

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JEFF FULLER,  
Plaintiff,  
v.  
ZEP INC., et al.,  
Defendants.

Case No. [18-cv-02672-JSW](#)

**ORDER GRANTING MOTION FOR  
FINAL APPROVAL, GRANTING  
MOTION FOR ATTORNEYS' FEES  
AND COSTS, AND GRANTING, IN  
PART, MOTION FOR INCENTIVE  
AWARD**

Re: Dkt. Nos. 54, 55, 56

Now before the Court for consideration are the motion for final approval of class action settlement, the motion for attorneys' fees and costs, and the motion for an incentive award, filed by Plaintiff Jeff Fuller ("Plaintiff"). The Court has considered the parties' papers, relevant legal authority, the record in this case, and the parties' arguments at the final approval hearing held on January 17, 2020. The Court GRANTS Plaintiff's motion for final approval, GRANTS Plaintiff's motion for attorneys' fees and costs, and GRANTS, IN PART, Plaintiff's motion for an incentive award.

**BACKGROUND**

The facts underlying this litigation are set forth in the Court's Order granting, in part, and denying, in part, Defendants' motion to dismiss, and the Court shall not repeat them in detail here. (*See* Dkt. No. 36.) In brief, Plaintiff alleged that Defendants improperly re-assigned accounts and commissions from its outside sales representatives. Plaintiff asserted putative class claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and to recover penalties under California Labor Code's Private Attorney's General Act ("PAGA").

1 On June 21, 2019, Plaintiff filed a motion for preliminary approval of a class action  
2 settlement (the “Settlement”), which the Court granted on August 19, 2019. As part of the  
3 Settlement, Defendants agreed to a lump-sum non-reversionary payment of \$1,500,000.00  
4 (“Settlement Fund”). The parties agreed that Class Counsels’ fees and costs, any incentive award,  
5 the Class Administrator’s costs, and a portion of the PAGA fees due to the Labor and Workforce  
6 Development Agency (“LWDA”) will be deducted from the Settlement Fund. The balance of the  
7 Settlement Fund will be used to make payments to individual class members, and class members  
8 are not required to submit a claim to obtain a settlement payment.

9 The Settlement also provides for changes in Defendants’ policies that will result in on-  
10 going monetary payments to class members, which Plaintiff contends increases the overall  
11 monetary value of the settlement. Plaintiff also notes that the balance of Settlement Fund used to  
12 make payments to class members is likely to exceed the amount of the commissions that Plaintiff  
13 contends were unlawfully re-assigned from class members. (*See* Dkt. No. 55-1 Declaration of  
14 Daniel J. Palay in Support of Final Approval (“Palay Decl. ISO Approval”), ¶¶ 17, 27-28.)

15 The Court will address additional facts as necessary in the remainder of this Order.

16 **A. Motion for Final Approval.**

17 The Court’s review of the Settlement is governed by Rule 23(e) of the Federal Rules of  
18 Civil Procedure. The Court begins with the issue of notice. It finds that the Class Notice was  
19 timely sent to class members by the Claims Administrator and fully and accurately informed class  
20 members of all material elements of the lawsuit and proposed Settlement. It also finds that the  
21 Class Notice fully and accurately informed the class members of their right and opportunity to  
22 object to the Settlement and to be heard at the final approval hearing. (Declaration of Emilio  
23 Cofinco (“Cofinco Decl.”), ¶¶ 5-11.)

24 Rule 23(e) generally requires the Court “to determine whether a proposed settlement is  
25 fundamentally fair, adequate, and reasonable.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026  
26 (9th Cir. 1998) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). “It  
27 is the settlement taken as a whole, rather than the individual component parts, that must be  
28 examined for overall fairness.” *Id.* (citing *Officers for Justice v. Civil Serv. Comm’n of San*

1 *Francisco*, 688 F.2d 615, 628 (9th Cir. 1982)). In exercising its discretion, the Court balances the  
2 following non-exhaustive factors: “the strength of the plaintiffs’ case; the risk, expense,  
3 complexity, and likely duration of further litigation; the risk of maintaining class action status  
4 throughout the trial; the amount offered in settlement; the extent of discovery completed and the  
5 stage of the proceedings; the experience and views of counsel; the presence of a governmental  
6 participant; and the reaction of the class members to the proposed settlement.” *Id.* (citing *Torrise*  
7 *v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). In this case, there is no  
8 governmental participant but notice was provided to 45 state Attorneys General pursuant to the  
9 Class Action Fairness Act (“CAFA”). (Cofinco Decl., ¶ 4.) The Court has not received any  
10 objections pursuant to the CAFA notice.

11 The Court finds that the Settlement is the product of serious, informed, non-collusive  
12 negotiations. The parties attended two mediation sessions presided over by Steven J. Rottman,  
13 and they also engaged in private settlement efforts. (Palay Decl. ISO Approval, ¶¶ 8-10.) Before  
14 the parties engaged in settlement discussions, they exchanged sales and revenue data and  
15 “thousands upon thousands of lines of sales and commission data,” which provided information  
16 about the potential value of the claims. (*Id.*, ¶¶ 12-13, 17.)

17 The Court also has considered the potential damages claimed in the lawsuit on behalf of  
18 Plaintiff and the 289 class members, Defendants’ potential liability, the risks of continued  
19 litigation including trial outcome, delay and potential appeals, the substantial benefits available to  
20 class members as a result of the Settlement, and the fact that the Settlement represents a  
21 compromise of the parties’ respective positions rather than the result of a finding of liability at  
22 trial. (*See, e.g.*, Palay Decl. ISO Approval, ¶¶ 17, 19-29; Declaration of Alejandro Gutierrez  
23 (“Gutierrez Decl.”), ¶¶ 14-16.) The Court concludes the terms of the Settlement have no obvious  
24 deficiencies and do not improperly grant preferential treatment to any individual class member.

25 The reaction of the class members also supports approving the Settlement. At the time  
26 Plaintiff filed the motion for final approval, there were no objections, no-opt outs, and one notice  
27 packet remained undeliverable. The Class Administrator attests that any disputes it received were  
28 not valid. (Cofinco Decl., ¶¶ 12-14.) There also were no objectors present at the hearing. Finally,

1 because class members are not required to submit claims, the Class Administrator estimates that  
2 nearly all of the 289 class members will receive an individual settlement payment. The highest  
3 payment is \$22,501.07, and the average payment is \$3,065.74. (*Id.*, ¶ 15.)

4 Accordingly, the Court GRANTS the motion for final approval. The Court will retain  
5 jurisdiction over the case and the parties to the extent necessary to implement the terms of the  
6 Settlement until each act agreed to be performed by the parties under the Settlement has been fully  
7 performed.

8 **B. Motion for Attorneys' Fees and Costs.**

9 Plaintiff seeks \$525,000 in attorneys' fees, which constitutes 35% of the Settlement Fund,  
10 and he seeks \$14,608.77 in costs. Pursuant to Rule 23(h), the Court may order reasonable  
11 attorneys' fees and costs as part of the parties' settlement. In a case where a common fund is  
12 established, as here, the Court has discretion to award attorneys' fees based on a percentage of  
13 recovery theory or based on the lodestar method. *See In re Wash. Pub. Power Supply Sys. Sec.*  
14 *Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994). The Ninth Circuit has established "25% of the  
15 common fund as a benchmark award for attorneys' fees." *Hanlon*, 150 F.3d at 1029; *see also*  
16 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (noting that 25% is benchmark  
17 and "usual" range of awards is 20-30%). In order to assess whether the percentage sought by  
18 Class Counsel is reasonable, the Court may consider the following factors: the results achieved;  
19 the risk involved with the litigation; the skill required and quality of work by counsel; the  
20 contingent nature of the fee; and awards made in similar cases. The Court may adjust this  
21 benchmark to account for "special circumstances." *Six (6) Mexican Workers v. Arizona Citrus*  
22 *Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

23 The fee award to Class Counsel will not be funded by the on-going monetary payments to  
24 class members, which consist of commissions generated by reassigned accounts on an ongoing,  
25 go-forward basis, at 100% for five years, and then 50% thereafter. When the Court considers  
26 those amounts, plus the additional sales programs that were negotiated for the class members, it  
27 concludes the Settlement confers a benefit on class members that is significantly higher than the  
28 face value of the Settlement Fund. In addition, according to Class Counsel, data revealed that

1 commissions generated by “re-assigned” accounts in this matter totaled approximately \$653,000  
2 for the period of April 2018 through April of 2019. For the estimated class size of 289  
3 individuals, this means the average “Individual Commission Loss” attributable to each class  
4 member is approximately \$2,259.52. As such, the payments to class members contemplated by  
5 the Settlement may exceed actual loss amounts. (Palay Decl. ISO Approval, ¶¶ 17-18; Cofinco  
6 Decl., ¶ 15.)

7 The structure of the Settlement, which is non-reversionary and opt-out only, also supports  
8 the fee request. Class members who do not opt-out of the settlement will receive a settlement  
9 payment without having to submit a claim form. In this case, no-class members opted out. The  
10 fact that it is a non-reversionary settlement means that no portion of the Settlement Fund will  
11 revert to Defendants. Therefore, the Settlement avoids the possibility of a highly disproportionate  
12 fee in relation to the actual monetary recovery of the class.

13 The Court concludes that Class Counsel demonstrated substantial skill, diligence,  
14 efficiency, and high-quality work in achieving the Settlement, including the creation of the  
15 Settlement Fund. Class Counsel obtained this excellent result within the 18-month duration of this  
16 action, but without the necessity of going through trial and appeals. This means that class  
17 members will not have to wait years to be paid their earned wages and will not have to wait to  
18 benefit from the negotiated commission payouts or new account policies. The distribution of the  
19 initial payment of commissions via the Settlement Fund is a substantial benefit in and of itself.

20 Before the parties agreed to settle, Defendants moved to dismiss, and Class Counsel  
21 incurred in fees in responding to that motion. (Gutierrez Decl., ¶¶ 7, 10.) According to the record,  
22 settlement negotiations involved the preparation of multiple mediation briefs, the exchange of  
23 draft contract provisions, the completion of analyses of sales and commission revenues on a  
24 nationwide basis for use in damages models; once settlement was achieved, the parties were  
25 required to prepare the Joint Stipulation. (*See, e.g.*, Palay Decl. ISO Approval, ¶¶ 12-13;  
26 Gutierrez Decl., ¶¶ 11-12, 29, Ex. A; Declaration of Brian Hefelfinger (“Hefelfinger Decl.”), ¶ 24,  
27 Ex. A.) Class Counsel also spent time preparing the motion for preliminary approval of the  
28 settlement and all supporting documents, supplemental memoranda in support of that motion,

1 jointly-approved internal company memoranda, the motions for final approval, attorneys' fees and  
2 costs, and Plaintiff's incentive award. Class Counsel expect to incur additional fees that relate to  
3 monitoring distribution of the Settlement Fund and monitoring Defendants' other obligations  
4 under the Settlement. At the hearing, Mr. Palay estimated that Class Counsel incurred an  
5 additional \$10,000 in fees since Plaintiff filed the fee motion, and he anticipated Class Counsel  
6 would incur approximately \$20,000 in fees in the coming year.

7 For each of the foregoing reasons, and taking into consideration the risk factors involved  
8 and the on-going monetary benefits to class members, the Court concludes the relief achieved  
9 would not have been possible but for the commitment and skill of Class Counsel. The Court  
10 concludes that the request for 35% of the Settlement Fund is reasonable under the circumstances.

11 The Court cross-checked the percentage of recovery against the lodestar by multiplying a  
12 reasonable hourly rate by the number of hours reasonably spent litigating the case. *See Ferland v.*  
13 *Conrad Credit Corp.*, 244 F.3d 1145, 1149 (9th Cir. 2001). As a starting point, the Court  
14 examined whether Class Counsel's hourly rates were reasonable within the "relevant community,"  
15 *i.e.* the Northern District of California. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th  
16 Cir. 2008). Plaintiff bears the burden to "produce satisfactory evidence – in addition to the  
17 attorney's own affidavits – that the requested rates are in line with those prevailing in the  
18 community for similar services by lawyers of reasonably comparable skill, experience, and  
19 reputation." *Id.*, at 980.

20 Class Counsel submitted declarations that show the hourly rates charged and requested are  
21 reasonable. Class Counsel also provided the Court with information about other cases in which  
22 courts approved their rates and which show the rates are commensurate with rates charged within  
23 this District. (*See* Gutierrez Decl., ¶¶ 20-24, 27, 31-32; Hefelfinger Decl., ¶¶ 10-23; Dkt. No. 54-  
24 3, Declaration of Daniel Palay in Support of Fee Motion ("Palay Fee Decl."), ¶¶ 12-13, 23, 25,  
25 35.) Class Counsel documented the nature of the work they and their staff performed and the  
26 hours that were billed. (Gutierrez Decl., ¶¶ 28-29, Ex. A; Hefelfinger Decl., ¶¶ 24-25, 28, Ex. A;  
27 Palay Fee Decl., ¶¶ 15-21, 24, 26.) The Court concludes that the hours Class Counsel expended  
28 on this litigation are reasonable and that they worked to avoid duplication of efforts.

1 As of the date of the fee motion was filed, Class Counsels' lodestar amounts were  
2 \$46,525.00 (Gutierrez Decl., ¶¶ 33-34) and \$212,600.00 (Hefelfinger Decl., Ex. A; Palay Decl.,  
3 ¶ 24). Therefore, Class Counsel ask the Court to apply a multiplier of slightly greater than 2 to the  
4 total lodestar. Courts may adjust the lodestar figure upward or downward by considering such  
5 factors as: the skill needed to perform the legal service properly; whether the attorney was  
6 precluded from taking other employment; time limitations imposed by the client or the  
7 circumstances; whether the case was "undesirable;" and awards in other cases. *See, e.g., Fischel*  
8 *v. Equitable Life Assurance Society of the United States*, 307 F.3d 997, 1007 n.7 (9th Cir. 2002).  
9 The Court has considered all of those factors, has considered that Class Counsel will incur  
10 additional fees, and has considered that the class members will receive on-going monetary  
11 benefits. The Court concludes Class Counsel's request for a multiplier of slightly more than two-  
12 times the lodestar is reasonable and that the lodestar cross-check supports the reasonableness of  
13 the requested 35% of the Settlement Fund.

14 In addition, counsel are entitled to reimbursement of their reasonable out-of-pocket  
15 expenses. *See Fed. R. Civ. P. 23(h); Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299  
16 (N.D. Cal. 1995) (approving reasonable costs in class action settlement). The Court grants  
17 Plaintiff's request for reimbursement to counsel of \$14,608.77 for out-of-pocket expenses, which  
18 are supported by Class Counsels' declarations. (Gutierrez Decl., ¶ 18; Palay Fee Decl., ¶ 38.) The  
19 largest portion of those costs are for the mediator's fees, which the Court finds reasonable. They  
20 also include court fees, costs for service, copying, postage, legal research, and travel, which the  
21 Court also finds are reasonable. *See, e.g., In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362,  
22 1366 (N.D. Cal. 1995).

23 Accordingly, the Court GRANT Plaintiff's motion for attorneys' fees and costs.

24 **C. Motion for Incentive Award.**

25 Plaintiff requests that the Court approve an incentive award in the amount of \$35,000.00.  
26 "Incentive awards are fairly typical in class action cases." *Rodriguez v. West Publishing Corp.*,  
27 563 F.3d 948, 958 (9th Cir. 2009). The decision to approve such an award is a matter within the  
28 Court's discretion. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000). An

1 incentive award is designed to “compensate class representatives for work done on behalf of the  
2 class, to make up for financial or reputational risk undertaken in bringing the action, and,  
3 sometimes, to recognize their willingness to act as a private attorney general.” *Rodriguez*, 563  
4 F.3d at 958-59. “[D]istrict courts must be vigilant in scrutinizing all incentive awards to  
5 determine whether they destroy the adequacy of the class representatives. ... [C]oncerns over  
6 potential conflicts may be especially pressing where, ... the proposed service fees greatly exceed  
7 the payments to absent class members.” *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157,  
8 1165 (9th Cir. 2013) (internal citation and quotation marks omitted).

9 Plaintiff’s request appeared to the Court to be larger than the average award. *See, e.g.*,  
10 *Bellinghausen v. Tractor Supply Company*, 306 F.R.D. 245, 267 (N.D. Cal. 2015) (noting an  
11 award of \$20,000 was “nearly four times the amount that is deemed presumptively reasonable in  
12 this District”). Plaintiff also requests an incentive award that is more than ten times the average  
13 payment class members will receive from the Settlement Fund, and it is approximately \$13,000  
14 more than the highest payment expected to be paid to a class member.

15 Plaintiff has been employed by Zep since 1980 and continues to work there. (Declaration  
16 of Jeff Fuller (“Fuller Decl.”), ¶¶ 2, 18.) Therefore, Plaintiff did put himself at professional risk  
17 when he pursued this case. Plaintiff attests that he has been involved in this litigation since its  
18 inception and details the nature of his involvement, which included reviewing pleadings, evidence,  
19 and settlement documents, communicating and liaising with fellow class members, and attending  
20 face-to-face settlement negotiations with Zep’s Chief Executive Officer. Plaintiff also attests that  
21 he personally paid for the travel expenses he incurred during the litigation. (*Id.*, ¶¶ 3, 6-13.)  
22 Plaintiff estimates he has spent approximately 300 hours participating in this litigation. (*Id.*, ¶ 14.)

23 The Court also takes into consideration the fact that Plaintiff entered a full and complete  
24 release of all known and unknown claims, whereas the other class members released only their  
25 wage and hour claims against ZEP. (*Id.*, ¶ 15). Plaintiff also risked his personal assets in the  
26 prosecution of this matter because his fee agreement with Class Counsel obligated him to pay  
27 litigation costs. (*Id.*, ¶ 19.) Because the briefs and oral argument reflected Plaintiff’s views about  
28 why the incentive award was justified, the Court asked Defendant’s counsel for his view of the



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1 reasonably of Plaintiff's request. Counsel responded that based on his experience with class  
2 representatives, Plaintiff fell at the top end of a continuum of involvement, both in terms of  
3 engagement and activity. The Court factors that opinion into its decision.

4 Plaintiff cites a number of cases in which representative plaintiffs have received substantial  
5 incentive awards when compared to awards to individual class members. Taking into  
6 consideration the amount of the Settlement Fund, the amounts individual class members are likely  
7 to receive, the risks Plaintiff took to bring this case, the amount of time and effort he expended,  
8 and the opinion of all counsel, in the exercise of its discretion, the Court concludes an incentive  
9 award of \$30,000 is appropriate.

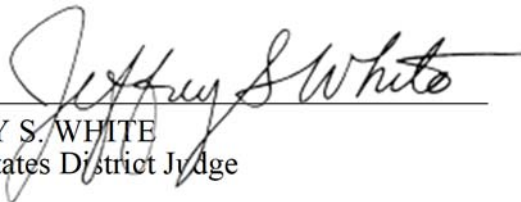
10 Accordingly, the Court GRANTS, IN PART, Plaintiff's motion for an incentive award.

11 **CONCLUSION**

12 For the foregoing reasons, the Court GRANTS Plaintiffs' motion for final approval and  
13 motion for attorneys' fees and costs, and it GRANTS, IN PART, Plaintiff's motion for an  
14 incentive award. This Order shall constitute the final judgment in this case, and the Clerk shall  
15 close the file.

16 **IT IS SO ORDERED.**

17 Dated: January 22, 2020

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20 JEFFREY S. WHITE  
21 United States District Judge  
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