned, however, that "this is only an initial presumption; a trial court's approval of a class action settlement will be vacated if the court 'is not provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise.' " (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408 (*Munoz*); see also *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 801 (*Clark*) [the trial court must have information necessary "for 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.' "].)

Factors for evaluating the fairness and reasonableness of a settlement include: "[T]he strength of plaintiff['s] case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through 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." (*Dunk*, *supra*, 48 Cal.App.4th at p. 1801.) Some courts have stated that the " ' "most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." ' " (*Kullar*, *supra*, 168 Cal.App.4th at p. 130; see also *Munoz*, *supra*,

186 Cal.App.4th at pp. 407-408.) "The list of factors is not exhaustive and should be tailored to each case." (*Dunk*, *supra*, 48 Cal.App.4th at p. 1801.)

Trial courts have broad discretion to determine whether the settlement is fair and reasonable. (*Clark*, *supra*, 175 Cal.App.4th at p. 799.) The reviewing court's "task is not to make an independent determination whether the terms of the settlement are fair, adequate and reasonable, but to determine 'only whether the trial court acted within its discretion.' " (*Kullar*, *supra*, 168 Cal.App.4th at pp. 127-128.)

II. *Presumption Of Reasonableness*

Appellants contend that the respondents are not entitled to a presumption of fairness. They do not dispute the existence of two of the four facts supporting the presumption—that the parties reached the settlement through arm's-length bargaining and that counsel is experienced in similar litigation. As for the percentage of objectors, appellants state in a footnote that "the percentage of objectors was not small," but do not elaborate. To the contrary, the fact that only one person opted out of the settlement and only 11 out of 503 class members objected indicates a generally favorable view of the settlement by the class. (See, e.g., *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152-1153 (*7-Eleven*) [proposed settlement was "overwhelmingly positive" where 80 out of 5,454 class members opted out and nine objected].)

The focus of appellants' challenge to the presumption is the extent of the parties' investigation and discovery. It was, they contend, insufficient to allow counsel and the court to act intelligently. In particular, they point to the fact that plaintiff did not take any depositions. Extensive discovery, however, is not a prerequisite to the approval of a settlement. (See *7-Eleven*, *supra*, 85 Cal.App.4th at p. 1150 [" ' "formal discovery is not a necessary ticket to the bargaining table" where the parties had sufficient information to make an informed decision about settlement' "].) The parties' investigation and discovery is sufficient if it allows for an "understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." (*Kullar*, *supra*, 168 Cal.App.4th at p. 120.)

Here, at the time of the motion for final approval of the settlement, the court had: the complaint; data concerning the size of the class, average hours worked per week and per day, and regular and overtime rates of pay; calculations and estimates of defendant's potential exposure from both plaintiff and the objectors; the objectors' critique of plaintiff's estimates; plaintiff's counsel's explanation of potential issues concerning class certification and the legal and factual merits of the claims; defendant's employee handbook; copious teacher schedules and timesheets; the formulas defendant used to calculate teacher pay; defendant's payroll records; declarations from plaintiff and each of the objectors; declarations from defendant's payroll director and defendant's director of U.S. operations for the west coast, who provided an explanation of defendant's two-part system for paying teachers and its method for determining when to pay overtime compensation; and the settlement agreement. In light of this information, we conclude that the record before the trial court was sufficient to allow counsel and the court to "act intelligently" in evaluating the settlement. A presumption of fairness is therefore appropriate in this case.

III. *Overtime Claim*

Appellants argue that plaintiff "failed to include any . . . damages [for unpaid overtime]." Initially, we observe that, with the exception of specifying $1,000 for PAGA penalties, the settlement agreement does not allocate the settlement payment among the various claims. The agreement provides for payment from a single settlement fund, distributed pro rata to class members based upon their gross wages, in exchange for a release of all claims alleged in the first amended complaint. In this light, it is somewhat misleading to speak in terms of including or not including "damages," or even payments, for any particular claim. Nevertheless, we understand appellants' argument that plaintiff "failed to include . . . damages" for unpaid overtime to mean that, in negotiating the settlement, plaintiff failed to assert, or perhaps abandoned, the claim for unpaid overtime.

In asserting the merits of the overtime claim, appellants point to two timesheets where a teacher indicated that he or she taught five or more 80-minute classes on particular days, and assert that there are many others. Appellants further assert that,

when time for preparation, grading, and administrative work is added to the class time for days when they taught five or six classes, the teacher worked more than eight hours and was entitled to overtime pay. Based on assumptions derived from available teacher schedules and timesheets, the objectors' counsel estimated that defendant's potential exposure for unpaid overtime was $567,207.96.[3]

Plaintiff does not dispute that she failed to pursue the unpaid overtime claim during settlement negotiations.[4] Instead, she and defendant challenge the appellants' assumptions in calculating potential overtime and emphasize the evidentiary problems with the claim and the risk that pursuing the claim would prevent the action from being certified or maintained as a class action. The record supports plaintiff's and defendant's points.

Initially, contrary to appellants' assertion, there is nothing in the record to indicate that defendant had a policy against paying overtime rates or that it systematically violated overtime laws. Indeed, the record includes evidence that defendant had a written policy of paying overtime wages for overtime worked, and payroll records indicate that defendant paid overtime pay to teachers, including many of the appellants. Although the records do not establish that defendant paid overtime every time it was due, they do support defendant's claim that it had a policy of paying overtime pay. According to

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[3] Appellants, in their reply brief, assert that plaintiff failed to "seek to recover any damages through settlement" for inaccurate paystubs in violation of section 226. This argument was not asserted below or in their opening brief. We do not, therefore, consider it. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453; *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.)

[4] There is no dispute that defendant was required to pay its teachers one and one-half times their regular pay for time worked in excess of either eight hours in a day or 40 hours in a week. (Lab. Code, § 510, subd. (a); Cal. Code Regs., tit. 8, § 11040, subd. (3)(A)(1); 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 360, p. 454.) The California Division of Labor Standards Enforcement (DLSE) has established methods for calculating the regular and overtime rates of pay when employees are paid on a piece rate basis. (See DLSE Enforcement Policies and Interpretations Manual (2002 rev.) § 49.2.1.2.)

defendant's payroll coordinator, instances in which defendant failed to pay teachers for overtime was "very rare."

Appellants' reliance on timesheets that show five classes taught in one day is problematic in two ways. First, contrary to appellants' assumption, a teacher who teaches five classes in one day does not necessarily work more than eight hours that day. Five 80-minute classes equals 6 hours 40 minutes of in-class instruction. The teacher does not have to prepare for the classes or grade student work that same day, if at all. The teacher can do so on days when he or she teaches fewer classes, and thereby work less than eight hours each day. Indeed, according to defendant, teachers who have taught a particular class previously may spend little if any time preparing for the class, and the availability of automated grading technology allows most teachers to spend little or no time grading. Thus, although it is *possible* that a teacher who taught five classes in one day worked more than eight hours that day, it is not necessarily so.

Second, because a teacher who taught five or fewer classes on a given day did not necessarily work overtime, determining whether a teacher actually worked overtime and, if so, the amount of such overtime requires an individualized inquiry that would not only increase the expense, complexity, and duration of the litigation, but also create a significant risk that the case would not be certified as a class action. (See generally *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28-30.)

Defendant would also have the right to assert defenses to individualized claims (see *Duran v. U.S. Bank National Assn.*, *supra*, 59 Cal.4th at pp. 33-38), which would further decrease the probability of achieving and maintaining class action status and, therefore, weaken the settlement value of the claim. Defendant could, for example, assert the defense that an employer is not liable for overtime when it had no actual or constructive knowledge of an employee's unreported overtime hours. (See, e.g., *Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 399.) The defense could be supported by the fact that defendant permitted its teachers to indicate on their timesheets additional time not otherwise covered by the timesheets. To the extent that a

teacher claimed to work such time without disclosing that fact on his or her timesheet, defendant could argue that the claim is barred.

In light of the absence of an unlawful overtime policy or system, and the need for individualized overtime inquiries and determinations, as well as defendant's right to assert defenses to individual claims, there was a substantial risk that a court would not certify the class. When the rarity of unpaid overtime work and the expense of litigating any overtime claims are also considered, plaintiff's failure to pursue class members' overtime claims in settlement is not unreasonable and does not render the settlement unfair.

Appellants contend the argument that teachers could move their preparation time from busy days to less busy days indicates that plaintiff considered only daily, not weekly, overtime. Appellants assume that if a teacher moves his or her preparation time to another day to keep from working more than eight hours, the shift would cause the teacher to work more than 40 hours during the week. "Because both types of overtime are actionable," appellants argue, plaintiff's "total disregard of weekly overtime is an error of law." The argument is flawed because shifting class preparation from a class-heavy day to a lighter day does not necessarily mean that the teacher will work more than 40 hours in the week; it may mean only that the teacher has evened out his or her weekly workload of fewer than 40 total hours for the week.

Appellants compare the alleged disregard of weekly overtime to the misunderstanding of a point of law discussed in *Clark*, *supra*, 175 Cal.App.4th 785. In that case, the class's counsel believed an overtime claim had no settlement value based on his understanding that the class members suffered no damages for the failure to pay for overtime because what they were actually paid at their regular rate exceeded 150 percent of the *minimum wage*. (*Id.* at p. 802.) The objectors in *Clark* pointed out that the applicable overtime rate is 150 percent of the class members' *actual* pay, not the *minimum wage*. (*Ibid.*) The determination of this disputed legal issue, the Court of Appeal explained, would have significantly affected the settlement value of the case.

(*Id.* at p. 803.) The trial court, however, erred by failing to even determine whether a legitimate controversy existed on the issue.

Appellants' reliance on *Clark* is misplaced because there is nothing in our record to suggest that plaintiff misunderstood the legal point that class members would be entitled to overtime if they worked more than 40 hours in a week. Plaintiff could have reasonably declined to pursue any weekly overtime claims during settlement negotiations because the vast majority of teachers were part-time teachers and litigating the rare instances in which teachers worked more than 40 hours in a week added undue complexity and expense to the case and increased the risk that the class would not be certified.

IV. *Failure To Claim More Than $1,000,000 In Damages For Unpaid Wages*

In support of the motion for preliminary approval of the settlement, plaintiff provided spreadsheets showing how defendant was potentially liable for unpaid work in the amount of $275,177.14 or, if one-half of the unpaid work was overtime work, $668,671.24. Plaintiff based the calculations on an assumption that eight "FTEs" worked 15 minutes without pay for every class period taught. When the objector's counsel questioned the meaning of FTE, plaintiff's counsel initially indicated that the acronym meant "Full Time Employee." If so, this implied that the estimate assumed no potential liability for unpaid wages for defendant's part-time employees. When questioned further, plaintiff's counsel stated that FTE meant full time *equivalent* employees, but admitted that the number was erroneous.

Appellants argue that plaintiff, by failing to calculate unpaid wages for part-time employees, "omitt[ed] the damages of 95% of the class." According to appellants, if *all employees* worked 15 minutes per class without being paid, defendant's potential exposure for unpaid wages was between about $3.5 million and $5 million.

In support of the motion for final approval, defendant's counsel submitted new spreadsheets that calculated an estimate of defendant's exposure for unpaid wages that included part-time employees and made no reference to FTEs. Instead, the calculations assumed that each teacher worked 15 minutes without pay for every class they taught.

Under this method, the estimate of defendant's exposure for unpaid wages was between $1,006,687.42 and $1,696,983.86.[5]

On appeal, appellants point to plaintiff's error in using FTEs (regardless of how the term is defined) and assert that, even if plaintiff's revised calculations are used, she "failed to claim between $735,000 and $1.1 million in damages *on this claim alone*." Appellants, however, do not explain why defendant might have *any* exposure for unpaid time worked. They simply assume, as did plaintiff, that teachers worked for 15 minutes without pay every time they taught a class. They do not, however, point to any facts that would support that assumption or any inference that teachers performed work for which they were not paid. Nor do they suggest what teachers were doing during the alleged 15 minutes of unpaid time or why the work was not covered by the per class payment.

In appellants' memorandum of points and authorities in support of their objections, they stated only, "[a]s the complaint alleged, [defendant's] formulas caused a significant amount of work time to go uncompensated." The complaint, however, after a lengthy recitation of Labor Code statutes, merely makes the conclusionary allegation that defendant "failed to pay [plaintiff] and members of the [c]lass for all earned wages every pay period." In appellants' calculations of estimated liability, they note their source for the assumption of 15 minutes of unpaid time per class period as "Plaintiff's Ex. 4." The referenced exhibit consists of plaintiff's original calculations, which assumed 15 minutes of unpaid work. Plaintiff's counsel authenticated the exhibit, but did not explain the time, stating only that "spreadsheets showing [defendant's] estimated liability exposure are attached hereto as Exhibit 4." In a declaration in support of the motion for final approval, plaintiff's counsel describes and authenticates the revised estimates, but states only that "these calculations assume 15 minutes of unpaid time for every 80-minute teaching period" without any explanation for the assumption. In short, the alleged

[5] Although plaintiff's revised estimate and the appellants' estimate both assumed 15 minutes of unpaid time per class for each teacher, the totals are unequal because they used different assumptions for the number of total classes taught.

15 minutes per class of unpaid work appears to be pure conjecture.[6] Furthermore, even if some teachers were not paid for work they performed, determining who performed such work, how much unpaid work they performed, and why the employee did not report the work on his or her timesheets are highly individualized inquiries that would make class certification and maintenance difficult, if not impossible.

In light of the absence of facts to support the critical assumption that teachers performed work for which they were not paid and the difficulty that teachers would have in achieving and maintaining class certification for such a claim, any errors in plaintiff's initial calculations do not affect the fairness of the settlement.

V. *Delay In Finalizing The Settlement*

Although plaintiff and defendant settled "in principle" in February 2013, they did not sign the written settlement agreement until January 2014. By its terms, the agreement extinguished claims that existed up until the date of the court's preliminary approval, which occurred in March 2014. Appellants assert that the delay in finalizing and approving the settlement agreement effectively "waived one additional year of claims in exchange for no additional settlement money." The argument assumes that the settlement payment reflected only the value of the claims that had accrued at the time of the mediation, not claims that accrued thereafter. Although it is conceivable that the parties, in arriving at a settlement amount, took into account the possibility that wage and hour violations would occur after the mediation, the settling parties in this case do not make this argument or challenge appellants' assumption. Instead, they contend that the

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[6] One of the objectors stated in his declaration that he was paid based upon the time stated in the timesheets, but that the "timesheets failed to reflect significant amounts of time [he] spent performing work for [defendant]." A second objector (Jesse) stated that the timesheet "did not actually track the time teachers worked." These statements, however, fail to recognize that the teachers are paid on a piece work system. Under that system, the fact that the timesheet does not reflect or track the time spent for the work performed is irrelevant; what matters is that they were paid for each "piece" they produced—or, in this case, each course they taught—regardless of how much time they spent preparing for and teaching the course. The statements, therefore, are not evidence that the declarants were not paid for work performed.

delay was due in part to defendant's efforts to identify class members, which, defense counsel explained, involved "get[ting] a bunch of old documents out of storage."

Defendant argues that as a result of their post-mediation efforts to identify class members, the class size turned out to be approximately 20 percent less than the size the parties had assumed during mediation. Defendant suggests that it could have renegotiated the agreement in light of this information, but did not. The reduction in the size of the class without any reduction in the size of the settlement fund, defendant argues, had the effect of increasing the amount available to each class member. The delay, it concludes, therefore benefitted the class.

The logic of this argument—that the delay led to a smaller class size and larger individual payments—is questionable. Nevertheless, we cannot conclude that the delay in finalizing and obtaining the settlement requires reversal. Even if the delay resulted in the release of an additional year of claims without additional settlement money for the class, there is no basis for concluding that any claims arising in the intervening year had any substantial value. As set forth above, there are few facts to support claims for unpaid wages or overtime even prior to the mediation. Teachers—most all of whom were part-time employees—rarely worked overtime, and the assumption critical to the unpaid wages claim—that teachers worked an additional 15 minutes for each class—is without evidentiary support. Defendant could not be sure that the settlement would be approved by the court, making it highly speculative to assume that after plaintiff sued defendant and the case settled that valid wage and hour claims thereafter increased. Indeed, as appellants point out, after the mediation, defendant implemented a modified timesheet that expressly calculates overtime work, thereby reducing the likelihood that overtime went unpaid.

Appellants further contend that the delay in finalizing the settlement raises an inference of collusion between the settling parties and a breach of plaintiff's fiduciary duty to the class. We disagree. The delay is, on our record, insufficient to support the proffered inferences.

VI. *Summary*

In light of the presumption of fairness, the weakness of the claims asserted, the time and expense in litigating the claims, the substantial risks that the class would not be certified, and the amount of the settlement, the court did not abuse its discretion in determining that the settlement was fair and reasonable.

VII. *Attorneys' Fees*

In its motion for final approval of the settlement agreement, plaintiff requested approval of her counsel's attorneys' fees in the amount specified in the settlement agreement—$191,666.67. This is one-third of the settlement fund.

Plaintiff asserted alternative grounds for the award. First, under a percentage-of-the-benefit method, the court may award fees in common fund cases such as this, and " 'fee awards in class actions average around one-third of the recovery.' " (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn. 11.) Second, the amount of the requested fees is reasonable under "the lodestar method," by which the court multiplies the number of hours the attorneys reasonably spent on the case by a reasonable hourly rate, then enhances that product by a multiplier to account for various factors. In this case, the agreed upon fees implies a multiplier of approximately two.

In granting the motion for final approval of the settlement, the court did not specify the basis for approving the attorneys' fees.

On appeal, appellants contend that plaintiff's counsel failed to provide the court with sufficient evidence to permit the court "to analyze the attorney fees and perform a lodestar calculation." Appellants do not challenge the ability of the court to award one-third of the settlement fund under the percentage-of-the-benefit method.

Some appellate courts have questioned whether the percentage-of-the-benefit method is a valid justification for an award of attorneys' fees in a class action settlement. (See, e.g., *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27; *Dunk, supra,* 48 Cal.App.4th at p. 1809.) Our Supreme Court recently resolved the issue. In *Laffitte v. Robert Half International Inc.* (2016) 1 Cal.5th 480, the Court, stating that "the percentage method is a valuable tool that should not be denied our trial courts," held

"that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." (*Id.* at p. 503.) The Court affirmed the trial court's fee award of one-third of the settlement fund, a total of $6,333,333.33. (*Id.* at pp. 485, 506.)

Here, although the trial court in this case did not expressly state its basis for approving the amount of attorneys' fees, we infer from the court's approval of the settlement agreement, which specified that the attorneys would be paid one-third of the fund, that the court approved the award based on, at least, the percentage-of-the-benefit method. Appellants do not challenge this basis for the award, focusing exclusively on the lodestar method. We therefore reject appellants' argument.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.