IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 20-cv-3180-RMR-MDB

JACQUELINE KOVACS, on behalf of herself and all others similarly situated,

Plaintiff,

v.

G4S SECURE SOLUTIONS (USA) INC.,

Defendant.

ORDER GRANTING PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT

This case is before the Court on the parties' Joint Motion for Preliminary Approval of a Class Action Settlement, ECF 77. For the reasons discussed below, the motion is GRANTED.

I. BACKGROUND

On October 23, 2020, Plaintiff Jacqueline Kovacs filed this action on behalf of herself and all others similarly situated against Defendant G4S Secure Solutions (USA) Inc. ("G4S"), alleging violations of the Fair Labor Standards Act ("FLSA") and Colorado wage laws. ECF 1. Plaintiff alleges that hourly, non-exempt security guards employed by Defendant in Colorado are not paid for time spent allegedly performing compensable work prior to the start of their shifts. On January 18, 2022, the Court conditionally certified this

case as a collective action under 29 U.S.C. § 216(b) and permitted Plaintiff to send notice to the collective. ECF 46. Notice was sent to 1,933 putative members of the collective on or about February 18, 2022, and a total of 294 individuals consented to join this case. ECF 77 at 2; ECF 77-1 at ¶ 12.

On September 6, 2022, the parties participated in mediation with Mediator Michael Dickstein. ECF 77 at 2. After continued negotiations facilitated by Mr. Dickstein, the parties were able to reach an agreement to settle this case on September 13, 2022. *Id.* The parties now jointly ask the Court to certify the settlement class and preliminarily approve the proposed settlement.

II. DISCUSSION

The Parties propose settlement of this case as a "hybrid" class action, in which members of a Rule 23 class who do not affirmatively opt out of the settlement will be bound by the settlement and will release Defendant from FLSA and Colorado state law claims. Under the FLSA, putative members of a collective action are bound by a judgment only if they affirmatively opt in to the case. *Dolan v. Project Const. Corp.*, 725 F.2d 1263, 1266 (10th Cir. 1984), *abrogated on other grounds by Hoffman-La Roche Inc. v. Sperling,* 493 U.S. 165 (1989). In contrast, putative members of a class action formed under Rule 23(b)(3) are bound by a judgment unless they timely opt out of the class. Fed. R. Civ. P. 23(c)(2)(B). Although the opt-in requirement of FLSA collective actions conflicts with the opt-out provisions of Rule 23(b)(3) class actions, courts have regularly permitted parties to enter into hybrid settlements to resolve both FLSA and state law claims. *See,*

e.g., Hunter v. CC Gaming, LLC, No. 19-CV-01979-DDD-KLM, 2020 WL 13444205, at *2 (D. Colo. May 12, 2020); *Pliego v. Los Arcos Mexican Restaurants, Inc.*, 313 F.R.D. 117, 125 (D. Colo. 2016) ("[T]he most recent cases arising in this District tend toward approving such arrangements."). Where parties seek settlement of a hybrid action, the settlement is evaluated on a combination of the factors required for preliminary approval of an FLSA action and those required for approval of a Rule 23 class settlement. *Pliego*, 313 F.R.D. at 128.

A. Rule 23 Certification

The Parties are requesting that the Court certify a Rule 23 class for settlement purposes only, so that notice of this settlement can be disseminated to Class Members explaining their options. The proposed class definition is:

> all Colorado hourly non-exempt security professionals and related positions, including but not limited to: Custom Protection Officers; Upscale Security Officers; Uniform Security Officers; Bank Protection Officers; Critical Facility Officers; Detention Officers; Border Patrols; Flex Officers; Multi-Site Officers; Emergency Medical Technicians; Firefighters; Nuclear Security Officers; and any and all hourly, non-exempt Supervisors/Managers/Leads of Defendant employed from February 19, 2019, through [June 21, 2023].

ECF 77 at 4.

"[A] district court faced with a settlement only class need not inquire whether the class would present intractable problems with trial management," but the court must determine whether the other requirements for Rule 23 class certification are satisfied. *Pliego*, 313 F.R.D. at 125. Those requirements are:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition, to certify a class it must be shown that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Rule 23(a)

a. Numerosity

"A certifiable class must be so numerous that joinder is impracticable." *Helmer v. Goodyear Tire & Rubber Co.*, No.12-cv-00685-RBJ-MEH, 2014 WL 1133299, at *3 (D. Colo. Mar. 21, 2014). "Numerosity also requires that the members of the class be ascertainable with the use of objective criteria." *Id*. The parties represent that there are 1,933 putative class members who live in various locations throughout Colorado, and it would be impracticable to join that many individual plaintiffs in a single suit. ECF 77 at 5. Furthermore, the parties state that the class members are objectively ascertainable through Defendants' personnel records. Therefore, the Court finds that the proposed class satisfies the numerosity requirement of Rule 23.

b. Commonality

"A finding of commonality requires only a single question of law or fact common to the entire class." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194–95 (10th Cir. 2010). Commonality exists when the class members have "'suffered the same injury' such

that the claims of the class are based on a common contention," and the determination of that contention will resolve the central issue. *Martinez v. Reams*, No. 20-cv-00977-PAB-SKC, 2020 WL 7319081, at *4 (D. Colo. Dec. 11, 2020) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

Here, Plaintiff alleges that Defendant had a policy or practice of requiring security guards to perform unpaid "pass-down" work prior to the beginning of their shifts. ECF 77 at 6; ECF 77-1 at ¶ 10. The Court agrees that common questions among all class members include whether Defendant did, in fact, have such a policy or practice and, if so, whether this policy or practice constituted a violation of the FLSA and Colorado law. Thus, the Court is satisfied that the commonality requirement is met.

c. Typicality

"A plaintiff's claim is typical of class claims if it challenges the same conduct that would be challenged by the class." *Hunter*, 2020 WL 13444205, at *3. "The typicality requirement ensures that the absent class members are adequately represented by the lead plaintiff such that the interests of the class will be fairly and adequately protected in their absence." *Martinez*, 2020 WL 7319081, at *5. Here, Plaintiff claims that she and all hourly, non-exempt security guards were subject to a common policy that required them to perform unpaid work. The Court agrees that Plaintiff's claims are typical of the claims that could be asserted by the Class, thus satisfying the typicality requirement of Rule 23.

d. Adequacy of Representation

Finally, Rule 23 requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequate representation requirement "concerns both the competence of the class representative's counsel and the representative's willingness and ability to control the litigation and to protect the interests of the class as a whole." *Maez v. Spring Auto. Grp.*, LLC, 268 F.R.D. 391, 396–97 (D. Colo. 2010) (internal citation omitted). Resolution of two questions determines legal adequacy: "(1) does the named plaintiff and her counsel have any conflicts of interest with other class members, and (2) will the named plaintiff and her counsel prosecute the action vigorously on behalf of the class." *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187–88 (10th Cir. 2002). "Absent evidence to the contrary, a presumption of adequate representation is invoked. Any doubt regarding adequacy of representation should be resolved in favor of upholding the class, subject to later possible reconsideration." *Hunter*, 2020 WL 13444205, at *4.

Here, Plaintiff has the same interest in vindicating her wage rights as do absent members of the putative class. Plaintiff's counsel is also highly experienced in wage and hour law and does not have any conflicts of interest with the members of the putative class. *See* ECF 77-1 at ¶¶ 3–8. Plaintiff and her counsel have prosecuted this action vigorously on behalf of the class and will no doubt continue to do so. The Court therefore finds that the proposed Class satisfies the adequacy requirement of Rule 23(a)(4).

Accordingly, the Court finds that all four elements of Fed. R. Civ. P. 23(a) have been met.

2. Rule 23(b)(3)

a. Predominance

"Classwide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject to only individualized proof." *Pliego*, 313 F.R.D. at 127 (citation omitted).

Here, the parties agree that common questions of fact or law predominate. The primary dispute between the parties is whether class members were subject to a policy or practice that required all security guards employed by Defendant in Colorado to perform "pass-down" work for which they were not paid. If such a policy is proven, then the generalized proof of that policy would apply to all class members. Thus, proof of the existence of a class-wide policy or practice is the predominant issue in this case.

b. Superiority

"Courts in this District have repeatedly recognized that a class action is superior where the small claims of parties with limited resources are otherwise unlikely to be pursued." *Hunter*, 2020 WL 13444205, at *4 (internal citations omitted). Here, as in *Hunter*, individual class members' claims are relatively small and, but for the class action

process, would likely not be pursued. The Court thus finds that the class action is the superior vehicle for the fair and efficient settlement of the instant controversy.

Accordingly, the Court finds that the class meets all the requirements of Rule 23 and therefore certifies the class for settlement purposes.

B. Preliminary Approval of Settlement Agreement

When scrutinizing a proposed hybrid settlement, "this court will combine the factors applicable to preliminary approval of an FLSA action with those for approval of a Rule 23 class settlement in determining whether preliminary approval of the settlement should be given." *Hunter*, 2020 WL 13444205, at *6 (quoting *Pliego*, 313 F.R.D. at 128). "A district court may approve an FLSA collective action settlement after 'scrutinizing settlement for fairness' and deciding whether the proposed settlement is a 'fair and reasonable resolution of a bona fide dispute over FLSA provisions.'" *Rodriguez v. 5830 Rest. Corp.*, No. 21-CV-01166-KLM, 2023 WL 1507195, at *6 (D. Colo. Feb. 3, 2023) (quoting *Lynn's Food Stores v. United States*, 679 F.2d 1350, 1353, 1355 (11th Cir. 1982)). In so doing, the Court considers whether (1) the settlement is reached as a result of contested litigation; (2) a bona fide dispute exists between the parties; and (3) the settlement is fair and reasonable. *Hunter*, 2020 WL 13444205, at *6.

Similar considerations apply to a Rule 23 class settlement. Courts consider (1) whether the proposed settlement was fairly and honestly negotiated, (2) whether serious questions of law and fact exist which place the ultimate outcome of the litigation in doubt, (3) whether the value of an immediate recovery outweighs the mere possibility

of future relief after protracted and expensive litigation, and (4) the judgment of the parties that the settlement is fair and reasonable. *Rutter & Wilbanks Corp. v. Shell Oil Co*., 314 F.3d 1180, 1188 (10th Cir. 2002). At the preliminary approval stage, "the Court makes a preliminary evaluation of the fairness of the proposed settlement and determines whether it has any reason to not notify the class members of the proposed settlement or to not hold a fairness hearing." *In re Motor Fuel Temperature Sales Pracs. Litig.*, 286 F.R.D. 488, 492 (D. Kan. 2012). A proposed class action settlement will therefore be preliminarily approved where it "appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, [and] does not improperly grant preferential treatment to class representatives." *Id*. (internal quotation marks omitted).

The Court has considered all of the foregoing factors and finds that preliminary approval of the proposed settlement agreement is warranted in this case.

1. Contested Litigation and Bona Fide Dispute

To show a bona fide dispute exists, the parties must present a court with (1) a description of the nature of the dispute; (2) a description of the employer's business and the type of work performed by the employee; (3) the employer's reasons for disputing the employees' right to a minimum wage or overtime; (4) the employees' justification for the disputed wages; and (5) if the parties dispute the computation of wages owed, each party's estimate of the number of hours worked and the applicable wage. *Davis v. Crilly*, 292 F. Supp. 3d 1167, 1172 (D. Colo. 2018).

The parties state that Defendant is a private security company that provides security services, including security guards, to clients throughout Colorado. Plaintiff was formerly employed by Defendant as a security guard. ECF 77 at 9. Plaintiff alleges that hourly, non-exempt security guards employed by Defendant in Colorado are subject to a requirement that they report to work prior to the start of their scheduled shift to perform "pass-down," which involves things such as obtaining information and gathering equipment, such as keys and a walkie talkie, with the security guard from the shift that is ending. *Id*. Plaintiff alleges that this purported "pass-down" time constitutes compensable work under the FLSA and Colorado law, for which security guards were not compensated. *Id*. Plaintiff alleges that Defendant's failure to pay for this time caused class members to not be paid all of the overtime compensation to which they were entitled. *Id*.

Defendant disputes that class members performed any work for which they were not paid because Defendant has written policies that prohibit employees from performing work off-the clock, class members can report and be compensated for any time they spent working off-the clock, and, to the extent that pass-down work occurs, the time spent performing pass-down was de minimis and therefore not compensable under the FLSA or Colorado law. *Id*. The parties further dispute the correct computation of wages owed, the applicable statute of limitations in this case, and whether liquidated damages and/or a statutory penalty would be owed to the class. *Id*. at 9–10.

Thus, this dispute involves a bona fide dispute between adversarial parties. Settlement of this matter, as reflects in this motion and by the settlement agreement, was

born of an adversarial process with all involved advocating for their clients. If this matter is not settled, the parties anticipate significant discovery, including additional depositions, as well as substantial motion practice.

Accordingly, the Court finds that the settlement emerges out of a bona fide dispute in an adversarial context concerning disputed questions of law and fact.

2. Fair and Reasonable Settlement

"For a settlement to be considered fair and reasonable under the FLSA, it must provide adequate compensation to the employee and must not frustrate the FLSA policy rationales." *German v. Holtzman Enterprises, Inc.*, No. 19-CV-03540-PAB-STV, 2023 WL 3585212, at *9 (D. Colo. May 22, 2023). The purpose of the FLSA is "to protect employees' rights from employers who generally wield superior bargaining power." *Pliego*, 313 F.R.D. at 130. To determine whether a settlement undermines the purpose of the FLSA courts consider: (1) the presence of other similarly situated employees; (2) a likelihood that plaintiff's circumstances will recur; and (3) whether defendants had a history of non-compliance with the FLSA. *Id.* (citing *Baker v. Vail Resorts Mgmt. Co.*, No. 13-CV-01649-PAB-CBS, 2014 WL 700096, at *2 (D. Colo. Feb. 24, 2014)). Courts consider similar factors when deciding to approve a Rule 23 settlement. *Hunter*, 2020 WL 13444205, at *6. Generally, "[t]here is a strong presumption in favor of finding a settlement fair." *Id*.

The Court agrees that these factors favor preliminary approval of the proposed settlement agreement here. The parties have exchanged written discovery, and

Defendant has taken the depositions of Plaintiff and three early opt-in Plaintiffs. Thus, the Parties have each had the opportunity to analyze the strength of their respective positions and make an informed decision regarding the risk of losing the case. The parties agree that "if this case does not settle at this juncture, the remainder of this case would be complex, costly, and will take an extended period of time before it is finally resolved. Settlement, on the other hand, provides peace of mind and finality to both parties, and allows them to avoid the long and arduous process of litigating this case to completion." ECF 77 at 11.

There is likewise no evidence of fraud or collusion in the settlement. The settlement was reached with the assistance of a well-respected mediator, and the parties both had the opportunity to vigorously present their positions. The parties were unable to settle this case on the day of mediation and only reached a mutually agreeable settlement after continued negotiations and compromise. *See id*. Plaintiff's counsel's experience also favors approval of the settlement. Plaintiff's counsel practices exclusively in wage-and-hour law and has litigated hundreds of such cases. *See* ECF 77-1 at ¶ 7. Plaintiff's counsel has also litigated several cases involving allegations of unpaid "pass-down" time, including a collective action involving thousands of class members across the country. *Id*. at ¶ 29. Plaintiff's counsel further opines that "the settlement reached in this case is fair and reasonable, and represents a substantial recovery without any risk of loss." ECF 77 at 11.

Finally, it is clear that this dispute presents significant risk for both sides, and the settlement amount is reasonable in relation to the potential recovery given the risk of loss and delays inherent in lengthy litigation. The Court therefore finds that the settlement is fair and equitable to all parties.

3. Attorneys' Fees and Service Payments

The Settlement provides that one-third of the gross settlement fund will be payable to Plaintiff's counsel for attorneys' fees, totaling $250,000. ECF 77 at 12; ECF 77-2 at ¶¶ 14, 33. The Settlement also provides for reimbursement of costs to Plaintiff's counsel in the amount of $27,915.38, and for the costs of settlement administration. ECF 77 at 12; ECF 77-2 at ¶¶ 14, 29, 33, 35. "Courts in this district have recognized that the customary fee to class counsel in a common fund settlement is approximately one-third of the economic benefit bestowed on the class." *Aguilar v. Pepper Asian Inc.*, No. 21-cv-02740-RM-NYW, 2022 WL 408237, at *5 (D. Colo. Feb. 10, 2022) (citation omitted); *see also Ostrander v. Customer Eng'g Servs., LLC*, No. 15-CV-01476-PAB-MEH, 2019 WL 764570, at *6 (D. Colo. Feb. 21, 2019) ("[A]n award equaling thirty-three percent of the gross settlement amount represents a customary, and presumptively reasonable, fee in this circuit."). These sums are reasonable here.

The parties also seek preliminary approval of a service payment of $7,500 to Plaintiff and $2,500 each to three early opt-in Plaintiffs, Allan Zink, Trevor Patzkowsky, and Joey Maes, who were deposed and had to respond to written discovery. ECF 77 at 13; ECF 77-2 at ¶ 34. The Court finds that these sums are within the range of incentive

awards that have been deemed reasonable and preliminarily approves them. *See Slaughter v. Sykes Enterprises, Inc.*, No. 17-CV-02038-KLM, 2019 WL 529512, at *8 (D. Colo. Feb. 11, 2019) (collecting cases).

Accordingly, having considered whether the proposed settlement was reached as a result of a bona fide dispute, is fair and equitable to all parties, and contains a reasonable award of attorneys' fees, the Court finds that the Settlement should be preliminarily approved.

C. Notice Procedure and Order

When a court determines that a settlement warrants preliminary approval, Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement. The notice provided to a class certified under Rule 23(b)(3) must be the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Such notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (v) the binding effect of a class judgment on members under Rule 23(c)(3). *Pliego*, 313 F.R.D. at 132. The Court has reviewed the parties' proposed notice at ECF 77-3 and finds that it satisfies each of the foregoing requirements.

III. CONCLUSION

For the reasons set forth herein, the Joint Motion for Preliminary Approval of a Class Action Settlement, ECF 77, is GRANTED**.** The parties' Settlement Agreement (ECF 77-2) is preliminarily approved as fair and reasonable, the parties' Settlement Notice (ECF 77-3) is approved for issuance, and Plaintiff's fee request is preliminarily approved.

Accordingly, it is ORDERED that:

1. The Court preliminarily certifies a settlement class pursuant to Fed. R. Civ. P. 23(e) consisting of:

> All Colorado hourly non-exempt security professionals and related positions, including but not limited to: Custom Protection Officers; Upscale Security Officers; Uniform Security Officers; Bank Protection Officers; Critical Facility Officers; Detention Officers; Border Patrols; Flex Officers; Multi-Site Officers; Emergency Medical Technicians; Firefighters; Nuclear Security Officers; and any and all hourly, non-exempt Supervisors/Managers/Leads of Defendant employed from February 19, 2019, through June 21, 2023.

2. Plaintiff Jacqueline Kovacs is preliminarily approved as the Class representative.

3. Nilges Draher LLC is preliminarily approved as Class Counsel.

4. Analytics Consulting, LLC is preliminarily approved as the Settlement Administrator.

5. The form, contents, and method of notice to be given to the Class as set forth in the Settlement Agreement and attached to the Motion at ECF 77-3 are approved.

6. Within twenty-one (21) days of the date of this Order, the parties and the Settlement Administrator shall issue Notice to the Settlement Class consistent with this Order and the terms of the proposed Settlement.

7. The Notice shall provide opt-out and objection deadlines of forty-five (45) days following the transmission of the Notice.

8. A Final Fairness Hearing is scheduled for **September 26, 2023, at 2:00 PM**. The Settlement Administrator shall include this date on the Notice to the Settlement Class, consistent with the proposed form of Notice, ECF 77-3 at 6. Pursuant to Fed. R. Civ. P. 23(e)(5), any member of the Settlement Class who has timely filed an objection may appear at the final fairness hearing, in person or by counsel, to be heard to the extent allowed by the Court, applying applicable law, in opposition to the proposed Settlement.

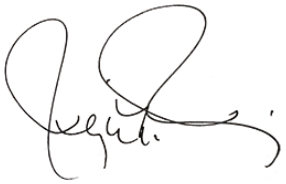
9. Motions seeking final approval of the Settlement and approval of reasonable attorneys' fees, costs, and service awards shall be filed no later than twenty-one (21) days prior to the date of the Final Fairness Hearing.

10. Proceedings in the case not related to the procedures for notifying members of the Settlement Class and preparing for the Final Fairness Hearing are stayed pending final approval of the Settlement Agreement and related matters.

11. The Court retains jurisdiction over this case to consider all further matters arising out of or connected with the settlement, including the administration and enforcement of the proposed Settlement.

DATED: June 21, 2023

BY THE COURT:



REGINA M. RODRIGUEZ
United States District Judge