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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DAVID LIVINGSTONE on behalf of  
himself and other similarly situated  
individuals,  
  
Plaintiffs,  
  
v.  
  
RANCHO SANTA FE FIRE  
PROTECTION DISTRICT,  
  
Defendant.

Case No.: 22-CV-602 JLS (NLS)

**ORDER (1) GRANTING JOINT  
MOTION FOR APPROVAL OF  
FLSA SETTLEMENT AND (2)  
DISMISSING ACTION WITH  
PREJUDICE**

(ECF No. 17)

Presently before the Court is Plaintiffs David Livingstone and Bret Davidson (collectively, “Plaintiffs”) and Defendant Rancho Santa Fe Fire Protection District’s (“Defendant” or the “District”) Joint Motion for Approval of Fair Labor Standards Act (“FLSA”) Settlement and Dismissal of Action with Prejudice (“Joint Mot.,” ECF No. 17). Having considered the Parties’ arguments and the law, the Court **GRANTS** the Joint Motion and **DISMISSES WITH PREJUDICE** the action for the reasons that follow.

**BACKGROUND**

Plaintiffs Livingstone and Davidson were employed by the District as battalion chiefs. *See* Joint Mot at 2. Plaintiffs allege that Defendant “improperly treated employees who held the rank of battalion chief as exempt from overtime compensation under the

1 FLSA and failed to compensate Plaintiffs for all overtime hours worked at time and one-  
2 half their regular rates of pay.” *Id.* Plaintiffs seek three years of back wages for the alleged  
3 violations, liquidated damages, and reasonable attorneys’ fees and costs. *Id.* Following an  
4 Early Neutral Evaluation Conference on October 12, 2022, with Magistrate Judge Nita L.  
5 Stormes,<sup>1</sup> the Parties agreed to settle the dispute under the following terms: Defendant will  
6 pay \$39,293.68 to Plaintiff Livingstone for unpaid overtime and liquidated damages over  
7 the period of April 28, 2019, to August, 1, 2021; Defendant will pay \$34,192.42 to Plaintiff  
8 Davidson for unpaid overtime and liquidated damages over the period of April 28, 2019,  
9 to May 31, 2021; and Defendant will pay \$25,513.90 in attorney’s fees. *See id.* at 2–3. In  
10 exchange, Plaintiffs agree to release Defendant from their overtime compensation claims  
11 with prejudice. *Id.* at 3.

#### 12 CERTIFICATION OF FLSA COLLECTIVE

13 Plaintiffs have not moved for certification of their FLSA collective action claim.  
14 “When the parties seek settlement approval of an FLSA collective action claim before  
15 seeking certification of a collective action, courts in this circuit first consider whether  
16 certification is appropriate and then whether the proposed settlement is substantively  
17 acceptable.” *Kempen v. Matheson Tri-Gas, Inc.*, No. 15-CV-00660-HSG, 2016 WL  
18 4073336, at \*4 (N.D. Cal. Aug. 1, 2016); *see also Monplaisir v. Integrated Tech Grp.,*  
19 *LLC*, No. C 19-01484 WHA, 2022 WL 1500551, at \*2 (N.D. Cal. May 12, 2022) (“Most  
20 district courts in this circuit first consider whether FLSA collective members are similarly  
21 situated to each other for the purposes of final collective certification.”). “For certification,  
22 the members of the FLSA collective action must be ‘similarly situated’ to the original  
23 plaintiffs.” *Kahekili Seto v. Cnty. of San Joaquin*, No. 20-CV-01788-KJM-CKD, 2022 WL  
24 3357504, at \*1 (E.D. Cal. Aug. 14, 2022) (quoting *Campbell v. City of Los Angeles*, 903  
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27 <sup>1</sup> Magistrate Judge Stormes set a deadline of November 18, 2022, for the Parties to submit the Joint  
28 Motion. *See* ECF No. 16. The Parties missed that deadline and did not file the Joint Motion until  
December 2, 2022. *See* Joint Mot. Despite failing to comply with a court order, this Court, in conjunction  
with Magistrate Judge Stormes, has decided to rule on the Joint Motion in the interest of judicial economy.

1 F.3d 1090, 1109 (9th Cir. 2018)). “[P]laintiffs are similarly situated, and may proceed in  
2 a collective, to the extent they share a similar issue of law or fact material to the disposition  
3 of their FLSA claims.” *Campbell*, 903 F.3d at 1117. Here, Plaintiffs Livingstone and  
4 Davidson are similarly situated. Both were employed by the District as battalion chiefs  
5 and were thus treated by the District as exempt from overtime compensation. *See* Joint  
6 Mot. at 2. Accordingly, the Court will *sua sponte* preliminarily certify Plaintiffs’ FLSA  
7 collective. *See Hudson v. Libre Tech. Inc.*, No. 3:18-CV-1371-GPC-KSC, 2019 WL  
8 5963648, at \*7 (S.D. Cal. Nov. 13, 2019) (preliminarily certifying FLSA group after  
9 determining plaintiffs were similarly situated).

## 10 APPROVAL OF SETTLEMENT TERMS

### 11 I. Legal Standard

12 Claims for unpaid wages under the FLSA may only be waived or otherwise settled  
13 if settlement is supervised by the Secretary of Labor or approved by a district court. *See*  
14 *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352–53 (11th Cir. 1982). “The  
15 Ninth Circuit has not established the criteria that a district court must consider in  
16 determining whether an FLSA settlement warrants approval.” *Otey v. CrowdFlower, Inc.*,  
17 No. 12-CV-05524-JST, 2015 WL 6091741, at \*4 (N.D. Cal. Oct. 16, 2015). District courts  
18 in this circuit, however, have frequently applied a widely-used standard adopted by the  
19 Eleventh Circuit, which looks to whether the settlement is a fair and reasonable resolution  
20 of a bona fide dispute.” *Kerzich v. Cnty. of Tuolumne*, 335 F. Supp. 3d 1179, 1184 (E.D.  
21 Cal. 2018) (citing *Dunn v. Teachers Ins. & Annuity Ass’n of Am.*, No. 13-CV-05456-HSG,  
22 2016 WL 153266, at \*3 (N.D. Cal. Jan. 13, 2016)); *see Lynn’s Food Stores, Inc.*, 679 F.2d  
23 at 1355 (establishing relevant standard).

24 A bona fide dispute exists when there are “legitimate questions” about the  
25 defendant’s FLSA liability. *Selk v. Pioneers Mem’l Healthcare Dist.*, 159 F. Supp. 3d  
26 1164, 1171–74 (S.D. Cal. 2016). There must be “some doubt . . . that the plaintiffs would  
27 succeed on the merits through litigation of their [FLSA] claims.” *Collins v. Sanderson*  
28 *Farms*, 568 F. Supp. 2d 714, 719–20 (E.D. La. 2008). If there is no question that the FLSA

1 entitles plaintiffs to the compensation they seek, then a court will not approve a settlement  
2 because to do so would allow the employer to avoid the full cost of complying with the  
3 statute. *See Socias v. Vornado Realty L.P.*, 297 F.R.D. 38, 41 (E.D.N.Y. 2014) (“Without  
4 judicial oversight . . . employers may be more inclined to offer, and employees, even when  
5 represented by counsel, may be more inclined to accept, private settlements that ultimately  
6 are cheaper to the employer than compliance with [FLSA].”).

7 “To determine whether a[n] FLSA settlement is fair and reasonable, the court  
8 evaluates the ‘totality of the circumstances’ within the context of the FLSA framework.”  
9 *Kahekili Seto v. Cnty. of San Joaquin*, No. 20-CV-01788-KJM-CKD, 2022 WL 3357504,  
10 at \*2 (E.D. Cal. Aug. 14, 2022) (quoting *Selk*, 159 F. Supp. 3d at 1173). The following  
11 factors should be considered when determining whether a settlement is fair and reasonable  
12 under the FLSA: (1) the plaintiff’s range of possible recovery; (2) the stage of proceedings  
13 and amount of discovery completed; (3) the seriousness of the litigation risks faced by the  
14 parties; (4) the scope of any release provision in the settlement agreement; (5) the  
15 experience and views of counsel and the opinion of participating plaintiffs; and (6) the  
16 possibility of fraud or collusion. *See Selk*, 159 F. Supp. 3d at 1173. “If after considering  
17 these factors the court determines that the settlement reflects a reasonable compromise over  
18 issues that are actually in dispute, then the court may approve the settlement in order to  
19 promote the policy of encouraging settlement of litigation.” *Id.* (internal quotations  
20 omitted).

## 21 **II. Analysis**

22 The Court finds that the proposed settlement is a fair and reasonable resolution of a  
23 bona fide dispute.

### 24 **A. Bona Fide Dispute**

25 Several bona fide disputes exist between the parties. Defendant contends that  
26 Plaintiffs were exempt from receiving overtime pay, while Plaintiffs argue they were non-  
27 exempt. Joint Mot. at 5. Moreover, there is a factual dispute concerning how many hours  
28 went unreported on Plaintiffs’ timesheets, and the Parties disagree as to whether Defendant

1 acted in good faith. *Id.* Such disputes evidence “legitimate questions” about Defendant’s  
2 FLSA liability. *See Selk*, 159 F. Supp. 3d 1171–74.

3 ***B. Fair and Reasonable Settlement Terms***

4 The Court finds that the proposed FLSA settlement is fair and reasonable under the  
5 six factors established in *Selk*.

6 *1. Plaintiff’s Range of Recovery*

7 “[I]n comparing the amount proposed in the settlement with the amount that  
8 plaintiffs could have obtained at trial, the court must be satisfied that the amount left on  
9 the settlement table is fair and reasonable under the circumstances presented.” *Selk*, 159  
10 F. Supp. 3d at 1174. Here, the Court is so satisfied. According to the Parties, both Plaintiffs  
11 and Defendant have reviewed timesheets and payroll records and have determined that if  
12 Defendant were to prevail on all disputed issues (except the FLSA exemption issue),  
13 Plaintiffs’ damages would be \$33,495.10, and if Plaintiff were to prevail on all disputed  
14 issues, the Plaintiffs’ damages would be \$180,886.95. Joint Mot. at 6. The Parties agreed  
15 to set Plaintiffs’ total damages at \$73,486.10, which represents about 40 percent of the best  
16 possible recovery. The Court finds this to be an amount within the range of a reasonable  
17 result that Plaintiffs could expect to recover if the matter were to proceed to trial. *See Selk*,  
18 159 F. Supp. 3d 1175 (collecting cases finding settlement funds ranging between 9 percent  
19 and 60 percent of best possible recovery to be reasonable). As such, this factor weighs in  
20 favor of approving the Settlement Agreement.

21 *2. Stage of Proceedings*

22 District courts should assess “the stage of proceedings and the amount of discovery  
23 completed to ensure the parties have an adequate appreciation of the merits of the case  
24 before reaching a settlement.” *Id.* at 1177. “So long as the parties have ‘sufficient  
25 information to make an informed decision about settlement,’ this factor will weigh in favor  
26 of approval.” *Id.* (quoting *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir.  
27 1998)). Here, the Parties state they “reached an agreement after carefully considering and  
28 analyzing the information exchanged between them,” which included the relevant time

1 records and wage history. Joint Mot. at 7. The parties also discussed how damages should  
2 be calculated. *Id.* Such information would have been crucial in determining Plaintiffs’  
3 recovery had the Parties gone to trial; therefore, the fact that it was exchanged between the  
4 Parties shows that they were armed with sufficient information to make an informed  
5 decision about settlement. Consequently, the Court finds that this factor weighs in favor  
6 of approving the Settlement Agreement.

### 7 3. *Seriousness of Litigation Risks*

8 Here, the seriousness of the litigation risks weighs in favor of approval. According  
9 to the Parties, they face “substantial uncertainty in the outcome of the case should the  
10 litigation proceed to trial.” Joint Mot. at 7. As discussed above, disputes exist regarding  
11 Plaintiffs’ potential recovery and Defendant’s potential liability. *See supra* p. 5. While  
12 Plaintiffs allege that Defendant failed to compensate them for overtime work hours,  
13 Defendant may only be held liable if Plaintiffs were paid less than what is required by the  
14 FLSA. *See Chavez v. City of Albuquerque*, 630 F.3d 1300, 1307 (10th Cir. 2011). It is  
15 also uncertain, according to the Parties, whether Plaintiffs can recover for a two-year or  
16 three-year period, as well as the extent of liquated damages that may be recovered. Joint  
17 Mot. at 7. Thus, it remains uncertain whether Defendant is liable, and, if so, the extent of  
18 its liability. Likewise, “there is a significant risk that litigation might result in a lesser  
19 recover[y] for the [collective] or no recovery at all.” *Bellinghausen v. Tractor Supply Co.*,  
20 306 F.R.D. 245, 255 (N.D. Cal. 2015). Consequently, both Parties would face serious risk  
21 if the case were to proceed to trial.

### 22 4. *Release Provision Scope*

23 “Courts review the scope of any release provision in a[n] FLSA settlement to ensure  
24 that class members are not pressured into forfeiting claims, or waiving rights, unrelated to  
25 the litigation.” *Selk*, 159 F. Supp. 3d at 1178. “[W]hen a[n] FLSA settlement provides  
26 that opt-in members will receive unpaid wages and related damages, but nothing more, a  
27 release provision should be limited to the wage and hour claims at issue.” *Id.* Here, the  
28 Settlement Agreement provides that Plaintiffs will receive unpaid wages and damages in

1 exchange for settling the present claims and “releas[ing], waiv[ing] and discharg[ing]  
2 [Defendant], and its officers, agents, employees, successors and assigns from any further  
3 claims under the FLSA up to and including the Effective Date of this Agreement.” Joint  
4 Mot at Ex. 1, 15. The Settlement Agreement also specifies that the release extends only to  
5 grievances “arising from or attributable to Plaintiffs’ claims relating to the action that the  
6 District violated the FLSA up to and including the Effective Date of this Agreement.” *Id.*  
7 The Court is satisfied that the release “does not force class members to forfeit unrelated  
8 claims, or allow [Defendant] to purchase a broad-based litigation shield in exchange for  
9 unpaid wages that class members are entitled to by statute.” *Selk*, 159 F. Supp. 3d at 1179.  
10 Consequently, the Court finds that the scope of the release provision does not weigh against  
11 finding the settlement fair and reasonable.

12           5.     *Experience and Views of Counsel/Opinions of Participating Plaintiffs*

13           “In determining whether a settlement is fair and reasonable, ‘[t]he opinions of  
14 counsel should be given considerable weight both because of counsel’s familiarity with  
15 th[e] litigation and previous experience with cases.’” *Selk*, 159 F. Supp. 3d at 1176  
16 (quoting *Larsen v. Trader Joe’s Co.*, No. 11-cv-05188-WHO, 2014 WL 3404531, \*5 (N.D.  
17 Cal. Jul. 11, 2014)). According to the Parties, they are “represented by experienced labor  
18 and employment attorneys, who have litigated numerous FLSA cases and advised clients  
19 on FLSA matters.” Joint Mot. at 8. Moreover, counsel for the Parties “assert that the  
20 individual amounts are fair and reasonable based on the damage calculations, the cost of  
21 further litigation, and the risk of an adverse verdict at trial.” *Id.* at 8–9. The Court finds  
22 no reason to question the experience or views of the Parties’ counsel; therefore, this factor  
23 weighs in favor of approving the settlement.

24           The opinions of the two participating Plaintiffs have not been communicated to the  
25 Court, but neither has the Court been made aware of any objections by the Plaintiffs in this  
26 case. “[T]he lack of objections by the active members of the class weighs in favor of  
27 finding the Settlement fair and reasonable.” *Selk*, 159 F. Supp. 3d at 1176.

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1           6.     *Possibility of Fraud or Collusion*

2           The Court finds no evidence that the Parties or their counsel colluded or pursued  
3 their own self-interests in reaching this settlement. The Parties aver that “settlement  
4 negotiations were at all times adversarial and agreement was reached only after the Court  
5 made a settlement recommendation based on the Parties’ calculations.” Joint Mot. at 9.  
6 Accordingly, the Court finds that this factor weighs in favor of approving the Settlement  
7 Agreement.

8           7.     *Conclusion*

9           Having considered the relevant factors and the representations of the Parties, the  
10 Court finds that the Settlement Agreement is a fair and reasonable resolution of a bona fide  
11 dispute.

12           **C.     Attorney’s Fees**

13           “The court in [an FLSA] action shall, in addition to any judgment awarded to the  
14 plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and  
15 costs of the action.” 29 U.S.C. § 216(b). “Typically, attorneys’ fees under the FLSA are  
16 determined using the lodestar method.” *Kerzich v. Cnty. of Tuolumne*, 335 F. Supp. 3d  
17 1179, 1185 (E.D. Cal. 2018). “The lodestar is calculated by multiplying the number of  
18 hours counsel reasonably expended on the litigation by [a] reasonable[e] hourly rate for  
19 each attorney, considering regional market rates and the attorney’s experience and skill.”  
20 *Kelley v. City of San Diego*, No. 19-CV-622-GPC-BGS, 2021 WL 424290, at \*10 (S.D.  
21 Cal. Feb. 8, 2021).

22           Here, the Parties’ Settlement Agreement provides that Defendant will pay Plaintiffs’  
23 counsel \$25,513.90 in attorneys’ fees. According to the Declaration of James J.  
24 Cunningham, counsel for Plaintiffs, Mr. Cunningham worked 28.5 hours on this matter,  
25 while his paralegal, Jaclyn Salamony, worked 21.0 hours. Declaration of James J.  
26 Cunningham (“Cunningham Decl.,” ECF No. 17-2) ¶ 26. A recent lodestar evaluation  
27 found a rate of \$500/hour for Mr. Cunningham and \$150/hour for Ms. Salamony to be

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1 reasonable. *See Kelley*, 2021 WL 424290, at \*10. At that rate, the lodestar value totals  
2 \$17,400.00. Litigation costs for this case totaled \$534.23. Cunningham Decl. ¶ 23.

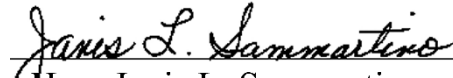
3 The award of attorneys' fees provided in the Settlement Agreement is roughly 45  
4 percent higher than the lodestar value. On the other hand, the percentage of the settlement  
5 amount allocated to Plaintiffs' counsel in the Settlement Agreement represents roughly 25  
6 percent of the total fund amount, which is \$99,000. "The typical range of acceptable  
7 attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with  
8 25% considered the benchmark." *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482,  
9 491 (E.D. Cal. 2010). Moreover, the Parties "stipulated to the above fees [] in an attempt  
10 to resolve the dispute expediently and with the Plaintiffs' best interest[s] in mind." Joint  
11 Mot. at 9. Thus, while the award of attorneys' fees provided in the Settlement Agreement  
12 exceeds the lodestar value, the award is consistent with the range of acceptable attorneys'  
13 fees in the Ninth Circuit and was agreed to by the Parties to the action. Accordingly, the  
14 Court finds that the fees requested are reasonable and appropriate, and awards the amount  
15 requested.

### 16 CONCLUSION

17 In light of the foregoing, the Court **GRANTS** the Joint Motion (ECF No. 17) and  
18 **DISMISSES** the action **WITH PREJUDICE**. As this Order concludes the litigation in  
19 this matter, the Clerk of the Court **SHALL CLOSE** the file.

20 **IT IS SO ORDERED.**

21 Dated: January 9, 2023

22   
23 Hon. Janis L. Sammartino  
24 United States District Judge  
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