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

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: SEPTEMBER 25, 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	20CV363833	Hernandez v. Burdick Painting (Lead Case; Consolidated with Case No. 20CV366446)	Rescheduled to January 29, 2025 at 1:30 p.m.
LINE 2	22CV403427	Bravo v. Michels Pacific Energy, Inc. (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	23CV413857	Pinedo v. Express Freight Handlers, Inc. (Class Action/PAGA)	See Line 3 for tentative ruling.
LINE 4	23CV422144	Nezzer v. Command Security Services, LLP (PAGA)	See Line 4 for tentative ruling.
LINE 5	22CV394401	Nguyen v. Port Plastics, Inc. (PAGA Representative Action) (Lead Case; Consolidated with 22CV394403/Class Action)	See Line 5 for tentative ruling.
LINE 6	22CV407445	Nava v. Performance First Building Services, Inc. (Class Action/PAGA)	See Line 6 for tentative ruling.
LINE 7	23CV418395	Smith v. Spread Your Wings, LLC (Class Action)	See Line 7 for tentative ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	22CV404404	Rush v. Spread Your Wings, LLC (Class Action)	See Line 8 for tentative ruling.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name:
Case No.:

- oo0oo -

Calendar Line 2

Case Name: Bravo v. Michels Pacific Energy, Inc. (Class Action/PAGA)
Case No.: 22CV403427

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 25, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a class and representative action arising out of alleged wage and hour violations. On November 28, 2022, Plaintiff Michael Bravo ("Plaintiff") filed the operative First Amended Complaint ("FAC") against Defendant Michels Pacific Energy, Inc. ("Defendant"). The FAC sets forth the following causes of action: (1) violation of Cal. Labor Code, sections 510 and 1198 (unpaid overtime); (2) violation of Cal. Labor Code, sections 226.7 and 512, subdivision (a) (unpaid meal period premiums); (3) violation of Cal. Labor Code, section 226.7 (unpaid rest period premiums; (4) violation of Cal. Labor Code, sections 1194, 1197 and 1197.1 (unpaid minimum wages); (5) violation of Cal. Labor Code, sections 201, 202 and 203; (6) violation of Cal. Labor Code, section 226, subdivision (a) (failure to provide accurate wage statements); (7) violation of Cal. Labor Code, sections 2800 and 2802 (failure to reimburse necessary business expenses); (8) violation of Cal. Business and Professions Code, section 17200, *et seq.*; and (9) violation of Cal. Labor Code, section 2699, *et seq.* (Private Attorneys General Act ("PAGA")).

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. Terms and Administration of Settlement

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

> [A]ll current and former hourly-paid and/or non-exempt non-union employees and union employees covered under the National Pipe Line Agreements employed by Defendant in the State of California at any time during the Class Period [September 26, 2018 through October 11, 2023].

(Declaration of Jonathan M. Genish in Support of Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement, Ex. 2 ("Agreement"), ¶¶ 6(a), 6(f).) The National Pipe Line Agreements refers to the Collective Bargaining Agreements ("CBAs") that cover Defendant's employees who are members of the International Union of Operating Engineers, the International Brotherhood of Teamsters, and the Laborers' International Union of North America. (*Id.* at ¶ 6(u).)

The settlement also include a subset of PAGA employees, defined as:

> "[A]ll current and former hourly-paid and/or non-exempt non-union union employees covered under the National Pipe Line Agreements employed by Defendant in the State of California at any time during the PAGA Period [September 22, 2021 through October 11, 2023]."

(Agreement, ¶¶ 6(y), 6(aa).)

According to the terms of the Agreement, Defendant will pay a maximum, non-reversionary gross settlement amount of $1,750,000. (Agreement, ¶ 6(p).) This amount includes attorney fees up to $583,333.33 (one-third of the gross settlement amount), litigation costs not to exceed $13,000, and a PAGA allocation of $200,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Employees), an enhancement award up to $10,000, and settlement administration costs not to exceed $8,500. (*Id.* at ¶¶ 6(a), 6(l), 6(p), 6(v), 6(x), 6(z), 6(ll), 9-12.) The net settlement amount will be distributed to participating class members on a pro rata basis according to their number of workweeks. (*Id.* at ¶¶ 6(s), 14.)

As amended, the Agreement provides that funds from checks remaining uncashed more than 180 days after mailing will be distributed to California Rural Legal Assistance, Inc. as the designated *cy pres* recipient in accordance with California Code of Civil Procedure section 384. (Supplemental Declaration of Jonathan M Genish, ¶ 5 and Ex. 2, amending paragraph 34 of the Agreement.) The court approves the designated *cy pres* recipient.

In exchange for the settlement, the class members agree to release Defendant, and related entities and persons, from any and all claims which were alleged, or which could have been alleged based on the factual allegations in the FAC arising during the Class Period. (Agreement, ¶¶ 6(ff), 6(hh), 35.) PAGA Employees agree to release Defendant, and related entities and persons, from any and all claims for civil penalties under PAGA arising from any of the factual allegations in Plaintiff's PAGA letter arising during the PAGA Period. (*Id.* at ¶¶ 6(gg), 6(hh), 36.) Plaintiff also agrees to a comprehensive general release. (*Id.* at ¶ 37.)

On May 30, 3024, the settlement administrator mailed the Class Notice to all 300 class members contained in the class list provided by Defendant on May 13, 2024. (Declaration of Nick Castro of ILYM Group, Inc. Regarding Notice and Settlement Administration, ¶¶ 5, 7 ("Castro Dec.").) Ultimately, four of the mailed notices were deemed undeliverable. (*Id.* at ¶ 8.) As of August 27, 2024, the administrator has not received any requests for exclusion, any notices of objection, or any workweek disputes. (*Id.* at ¶¶ 9-11.) The notice process has now been completed. According to the administrator's calculations, the estimated average gross

individual settlement share is $3,125.56 and the estimated average individual PAGA payment is $196.85. (*Id.* at ¶¶ 13-14.)

At preliminary approval, the court found the settlement to be fair and reasonable. Given that there are no objections, it finds no reason to deviate from that finding now. Accordingly, the court finds that the settlement is fair and reasonable for purposes of final approval.

IV. Enhancement Award, Attorney Fees and Costs

Plaintiff requests an enhancement award of $7,500. (Declaration of Plaintiff Michael Bravo in Support of Motion for Final Approval ("Bravo Dec."), ¶ 12.)

> 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, internal punctuation and citations omitted.)

Plaintiff has filed declarations generally describing his participation in the lawsuit. He states that he has spent approximately 25 to 30 hours in connection with this action, including discussing the case with counsel, gathering documents, providing information regarding Defendant's policies and practices, and reviewing settlement documents. (Bravo Dec., ¶¶ 4-9.) Plaintiff also states that he put his current and future employment at risk by bringing this lawsuit. (*Id.* at ¶ 7.) As discussed at the prior hearing, the court approves an enhancement award of $7,500.

The court 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.) "Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." (*Wershba*, *supra,* 91 Cal.App.4th at p. 254.)

Class counsel seeks an attorney fee award of $583,333.33 (one-third of the gross settlement amount) and reimbursement of litigation costs and expenses in the amount of $13,000. (Plaintiff's Notice of Motion and Motion for Final Approval of Class Action and PAGA Settlement [], pp. i:20-23, 16: 9-12.) Counsel asserts that the requested fee award is within the range of reasonableness and that a percentage award is supported by the circumstances of the case and the contingency basis of the representation. (*Id.* at pp. 18:23-19:14.) Counsel also contends that the requested amount is also justified under the lodestar method. (*Id.* at pp. 20:26-22:22.)

Counsel states that its total fees incurred thus far amount to $229,093, based on 256.50 hours billed at rates ranging from $695 to $1,150. (Declaration of Miriam L. Schimmel, ¶ 10.) This results in a multiplier of 2.55. This is within the range of multipliers that courts typically approve. (See *Wershba*, supra, 91 Cal.App.4th at p. 255 ["[m]ultipliers can range from 2 to 4 or even higher"]; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051, fn. 6 [stating that multipliers ranging from one to four are typical in common fund cases].)

The benefits achieved by the settlement justify an award of attorney fees to class counsel. The court finds that the requested attorney fee award is reasonable as a percentage of the common fund and approves an attorney fee award in the requested amount of $583,333.33.

Class counsel also presents evidence of litigation costs supporting the requested award of $13,000. (Declaration of Jonathan M. Genish in Support of Plaintiff's Motion for Final Approval of Class Action and PAGA Settlement [], ¶ 36 and Ex. 4.) The court observes that the costs incurred to date are slightly less than the requested $13,000, and that anticipated total costs are slightly more than $13,000. The court finds any discrepancy in this regard to be *de minimis* and approves a litigation cost award in the amount of $13,000. The settlement administration cost are also approved in the amount of $8,500. (Castro Dec., ¶ 15 and Ex. B.)

V. Conclusion

The motion for final approval of class and representative action settlement is GRANTED.

The class as defined herein is certified for settlement purposes. Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Pursuant to

Rule 3.769(h) of the California Rules of Court, the Court retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for March 26, 2025 at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to the *cy pres* recipient; the status of any unresolved issues; and any other matters appropriate to bring to the court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

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: Pinedo v. Express Freight Handlers, Inc. (Class Action/PAGA)
Case No.: 23CV413857

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 25, 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 arising from alleged wage and hours violations. On April 11, 2023, Plaintiff Jonathan Pinedo ("Plaintiff") initiated this action by filing a Class Action Complaint against Defendant Express Freight Handlers, Inc., alleging various employment law violations. On December 13, 2023, Plaintiff filed a First Amended Complaint, adding a cause of action for civil penalties under the Private Attorneys General Act (Labor Code, §§ 2698, *et seq.*, ("PAGA")).

On August 30, 2024, Plaintiff filed the operative Second Amended Complaint ("SAC") against Defendants Express Freight Handlers, Inc., Restaurant Depot, LLC, and Jetro Holdings, LLC, adding three new causes of action and two additional Defendants.

The SAC sets forth the following causes of action: (1) failure to provide medal periods (Lab. Code, §§ 204, 223, 226.7, 512 and 1198); (2) failure to provide rest periods (Lab. Code, §§ 204, 223, 226.7 and 1198); (3) failure to pay hourly wages (Lab. Code, §§ 223, 510, 1194, 1194.2, 1197, 1197.1 and 1198); (4) failure to pay vacation wages (Lab. Code, § 227.3); (5) failure to indemnify (Lab. Code, § 2802); (6) failure to provide accurate written wage statements (Lab. Code, § 226, subd. (a); (7) failure to timely pay all final wages (Lab. Code, §§ 201, 202 and 203); (8) unfair competition (Bus. & Prof. Code, §§ 17200, *et seq.*); (9) failure to pay sick pay (Lab. Code, § 246); (10) failure to keep required records (Lab. Code, §§ 1174, 1174.5, 1175); (11) failure to pay reporting time pay (Lab. Code, § 1198); (12) Civil Penalties under PAGA (Lab. Code, § 2698, *et seq.*).

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

As preliminary matter, on September 17, 2024, defense counsel in this matter filed a Notice of Related Case, referencing a case pending in this department: *Minh Ma v. Express Freight Handlers, Inc., et al.*, 24CV435566 ("*Minh Ma*"). The court requests an update regarding whether there have been any settlement discussions with counsel for the plaintiff in this related case. Prior to the hearing in this matter, if possible, Plaintiff's counsel shall file a supplemental declaration addressing whether there has been any discussion with counsel in *Minh Ma* regarding the settlement here and its impact on the claims alleged in *Minh Ma.*

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

This case has settled on behalf of the following class:

> [A]ll persons who, during the Class Period, have previously been or currently are employed in California by Defendant in hourly or non-exempt positions in California.

(Declaration of Shaun Setareh ("Setareh Dec."), Ex. 1 ("Agreement"), ¶ 6.) The Class Period means "the period of time from April 11, 2019, through to the date of Preliminary Approval of the Settlement." (Agreement, ¶ 5.) Under the Agreement, the term "Defendant" means Express Freight Handlers, Inc ("Defendant"). (*Id.* at ¶ 3.) The other named defendants in this case, Restaurant Depot, LLC and Jetro Holdings, LCC, are specified identified in the Agreement as among the "Released Parties." (*Id.* at ¶ 9.)

The settlement also includes a subset of PAGA Employees, defined as "all persons who have previously been or currently are employed by Defendant in hourly or non-exempt positions in California at any time during the PAGA Period." (Agreement, ¶ 12.) The PAGA Period mean the period of time from Aprill 11, 2022, through to the date of preliminary approval of the settlement. (*Id.* at ¶ 14.)

According to the terms of the settlement, Defendant will pay a non-reversionary maximum settlement number ("MSN") of $410,325. (Agreement, ¶ 26.) This amount includes attorney fees up to $136,775 (one-third of the MSN), litigation costs up to $14,000, an enhancement award to Plaintiff of up $7,500, settlement administration costs up to $15,000, and a PAGA allocation of $20,516.25 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Employees). (*Id.* at ¶¶ 27(a)-27(e).)

The Agreement includes an escalator clause providing that, in the event that it is determined that the number of workweeks worked by Class Period increases by more than 10% more than the data previously provide, the MSN shall be increased proportionately. (Agreement, ¶ 30.) The net settlement amount will be distributed to participating class members on a pro rata basis according to their number of workweeks worked. (*Id.* at ¶ 28(b).) The payments to PAGA Employees will be distributed on a pro rata basis according to the number of pay periods worked. (*Id.* at ¶ 28(a).)

The Agreement provides that funds from checks remaining uncashed more than 180 days after mailing will be distributed to Alliance for Children's Rights as the designated *cy pres* recipient pursuant to Code of Civil Procedure section 384. (Agreement, ¶ 56.) There is a discrepancy between the *cy pres* provision in counsel's declaration (referencing a distribution to the State's Unclaimed Property Division) and in the Agreement itself. (See Setareh Dec., p. 16:7-10.) The court approves the provision in the Agreement designating a *cy pres* recipient.

In exchange for the settlement, the class members agree to release Defendant Express Freight Handlers, Inc. and related persons and entities, including Restaurant Depot, LLC and Jetro Holdings, LLC, (the "Released Parties"), from any and all claims that were or could have been alleged based on the facts alleged in this action. (Agreement, ¶¶ 9, 31.) PAGA Employees agree to release the Released Parties from all PAGA claims that were or could have been alleged based on the facts alleged in this action or the PAGA Notice submitted to the LWDA, occurring during the PAGA Period. (*Id.* at ¶ 32.) Plaintiff also agrees to a comprehensive general release. (*Id.* at ¶ 33.)

B. Fairness of the Settlement

Plaintiff contends the proposed settlement is fair, reasonable, and adequate in light of the complexities of this case. (Setareh Dec., ¶ 11.) The parties reached the settlement after discovery, meditation with Michael Loeb, Esq., and continued negotiations following mediation. (*Ibid.*) Prior to mediation, the parties engaged in extensive informal discovery, with the Defendants producing hundreds of pages of documents, including Plaintiff's personnel file and information regarding the class size and payroll data. (*Ibid.*) Plaintiff hired an expert to analyze the data produced by the Defendants. (*Ibid.*)

Plaintiff presents an analysis of the estimated potential recovery of his claims. (Setareh Dec., ¶ 12.) Plaintiff estimates that the total potential recovery of his class and PAGA claims is $5,933,228.62 and provides a breakdown of this amount by claim. (*Ibid.*) Plaintiff explained the rationale for reducing this amount to a more realistic figure for purposes of settlement, including, but not limited to, the following: the low likelihood of prevailing on all claims; the difficulty in establishing willfulness for the waiting time penalties claims; the risk that the Defendants' challenged employment policies might not ultimately support class certification or

class-wide liability; and the risk that a judge may exercise its discretion to reduce any civil penalties awarded under PAGA. (*Id.* at ¶ 13.)

The MSN of $410,325 represents 6.92% of the estimated total potential recovery of $5,933,228.62. Therefore, 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].)

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 Plaintiff's 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. Enhancement Award, Attorney Fees and Costs

Plaintiff requests an enhancement award of $7,500.

> 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.)

Prior to the final approval hearing, Plaintiff shall submit a declaration describing his participation in this action and including an estimate of the number of hours he has spent in connection with this action. The court will address the reasonableness of the enhancement award at that time.

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.) Plaintiff's counsel will seek attorney fees of up to one third of the MSN (currently estimated to be $136,775), and litigation costs not to exceed $14,000. Prior to the final approval hearing, Plaintiff's 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 267 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. 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.

However, the notice does not identify the *cy pres* recipient or otherwise indicate what will happen to the funds from checks that remain uncashed after the void date. The notice must be amended to include this information. The court also asks that the section titled "The Court's Final Fairness Hearing" on page 9 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.

In sum, the court approves the class notice on the condition that the parties make the changes indicated above prior to its mailing.

IV. Conclusion

The motion for preliminary approval of the class and representative settlement is GRANTED.

The court sets a final approval hearing for March 19, 2025 at 1:30 p.m. in Department 19. At least 10 court days prior to the hearing, Plaintiff shall submit a declaration describing his participation in this action and including an estimate of the number of hours he has spent in connection with this action, and Plaintiff's counsel shall submit lodestar information (including hourly rate and hours worked), evidence of actual costs incurred, and information regarding the notice process evidence of any settlement administration costs.

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

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Calendar Line 4

Case Name: Nezzer v. Command Security Services, LLP (PAGA)
Case No.: 23CV422144

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 25, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

Plaintiff Jacob Nezzer ("Plaintiff") brings this representative action against Defendant Command Security Services, LP ("Defendant"). On September 1, 2023, Plaintiff filed his Class and Representative Action Complaint ("Complaint"), alleging the following causes of action: (1) failure to pay minimum wages; (2) failure to provide legally compliant meal periods or compensation in lieu thereof; (3) failure to provide legally compliant rest periods or compensation in lieu thereof; (4) failure to pay all wages owed upon separation; (5) failure to provide paid sick leave; (6) failure to furnish accurate itemized wage statements; (7) failure to maintain accurate records; (8) failure to provide copies of signed documents; (9) failure to reimburse for necessary work expenses; (10) violation of unfair competition law; and (11) Private Attorneys General Act (Labor Code sections 2698, *et seq.* ("PAGA")).

On December 4, 2023, the court (Hon. Kulkarni) entered an order on the parties' stipulation to dismiss Plaintiff's class claims without prejudice. (Joint Stipulation and Order, p. 3:14.) Plaintiff signed an arbitration agreement in January of 2023, and the parties agreed to proceed with arbitration only as to Plaintiff's individual wage and hour claims and his individual PAGA claims. (*Id.* at pp. 2:9-17; 3:11-13.)

The parties have reached a settlement. Plaintiff has moved for approval of the PAGA settlement, and the motion is unopposed.

II. Legal Standard

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

This case has been settled on behalf of a group of "Aggrieved Employees," defined as "all current and former persons employed by [Command Security Services, LP ("Defendant")] or Released Parties as non-exempt employees in California during the PAGA Period." (Declaration of R. Craig Clark ("Clark Dec."), Ex. 1 ("Agreement"), ¶ 1.4.) "Released Parties" means Defendant and related entities and persons. (*Id.* at ¶ 1.26.)

The "PAGA Period" is the period from June 30, 2022 to the Effective Date. (Agreement at ¶ 1.19.)

> "Effective Date" means the date by when the following have occurred: (a) the Court enters a Judgment on its Order Approving the PAGA Settlement, (b) the Judgment is final, and (c) the date the time to appeal or seek permission to appeal or seek other judicial review of the entry of a Judgment approving the Settlement has expired with no appeal or other judicial review having been taking or sought.

(*Id.* at ¶ 1.9.)

According to the terms of the settlement, Defendant will pay a gross settlement amount of $215,000. (Agreement, ¶ 1.10.) This amount includes attorney fees of up to one-third of the

gross settlement amount (currently estimated to be $71,666.67), litigation costs up to $15,000, an enhancement award up to $5,000, settlement administration expenses of up to $4,250, and a PAGA Penalties payment totaling $119,083.32 (75% of which ($89,312.49) will be paid to the LWDA, and 25% of which ($29,770.83) will be paid to the Aggrieved Employees). (*Id.* at ¶¶ 1.10, 1.22, 3.1, 3.2.1-3.2.4.) The court approves Phoenix Class Action Administration Solutions as the settlement administrator. (*Id.* at ¶¶ 1.2, 7.1.)

Based on a review of its records, Defendant estimated there were approximately 249 Aggrieved Employees who worked a total of 6,864 pay periods. (Agreement, ¶ 4.1.) Under the Agreement, Individual PAGA Payments will be distributed to Aggrieved Employees on a pro-rata basis according to the number of pay periods worked during the PAGA Period. (*Id.* at ¶ 3.2.3.1.) Funds from checks remaining uncashed more than 180 days after mailing will be transmitted to the California Controller's Unclaimed Property Fund in the name of the Aggrieved Employee. (*Id.* at ¶ 4.4.3.)

In exchange for the settlement, the Aggrieved Employees are deemed to release Defendant, and related entities and persons, from all claims for PAGA penalties that were alleged, or reasonable could have been alleged, based on the PAGA Period facts alleged in the operative Complaint and the PAGA Notice sent to the LWDA. (Agreement, ¶¶ 1.25, 1.26, 5.2.) Plaintiff also agrees to a comprehensive general release. (*Id.* at ¶ 5.1.)

B. Fairness of the Settlement

Plaintiff contends the proposed settlement is fair, reasonable, adequate and in the best interest of the PAGA settlement class and the State of California. (Clark Dec., ¶ 36.) On March 5, 2024, the parties participated in mediation with Steve Pearl, Esq. (*Id.* at ¶ 5.) Prior to mediation, the parties engaged in discovery, with Defendant producing documents such as Plaintiff's personnel file, time and pay records for a 15% sample of other non-exempt employees, handbooks and relevant policies. (*Id.* at ¶ 4.)

Plaintiff estimates that Defendant's maximum exposure for PAGA penalties is $1,029,600. (Agreement, ¶ 8.) This amount is based on 6,864 pay periods at $50 penalty x 3, for overtime, meal period premiums, and rest period premiums. (*Ibid.*) Plaintiff reasons that, although penalties under PAGA are $100 per pay period for an initial violation and $200 per

pay period for a subsequent violation, Defendant will argue that Labor Code section 558 applies to limit the penalties available to $50 per pay period. (*Id.* at ¶ 7.) Plaintiff also discusses Defendant's anticipated defenses to the particular claims in question, noting the difficulties in proving the claims and the risk of recovering nothing. (*Id.* at ¶¶ 9-14.)

According to Plaintiff's figures, the gross settlement amount of $215,000 represents 20.88% of the $1,029,600 maximum in civil penalties that Plaintiff could recover at trial. After reviewing Plaintiff's written submission, the court finds that he 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 proposed PAGA settlement is fair and reasonable.

C. Enhancement 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 his participation in the action. (Declaration of Jacob Nezzer, ¶¶ 7-11.) He states that he has actively participated in this lawsuit from the outset, and his involvement has included regular communication with counsel and providing detailed descriptions regarding his claims and Defendant's policies and practices. (*Id.* at ¶ 9.) He estimates that he has spent approximately 35 hours on the litigation of this case. (*Ibid.*) The court finds that an enhancement award is justified and that the amount requested is reasonable.

Accordingly, the court approves an enhancement award of $5,000.

D. Attorney Fees and Costs

Plaintiff's counsel seeks an attorney fees award of $71,666.67 (one-third of the gross settlement amount). (Clark Dec., ¶ 26.) Plaintiff's counsel states that its lodestar to date is $102,749, based on 132.5 hours billed at rates from $250 to $1,150 per hour. (*Id.* at ¶¶ 27-28.)

This results in a negative multiplier. The court finds the requested fees to be reasonable as a percentage of the total recovery, and an attorney fee award is approved in the requested amount of $71,666.67.

Plaintiff's counsel also requests litigation costs in the total amount of $14,417.56 and provides evidence of incurred costs in that amount. (Clark Dec., ¶ 32 and Ex. 3.) The amount requested is reasonable, and the court approves an award of litigation costs in the amount of $14,417.56.

Plaintiff also requests settlement administration costs in the amount of $4,250. (Agreement, ¶ 3.2.2.) Plaintiff provides a declaration from the settlement administrator demonstrating that costs associated with settlement administration will not exceed $4,250. (Declaration of Jodey Lawrence of Phoenix Settlement Administrators, ¶ 16 and Ex. B.) Therefore, the court approves settlement administration costs in the amount of $4,250.

IV. Conclusion

Accordingly, the motion for approval of PAGA settlement is GRANTED.

The Court sets a compliance hearing for March 26, 2025 at 2:30 p.m. in Department 19. At least ten court days before the hearing, Plaintiff's counsel and the settlement administrator shall submit the following: a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; the status of any unresolved issues; and any other matters appropriate to bring to the court's attention.

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

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Calendar Line 5

Case Name: Nguyen v. Port Plastics, Inc. (PAGA Representative Action) (Lead Case; Consolidated with 22CV394403/Class Action)
Case No.: 22CV394401

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 25, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a consolidated action comprised of two cases brought Plaintiff Kenneth Nguyen ("Plaintiff") against Defendant Port Plastics, Inc. ("Defendant"): (1) Kenneth Nguyen v. Port Plastics, Inc. (Santa Clara County Superior Court, Case No. 22CV394401), a representative action under the Private Attorneys General Act (Lab. Code, section 2699, *et seq.*, ("PAGA"); and (2) Kenneth Nguyen v. Port Plastics, Inc. (Santa Clara County Superior Court, Case No. 22CV394403), a Class Action.

On June 24, 2022, the court (Hon. Lucas) entered an order on the parties' stipulation to consolidate the two cases. On July 28, 2022, Plaintiff filed the operative Consolidated Class Action and Representative Action Complaint against Defendant, setting forth the following causes of action: (1) unfair business competition in violation of Cal. Business and Professions Code, sections 17200, *et seq.*; (2) failure to pay minimum wages in violation of Cal. Labor Code, sections 1194, 1197and 1197.1; (3) failure to pay overtime wages in violation of Cal. Labor Code, section 510; (4) failure provide required meal periods in violation of Cal. Labor Code, sections 226.7 and 512 and the applicable [Industrial Welfare Commission ("IWC")] Wage Order; (5) failure to provide required rest periods in violation of Cal. Labor Code, sections 226.7and 512 and the applicable IWC Wage Order; (6) failure to provide accurate itemized wage statements in violation of Cal. Labor Code, section 226; (7) failure to reimburse employees for required expense in violation of Cal. Labor Code, section 2802; (8) failure to provide wages when due in violation of Cal. Labor Code, sections 201, 202 and 203; (9) discrimination and retaliation in violation of [the Fair Employment and Housing Act ("FEHA")]; (10) wrongful termination in violation of public policy; and (11) violation of the

Private Attorneys General Act, Cal. Labor Code, sections 2698, *et seq.*). The ninth and tenth causes of action are alleged by Plaintiff as an individual.

The parties reached a settlement, and Plaintiff moved for preliminary approval. The court initially continued the motion and requested that Plaintiff's counsel file supplemental materials identifying a *cy pres* recipient, explaining the resolution of Plaintiff's individual causes of action, and making modifications to the class notice. Counsel did so, and the court entered an order granting preliminary approval of the settlement.

Now before the court is Plaintiff's motion for final 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. Terms and Administration of Settlement

This consolidated action has been settled on behalf of the following class:

> [A]ll individuals who are employed by or previously were employed by Defendant Port Plastics, Inc. in California who were classified as non-exempt and/or hourly paid employees and who worked at any time during the Class Period.

(Declaration of Norman Blumental in Support of Motion for Final Approval [] ("Blumenthal Dec."), Ex. 2 ("Agreement"), ¶ 1.5.) The Class Period is defined as the period of time from February 15, 2018, through the earlier of the date of an order approving Plaintiff's motion for preliminary approval or August 1, 2023. (*Id.* at ¶ 1.13.) The Agreement contains an escalator clause providing that, in the even the estimated number of workweeks is determined to be too low by more than 10%, Defendant may elect to: (a) elect to increase the gross settlement amount proportionately; (b) shorten the Class Period; or (c) increase the gross settlement amount proportionately by the same percentage of workweeks through a shortened Class Period as agreed upon by the parties. (Agreement, ¶ 9.)

The class includes a subset of Aggrieved Employees, who are defined as "all individuals who worked for Defendant Port Plastics, Inc. in California who were classified as non-exempt and/or hourly paid employees and who worked at any time during the PAGA period." (Agreement, ¶ 1.4.) The "PAGA Period" is defined as the period of time from December 9, 2020, through the earlier of the date of an order approving Plaintiff's motion for preliminary approval, or August 1, 2023. (*Id.* at ¶ 1.31.)

According to the terms of the settlement, Defendant will pay a non-reversionary gross settlement amount of $350,000. (Agreement, ¶¶ 1.22, 3.1.) This amount includes attorney fees of $116,666 (one-third of the gross settlement amount), litigation costs not to exceed $21,000, an enhancement award to Plaintiff not to exceed $10,000, settlement administration costs not to exceed $5,500, and a PAGA allocation of $15,000 (75 percent of which will be paid to the LWDA, and 25 percent of which will be paid to Aggrieved Employees). (*Id.* at ¶¶ 1.3, 1.7, 1.15, 1.22, 1.24, 1.27, 1.28, 1.34, 3.2.)

The net settlement amount will be distributed to the class members on a pro rata basis based on the number workweeks worked during the Class Period. (Agreement, ¶¶ 1.23, 1.28, 3.2.) Similarly, Aggrieved Employees will receive a pro rata share of the 25 percent of the PAGA payment allocation to them based on the number of workweeks worked during the PAGA period. (*Id.* at ¶¶ 1.24, 1.34, 3.2.)

As currently amended by stipulation, the Agreement provides that the funds from settlement checks remaining uncashed after 180 days will be paid to the Children's Advocacy Institute as the *cy pres* recipient in accordance with California Code of Civil Procedure section 384. (Supplemental Declaration of Kyle Nordrehaug, Ex. 1 [stipulation amending ¶ 5.4 of the Agreement].)

In exchange for the settlement, class members agree to release Defendant, and related persons and entities, from all class claims pleaded or which reasonably could have pleaded based on the factual allegations of the operative Complaint. (Agreement, ¶¶ 1.38, 1.40, 6.2.) Aggrieved Employees agree to release Defendant and related persons and entities from all PAGA claims pleaded or which reasonably could have been pleaded based on the facts contained in the operative Complaint and in Plaintiff's notice letter to the LWDA. (*Id.* at ¶¶ 1.40, 6.1.)

Plaintiff also agrees to a general release. (Agreement, ¶ 6.1.) Plaintiff's general release in the Agreement does not extend to his individual claims for discrimination, retaliation and wrongful termination. However, counsel has informed the court that the parties entered into a confidential individual settlement agreement that resolves Plaintiff's individual claims and provides that those claims will be dismissed with prejudice.

On July 10, 2024, the settlement administrator mailed the Class Notice Packet to all 105 individuals contained in the class list provided by Defendant on June 27, 2024. (Declaration of Makenna Snow of ILYM Group, Inc. Regarding Notice and Settlement Administration, ¶¶ 5, 7 ("Snow Dec.").) Ultimately, two Class Notice Packets were deemed undeliverable. (*Id.* at ¶ 10.) As of September 18, 2024, the administrator has not received any requests for exclusion, any objections to the settlement, or any disputes from Class Members during the response period. (*Id.* at ¶¶ 11-13.) The notice process has now been completed.

Defendant elected to shorten the end date of the class period to June 30, 2022, as set forth in the Agreement's escalator clause. (Snow Dec., ¶ 16.) This caused the gross settlement amount to increase by $22,826.75, resulting in a revised gross settlement amount of $372,826.75. (*Id.* at ¶ 17.) According to the settlement administrator's calculations, participating Class Members will receive an estimated average gross payment of $1,876.68, and Aggrieved Employees will receive an estimated average payment of $54.35. (*Id.* at ¶¶ 18-19.)

At preliminary approval, the court found the settlement to be fair and reasonable. Given that there are no objections, it finds no reason to deviate from that finding now. Accordingly, the court finds that the settlement is fair and reasonable for purposes of final approval.

IV. Enhancement Award, Attorney Fees and Costs

The Agreement provides for an enhancement award to Plaintiff in the 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, internal punctuation and citation.)

Plaintiff has submitted a declaration describing his participation in the action and stating that he has spent approximately 30 to 40 hours in connection with this litigation. Plaintiff took risk by putting his name on this case because it may impact his current or future employment. As the court explained previously, the requested amount of $10,000 is more than the court typically awards, relative to the amount of time spent on the litigation. Accordingly, the court approves an enhancement award to Plaintiff in the amount of $5,000.

The court 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.) "Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." (*Wershba, supra,* 91 Cal.App.4th at p. 254.)

Class counsel seeks an attorney fee award of in the amount of $116,666, one-third of the gross settlement amount of $350,000. (Blumental Dec., pp. 12:16-13:23.) Counsel asserts that the percentage-based award was bargained for during arms-length negotiations and is reasonable in light of the contingency basis of the representation. (*Id.* at p. 13:1-14.) Counsel states that its total incurred lodestar to date is $162,457.50, based on 213 hours with attorneys' hourly rates ranging from $450 to $995. (*Id.* at p. 18:16-19.) The billing records provided by counsel indicate attorney fees incurred in that amount, and slightly more. (*Id.* p. 18:18-19, fn. 6, Ex. 3-4 [law firm switched billing systems in June 2022].) This results in a negative multiplier.

The benefits achieved by the settlement justify an award of attorney fees to class counsel. The court finds that the requested fee award is reasonable as a percentage of the common fund without the use of a multiplier and approves an attorney fee award in the requested amount of $116,666.

Class counsel also presents evidence of litigation expenses incurred in the amount of $12,638.21. (Blumental Dec., pp. 19:23-20:4.) This amount is under the maximum litigation expense of $21,000 as provided in the settlement. (Agreement, ¶ 3.2.(b).) The court approves a litigation cost award in the incurred amount of $12,638.21. The settlement administration costs are also approved in the amount of $5,500. (Snow Dec., ¶ 20.)

V. Conclusion

The motion for final approval of class and representative action settlement is GRANTED.

The class as defined herein is certified for settlement purposes. Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Pursuant to

Rule 3.769(h) of the California Rules of Court, the Court retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for March 26, 2025 at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to the *cy pres* recipient; the status of any unresolved issues; and any other matters appropriate to bring to the court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

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

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Calendar Line 6

Case Name: Nava v. Performance First Building Services, Inc. (Class Action/PAGA)
Case No.: 22CV407445

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 25, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This action arises out of alleged wage and hour violations by defendant Performance First Building Services, Inc. ("Defendant"). On October 26, 2023, plaintiff Maura Munoz Nava ("Plaintiff") filed the operative First Amended Class Action Complaint ("FAC") against Defendant. According to the FAC's allegations, Defendant is private janitorial business providing cleaning and disinfecting services for commercial business throughout the state of California. (FAC, ¶ 1.) Defendant implemented unlawful policies with respect to meal and rest breaks and willfully turned a blind eye to off-the-clock work, resulting in miscalculation of pay. (*Id.* at ¶¶ 3-5.) Defendant also failed to provide accurate wage statements and failed reimburse Plaintiff and other aggrieved employees for necessary expenses. (*Id.* at ¶¶ 6-7.)

The FAC sets forth the following causes of action: (1) Failure to Provide Required Meal Periods; (2) Failure to Provide Required Rest Breaks; (3) Failure to Pay Overtime Wages; (4) Failure to Pay Minimum Wages; (5) Failure to Pay Timely Wages; (6) Failure to Pay All Wages Due to Discharged and Quitting Employees; (7) Failure to Furnish Accurate Itemized Wage Statements; (8) Failure to Maintain Required Records; (9) Failure to Provide Supplemental COVID-19 Sick Leave; (10) Failure to Reimburse for Business Expenses; (11) Unfair Business Practices; (12) Failure to Pay Wages Under the Fair Labor Standards Act ("FLSA"); and (13) Penalties Under the Labor Code Private Attorneys General Act ("PAGA").

The parties have reached a settlement. On December 28, 2023, Plaintiff filed a motion for preliminary approval of the settlement. The court denied the motion without prejudice. (See January 31, 2024 Minute Order, p. 5.) In its minute order, the court discussed its concerns with the proposed hybrid class action and FLSA settlement. (*Id.* at pp. 3-5.) These concerns included the motion's failure to explicitly request certification of the FLSA collective action and the

failure of the proposed class notice to adequately explain the hybrid nature of the action and the options available to recipients of class notice. (*Id.* at p. 4.)

On June 21, 2024, Plaintiff filed a renewed motion for preliminary approval of the settlement. Plaintiff seeks an order: preliminarily approving the proposed settlement; approving the form and plan for distribution of the Notice of Class, Collective and PAGA Representative Settlement; provisionally certifying the Class and Collective Action for settlement purposes only; appointing Plaintiff as representative of the Class; appointing Plaintiff's counsel as Class Counsel; and setting a hearing for final approval of the class action settlement. (Notice of Motion and Motion, ¶¶ 1-6.) The motion is unopposed.

On July 17, 2024, the court continued the motion and asked the parties to further address several issues. (See July 17, 2024 Minute Order, p. 5.) In particular, the court stated that it would not approve a proposed FLSA opt-in procedure based on the cashing of settlement checks because employees must give their consent in a writing to be filed with the court. (*Id.* at p. 5.)

On September 4, 2024, Plaintiff's counsel filed a supplemental declaration indicating that the parties met and conferred and executed an amended settlement agreement addressing the deficiencies outline by the court. As discussed below, the court has reviewed the supplemental materials and 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.)

C. FLSA

In reviewing an FLSA settlement, a court must determine whether the settlement represents a "fair and reasonable resolution of a bona fide dispute." (*Selk v. Pioneers Memorial Healthcare District* (S.D. Cal. 2016) 159 F.Supp.3d 1164, 1172 ("*Selk*"), quoting *Lynn's Food Stores, Inc. v. U.S. By and Through U.S. Dept. of Labor, Employment Standards Admin., Wage and Hour Div.* (11th Cir. 1982) 679 F.2d 1350, 1355; see also *Kerzich v. County of Tuolumne* (E.D. Cal. 2018) 335 F.Supp.3d 1179, 1184 [district courts in the Ninth Circuit have frequently applied the widely-used *Lynn's Food* standard].) First, the court must find that a bona fide dispute exists, in that there are legitimate questions about the existence and extent of the defendant's FLSA liability: "If there is no question that the FLSA entitles plaintiffs to the compensation they seek, then a court will not approve a settlement because to do so would allow the employer to avoid the full cost of complying with the statute." (*Selk, supra,* 159 F.Supp.3d at p. 1172.)

The court must then determine whether the settlement is fair and reasonable, considering the totality of the circumstances and factors similar to those used to assess class action settlements: "(1) the plaintiff's range of possible recovery; (2) the stage of proceedings and amount of discovery completed; (3) the seriousness of the litigation risks faced by the

parties; (4) the scope of any release provision in the settlement agreement; (5) the experience and views of counsel and the opinion of participating plaintiffs; and (6) the possibility of fraud or collusion." (*Selk, supra*, 159 F.Supp.3d at pp. 1172-1173.) "The settlement amount need not represent a specific percentage of the maximum possible recovery," but must "bear[] some reasonable relationship to the true settlement value of the claims." (*Id.* at p. 1174.)

III. Discussion

This case has been settled on behalf of three groups: the "California Class"; the "FLSA Collective"; and the "PAGA Aggrieved Employees." (Supplemental Declaration of Scott Ernest Wheeler [] ("Supp. Wheeler Dec."), ¶ 2 and Ex. A (Second Amended Class Action, Collective Action, and PAGA Settlement Agreement and Release ("Agreement")), ¶¶ 2, 17, 30.) The Agreement defines the settlement groups as follows:

> **The California Class**
>
> The "California Class" means "all nonexempt hourly employees who worked at any time for Defendant in the state of California from November 14, 2018 through November 19, 2023."
>
> **The FLSA Collective**
>
> The "FLSA Collective" means "all nonexempt hourly employees who worked at any time for Defendant from November 14, 2019 through November 19, 2023."
>
> **The PAGA Aggrieved Employees**
>
> The "PAGA Aggrieved Employees" means "all hourly, non-exempt employees employed by Defendant in California at any time during the PAGA Period [from August 26, 2021 through November 19, 2023.)

(*Id.* at ¶¶ 2, 8, 17, 18, 30, 31.)

According to the terms of the settlement, Defendant will pay a non-reversionary gross settlement amount of $300,000. (Agreement, ¶ 21.) The gross settlement amount includes attorney fees up to $100,000 (one-third of the gross settlement amount), litigation costs not to exceed $14,500, 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), and FLSA Settlement allocation of $5,000, an enhancement award to Plaintiff up to $6,000, and settlement administration costs not to exceed $15,000. (*Id.* at ¶¶ 69, 69(i)-(l).) The court approves Phoenix Settlement Administrators as the settlement administrator. (*Id.* at ¶ 48; see also Declaration of Jodey Lawrence.)

Individual settlement payments from the net settlement amount and the FLSA settlement amount will be distributed to the California Class members and FLSA Collective members on a pro-rata basis according to their respective number of compensable pay periods. (Agreement, ¶¶ 69(a)-(c).) Similarly, payments to PAGA Aggrieved Employees will be distributed on a pro-rata basis according to their number of PAGA workweeks. (*Id.* at ¶ 69(d).)

Settlement payment checks will be void 180 days after mailing, and the funds from those checks will be distributed to Legal Aid at Work's Wage Protection Clinic as the designated *cy pres* recipient pursuant to California Code of Civil Procedure section 384. (Agreement, ¶¶ 69(e)-69(f).) The court approves the designated *cy pres* recipient.

In exchange for the settlement, the three settlement groups are subject to three separate release provisions with respect to Defendant and its current and former officers, directors, employees and agents only. (Agreement, ¶¶ 40-44.) The California Class members agree to release any and all claims that were or could have been alleged based on the facts alleged in the FAC (or the LDWA Notice) occurring during the California Class Period. (*Id.* at ¶ 41.)

The FLSA Collective Members agree to release all claims under the FLSA that were or could have been alleged based on the facts alleged in the FAC, including all claims for failure to pay all wages and overtime. (Agreement at ¶ 40.) PAGA Aggrieved Employees release all claims for civil penalties only under PAGA that were or could have been alleged based on the facts pleaded in the FAC and set forth on the LDWA Notice date August 26, 2022. (*Id.* at ¶ 42.) The releases include claims for attorney fees and costs. (*Id.* at ¶ 43.) Plaintiff also agrees to a comprehensive general release. (*Id.* at ¶ 39.)

B. Fairness of the Settlement

Plaintiff states that the settlement was reached through discovery, analysis, and mediation with Hon. Howard R. Broadman (Ret.). (Declaration of Scott E. Wheeler in Support of Plaintiff's Renewed Motion for Preliminary Approval of Class, Collective and PAGA Representative Action ("Wheeler Dec."), ¶¶ 6-9.) Prior to mediation, Defendant responded to Plaintiff's informal discovery requests and produced a large volume of payroll information, sample wage statements and time records, and relevant policies and procedures. (*Id.* at ¶ 6.)

In response to Plaintiff's discovery requests, Defendant confirmed that putative class includes approximately 325 employees who worked approximately 15,000 pay periods for Defendant in California during Class Period. (Wheeler Dec., ¶ 6.) There are approximately 293 Aggrieved Employees who worked approximately 6,070 pay periods during the PAGA Period. (*Ibid.*) Counsel conducted legal research regarding the applicable federal and California laws and spent significant time reviewing and analyzing the documentary evidence. (*Id.* at ¶¶ 7-8.)

Plaintiff calculated Defendant's exposure based on her claims under the FLSA and the California Labor Code, including those for applicable PAGA penalties. (Wheeler Dec., ¶ 22.) According to Plaintiff's analysis, Defendant's total maximum recovery on the California Class claims, the FLSA Collective claims, and the PAGA claims is $1,509,562.33. (*Id.* at ¶¶ 41-42.) Plaintiff provides a breakdown and analysis of this amount by claim. (*Id.* at ¶¶ 22-45.) Plaintiff also describes the risks associated with continued litigation of her claims and contends that the recovery is particularly valuable considering such risks. (*Ibid.*)

For example, Plaintiff explains that the $5,000 amount attributed to the FLSA unpaid overtime claim was arrived at with the assistance of the mediator and in light of the fact that FLSA overtime claims are for hours in excess of 40 per week, whereas California law requires overtime for any hours over eight per day. (Wheeler Dec., ¶ 3.) Plaintiff states that there are no potential damages under the rest break claim because Defendant implemented a valid rest break policy. (*Id.* at ¶ 2.) Plaintiff also explained that it is unlikely she would be able to recover the maximum in PAGA penalties due to the weight of the evidence and the strength of the defenses that would be asserted by Defendant. (*Id.* at ¶ 28.)

The gross settlement amount of $300,000 represents approximately 19.87% of the total maximum recovery of $1,509,562.33. Therefore, 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].) Based on the circumstances of the case, the court finds that the proposed gross settlement amount is fair.

As mentioned above, the court previously identified deficiencies with the proposed settlement relating to the opt-in procedure for the FLSA Collective members. Unlike a class action brought under Code of Civil Procedure section 382, an FLSA collective action requires a fundamentally different "opt-in" procedure. The court in *Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067 (*Haro*), explained that the FLSA "govern[s] minimum wages and maximum hours." (*Id.* at p. 1070.)

The FLSA "opt-in" procedure requires that aggrieved employees "give[] [their] consent in writing" to become a party to an FLSA action, which consent must be "filed in the court in which such action is brought." (29 U.S.C. § 216(b); *Haro, supra,* 174 Cal.App.4th at p. 1071.) "An FLSA action has to be litigated according to rules that are specifically applicable to these actions" and may not be prosecuted as a class action. (*Haro, supra,* 174 Cal.App.4th at p. 1077.)

Many courts have disapproved of the practice of having FLSA class members opt-in by cashing their settlement checks. (See *Haralson v. U.S. Aviation Services Corp.* (N.D. Cal. 2019) 383 F.Supp.3d 959, 968 ["[m]any courts" have rejected this opt-in by settlement check proposal]; see also *Beltran v. Olam Spices & Vegetables, Inc.* (E.D.Cal. Dec. Mar. 23, 2021, No. 1:18-cv-01676-) 2021 U.S.Dist.LEXIS 55013, at *8; *Anderson v. Safe Streets USA, LLC* (E.D.Cal. Dec. 20, 2022, No. 2:18-cv-00323-KJM-JDP) 2022 U.S.Dist.LEXIS 229149, at *20-21 ["[U]nder the current settlement agreement, class members opt into the collective action and release their FLSA claims when they cash, deposit, or endorse their settlement check. [] Such an opt-in procedure is prohibited under the FLSA. [Citation.]"].)

Under the settlement agreement as originally drafted and presented to the court, the FLSA Collective members would opt-in simply by cashing the settlement checks sent to them. (See July 17, 2024 Minute Order, p. 5.) Based on the authority outlined above, the court stated it would not approve this opt-in proposal. (*Id.* at pp. 4-5.) As counsel states in his supplemental declaration, the parties have met and conferred and executed an amended agreement to address the court's concerns in this regard. (Supp. Wheeler Dec., ¶¶ 5-8; Agreement, ¶ 64.)

The amended Agreement adds paragraph 28, describing the "Opt-in Form" that prospective FLSA Collective members must sign and return if they want to participate as "Opt-

In Plaintiffs" to the FLSA Collective. (Agreement, ¶¶ 28, 29.) Also new in the amended Agreement is paragraph 64, which describes the opt-in process and states that Class Counsel will promptly file the completed Opt-In Forms with the court on a rolling basis. (*Id.* at ¶ 64.) Further, the revised class notice now also describes how putative class members may choose to remain in the California Class and/or the FLSA Collective or may choose to exclude themselves from either settlement group. (See Agreement, Ex. 1, § 8.)

In light of the changes made as outline above, the court finds that the amended Agreement now contains a valid opt-in procedure for the FLSA Collective and permits putative class members to choose whether they will participate in either or both of the California and FLSA settlement classes. The parties are also explicitly requesting certification of the both the California and FLSA classes, purposes of settlement only. (Agreement, ¶ 59.) Accordingly, the court finds that the amendments to the Agreement sufficiently address the concerns previously articulated by the court.

Furthermore, the settlement as a whole provides for some recovery for each member of the three settlement groups and eliminates the risk and expense of further litigation. 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.

C. Incentive Award, Fees and Costs

Plaintiff requests an enhancement award of $6,000.

> 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, internal punctuation and citations omitted.)

In support of the request, Plaintiff's counsel asserts that Plaintiff has been diligent and acted above and beyond counsel's expectations. (Wheeler Dec., ¶ 48.) Counsel states that Plaintiff spent a substantial amount of time on this case and was willing to assume a substantial financial risk should Defendant have prevailed. (*Ibid.*) Prior to the final approval hearing, Plaintiff shall submit a declaration describing her participation in this action and including an estimate of the number of hours she has spent participating in the case.

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.) Plaintiff's counsel will seek attorney fees of up to $100,000 (one-third of the maximum settlement amount) and litigation costs not to exceed $15,000. Prior to the final approval hearing, Plaintiff's 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 California Class and the FLSA Collective 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.)

Regarding certification of the FLSA collective, an employee may bring such an action on behalf of himself/herself and other employees who are "similarly situated" and who have filed written consents to join the action. (*Millan v. Cascade Water Services, Inc.* (E.D. Cal. 2015) 310 F.R.D. 593, 607, citing 29 U.S.C. § 216(b).) This requirement is similar but less stringent than the requirements to certify a class action: "a proper collective action will address in a single proceeding claims of multiple plaintiffs who share 'common issues of law and fact arising from the same alleged prohibited activity.'" (*Ibid.*, quoting *Hoffmann–La Roche, Inc. v. Sperling* (1989) 493 U.S. 165, 170.)

Here, Plaintiff states there are approximately 325 members of the California Class and FLSA Collective, 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 California Class, that they must opt-in to the FLSA settlement, and that they may object. (See Agreement, Ex. 1.) The settlement amounts, including attorney fees and payment to the named plaintiff, are stated. As discussed above, the revised class notice also describes how putative class members may choose to remain in the California Class and/or the FLSA Collective or may choose to exclude themselves from either settlement group. (*Id.* at § 8.)The notice also informs 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.

Accordingly, the class notice is approved.

IV. Conclusion

The motion for preliminary approval of the settlement is GRANTED.

The final approval hearing shall take place on April 23, 2024 at 1:30 p.m. in Department 19. At least ten court days prior to final approval hearing, Plaintiff shall submit a declaration describing her participation in this action and including an estimate of the number of hours she has spent participating in the case, and Plaintiff's 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.

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

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Calendar Line 7

Case Name: Smith v. Spread Your Wings, LLC (Class Action)
Case No.: 23CV418395

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 25, 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 brought by Plaintiff Shawuana Smith ("Plaintiff") against Defendant Spread Your Wings LLC ("Defendant"). On October 20, 2023, Plaintiff filed the operative First Amended Class Action Complaint, setting forth various causes of action based on alleged wage and hour violations.

On July 8, 2024, Defendant's attorneys, Edward Wells and Richard Liu of Innovative Legal Services, P.C., filed a motion to be relieved as counsel. The motion is unopposed. At the initial hearing on August 28, the court continued the hearing and requested that counsel amend the moving papers, observing that if the client is served by mail at the client's last known address, counsel's declaration should indicate that counsel has confirmed that the address is current within the prior 30 days. On September 11, 2024, counsel filed amended papers in support of the motion. As discussed below, the motion is GRANTED.

II. Legal Standard

Motions to be relieved as counsel are technical and governed by rule 3.162 of California Rules of Court ("Rule 3.1362"). Notice and motion must be directed to the client on Judicial Council Form MC-051. No memorandum is required. (Rule 3.1362(a) & (b).) Counsel must provide a declaration on Judicial Council Form MC-052 stating "in general terms and without compromising the confidentiality of the attorney-client relationship why a motion under Code of Civil Procedure section 284(2) is brought instead of filing a consent under Code of Civil Procedure section 284(1)."[1] (Rule 3.1362(c).)

[1] Code of Civil Procedure section 284 provides, in its entirety: The attorney in an action or special proceeding may be changed at any time before or after judgment of final determination, as follows: [¶] 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; [¶] 2. Upon the order of the court, upon the application of either client or attorney, after notice one to the other.

The notice of motion and motion, the declaration, and the proposed order must be served on the client and all parties "by personal service, electronic service, or mail." (Rule 3.1362(d)). Rule 3.1362(d) sets forth the services requirements, as follows:

> If the notice is served on the client by mail under Code of Civil Procedure section 1013, it must be accompanied by a declaration stating facts showing that either:
> (A) The service address is the current residence or business address of the client; or
> (B) The service address is the last known residence or business address of the client and the attorney has been unable to locate a more current address after making reasonable efforts to do so within 30 days before the filing of the motion to be relieved.

(Rule 3.1362(d).)

> The proposed order relieving counsel must be prepared on the Order Granting Attorney's Motion to Be Relieved as Counsel—Civil (form MC-053) and must be lodged with the court with the moving papers. The order must specify all hearing dates scheduled in the action or proceeding, including the date of trial, if known. If no hearing date is presently scheduled, the court may set one and specify the date in the order. After the order is signed, a copy of the signed order must be served on the client and on all parties that have appeared in the case. The court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the court.

(Rule 3.1362(e).)

III. Discussion

Counsel states that the motion is required because the client did not voluntarily consent to the attorney's request to be relieved as counsel. Counsel further states that irreconcilable differences have arisen with Defendant, making it unreasonably difficult to carry out the representation effectively. Counsel's ethical obligations prevent greater specificity.

Counsel has provided the court with the required form motion and declaration. Counsel's declaration indicates that the motion, declaration, and proposed order have been served to Defendant at Defendant's last known mailing address, and that counsel has confirmed by email within the last 30 days that the client's mailing address is current. Counsel has also provided a proposed order on the appropriate judicial council form, accurately indicating that the next court date is September 25, 2024 for the hearing on this motion and for a case management conference.

Accordingly, Defendant's counsel has stated good cause for the motion to be relieved as counsel, and the motion complies with the statutory requirements.

III. Conclusion

The motion to be relieved as counsel by Defendant's attorneys Edward Wells and Richard Liu of Innovative Legal Services, P.C., is GRANTED.

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

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Calendar Line 8

Case Name: Rush v. Spread Your Wings, LLC (Class Action)
Case No.: 22CV404404

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 25, 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 brought by Plaintiff Roselyn Rush ("Plaintiff") against Defendant Spread Your Wings LLC ("Defendant"). Plaintiff's Class Action Complaint sets forth a single cause of action for violation of Business and Professions Code sections 17200, *et seq.*

On July 8, 2024, Defendant's attorneys, Edward Wells and Richard Liu of Innovative Legal Services, P.C., filed a motion to be relieved as counsel. The motion is unopposed. At the initial hearing on August 28, the court continued the hearing and requested that counsel amend the moving papers, observing that if the client is served by mail at the client's last known address, counsel's declaration should indicate that counsel has confirmed that the address is current within the prior 30 days. On September 11, 2024, counsel filed amended papers in support of the motion. As discussed below, the motion is GRANTED.

II. Legal Standard

Motions to be relieved as counsel are technical and governed by rule 3.162 of California Rules of Court ("Rule 3.1362"). Notice and motion must be directed to the client on Judicial Council Form MC-051. No memorandum is required. (Rule 3.1362(a) & (b).) Counsel must provide a declaration on Judicial Council Form MC-052 stating "in general terms and without compromising the confidentiality of the attorney-client relationship why a motion under Code of Civil Procedure section 284(2) is brought instead of filing a consent under Code of Civil Procedure section 284(1)."[2] (Rule 3.1362(c).)

[2] Code of Civil Procedure section 284 provides, in its entirety: The attorney in an action or special proceeding may be changed at any time before or after judgment of final determination, as follows: [¶] 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; [¶] 2. Upon the order of the court, upon the application of either client or attorney, after notice one to the other.

The notice of motion and motion, the declaration, and the proposed order must be served on the client and all parties "by personal service, electronic service, or mail." (Rule 3.1362(d)). Rule 3.1362(d) sets forth the services requirements, as follows:

> If the notice is served on the client by mail under Code of Civil Procedure section 1013, it must be accompanied by a declaration stating facts showing that either:
> (A) The service address is the current residence or business address of the client; or
> (B) The service address is the last known residence or business address of the client and the attorney has been unable to locate a more current address after making reasonable efforts to do so within 30 days before the filing of the motion to be relieved.

(Rule 3.1362(d).)

> The proposed order relieving counsel must be prepared on the Order Granting Attorney's Motion to Be Relieved as Counsel—Civil (form MC-053) and must be lodged with the court with the moving papers. The order must specify all hearing dates scheduled in the action or proceeding, including the date of trial, if known. If no hearing date is presently scheduled, the court may set one and specify the date in the order. After the order is signed, a copy of the signed order must be served on the client and on all parties that have appeared in the case. The court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the court.

(Rule 3.1362(e).)

III. Discussion

Counsel states that the motion is required because the client did not voluntarily consent to the attorney's request to be relieved as counsel. Counsel further states that irreconcilable differences have arisen with Defendant, making it unreasonably difficult to carry out the representation effectively. Counsel's ethical obligations prevent greater specificity.

Counsel has provided the court with the required form motion and declaration. Counsel's declaration indicates that the motion, declaration, and proposed order have been served to Defendant at Defendant's last known mailing address, and that counsel has confirmed by email within the last 30 days that the client's mailing address is current. Counsel has also provided a proposed order on the appropriate judicial council form, accurately indicating that the next court date is September 25, 2024 for the hearing on this motion and for a case management conference.

Accordingly, Defendant's counsel has stated good cause for the motion to be relieved as counsel, and the motion complies with the statutory requirements.

III. Conclusion

The motion to be relieved as counsel by Defendant's attorneys Edward Wells and Richard Liu of Innovative Legal Services, P.C., is GRANTED.

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

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Calendar Line 9

Case Name:
Case No.:

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Calendar Line 10

Case Name:
Case No.:

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Calendar Line 11

Case Name:
Case No.:

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Calendar Line 12

Case Name:
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Calendar Line 13

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