SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

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LAW AND MOTION TENTATIVE RULINGS
DATE: SEPTEMBER 18, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV381912	Bravo, et al. v. Gallaher Company, et al. (PAGA)	See Line 1 for tentative ruling.
LINE 2	22CV407920	Taylor v. Senpex, LLC (Class Action)	See Line 2 for tentative ruling.
LINE 3	21CV380800	Guzman v. Randstad US, LLC (PAGA)	See Line 3 for tentative ruling.
LINE 4	23CV410939	Bueno v. Zoller Electronics, Inc. (Class Action/PAGA)	See Line 4 for tentative ruling.
LINE 5	23CV409762	Rico v. FMA Landscape Services, Inc., et al. (Class Action)	See Line 5 for tentative ruling.
LINE 6			
LINE 7			
LINE 8			
LINE 9			
LINE 10			

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LAW AND MOTION TENTATIVE RULINGS

LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Bravo, et al. v. Gallaher Company, et al. (PAGA)
Case No.: 21CV381912

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 18, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a representative action arising from alleged wage and hour violations. On April 21, 2024, Plaintiffs Angel Bravo and Pablo Flores (collectively, "Plaintiffs") initiated this action by filing a Complaint against Defendants Gallaher Company and Robert John Gallaher (collectively, "Defendants"). On September 7, 2021, Plaintiffs filed the operative First Amended Complaint ("FAC") against Defendants, setting forth the following causes of action:

(1) unpaid wages, violation of Industrial Welfare Commission ("IWC") Orders 16-2001 and Labor Code, §§ 200, *et seq.*, 204, 223, 226.2, 1194;
(2) overtime wages, violation of Wage Orders and Labor Code, §§ 510 and 1194;
(3) failure to provide accurate itemized wage statements, violation of Labor Code, § 226;
(4) failure to pay all wages due upon termination (Labor Code, §§ 201-203);
(5) failure to reimburse expenses (Labor Code, § 2802);
(6) unfair business practices, violation of Unfair Competition Law, Business & Professions Code, §§ 17200, *et seq.*;
(7) Private Attorneys General Act ("PAGA") violations (Labor Code, §§ 2698, *et seq.* and 558).

The parties have reached a settlement. Before the court is Plaintiff's motion for approval of PAGA settlement, and the motion is unopposed.

II. Legal Standard for PAGA Settlement Approval

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___ [2022 U.S. LEXIS 2940].) Seventy-five percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid*.) PAGA is intended "to augment the limited enforcement capability of [the LWDA] by

empowering employees to enforce the Labor Code as representatives of the Agency." (*Id*. at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

> As discussed by one court:
> PAGA does not establish a clear standard for evaluating PAGA settlements. …
> [¶]
> Accordingly, certain courts have been willing to approve PAGA settlements only if (1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals.

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061, 2019 U.S. Dist. LEXIS 77988 (*Patel*), at *5.)

As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel*, *supra*, 2019 U.S. Dist. LEXIS 77988 at *5-6.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel." (*Ibid*.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76–77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson, supra,* 383 F. Supp. 3d at p. 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."],

quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*O'Connor*, *supra* at p. 1133.) The settlement must be reasonable in light of the potential verdict value. (*Id.* at 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc*. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, 2016 U.S. Dist. LEXIS 140759 at *8-9.)

III. Discussion

Plaintiffs move for approval of a proposed PAGA settlement. Defendants are a small construction company and its owner. (Declaration of Tomas E. Margain ("Margain Dec."), ¶ 9.) The theory of the case is that certain workers, who were drivers, were not properly paid for their mileage or their time worked prior to and after their start and end times. (*Id.* at ¶ 10.) Plaintiffs allege that Defendants did not pay Plaintiffs for the time they spent purchasing materials before or after their paid workday. (*Id.* at ¶ 11.) During discovery, Defendants produced the time and pay records for Plaintiffs Bravo and Flores, as well as those for a third individual, Javier Alejandro Martinez. (*Id.* at ¶ 15.) Defendants also produced the records of workers in the PAGA claim. (*Ibid.*)

Following mediation, the parties reached an agreement. (Margain Dec., ¶¶ 19-20.) The settlement terms regarding the individual claims of Plaintiff Bravo, Plaintiff Flores, and Mr. Martinez (the "Participating Workers"), as well as the PAGA claim on behalf of fourteen workers, were all memorialized in a single settlement agreement (the "Agreement"). (*Id.* at ¶¶ 19-20, 22.) Confidentiality of this Agreement was a non-negotiable term for the Defendants. (*Id.* at ¶ 19.)

A. Terms of the PAGA Settlement

Plaintiff's counsel has confidentially submitted a copy of the Agreement to the court for its review, and the court has received and reviewed the Agreement. Counsel represents that the

amounts to be paid to the three Participating Workers are confidential. (Margain Dec. at ¶ 19.) Under the Agreement, Defendants will pay a gross amount as payment for all claims.

After removing the total amount to be paid as individual payments to the three Participating Workers, there is $90,000 remaining. This amount includes $44,400 in combined attorney fees and costs, $2,000 in settlement administration expenses, and $43,600 allocated to the PAGA claim. Of the $43,600 PAGA allocation, 75 percent ($32,700) will be paid to the LWDA, and 25 percent ($10,900) will be paid to "PAGA Pool Members" on a pro-rata basis according to the number of workweeks worked by the PAGA Pool Member during the "PAGA Pool Period." The PAGA Pool Period is defined as the period from March 11, 2020 to the date of the court's order approving the Agreement.

The court is concerned that the Agreement does not clearly define the "PAGA Pool Members," i.e., the group of aggrieved employes on whose behalf the PAGA claim is being settled. Initially, the Agreement states that there are approximately 14 PAGA Pool Members, without stating how they are to be identified. Later, in reference to the Defendants' duties to provide information, the Agreement states that Defendant must provide the administrator a list containing the names of the fourteen 14 PAGA Pool Members from March 11, 2020 to the date of the court's order approving the Agreement who are identified as workers who drove their own vehicles for business purposes. While it is logical that the parameters of this list would correspond to the definition of "PAGA Pool Members," the court is concerned that there appears to be no explicit provision within the Agreement defining of the group of aggrieved employes on whose behalf the PAGA claim is being settled.

Accordingly, the motion shall be CONTINUED, and the parties shall meet and confer with the objective of executing a stipulation or addendum to Agreement clearly defining the group of aggrieved employes on whose behalf the PAGA claim is being settled.

In exchange for the settlement, PAGA Pool Members are deemed to have released all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the action and PAGA notice. The scope of the release provisions are appropriately tied to the factual allegations in the complaint. (See *Amaro Arean*

Management, LLC (2021) 69 Cal.App.5th 521, 538.) Plaintiffs and Mr. Martinez also agree to a comprehensive general release.

B. Fairness of the PAGA Settlement

Plaintiffs contend the PAGA settlement is the result of non-collusive arms-length negotiations conducted during adversarial proceedings. (Margain Dec., ¶¶ 21, 24.) Counsel states that obstacles to settlement include the fact that Defendant is a small employer and may have solvency issues and the court's discretion to reduce the amount of PAGA penalties. (*Id.* at ¶ 25.) Counsel asserts that the PAGA amount of $43,600 is an excellent recovery because it amounts to $219.10 per pay period (based on 199 pay periods). (*Id.* at ¶¶ 25-26.)

Nevertheless, counsel does not sufficiently explain the valuation of the Defendants' PAGA exposure or meaningfully address how the PAGA settlement is fair to PAGA Pool Members who are not among the three Participating Workers. Plaintiffs state that there are potentially 14 workers, in addition to themselves and Mr. Martinez, who worked approximately 199 pay periods. (Plaintiffs' Memorandum of Point and Authorities in Support of Motion for Approval of PAGA Settlement, p. 4:17-25.) Plaintiffs also state that the Defendants have a potential PAGA exposure of $295,000, based on nine different penalties. (*Ibid.*) However, Plaintiff do not provide any breakdown of this amount by claim, nor do they explain how Defendants' total maximum potential exposure was reduced to arrive at the settlement amount. Under the Agreement, the three "Participating Workers" will be receiving substantially more than the individual PAGA Pool Members. As such, the court asks Plaintiffs' counsel to explain why this discrepancy is fair.

Accordingly, prior to the continued hearing, Plaintiffs' counsel shall submit a supplemental declaration explaining the valuation of the PAGA claims, the rationale for any discount applied, and why the settlement reached is fair to those members who are not among the three "Participating Workers."

C. Attorney Fees and Costs

Plaintiffs' attorneys seek a combined fees and costs award of $44,400. (Margain Dec., ¶ 6.) Attorney Tomas Margain states he worked 84.6 hours at a rate of $894, for a lodestar amount of $75,632.40. (*Ibid.*) Attorney Xiaoming Liu states that she worked a total of 54 hours

at $475 per hour, resulting in a lodestar amount of $25,650. (Declaration of Xiaoming Liu, ¶ 9.) Thus, Plaintiffs' counsel submit evidence supporting a combined lodestar amount of $101,282.40. Therefore, the requested amount results in a significant negative multiplier.

The court will make a determination on the reasonableness of the attorney fees and costs award at the continued hearing.

IV. Conclusion

Accordingly, the motion for approval of PAGA settlement is CONTINUED to October 23, 2024 in Department 19 at 1:30 p.m.

At least ten court days prior to the continued hearing, Plaintiffs' counsel shall submit a supplemental declaration explaining the valuation of the PAGA claims, the rationale for any discount applied, and why the settlement reached is fair to those members who are not among the three "Participating Workers."

Plaintiffs shall prepare the order.

- oo0oo -

Calendar Line 2

Case Name: Taylor v. Senpex, LLC (Class Action)
Case No.: 22CV407920

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 18, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative class action arising out of alleged wage and hour violations. Plaintiff Rachel Taylor ("Plaintiff") initiated this action on November 18, 2022 by filing a Class Action Complaint ("Complaint") against Defendant Senpex, LLC ("Defendant" or "Senpex").

According to the Complaint's allegations, Defendant is a delivery company that offers a network of over 7,000 couriers across major U.S. cities to service its clients' needs. (Complaint, ¶ 1.) To carry out its parcel-delivery obligations, Defendant obtains the services of drivers like Plaintiff and the putative class members, who pick up and deliver packages for Senpex's third-party customers. (*Id.* at ¶ 2.) By refusing to recognize its drivers as employees, Defendant cheats them out of protections provided by California labor laws, such as minimum wages, overtime pay, and reimbursement of business expenses. (*Id.* at ¶ 3.) The Complaint seeks recovery on behalf of Plaintiff and other similarly situated drivers for alleged violations of California's Labor Code and Industrial Welfare Commission Wage Order No. 1 ("Wage Order 1") and related alleged unfair business practices. (*Id.* at ¶ 4.)

Plaintiff worked as a driver for Defendant from 2019 until March 14, 2022. (Complaint, ¶ 7.) The Complaint defines the putative class period as: "from four years preceding the date that the first Complaint in this action is filed, until the full resolution of this action, plus any time that may be attributed to equitable or other forms of tolling." (*Id.* at ¶ 26.)

The Complaint sets forth the following causes of action: (1) failure to reimburse expenses (Lab. Code, § 2802); (2) failure to provide accurate wage statements (Lab. Code, § 226); (3) failure to pay overtime (Lab. Code, § 226); (4) failure to provide meal periods (Lab. Code, § 226.7); (5) failure to provide rest breaks (Lab. Code, § 226.7); (6) failure to pay wages

when due (Lab. Code, §§ 201-203); (7) unfair business practices (Bus. & Prof. Code, § 17200, *et seq.*).

On April 11, 2024, Defendant filed an Answer to Plaintiff's Complaint, generally denying the Complaint's allegations and setting forth various affirmative defenses, including several based on Defendant's position that Plaintiff and putative class members worked as app-based drivers and were therefore independent contractors.

On July 3, 2024, Plaintiff filed the motion now before the court, a motion for summary adjudication challenging Defendant's First Affirmative Defense that Plaintiff and putative class members are app-based drivers. Defendant opposes the motion.

II. Facts Presented

A. Plaintiff's Facts

In support of her motion for summary adjudication, Plaintiff proffers the following purportedly undisputed material facts: For recurring deliveries, such as the normal set of four deliveries that Plaintiff made most workdays, the deliveries are pre-assigned and pre-accepted by a courier prior to the day of performance. (Plaintiff's Separate Statement of Undisputed Material Facts ("Pl.'s UMF"), Issue No. 1, Fact No. 1.[1]) On the day of the scheduled delivery, the delivery is sent to the courier in the Senpex app and by email four hours before the delivery time. (*Ibid.*)

The courier accepts a delivery request, at the latest, four hours before picking up the item. (Pl.'s UMF, No. 1.2.) Senpex's records do not reflect the four plus hour period from when the delivery is accepted prior to its scheduled delivery time. (*Id.* at No. 1.3.) Each time entry for Plaintiff's deliveries reflects engaged time as less than one hour in length. (*Ibid*.) The miles a courier drives between accepting a delivery request and completing the delivery are not tracked. (*Id.* at No. 1.4.)

Senpex's "Inactive Accounts" policy allows it to suspend or terminate any courier account that has been inactive for 90 days. (Pl's UMF, No. 2.1.) Turning down a delivery, once accepted, endangers a driver's access to Senpex's platform and permits Senpex to terminate the

[1] The court will refer to Issue No. 1, Fact No. 1 as "No. 1.1." All other facts in Plaintiff's Separate Statement of Undisputed Material Facts and Defendant's Separate Statement of Disputed and Undisputed Material Facts will be referenced in a similar manner.

driver. (*Id.* at No. 2.2.) Senpex has Terms of Service that apply to its couriers/drivers. (*Id.* at No. 2.3.) Senpex offers deliveries outside of a 50-mile radius and Plaintiff performed at least two such deliveries. (*Id.* at No. 3.1.)

Senpex claims that the parties did not have a contract. (Pl.'s UMF, No. 4.1.) Senpex does not provide any healthcare subsidy for its drivers. (*Id.* at No. 5.1.) Senpex does not provide any insurance for its drivers. (*Id.* at No. 5.2.) Senpex does not provide safety training. (*Id.* at No. 5.3.) Senpex, at times, retained part of drivers' gratuities. (*Id.* at No. 5.4.)

B. Defendant's Facts

i. Defendant's Responses

In support of its opposition to Plaintiff's motion, Defendant Senpex sets forth the following responses to Plaintiff's Separate Statement: Defendant does not dispute that it allows drivers to accept recurring, pre-scheduled deliveries, but the driver has the right to cancel any accepted delivery, including a recurring delivery. (Defendant's Separate Statement of Undisputed and Disputed Material Facts [] ("Def.'s UMF"),"No. 1.1.").) Defendant does not dispute that the courtier accepts a delivery request, at the latest, four hours before picking up the item. (*Id.* at No. 1.2.)

Defendant does not dispute it does not that track engaged time from the time of acceptance of the delivery, since deliveries can be scheduled in advance. (Def.'s UMF, No. 1.3.) Delivery jobs are logged in the app, and engaged time is tracked from the time the driver logs into the app to begin the job. (*Ibid.*) The majority of Plaintiff's deliveries were local and were less than one hour in length. (*Ibid.*) Acceptance of a job using the app can be done from any location. (*Ibid.*) Miles are not tracked until the courier logs into the app the begin the job, which starts from the time the driver begins driving to the pickup location. (*Ibid.*)

Defendant does not dispute that it reserves the right to suspend or terminate a courier's account that has not accepted a delivery for more than 90 days. (Def.'s UMF, No. 2.1.) Defendant has never suspended a driver for this, and even if a driver is suspended, the account can be reactivated. (*Ibid.*) Defendant does not dispute that it reserves the right to terminate a driver if the driver accepts a delivery and later cancels it, but Defendant has never terminated a

driver for this reason. (*Id.* at No. 2.2.) Defendant does not dispute that its Terms of Service apply to its couriers/drivers. (*Id.* at No. 2.3.)

Defendant does not dispute that it offers the occasional delivery that is outside of a 50-mile radius. (Def.'s UMF, No. 3.1.) Of the over 600 jobs performed by Plaintiff, this occurred only twice. (*Ibid.*) Defendant does not dispute that there was not a written contract that Senpex couriers signed, but the Terms and Conditions must be agreed to by the drivers before they can begin working. (*Id.* at No. 4.1.)

Defendant does not dispute that it did not provide a healthcare subsidy during the time that Plaintiff was making deliveries for Defendant. (Def.'s UMF, No. 5.1.) Defendant currently does provide a healthcare subsidy. (*Ibid.*) Defendant does not dispute that it did not provide insurance. (*Id.* at No. 5.2.) Defendant does not dispute that it did not offer safety training when Plaintiff was a courier but asserts that it currently provides safety training. (*Id.* at No. 5.3.) Defendant does not dispute that on a few occasions, it retained party of drivers' gratuities, but it now ensures that the entire gratuity is paid to the drivers. (*Id.* at No. 5.4.)

ii. Defendant's Additional Facts

Defendant also submits the following additional material facts in support of its opposition to Plaintiff's motion for summary adjudication (repeated in reference to each of the five issues identified by Plaintiff in her Separate Statement): Defendant is a business entity that maintains an online-enabled application or platform used to facilitate delivery services within the State of California on an on-demand basis. (Defendant's Separate Statement; Additional Material Facts ("Def.'s AMF"), No. 5.) Defendant maintains a record of the amount of engaged time and miles accumulated by its couriers, which is from the time the courier begins the job until the delivery is completed. (*Id.* at No. 6.)

Senpex couriers are provided with the option to accept or decline each delivery request. (Def.'s AMF, No. 7.) Defendant does not require the courier to accept any specific delivery request as a condition of maintaining access to Senpex's online-enabled application or platform. (*Id.* at No. 8.) Defendant does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into its online-enabled application or platform. (*Id.* at No. 9.)

Defendant does not restrict an app-based driver from performing delivery services through other network companies except during engaged time. (Def.'s AMF, No. 10.) Defendant does not restrict the app-based driver from working in any other lawful occupation or business. (*Id.* at No. 11.)

III. Legal Standard for Summary Adjudication

Any party may move for summary judgment. (Code Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material facts and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar*, *supra*, 25 Cal.4th at p. 843.) The purpose of the summary judgment procedure is "to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 843.)

"Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. ([Code Civ. Proc.,] § 437c, subd. (f).)" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.) "A summary adjudication is properly granted only if a motion therefor completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. ([Code Civ. Proc.,] § 437c, subd. (f)(1).)" (*Ibid.*) "Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment. ([Code Civ. Proc.,] § 437c, subd. (f)(2)." (*Ibid.*)

The moving party "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in

favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party's] motion." (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Aguilar, supra*, 25 Cal.4th at p. 844 [internal quotations omitted].) The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed. (*Id.* at p. 843.)

IV. Discussion

Plaintiff moves for summary adjudication of Defendant's First Affirmative Defense on the following basis:

> [T]hat there is no merit to Defendant's affirmative defense that Plaintiff was an app-based driver under Proposition 22 (Business and Profession[s] Code, § 7451). Specifically, Senpex's First Affirmative Defense asserting that Plaintiff and/or the putative class members worked as app-based driver(s) and were therefore independent contractor(s), as provided for in Proposition 22 and Business and Professions Code section 7451 fails.

(Plaintiff's Notice of Motion and Motion for Summary Adjudication, p. 1:7-12.) Defendant's First Affirmative Defense is set forth in its Answer as follows:

> As a separate and affirmative defense, the COMPLAINT, and each cause of action therein, fails to state facts sufficient to constitute a claim upon which relief may be [granted] against Defendant, as Plaintiff and/or the putative class members worked as app-based driver(s) and were therefore independent contractor(s), provided for in Proposition 22 and Business and Professions Code Section 7451.

(Answer, pp. 1:24-2:3.)

A. Constitutionality of Proposition 22

As an initial matter, Plaintiff argued in her moving papers that Proposition 22 is unconstitutional and cannot be enforced. (Plaintiff's Memorandum of Points and Authorities ("Pl.'s MPA"), pp. 9:26-10:3.) As Plaintiff states, when she filed her motion on July 3, 2024, the California Supreme Court had granted review of *Castellanos v. State of California* (2024) 16 Cal.5th 588 (*Castellanos*) but had not yet filed its opinion. (Pl's MPA, p. 9:26-28.) Plaintiff asserted that she reserved the right to argue that Proposition 22 is unconstitutional, should the

state high court find otherwise. (*Id.* at pp. 9:28-10:1-3.) In opposition, Defendant contends that the California Supreme Court has ruled that the Business and Professions Code does not conflict with article XIV, section 4 of the California Constitution. (Defendant's Opposition ("Opp."), p. 1:13-21.)

On July 25, 2024, the California Supreme Court filed its opinion in *Castellanos*. The opinion explains that our high court granted the plaintiff's petition for review, limiting the issue to the following question: "Does Business and Professions Code section 7451, which was enacted by Proposition 22 (the 'Protect App-Based Drivers and Services Act'), conflict with Artible XIV, section 4 of the California Constitution and therefore require that Proposition 22, by its own terms, be deemed invalid in its entirety?" (*Castellanos*, *supra*, 16 Cal.5th at p. 600.) The *Castellanos* court answered this question in the negative, stating: "section 7451 does not conflict with article XIV, section 4 because the latter provision does not preclude the electorate from exercising its initiative power to legislate on matter affecting workers' compensation." (*Id.* at p. 596.) Thus, our high court affirmed the judgment of the Court of Appeal "insofar as it held that Business and Professions Code section 7451 does not conflict with the article XIV, section 4 of the California Constitution." (*Id.* at p. 610.)

In her reply, Plaintiff acknowledged the California Supreme Court's recent opinion in *Castellanos* and withdrew her argument that Proposition 22 is unconstitutional. (Reply, p. 1:11, fn. 1.) Accordingly, the court need not address Plaintiff's argument concerning the constitutionality of Proposition 22.

B. Prospective Effect of Proposition 22

Plaintiff contends that even if Defendant can demonstrate its drivers are independent contractors under the provisions of Proposition 22, "that does not moot claims predating the Proposition's effective date." (Pl.'s MPA, p. 9:18-25, citing *Lawson v. Grubhub, Inc.* (9th Cir. 2021) 13 F.4th 908, 914 ["We conclude without difficulty that Proposition 22 does not apply retroactively."].) While Defendant does not address this point head-on, Defendant does point out that a motion for summary adjudication of an affirmative defense may be granted only if it completely disposes of the affirmative defense. (Opp., p. 3:11-16, citing Code Civ. Proc., § 437c, subd. (f)(1) ["A motion for summary adjudication shall be granted only when it

completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty."].)

Proposition 22 was adopted by voters on November 3, 2020, and became effective on December 16, 2020. (See 2020 Bill Text CA V. 5.) Plaintiff's argument that it does not apply to employment classifications occurring before December 16, 2020 is well taken, as Defendant offers no authority finding that Proposition 22 may be applied retroactively. Nevertheless, the Complaint asserts alleged employment law violations occurring both before and after the effective date of Proposition 22 because it alleges that Plaintiff worked for Defendant from 2019 until March 14, 2022 and it defines the class period as "from four years preceding the date the that the first Complaint in this action is filed [November 18, 2022], until the full resolution of this action, plus any time that may be attributed to equitable or other forms of tolling." (Complaint, ¶¶ 7, 26.)

Here, by its terms, Defendant's First Affirmative Defense is made against all claims asserted in the Complaint, by "Plaintiff and/or the putative class members." (Answer, pp. 1:24-2:3.) Therefore, the defense is stated against all employment classifications occurring during the class period. Plaintiff effectively concedes this point in stating that "even if Proposition 22 applies here, that only assists Defendant after December 16, 2020 when the law went into effect." (Pl.'s MPA, p. 3:25-26.) By implication, if it does apply, Proposition 22 does assist Defendant with respect to alleged employment law violations occurring after December 16, 2020.

Accordingly, Plaintiff's contention that Proposition 22 does not impact claims that predate December 2020 does not adequately support her motion because, even accepting this argument as accurate, it does not completely dispose of Defendant's First Affirmative Defense. The court will go on to address Plaintiff's remaining arguments below.

C. Statutory Requirements

Plaintiff's primary argument in support of her motion is that Defendant fails to meet the requisite conditions under Proposition 22 to qualify as a "delivery network company" with an "independent contractor" relationship with its delivery drivers, thereby avoiding the usual protections California employment laws for "employees." (Pl's MPA, pp. 4:1-9:17.) As

addressed previously, Defendant contends that Plaintiff fails to completely dispose of the First Affirmative Defense. (Opp., p. 3:9-16.) More specifically, Defendant argues that Plaintiff's motion fails because Defendant does qualify as delivery network company and that Plaintiff has properly been designated as an independent contractor. (*Id.* at pp. 3:17-21; 8:5-7.)

Business and Professions Code section 7451 sets forth specific conditions that delivery network company must satisfy in order to properly designate a driver as an independent contractor under Proposition 22.[2] Section 7451 "was enacted by the voters through Proposition 22 (Gen. Elec. (Nov. 3, 2020)), the Protect App-Based Drivers and Services Act (Proposition 22) (Bus. & Prof. Code, §§ 7448-7467; all undesignated statutory references are to this code)." (*Castellanos v. State of California* (2024) 16 Cal.5th 588, 595 (*Castellanos*).) "Under section 7451, a driver for an app-based transportation or delivery company, such as Uber Technologies (Uber), Lyft, Inc. (Lyft), or DoorDash, Inc., is an independent contractor and not an employee of the company as long as several conditions are met." (*Ibid.*) "As a result of section 7451, app-based drivers are not covered by California's worker's compensation laws, which generally apply to employees and not to independent contractors." (*Id.* at pp. 595-596.)

Proposition 22 defines a "Delivery Network Company" ("DNC") as the following:

> [A] business entity that maintains an online enabled application or platform used to facilitate delivery services within the State of California on an on-demand basis, and maintains a record of the amount of engaged time and engaged miles accumulated by DNC couriers. Deliveries are facilitated on an on-demand basis if DNC couriers are provided with the option to accept or decline each delivery request and the DNC does not require the DNC courier to accept any specific delivery request as a condition of maintaining access to the DNC's online-enabled application or platform.

(Section 7463, subd. (f).)

The focus of the instant motion is Plaintiff's contention that Defendant does not qualify as a DNC under section 7463 and does not meet the "driver independence" provisions set forth in section 7451, which provides as follows in full:

> Notwithstanding any other provision of law, including, but not limited to, the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations, an app-based driver is an independent contractor and not an employee or agent with respect to the

[2] Undesignated statutory references are to the Business and Professions Code.

app-based driver's relationship with a network company if the following conditions are met:

> **(a)** The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform.
>
> **(b)** The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform.
>
> **(c)** The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.
>
> **(d)** The network company does not restrict the app-based driver from working in any other lawful occupation or business.

Plaintiff sets forth several arguments in support of its position that Defendant does not qualify for the protections described in Proposition 22. (Pl.'s MPA, pp. 4:1-9:17.) First, Plaintiff contends that Defendant does not qualify as a DNC because it does not track engaged time or miles. (*Id.* at pp. 4:8-5:13.) According to Plaintiff, Defendant "does not operate like a traditional gig company where there is simultaneous customer request for service, acceptance of the request by a worker, and performance (e.g. is it not like Uber and DoorDash – the companies that authored Proposition 22.)." (*Id.* at p. 4:17-19.)

Plaintiff argues that, in the case of recurring deliveries, Defendant does not track a driver's time or miles driven for the period of time from when the delivery is assigned and accepted prior to its scheduled delivery time. (Pl.'s MPA, p. 4:26-5:13; Pl.'s UMF, Nos. 1.1-1.4.) Plaintiff asserts that the miles driven over the acceptance and completion period are not tracked. (*Ibid.*) According to Plaintiff, this run afoul of the definition of "engaged time" as set forth in Proposition 22. Section 7463, subdivision (j) defines "engaged time" as follows:

> **(1)** "Engaged time" means, subject to the conditions set forth in paragraph (2), the period of time as recorded in a network company's online-enable application or platform, from when an app-based driver accepts a rideshare request or delivery request to when the app-based driver completes that rideshare request or delivery request.
> **(2)**
>
> **(A)** Engaged time shall not include the following:
>
> **(i)** Any time spent performing a rideshare service or delivery service after the request has been cancelled by the customer.

> **(ii)** Any time spent on a rideshare service or delivery service where the app-based driver abandons performance of the service prior to completion.
>
> **(B)** Network companies may also exclude time if doing so is reasonably necessary to remedy or prevent fraudulent use of the network company's online-enabled application or platform.

In opposition, Defendant maintains that it meets the DNC requirements because it maintains the requisite online application or platform and that it maintains records of the amount of engaged time and engaged. (Opp., p. 4:4-7; Def.'s AMF, Nos. 5-6.) Defendant states that its drivers are given the option to accept or decline each delivery request, even for recurring deliveries, and that it does not require its drivers to accept any specific delivery request as a condition of maintaining access to its application. (Opp., p. 4:8-13; Def.'s AMF Nos. 7-8.)

In response to Plaintiff's assertion that Defendant does not operate like a traditional gig company, Defendant contends that even companies like Uber, Lyft, and DoorDash offer their customers the option to schedule pickup or deliveries before the actual pick-up is required. (Opp., p. 4:19-22.) Defendant also argues that it does track engaged time and miles, and that the tracking process it used in relation to Plaintiff was the result of her special request to have regularly scheduled deliveries. (*Id.* at p. 5:4-15, citing the Declaration of Anar Mammadov in Support of Defendant's Opposition to Plaintiff Rachel Taylor's Motion for Summary Adjudication, ¶¶ 5-7, 9-10.)

Here, the court is not convinced that Plaintiff's evidence establishes that Defendant does not comply with the "engaged time" requirements of Proposition 22. As evident from the text of section 7463, subdivision (j), the definition of engaged is not necessarily subject to the strict interpretation that Plaintiff would suggest. For instance, it provides that network companies may exclude time from the "engaged time" calculation when doing so is reasonably necessary. Plaintiff is not citing any authority interpreting the statutes in the manner she does. This is a relatively new statutory scheme, and neither party is able to refer to controlling authority concerning what exclusions might be properly considered "reasonably necessary" within the meaning of section 7463, subdivision (j). This suggests that a more particularized factual inquiry is required to determine whether Defendant sufficiently tracks its driver's engaged time within the meaning of Proposition 22.

In further support of its motion, Plaintiff advances similar arguments regarding Proposition 22's requirements, including that Defendant does not provide sufficient worker flexibility, that it offers jobs outside of a 50-mile radius, that it does not meet the written contract requirements, and that it fails to provide the economic security required by Proposition 22. (Pl.'s MPA, pp. 5:15-9:17.) In each case, Defendant disputes Plaintiff's interpretation of the facts as well as the meaning of the relevant statutory provisions. (Opp., pp. 5:16-8:7.)

For example, Defendant contends that Plaintiff fails to offer any authority in support of her position that failing to comply with certain provisions set forth in Proposition 22 automatically disqualifies Defendant from being able to ever classify its drivers as independent contractors under the statutory scheme. (Opp., pp. 6:19-7:2.) Defendant's evidence and argument suggest that there are triable issues of material fact regarding whether it qualifies as a DNC and its drivers qualify as independent contractors, and it asserts that it now follows the additional benefits and protections requirements set forth in Proposition 22. (*Ibid.*; see also Def.'s UMF, Nos. 1.1, 1.3, 1.4, 2.1, 2.2, 3.1, 4.1, 5.1-5.4; see also Def.'s AMF, Nos. 5-11.)

As such, the court is not persuaded that Plaintiff meets her initial burden of establishing that Defendant's First Affirmative Defense has no possible application to the claims alleged in Plaintiff's Complaint. Plaintiff has not shown that Defendant "does not possess, and cannot reasonably obtain" evidence that would allow a trier of fact to find that Defendant's First Affirmative Defense might have some application in defending against the Complaint's allegations. (See *Aguilar*, *supra*, 25 Cal.4th at p. 854; see also Code. Civ. Proc., § 437c, subd. (f)(1) [summary adjudication must completely dispose of an affirmative defense.].) This is a fact-intensive inquiry more properly suited to resolution by a finder of fact.

In sum, Plaintiff does not sufficiently develop her argument that, based on the facts proffered, there is no merit to Defendant's First Affirmative Defense. Thus, Plaintiff fails to meet her initial burden. Furthermore, even if Plaintiff had met her initial burden, Defendant met its burden in opposition by establishing that there are triable issues of material fact as to whether there any merit to its First Affirmative Defense.

V. Conclusion

Accordingly, the motion for summary adjudication is DENIED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 3

Case Name: Guzman v. Randstad US, LLC (PAGA)
Case No.: 21CV380800

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 18, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a representative action arising from alleged wage and hour violations. On April 28, 2021, Plaintiff Christina Guzman ("Plaintiff") commenced this action by filing a Class Action Complaint against defendant Randstad US, LLC ("Defendant"), setting forth causes of action for: (1) failure to pay wage and/or overtime under Labor Code, §§ 510, 1194, and 1199; (2) failure to provide meal breaks pursuant to Labor Code, §§ 226.7 and 512; and (3) penalties pursuant to Labor Code, § 203.

On July 2, 2021, Plaintiff filed the operative First Amended Complaint ("FAC") alleging an additional cause of action against Defendant for penalties under Labor Code, § 2699, *et seq.* (the Private Attorneys General Act, ("PAGA")) arising from Defendant's alleged violations of Labor Code, §§ 201, 202, 203, 226.7, 510, 512, 1194, and 1199.

In light of an existing arbitration agreement, Plaintiff requested dismissal of her class claims. On December 14, 2021, the court (Hon. Lucas) entered an order granting the dismissal of the class claims. On January 14, 2022, the court (Hon. Lucas) granted Plaintiff's request to dismiss her individual claims in Causes of Action 1-3. The parties agreed to arbitrate Plaintiff's individual PAGA claims pursuant to the arbitration agreement, and filed a stipulation to stay Plaintiff's non-individual PAGA claims in this action.

The parties have reached a settlement regarding Plaintiff's non-individual PAGA claims. Now before the court is Plaintiff's unopposed motion for approval of the PAGA settlement.

II. Legal Standard for PAGA Settlement Approval

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations.

(*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___ [2022 U.S. LEXIS 2940].) Seventy-five percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid*.) PAGA is intended "to augment the limited enforcement capability of [the LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id*. at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

> As discussed by one court:
> PAGA does not establish a clear standard for evaluating PAGA settlements. …
> [¶]
> Accordingly, certain courts have been willing to approve PAGA settlements only if (1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals.

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061, 2019 U.S. Dist. LEXIS 77988 (*Patel*), at *5.)

As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel, supra,* 2019 U.S. Dist. LEXIS 77988 at *5-6.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel." (*Ibid*.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.*

(2021) 72 Cal.App.5th 56, 76–77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson, supra,* 383 F. Supp. 3d at p. 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*O'Connor, supra* at p. 1133.) The settlement must be reasonable in light of the potential verdict value. (*Id.* at 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc*. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, 2016 U.S. Dist. LEXIS 140759 at *8-9.)

III. Discussion

A. Provisions of the Settlement

Plaintiff moves for approval of a proposed settlement on behalf of "Aggrieved Employees," defined as:

> [A]ll persons who are employed or have been employed as an hourly employee by RANDSTAND US, LLC, in the State of California who were assigned to work at Advoque during the Release Period [April 28, 2020 to March 17, 2024].

(Declaration of Kelsey M. Szamet ("Szamet Dec."), Ex. 1 ("Agreement"), ¶¶ 1.4, 1.20.)

Defendant will pay a gross settlement amount of $140,000. (Agreement, ¶¶ 1.11, 3.1.) This amount is based on Defendant's representation that there are 981 Aggrieved Employees who worked 6,359 pay periods during the Release Period. (*Id.* at ¶ 8.) If the estimated number of pay periods increases by more than 10%, Defendant has the option to increase the gross settlement amount on a proportional basis or roll back the Release Period to end on a date before the number of pay periods exceeds 10%. (*Ibid.*)

Providing Defendant with the option of shortening the PAGA Period is problematic because it could possibly eliminate otherwise eligible Aggrieved Employees from the recovery. The court is disinclined to grant preliminary approval of settlement under which it is possible that an individual may be first told that they may be entitled to recovery, and then later told they are not entitled to recovery because Defendant exercised its option to change the end date of the PAGA Period.

Accordingly, the motion for approval of the PAGA settlement shall be CONTINUED. The parties are directed to meet and confer on this issue, and Plaintiff's counsel shall submit a supplemental declaration clarifying whether otherwise eligible Aggrieved Employees could be eliminated from the recovery should Defendant elect to change the end date of the Release Period.

The gross settlement amount includes litigation costs of up to $13,000, a service award to Plaintiff of up to $5,000, and settlement administration expenses up to $8,850, and PAGA penalties in the amount of $113,150. (Agreement, ¶¶ 3.2, 3.2.1-3.2.4.) Plaintiff's counsel will file a separate application or motion for approval of no more than $140,000 in attorney fees. (*Id.* at ¶ 3.2.1.) Of the amount designated as PAGA penalties, 75 percent will be paid to the LWDA, and 25 percent will be distributed to Aggrieved Employees as individual PAGA payments. (*Id.* at ¶ 3.2.4.) Funds from checks that are not cashed within 180 days after the date of mailing will be transmitted to the California Controller's Unclaimed Property fund in the name of the Aggrieved Employee. (*Id.* at ¶¶ 4.4.1, 4.4.3.)

In exchange for the settlement, the Aggrieved Employees agree to release Defendant, and related persons and entities, from all claims for PAGA penalties that were alleged or reasonably could have been alleged based on the facts stated in the operative Complaint and the PAGA notice occurring during the PAGA Period. (Agreement, ¶¶ 1.20, 1.27, 5.1.) The scope of the release provisions are appropriately tied to the factual allegations in the complaint. (See *Amaro Arean Management, LLC* (2021) 69 Cal.App.5th 521, 538.)

B. Fairness of the Settlement

Plaintiff contends that the settlement is fair and reasonable based on its analysis of the maximum penalties available and the risks of continued litigation. (Plaintiff's Memorandum of

Points and Authorities ("Plaintiff's MPA"), p. 16:1-2.) On January 9, 2024, the parties participated in an all-day mediation with Brandon McKelvey, Esq., which lead to the Agreement to settle the action. (*Id.* at p. 3:6-7.) Prior to mediation, the parties engaged in discovery, and Plaintiff obtained personnel records and extensive time and pay data. (*Id.* at p. 3:1-2.)

Plaintiff assessed that the maximum potential exposure for the PAGA claims for Aggrieved Employees is $635,900, based on a $100 penalty for 6,359 pay periods. (Plaintiff's MPA, p. 16:3-4.) Plaintiff notes that, by stacking the penalties for each of the three distinct underlying Labor Code violations, the maximum potential exposure increases to $1,907,700. (*Id.* at p. 16:5-7.)

Thus, the gross settlement amount of $140,000 represents 22.02% of the maximum potential exposure without stacking, and 7.34% of the maximum potential exposure with stacking. This percentage recovery is within general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D. Cal., Feb 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S. Dist. LEXIS 30201, at *41-42 [citing cases indicating that a general range of 5 to 35 percent of the maximum potential exposure is reasonable].)

Plaintiff explains that the total value of the PAGA claims was discounted to account for Defendant's anticipated arguments that it paid employees properly in accordance with its lawful policies and practices, that employees were provided the opportunity to take meal breaks, and that no employees complained about any of the alleged Labor Code violations prior to this lawsuit. (Plaintiff's MPA, p. 15:20-26.) Plaintiff described the particular risks associated with litigating each of the alleged Labor Code violations. (*Id.* at pp. 8:14-16.) Plaintiff also explained the risks of proceeding with the litigation, including that the court may exercise discretion to reduce the maximum civil penalty awarded. (*Id.* at pp. 7:9-8:13, 14:17-15:28.)

The court has reviewed Plaintiff's written submissions and finds that she has sufficiently explained the rationale for the settlement amount. The settlement provides for some recovery for each Aggrieved Employee and eliminates the risk and expense of future litigation. Therefore, the court finds that the settlement of Plaintiff's non-individual PAGA

claims is fair and reasonable, subject to resolution of the Release Period end date issue as discussed above.

C. Incentive Award

As part of the settlement, Plaintiff seeks a service award in the amount of $5,000. Although service awards are common in class actions, there is less authority regarding the propriety of service awards in PAGA cases. Nevertheless, a PAGA case is a representative action like a class action, and courts have recognized that an individual's willingness to act as a private attorney general may merit a service award. (See *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 959.)

Plaintiff has submitted a declaration detailing her participation in the action. (Declaration of Christina Guzman.) She states that she has spent a significant amount of time on this case, including discussing the case with counsel, reviewing the complaint, gathering facts and documents for counsel, preparing and being available for mediation, and reviewing settlement documents. (*Id.* at ¶¶ 4-5.) Plaintiff was deposed for approximately 6 hours. (*Id.* at ¶ 5.) Plaintiff acted as a representative for the aggrieved employees and has agreed to a broader release.

While the court agrees that a service award is justified, it requests further information. Prior to the continued hearing, Plaintiff shall file a supplemental declaration including the approximate number of hours she has spent on this case and clarifying whether she received any amount from Defendant in connection with the dismissal of her individual claims.

D. Litigation and Settlement Administration Costs

The Agreement provides for a payment from the gross settlement amount for litigation expenses up to $13,000. (Agreement, ¶ 3.2.1.) Plaintiff's counsel represents that she has incurred $11,647.14 in costs to date and anticipates incurring another $600 in costs in connection with the instant motion. (Szamet Dec., ¶¶ 108-109.) Counsel provides evidence of costs incurred. (*Id.* at Ex. 5.) The court approves a payment of litigation expenses in the amount incurred to date: $11,647.14.

The Agreement provides for a payment from the gross settlement amount for settlement administration expenses up to $8,850. (Agreement, ¶ 3.2.3.) The settlement administrator has

submitted a declaration representing that the fees associated with administration of this settlement are $8,850. (Declaration of Lisa Mullins of ILYM Group, ¶¶ 6-7 and Ex. C.) The court approves settlement administration expenses in the requested amount of $8,850.

E. Attorney's Fees

The Agreement provides that Plaintiff's counsel will separately file a request for attorney fees of up to $140,000. (Agreement, ¶ 3.2.1.) Plaintiff's counsel has filed a separate motion for approval of attorney fees. Counsel represents there is an aggregate lodestar in the amount of $118,255 based on 157.9 hours of work at hourly rates of $400 per hour to $1,100 per hour. (Szamet Dec., ¶¶ 75, 83.) Counsel provides a breakdown of the hours and hourly rates by attorney. (*Id.* at ¶ 98.)

Counsel requests an award of attorney fees in the amount of $140,000, resulting in a multiplier of 1.18. However, aside from counsel's declaration, counsel has not provided evidence demonstrating that the hours of work representing the lodestar figure were incurred in connection with this action. The court also observes that requested attorney fee award is equal to the gross settlement amount. Prior to the continued hearing, Plaintiff's counsel shall provide the attorney billing records supporting the aggregate lodestar figure.

IV. Conclusion

Accordingly, the motion for approval of the PAGA settlement is CONTINUED to October 23, 2024 in Department 19 at 1:30 p.m.

At least ten court days prior to the hearing, Plaintiff's counsel shall submit a supplemental declaration clarifying whether otherwise eligible Aggrieved Employees could be eliminated from the recovery should Defendant elect to change the end date of the Release Period. Counsel shall also provide attorney billing records supporting the fee request, and Plaintiff shall submit a supplemental declaration including the approximate number of hours she has spent on this case and clarifying whether she received any amount from Defendant in connection with the dismissal of her individual claims. If the parties have entered into any separate settlement agreements, copies shall be provided to the court confidentially for the judge's review.

Plaintiff shall prepare the order.

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Calendar Line 4

Case Name: Bueno v. Zoller Electronics, Inc. (Class Action/PAGA)
Case No.: 23CV410939

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 18, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative class and representative action. On February 8, 2023, Plaintiff Alexander Bueno ("Plaintiff") initiated this action by filing a Class Action Complaint against Defendant Zollner Electronics, Inc. ("Defendant"), setting forth various causes of action arising from alleged wage and hour violations. On April 2, 2024, Plaintiff filed the operative Second Amended Class and Representative Action Complaint ("SAC") against Defendant, setting forth the following causes of action:

(1) failure to pay overtime wages (Labor Code, §§ 204, 510, 558, 1194, 1198);
(2) failure to pay meal period premiums at the regular rate of compensation (Labor Code, §§ 226.7, 1198);
(3) meal period violations (Labor Code, §§ 226.7, 512, 1198);
(4) rest period violations (Labor Code, §§ 226.7, 516, 1198);
(5) wage statement violations (Labor Code, § 226, *et seq.*);
(6) waiting time penalties (Labor Code, §§ 201-203);
(7) failure to reimburse expenses (Labor Code, § 2802);
(8) sick pay violations (Labor Code, §§ 245-249);
(9) unfair competition (Business & Professions Code, § 17200, *et seq.*);
(10) civil penalties under the Private Attorneys General Act (Labor Code, § 2698, *et seq.* ("PAGA")).

The parties have reached a settlement. Plaintiff now moves for preliminary approval of the settlement. The motion is unopposed.

II. Legal Standard for Settlement Agreements

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*),

disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' 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.

(*Wershba, supra*, 91 Cal.App.4th at pp. 244-245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (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."

(*Wershba, supra*, 91 Cal.App.4th at p. 245, citation omitted.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC*

(2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___, 2022 U.S. LEXIS 2940.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76-77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-cv-02198-EMC) 2016 WL 5907869, 2016 U.S. Dist. LEXIS 140759, at *20-24.)

III. Discussion

A. Provisions of the Settlement

This case has been settled on behalf of the following "Settlement Class":

> [A]ll current and former non-exempt employees who worked for Zollner in California at any time from February 8, 2019 through December 4, [2023], or, if applicable, the Alternate End Date (defined herein below) (the "Class Period").

(Declaration of Neil Larson ("Larson Dec."), Ex. 1 ("Agreement"), ¶ 1.)

The settlement also includes a subset "PAGA Members" defined as "those Settlement Class members employed by Zollner in California at any time from February 8, 2022 through December 4, 2023, or, if applicable, the Alternate End Date (the 'PAGA Period')." (Agreement, ¶ 2.)

According to the terms of the settlement, Defendant will pay a non-reversionary gross settlement amount of $595,000. (Agreement, ¶ 6.) The gross settlement amount includes all payments to the Settlement Class, settlement administration costs up to $10,000, a service award to Plaintiff up to $10,000, attorney fees of one-third of the gross settlement amount (currently estimated to be $198,333.33), litigation costs up to $20,000, and a PAGA allocation of $50,000 (75 percent of which will be paid to the LWDA and 25 percent of which paid to PAGA Members). (*Id.* at ¶ 6(C).) The net settlement amount will be distributed to participating class members on a pro rata basis according to the number of workweeks they were employed by Defendant. (*Id.* at ¶ 8(B).) Similarly, individual payments to PAGA Members will be distributed on a proportional basis according to the number of pay periods they were employed by Defendant. (*Id.* at ¶ 8(C).)

The Agreement contains an escalator clause providing that, if the actual number of workweeks is determined to be incorrect by more than 10%, the gross settlement amount will be increased proportionally, or, at Defendant's option, the Class Period and PAGA Period will end as of the date the 10% threshold was reached (with such date being the "Alternate End Date"). (Agreement, ¶ 7.) It is unclear when Defendant will be able to exercise the option to chose the Alternate End Date. Providing Defendants with the option of shortening the Class Period and the PAGA Period is problematic because it could possibly eliminate otherwise eligible Settlement Class members and PAGA Members from the recovery. The court is disinclined to grant preliminary approval of settlement and notice under which it is possible that an individual may be first told that they may be entitled to recovery, and then later told they are not entitled to recovery because Defendant exercised its option to change the end date of the Class Period or the PAGA Period.

Accordingly, the motion for preliminary approval shall be briefly CONTINUED, and Plaintiff's counsel shall submit a supplemental declaration clarifying that Defendant's potential exercise of the Alternate End Date option will not result in notices being sent to individuals who might later be excluded from eligibility from recovery.

The Agreement states that individual settlement payment checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be

distributed to the California Controller's Unclaimed Property Fund. (Agreement, ¶ 8 (F).) The parties' proposal to send funds from uncashed checks issued to class member to the State of California Unclaimed Property Fund does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class members funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent."

The court is disinclined to grant preliminary approval of a settlement that does not comply with Code of Civil Procedure section 384. Therefore, the court asks that the parties meet and confer with objective of selecting a *cy pres* recipient in compliance with Code of Civil Procedure section 384. Prior to the continued hearing, counsel shall submit a stipulation or an addendum to the Agreement indicating the *cy pres* recipient.

In exchange for the settlement, the class members agree to release Defendant, and related entities and persons, from all claims that were, or reasonably could have been, alleged based on the facts pleaded in the SAC occurring during the Class Period. (Agreement, ¶ 3.) PAGA Members agree to release Defendant, and related entities and persons, from all claims for PAGA civil penalties that were alleged based on facts pleaded in the SAC and the LWDA notice. (*Ibid.*) Plaintiff also agrees to a comprehensive general release. (Agreement, ¶ 4.)

B. Fairness of the Settlement

Plaintiff asserts that the settlement is fair, reasonable, and adequate for the Settlement Class. (Larsen Dec., ¶ 6.) Plaintiff states that the settlement was reached through discovery, analysis, and mediation with Kelly A. Knight, Esq. (*Id.* at ¶¶ 10, 18, 19.) Prior to mediation, the parties engaged in extensive information discovery, with Defendant providing Plaintiff with data including the number of class members, workweeks worked, number of pay periods, average rate of pay, and other relevant metrics. (Agreement, ¶ 18.)

Plaintiff present an analysis of the value of his claims. (Larsen Dec., ¶¶ 23-31.) According to Plaintiff's exposure analysis, Defendant's estimated realistic total class wide recovery on Plaintiff's claims is $623,806. (*Id.* at ¶ 31.) Plaintiff provides a breakdown of this

amount by claim. (*Id.* at ¶¶ 23-31.) According to Plaintiff's analysis regarding the potential exposure for each claim, Defendant's estimated total maximum potential exposure is $1,982,992. (*Ibid.*)

Thus, the Agreement's gross settlement amount of $595,000 represents approximately 30% percent of the estimated total maximum potential recovery, and approximately 95.4% of the estimated realistic potential recovery. As such, the proposed settlement amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D. Cal., Feb 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist. LEXIS 30201, at *41-42 [citing cases approving settlements in the range of 5 to 35 percent of the maximum potential exposure].)

In sum, the court has reviewed Plaintiff's written submissions in support of the proposed settlement. Based on the circumstances of the case, including the strength of Plaintiffs' case and the likelihood of obtaining recovery from Defendant, the court finds the terms of the settlement to be fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees and Costs

Plaintiffs request enhancement awards in the total amount of $10,000.

> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted.)

Plaintiff has submitted a declaration describing his participation in this action. (Declaration of Alexander Bueno, ¶¶ 4-5.) Plaintiff states that his participation has included communicating with his attorneys, gathering documents, and reviewing the Agreement. (*Id.* at

¶ 5.) He estimates that he has spent approximately 20 to25 hours of his time on this case. (*Ibid.*) He also states that his reputation suffered and that he has lost friendships with former co-workers and struggled to find employment. (*Id.* at p. 6.)

Plaintiff has spent time in connection with this litigation and undertaken risk by attaching his to this case because it might impact his future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].).

The court agrees that a service award to Plaintiff is appropriate. However, the amount requested by Plaintiff, in relation to the amount of time spent on the litigation, is higher than the court normally awards in such situations. Accordingly, the court approves a service award to Plaintiff in the amount of $5,000.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will seek attorney fees of up to one third of the maximum settlement amount (currently estimated to be 198,333.33), and litigation costs not to exceed $20,000. Prior to any final approval hearing, Plaintiffs' counsel shall submit lodestar information (including hourly rate and hours worked) and evidence of actual costs incurred as well as evidence of any settlement administration costs.

D. Conditional Certification of Class

Plaintiff requests that the class be conditionally certified for purposes of the settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, section 382 requires: (1) an ascertainable class;

and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Sav-On, supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

As explained by the California Supreme Court,

> The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

(*Sav-On, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiff states there are approximately 200 class members, who can be identified from a review of Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

The content of a class notice is subject to court approval. "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining the manner of the notice, the

court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

Here, the notice describes the lawsuit, explains the settlement, and instruct class member that they may opt out of the settlement or object. (Agreement, Ex. A.) The settlement amounts, including attorney fees and payment to the named plaintiff, are stated.

However, the second page of the class notice is misleading as it states that class members "have two basic options under the Settlement": (1) "Do Nothing"; and (2) "Opt-Out of the Class Settlement." This portion of the class notice must be modified to reflect that class members have a third option—they may object to the settlement. The notice directs class members that they may appear at the final fairness hearing to make an oral objection without filing a written objection and provides instructions for attending the hearing remotely.

The court request that section titled "What is the next step?" on page 5 of notice be amended to include the following language regarding the final approval hearing:

> Class members may appear at the final approval hearing in person or remotely using the Microsoft Teams link for Department 19 (Afternoon Session), and should review the remote appearance instructions beforehand: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml
> Class members who wish to appear remotely are encouraged to contact class counsel at least three days before the hearing, if possible, so that potential technology or audibility issues can be avoided or minimized.

Further, as discussed above, Plaintiff shall provide a *cy pres* recipient in compliance with Code of Civil Procedure section 384, and the class notice must be amended to indicate this change.

IV. Conclusion

Accordingly, the motion for settlement approval is CONTINUED to October 2, 2024 in Department 19 at 1:30 p.m. At least five court days prior to the continued hearing, Plaintiff's counsel shall submit a revised class notice as well as a supplemental declaration indicating the parties' *cy pres* designation and clarifying whether Defendant's option to exercise the Alternate End Date could result in individuals receiving misleading information regarding their eligibility for recovery.

Plaintiff shall prepare the order.

- oo0oo -

Calendar Line 5

Case Name: Rico v. FMA Landscape Services, Inc., et al. (Class Action)
Case No.: 23CV409762

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 18, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This class and representative action, arising out of alleged wage and hour violations, is brought by plaintiff Juan Manuel Nino Rico ("Plaintiff") against defendants F M A Landscape Services, Inc. and Miguel A. Medina (collectively, "Defendants"). Plaintiff filed the operative complaint ("Complaint") on January 10, 2023, setting forth the following causes of action: (1) Recovery of Unpaid Minimum Wages and Liquidated Damages – Labor Code §§ 1194, 1194.2; (2) Recovery of Unpaid Overtime – Labor Code § 1194; (3) Failure to Provide Meal Periods of Compensation in Lieu thereof – Labor Code § 226.7; (4) Failure to Provide Rest Periods or Compensation in Lieu thereof – Labor Code § 226.7; (5) Failure to Provide Accurate Itemized Wage Statements – Labor Code § 226; (6) Waiting Time Penalties – Labor Code §§ 201, *et seq.*; (7) Violation of Unfair Competition Law – Bus. & Prof. Code §§ 17200, *et seq.*; (8) Violation of Private Attorneys General Act – Labor Code §§ 2698, *et seq.*

The parties have reached a settlement. Plaintiff's unopposed motion for preliminary approval of the settlement is currently before the court. At the initial hearing on July 24, 2024, the court continued the motion to September 18, 2024 and asked the parties to identify a *cy pres* recipient and modify the class notice.

On August 29, 2024, counsel submitted a supplemental declaration addressing the court's requests. As discussed below, the court now GRANTS the motion for preliminary approval.

II. Legal Standard for Settlement Agreements

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and

whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' 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.

(*Wershba, supra*, 91 Cal.App.4th at pp. 244-245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba, supra,* 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (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."

(*Wershba*, *supra*, 91 Cal.App.4th at p. 245, citation omitted.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-

five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___, 2022 U.S. LEXIS 2940.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76-77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-cv-02198-EMC) 2016 WL 5907869, 2016 U.S. Dist. LEXIS 140759, at *20-24.)

III. Discussion

A. Provisions of the Settlement

This case has been settled on behalf of the following class:

> [a]ll current and former non-exempt California employees who worked for Defendants at any time during the period of July 16, 2018 through the earlier of: (a) the date the court enters and [sic] order granting preliminary approval of this settlement; or (b) December 31, 2023.

(Declaration of J. Kirk Donnelly in Support of Motion for Preliminary Approval of Class Action Settlement ("Donnelly Dec."), Ex. 1 ("Agreement"), ¶ 1.9.) The agreement defines "Defendants" as F M A Landscape Services, Inc. and Miguel Medina. (Agreement, ¶ 1.17.) The settlement also includes a subset PAGA class of "Aggrieved Employees," defined as:

> [a]ll current and former non-exempt California employees who worked for Defendants at any during the period of July 16, 2018 through the earlier of: (a) the date the court enters and [sic] order granting preliminary approval of this settlement; or (b) December 31, 2023 (the "PAGA Period").

(Settlement Agreement, ¶ 1.5.)

According to the terms of the settlement, Defendant will pay a gross settlement amount of $360,000. (Agreement, ¶¶ 1.24, 3.1.) The settlement agreement provides that the Gross may be increased proportionately if the actual number of pay periods is determined to be incorrect by more than 10 percent or 13,200 workweeks. (*Id.* at ¶ 4.1.) The gross settlement amount includes attorney fees up to 1/3 of the gross settlement amount (currently estimated to be $120,000), litigation costs not to exceed $10,000, a PAGA allocation of $20,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Aggrieved Employees as individual PAGA payments), a service award up to $10,000, and settlement administration costs not to exceed $12,000. (*Id.* at ¶¶ 1.24, 3.2, 3.2.1-3.2.3, 3.2.5.)

The settlement agreement identifies Phoenix Settlement Administrators ("Phoenix") as the entity the parties appointed to administer the settlement. (Agreement, ¶ 1.2.) Phoenix has provided a declaration indicating that the settlement administration for this matter has a flat fee of $12,000. (Declaration of Michael Moore, ¶ 17, Ex. B.) The court approves Phoenix as the settlement administrator and settlement administration costs up to $12,000.

The net settlement amount will be distributed to participating class members on a pro rata basis according to the number of workweeks they were employed by Defendants. (Agreement, ¶ 3.2.4.) Similarly, the portion of the PAGA allocation designated for Aggrieved Employees will be distributed on pro rata basis according to the number of pay periods worked. (*Id.* at ¶ 3.2.5.1.) Defendants will fund the gross settlement amount in three installments. (Settlement Agreement, ¶ 4.3.) Within ten days of the funding of each installment, the administrator will issue checks to Class Members and Aggrieved Employees with a void date of 120 days after mailing. (*Id.* at ¶ 4.4.1.) For the distributions from the first and second installments, checks remaining uncashed more than 120 days after mailing will be void and the funds from those checks will be added back into the net settlement amount and distributed pro rata to the participating class members with the next distribution. (*Id.* at ¶¶ 1.30, 4.4.1, 4.4.3.)

As the court discussed in its prior tentative decision, the Agreement as initially presented provided that funds from checks following the third installment that remain uncashed more than 120 days after mailing would be transmitted to the California State Controller's Office Unclaimed Property Fund. The parties have since executed an addendum to the Agreement reflecting that unclaimed residual funds will go to the East Bay Community Law Center as the designated *cy pres* recipient. (See Supplemental Declaration of J. Kirk Donnelly ("Supp. Donnelly Dec."), ¶ 1, Ex. 1 ("Addendum"), modifying ¶ 4.4.3 of the Agreement.) The court approves the Addendum and the designation of East Bay Community Law Center as the *cy pres* recipient.

In exchange for the settlement provisions, Plaintiff, Class Members and Aggrieved Employees each respectively agree to release the "Released Parties" from certain claims. (Agreement, ¶¶ 1.40-1.42.) The term "Released Parties" means "Defendants and each of their former and present directors, officers, partners, shareholders, owners, members, attorneys, insurers, predecessors, successors, assigns, subsidiaries, affiliates and parent." (*Id.* at ¶ 1.42.) Plaintiff agrees to a comprehensive general release. (*Id.* at ¶ 5.1.1.)

Class Members agree to release the Released Parties from all claims that were alleged based on the facts pleaded in the Complaint occurring during the Class Period. (Agreement, ¶ 5.2.) PAGA Aggrieved Employees agree to release the Released Parties from all claims for PAGA civil penalties that were alleged based on facts pleaded in the Complaint and/or the notice Plaintiff sent to the LWDA. (*Id.* at ¶ 5.3.)

B. Fairness of the Settlement

Plaintiff states that the settlement was reached through discovery, analysis, and mediation with Hon. George Hernandez (Ret.). (Donnelly Dec., ¶¶ 8-9; Agreement, ¶¶ 2.3-2.4.) In anticipation of mediation, the parties engaged in extensive informal discovery, and Defendants provided Plaintiff with payroll records, personnel policies/handbooks, personnel files, and a random sampling of paystub and time records for about 25% of the putative class. (Donnelly Dec., ¶ 8.) Plaintiff conducted a detailed review of the payroll records, time records, and other information provided by Defendant. (*Id.* at ¶ 24.) Defendant represented that there are approximately 193 class members who worked approximately 12,000 workweeks within

the class period. (Donnelly Dec., ¶ 11; Agreement, ¶ 4.1.) Plaintiff states the net settlement amount will be approximately $180,000, meaning the average net payment to class members will be $974.09. (Donnelly Dec., ¶¶ 10-11.)

Plaintiff estimates that Defendant's maximum potential liability for all the claims is approximately $3,844,175, based on estimated potential exposure of $2,344,175 for the class claims and $1,500,000 for the PAGA claims. (Donnelly Dec., ¶¶ 25-26, 31.) Plaintiff provides a breakdown for this amount by claim (*Ibid.*) Plaintiff discounted the value of the claims given Defendants' defenses, the possibility that the court could substantially reduce any PAGA penalties, and the risks and costs associated with class certification. (*Id.*at ¶¶ 29-33.)

The gross settlement amount represents approximately 9.36% of the potential maximum recovery. The proposed settlement amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D. Cal., Feb 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist. LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].)

Therefore, the court finds the terms of the settlement to be fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees and Costs

Plaintiff request enhancement awards in the total amount of $10,000.

> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted.)

Plaintiff has provided a declaration detailing his involvement in this matter. (Declaration of Juan Manuel Nino Rico, ¶¶ 3-7.) Plaintiff states he has participated in numerous meetings and communication with his lawyers, and that he provided his lawyers with information and documents related to this case. (*Id.* at ¶¶ 5-7.) Plaintiffs states he participated in all stages of this litigation and spent time on tasks such as searching for documents, responding to requests for information, and reviewing drafts of the Complaint and the settlement agreement. (*Ibid.*) Plaintiff asserts that he spent at least 15-20 hours of his time on this litigation. (*Id.* at ¶ 7.)

The time Plaintiff spent on this litigation benefited the putative class members and Aggrieved Employees because of the resulting settlement. Plaintiff also undertook risk by attaching his name to this case because it might impact her future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].).

The court agrees that a service award to Plaintiff is appropriate. However, the amount sought for the service award is higher than the court typically awards in similar situations. Accordingly, the court approves a service award to Plaintiff in the amount of $2,500.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will seek attorney fees up to 1/3 of the gross settlement amount (currently estimated to be $120,000) and litigation costs not to exceed $10,000. Plaintiff's counsel shall submit lodestar information (including hourly rate and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiff's counsel shall also submit, prior to the final approval hearing, evidence of actual costs incurred as well as evidence of any settlement administration costs.

D. Conditional Certification of Class

Plaintiff requests that the class be conditionally certified for purposes of the settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order

approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, section 382 requires: (1) an ascertainable class; and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Sav-On, supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

As explained by the California Supreme Court,

> The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

(*Sav-On, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiff states that there are approximately 193 class members, who can be identified from a review of Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

The content of a class notice is subject to court approval. “If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court.” (Cal. Rules of Court, rule 3.769(f).)

In its prior tentative decision, while stating that the proposed notice generally complied with the requirements, the court asked the parties modify the language regarding the final approval hearing and to include indication of the designated *cy pres* recipient, as discussed above. Counsel has since provided a revised class notice sufficiently addressing the court’s requests. (Supp. Donnelly Dec., Ex. 2.)

The court has reviewed and approves the revised class notice.

IV. Conclusion

Accordingly, the motion for preliminary approval of class and representative action settlement is GRANTED. The final approval hearing is scheduled for January 15, 2025 at 1:30 p.m. in Department 19.

At least ten court days prior to the final approval hearing, Plaintiff’s counsel shall submit lodestar information (including hourly rate and hours worked), evidence of actual costs incurred, and evidence of settlement administration costs.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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