SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, 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.)

Court Reporters are not provided. Please consult our Court's website, www.scscourt.org, for the rules, policies, and required forms for appointment by stipulation of privately-retained court reporters.

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LAW AND MOTION TENTATIVE RULINGS
DATE: FEBRUARY 21, 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	22CV393451	Guillen v. DMD Construction, Inc., et al. (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	21CV388108	Sansoni v. Maxar Space LLC, et al. (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	21CV383092	Reyes v. Vitas Healthcare Corporation of California (Class Action/PAGA)	See Line 3 for tentative ruling.
LINE 4	23CV413082	Cole, et al. v. VMK, Inc., et al. (Class Action)	See Line 4 for tentative ruling.
LINE 5	23CV416842	Wenzel v. Zscaler, Inc. (PAGA)	See Line 5 for tentative ruling.
LINE 6	22CV392905	Cervantez v. Garden City, Inc.	See Line 6 for tentative ruling.
LINE 7	20CV365260	Sheppard v. Staffmark Investment LLC (Class Action/PAGA)	See Line 7 for tentative ruling.
LINE 8			
LINE 9			
LINE 10			

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LAW AND MOTION TENTATIVE RULINGS

LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Guillen v. DMD Construction, Inc., et al. (Class Action/PAGA)
Case No.: 22CV393451

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on February 21, 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. The operative Second Amended Class Action Complaint ("SAC"), filed on August 4, 2022, sets forth the following causes of action: (1) Failure to Pay Wages for All Hours Worked, Labor Code sections 204(b), 223, 1194, 1194.2 Wage Orders; (2) Failure to Pay Overtime Wages, Labor Code sections 510, 1194, 1198, Wage Orders; (3) Failure to Provide Meal Periods, or Pay Premium Wages in Lieu Thereof; (4) Failure to Provide Rest Breaks, or Pay Premium Wages in Lieu Thereof; (5) Failure to Provide Accurate Itemized Wage Statements, Labor Code section 226; (6) Failure to Timely Pay Final Wages at Termination, Labor Code sections 201-203; (7) Failure to Reimburse Necessary Business Expenses, Labor Code section 2802; (8) Violation of California's Unfair Competition Law, Business & Professions Code sections 17200, et seq.]; and (9) Violation of Private Attorneys General Act, Labor Code §§ 2698, et seq. ("PAGA").

The parties have reached a settlement. Plaintiff Edgar Efren Guillen ("Plaintiff") moved for preliminary approval of the settlement. The motion was unopposed.

On March 29, 2023, the court granted the motion for preliminary approval of settlement subject to approval of the modified class notice. Specifically, the court directed the parties to modify section J of the class notice to clarify that class members could object in writing, but could also object to the settlement by appearing at the final approval hearing without submitting any written objection and with no prior notice. The court also instructed the parties to include specific language regarding the final approval hearing and class members' ability to appear remotely via Microsoft Teams.

Subsequently, Plaintiff moved for final approval of the settlement. The motion was unopposed. However, based upon a review of the record, it did not appear that the parties submitted an amended class notice to the court for approval.

On September 27, 2023, the court continued the motion for final approval of settlement to February 21, 2024. The court explained that the notice mailed to the class on May 3, 2023, was inadequate. The court directed the parties to amend the class notice and submit the amended notice to the court for its approval.

On October 6, 2023, the court approved the amended class notice.

On January 25, 2024, Plaintiff submitted supplemental declarations in support of the motion for final approval of settlement.

Now before the court is Plaintiff's motion for final approval of settlement.

II. LEGAL STANDARD

Generally, "questions whether a 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*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the 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 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*., quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

> The case has been settled on behalf of the following class:
> [A]ll individuals who were employed by the Company Defendants in California as non-exempt and/or hourly-paid employees at any time(s) between January 19, 2018 through the Date of Preliminary Approval of the Parties' settlement ….

The class includes a subset of aggrieved employees, who are defined as "all individuals who were employed by the Company Defendants in California as non-exempt and/or hourly-paid employees at any time(s) during the applicable PAGA Period." The PAGA Period means the period from October 18, 2020 through the date of preliminary approval.

As discussed in connection with preliminary approval, defendants DMD General Construction, Inc., Krystian Konefal, and Maciej Wnorowski (collectively, "Defendants") will pay a gross, non-reversionary settlement amount of $150,000. The gross settlement amount includes attorney fees not to exceed $50,000 (1/3 of the gross settlement fund), attorney costs not to exceed $10,000, a PAGA allocation of $7,500 (75 percent to be paid to the LWDA and 25 percent to be paid to aggrieved employees), a service payment for the class representative not to exceed $7,500, and settlement administration costs not to exceed $5,250. The net settlement amount will be distributed to class members pro rata basis. If the aggregate funds from checks remaining uncashed more than 180 days after mailing total $10,000 or more, the will be distributed to each participating class member on a pro rata basis. If the aggregate funds total less than $10,000, the checks will be void and the funds from those checks will be sent to the George & Katherine Alexander Community Law Center.

In exchange for the settlement, the class members agree to release Defendants, and related entities and persons, from any and all claims based on, or that could have been alleged, based on the facts alleged in the SAC. In addition, Plaintiff agrees to a comprehensive general release, which excludes claims for discrimination filed with the DFEH.

On October 24, 2023, the settlement administrator mailed notice packets to 39 class members. (Supplemental Declaration of Jarrod Salinas With Respect to Notice and Settlement Administration ("Supp. Salinas Dec."), ¶ 3.) All of the notices were deliverable. (*Id.* at ¶ 4.) As of January 23, 2024, there were no objections and no requests for exclusion. (*Id.* at ¶¶ 5-6.)

The highest individual settlement share to be paid is approximately $7,446.81, the lowest individual settlement share to be paid is approximately $55.16, and the average individual settlement share to be paid is approximately $1,891.05. (Supp. Salinas Dec., ¶ 10.) The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests an incentive award of $7,500. In connection with its prior order granting preliminary approval of the settlement, the court directed the class representative to file a declaration specifically detailing his participation in the action and an estimate of the time spent. No such declaration has been submitted. Consequently, the request for an incentive award is unsupported and denied.

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 seeks attorney fees of $50,000 (1/3 of the gross settlement fund). Plaintiff's counsel provides evidence demonstrating a total lodestar of $106,035. (Declaration of Class Counsel in [Support] of Motion for Final Approval of Class Action & PAGA Settlement ("Class Counsel Dec."), ¶¶ 13-14.) This results in a negative multiplier. The court finds the attorney fees are reasonable as a percentage of the common fund and are approved.

Plaintiff's counsel also requests litigation costs in the amount of $6,078.98, and provides evidence of incurred costs in that amount. (Class Counsel Dec., ¶ 19.) Consequently,

the litigation costs are reasonable and approved. The settlement administration costs of $5,250 are also approved. (Supp. Salinas Dec., ¶ 13.)

Accordingly, the motion for final approval is GRANTED with the exception of the request for an incentive award.

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

The court will set a compliance hearing for October 23, 2024, 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 Defendants, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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Calendar Line 2

Case Name: Sansoni v. Maxar Space LLC, et al. (Class Action/PAGA)
Case No.: 21CV388108

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on February 21, 2024, at 9:00 a.m. in Department 19. The court now issues its tentative ruling as follows:

IV. INTRODUCTION

This is a putative class and representative action arising out of various alleged wage and hour violations. The operative First Amended Class Action and Representative Action Complaint, filed on March 23, 2023, sets forth causes of action for: (1) Violation of Cal. Labor Code §§ 510 and 1198 (Unpaid Overtime); (2) Violation of Cal. Labor Code §§ 226.7 and 512, subd. (a) (Unpaid Meal Period Premiums); (3) Violation of Cal. Labor Code § 226.7 (Unpaid Rest Period Premiums); (4) Violation of Cal. Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (5) Violation of Cal. Labor Code §§ 201, 202, and 203 (Final Wages Not Timely Paid); (6) Violation of Cal. Labor Code §§ 204 and 210 (Wages Not Timely Paid During Employment); (7) Violation of Cal. Labor Code § 226, subd. (a) (Failure to Provide Accurate Wage Statements); (8) Violation of Cal. Labor Code §§ 2800 and 2802 (Failure to Reimburse Necessary Business Expenses); (9) Violation of Cal. Business & Professions Code § 17200, et seq.; and (10) Violation of Cal. Labor Code § 2699, et seq. (Private Attorneys General Act).

The parties have reached a settlement. Plaintiff Mill Sansoni ("Plaintiff") moved for preliminary approval of the settlement.

On June 21, 2023, the court granted preliminary approval of the settlement subject to approval of an amended class notice and the parties' identification of a new *cy pres* recipient in compliance with Code of Civil Procedure section 384. The parties were ordered to submit the revised class notice and *cy pres* recipient by July 7, 2023.

On July 7, 2023, Plaintiff filed an amended class notice, which made the changes requested by the court. That same day, the parties filed an Amendment to Stipulation of Class and PAGA Representative Action Settlement, identifying Child Advocates of Silicon Valley as

the new *cy pres* recipient. The court then approved the amended class notice and *cy pres* recipient.

Plaintiff moved for final approval of the settlement. The motion was unopposed.

On January 10, 2024, the court continued the motion for final approval of settlement to February 21, 2024. The court explained that it had concerns regarding the adequacy of the class notice. The court directed Plaintiff to file a supplemental declaration clarifying why notice packets were only mailed to 1,384 class members (given that the parties previously represented there were 1,420 class members) and when, if ever, notice was provided to the one individual omitted from the class list. The court also asked Plaintiff to file a supplemental declaration to support the requested incentive award, estimating the total amount of time spent in connection with this action. Lastly, the court requested Plaintiff's counsel provide a supplemental declaration setting forth the hours worked by each attorney on this matter.

On February 6, 2024, Plaintiff filed supplemental declarations in support of the motion for final approval.

Now before the court is Plaintiff's motion for final approval of settlement.

V. LEGAL STANDARD

Generally, "questions whether a 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*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the 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 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*., quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

VI. DISCUSSION

> The case has been settled on behalf of the following class:
> [A]ll current and former California non-exempt employees of the Maxar Defendants, and of companies that supply contingent workers to the Maxar Defendants and who are assigned to work at the Maxar Defendants (including, but not limited to, [defendant Zenex Partners, Inc. ("Zenex")]), during the Class Settlement Period.

The Maxar Defendants are defined as defendants Maxar Space LLC, Maxar Intelligence Inc., Maxar Mission Solutions Inc., Maxar Technologies Holdings Inc., Maxar Space Holdings LLC, and Maxar Space Robotics LLC, collectively. The Class Settlement Period is define as the period beginning October 14, 2017, and ending on either the Preliminary Approval Date or 120 days from the date of mediation (i.e., April 16, 2023), whichever date occurs earlier. The class also contains a subset of PAGA Members that are defined as "all current and former California non-exempt employees of the Maxar Defendants, and of companies that supply contingent workers to the Maxar Defendants and who are assigned to work at the Maxar Defendants (including, but not limited to, [Zenex]), during the PAGA Settlement Period." The PAGA Settlement Period is defined as the period beginning October 14, 2020, and ending on

either the Preliminary Approval Date or 120 days from the date of mediation (i.e., April 16, 2023), whichever date occurs earlier.

According to the terms of settlement, Maxar Defendants will pay a total non-reversionary amount of $3,228,140. The total settlement payment includes attorney fees of $1,129,849 (35 percent of the gross settlement amount), litigation costs up to $50,000, an incentive award for the class representative not to exceed $7,500, settlement administration costs (estimated not to exceed $16,500), and a PAGA allocation of $300,000 (from which $225,000 will be paid to the LWDA and $75,000 will be paid to PAGA Members).

The net settlement amount of approximately $1,600,000 will be distributed to the class members on a pro rata basis based on the number of workweeks worked during the Class Settlement Period. Similarly, PAGA Members will receive a pro rata share of the 25 percent portion of the PAGA payment allocated to aggrieved employees based on the number of workweeks worked during the PAGA Settlement Period.

Checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be distributed to Child Advocates of Silicon Valley.

In exchange for the settlement, class members agree to release Defendants, and related persons and entities, from all claims asserted in any of the complaints filed in the action, and all claims that could have been asserted in the action arising from the same alleged facts or in any PAGA letter sent by Plaintiff to the LWDA, that accrued or arose during the Class Settlement Period. PAGA Members agree to release Defendants, and related persons and entities, from all claims for civil penalties under PAGA asserted in any of the complaints filed in the action, and all claims that could have been asserted in the action based on the same alleged facts in the complaints or in any PAGA letter sent by Plaintiff to the LWDA.

On October 12, 2023, the settlement administrator mailed notice packets to 1,384 class members. (Declaration of Nathalie Hernandez of ILYM Group, Inc., in Support of Motion for Final Approval of Class Action Settlement ("Hernandez Dec."), ¶¶ 5-7.) On November 30, 2023, Defendants informed the settlement administrator that one individual was inadvertently omitted from the class list and should be added, which brought the class list up to 1,385 class members. (*Id*. at ¶ 8.) Ultimately, 23 notice packets were deemed undeliverable. (*Id*. at ¶ 11.)

As of December 13, 2023, there were no objections and no requests for exclusion. (*Id.* at ¶¶ 12-13.) The highest individual settlement share to be paid is approximately $3,230.17 and the average individual settlement share to be paid is approximately $1,271.45. (*Id*. at ¶ 15.)

Plaintiff's counsel has now provided a supplemental declaration regarding class notice. Plaintiff's counsel states that the 1,420 number was an estimate that Defendant provided to obtain a quote from the settlement administrator, and the declaration of the settlement administrator correctly reflects that 1,385 notice packets were mailed out. Thus, it appears there are actually less class members than the parties previously anticipated, i.e., only 1,385 class members.

With respect to the one individual who was inadvertently omitted from the class list. Plaintiff's counsel states that notice was provided to that individual on December 1, 2023. Consequently, the time period for that individual to respond elapsed on January 30, 2024. However, Plaintiff's counsel does not state whether the settlement administrator received any response from this individual before the January 30, 2024 deadline. Notably, the only declaration received from the settlement administrator was dated December 13, 2023, and therefore that declaration does not address what response, if any, was received from the omitted class member. Plaintiff's counsel is ordered to appear at the final approval hearing to address whether any response was received from the omitted class member before the January 30, 2024 deadline.

The court otherwise finds that the proposed settlement is fair for purposes of final approval.

Plaintiff requests an incentive award of $7,500 for the class representative. In its order granting preliminary approval of the settlement, the court directed the class representative to file a declaration detailing his participation in the action and an estimate of the time spent. In connection with the motion for final approval, Plaintiff filed a declaration in support of his request for an incentive award which did not include an estimate of the time spent in connection with this action.

Plaintiff has now filed a supplemental declaration estimating that he spent approximately 37 hours in connection with this action, including discussing the case with class

counsel, gathering documents, reviewing documents with class counsel and answering their questions, identifying potential witnesses, describing Defendants' policies and practices, and reviewing settlement documents. (Supplemental Declaration of Heather M. Davis in Support of Motion for Final Approval of Class Action and PAGA Settlement ("Supp. Davis Dec."), Ex. A, ¶¶ 6-11.)

Moreover, Plaintiff undertook risk by putting his name on the case because it might impact his future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].) However, the requested amount of $7,500 is more than the court typically awards for the amount of time Plaintiff spent in connection with this action. Therefore, the court approves an incentive award in the total amount of $5,000.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel seeks attorney fees of $1,129,849 (35 percent of the total settlement fund). Plaintiff's counsel initially provided evidence that the attorneys of the Protection Law Group spent 621.15 hours on the case and bill at hourly rates between $375 to $800. (Declaration of Heather M. Davis in Support of Motion for Final Approval of Class Action and PAGA Settlement ("Davis Dec."), ¶¶ 49-54 & Ex. E.) Although the hours included work by multiple attorneys who bill at different hourly rates, Plaintiff's counsel did not state how many hours were worked by each attorney; instead, Plaintiff's counsel asserted that a "blended hourly rate" of at least $650 is appropriate.

Plaintiff's counsel has now provided a supplemental declaration, which provides a breakdown of the hours worked by each attorney and their hourly rate. (Supp. Davis Dec., ¶ 6.). Based on the additional information provided, the total lodestar is $403,500. (*Id.* at ¶ 7.) This results in a multiplier of 2.8.

Here, the percentage of the common fund sought by counsel is higher than the 33.33 percent typically awarded in wage and hour cases. As a substantial multiplier is required to

reach the requested fee award, the court finds no reason to award counsel in this matter more than the typical one-third of the common fund considering the relevant factors. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 [in order to reflect the fair market value of attorney services, lodestar may be adjusted with a multiplier based on factors including the extent to which the nature of the litigation precluded other employment by the attorneys and the contingent nature of the fee award].) Consequently, the court approves attorney fees in the amount of $1,076,046.67 (1/3 of the gross settlement amount). The unapproved portion of the fee request shall become part of the net settlement to be distributed to the class members.

Plaintiff's counsel also requests litigation costs in the total amount of $13,332.55 and provides evidence of incurred costs in that amount. (Davis Dec., ¶ 64 & Ex. F.) Therefore, the litigation costs are reasonable and approved. The settlement administration costs of $16,500 are also approved. (Hernandez Dec., ¶ 16.)

Accordingly, the motion for final approval of the class action settlement is GRANTED subject to Plaintiff's counsel appearance at the final approval hearing to address whether any response was received from the omitted class member before the January 30, 2024 deadline.

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

The court will set a compliance hearing for October 23, 2024, 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 Defendants, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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Calendar Line 3

Case Name: Reyes v. Vitas Healthcare Corporation of California (Class Action/PAGA)
Case No.: 21CV383092

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on February 21, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VII. INTRODUCTION

This is a class and representative action arising out of alleged wage and hour violations. The operative Second Amended Class & PAGA Action Complaint ("SAC"), filed on March 28, 2023, sets forth the following causes of action: (1) Failure to Pay All Minimum Wages; (2) Failure to Pay All Overtime Wages; (3) Rest Period Violations; (4) Meal Period Violations; (5) Wage Statement Violations; (6) Failure to Reimburse for Necessary Business Expenses; (7) Waiting Time Penalties; (8) Failure to Timely Pay Wages During Employment; (9) Unfair Competition; and (10) PAGA Penalties.

The parties reached a settlement. Plaintiffs Erlinda Reyes ("Reyes") and Jazzina Williams ("Williams") (collectively, "Plaintiffs") moved for preliminary approval of the settlement.

On May 17, 2023, the court continued the motion for preliminary approval of the settlement to June 28, 2023. In its minute order, the court noted that there were multiple problems with the settlement First, the settlement agreement purported to settle this lawsuit as well as a different case not before the court, *Jazzina Williams v. VITAS Healthcare Corporation of California* (Alameda County Superior Court, Case No. RG17853886) ("*Williams* Action"). The court ordered Plaintiffs to file a supplemental declaration addressing the court's authority to approve the settlement to the extent it encompassed the *Williams* Action. Next, the court directed Plaintiffs to designate a new *cy pres* recipient in compliance with Code of Civil Procedure section 384. The court further informed the parties that the settlement agreement must be modified to provide for two separate calculations and payments: one for payments related to the settlement of the class claims; and one for payments related to the settlement of the PAGA claim. The court also ordered Plaintiffs to file supplemental

declarations specifically detailing their participation in the actions and an estimate of the time spent. Lastly, the court asked the parties to make several changes to the class notice.

On June 16, 2023, Plaintiffs' counsel filed a supplemental declaration with the court.

On June 28, 2023, the court granted preliminary approval of the settlement, noting that the parties had addressed the majority of the problems identified in the prior court order.

On July 6, 2023, Plaintiffs' counsel filed a Notice of Errata, informing the court of a typographical error in the definition of the settlement class set forth in the settlement agreement. On July 21, 2023, the court entered an order approving the settlement with the corrected definition.

Plaintiffs moved for final approval of the settlement. The motion was unopposed.

On January 10, 2024, the court continued the motion for final approval of settlement to February 21, 2024. The court explained that it had concerns regarding the adequacy of the class notice and directed Plaintiff to provide a supplemental declaration clarifying why notice packets were only mailed to 2,227 class members (instead of 2,498). The court also asked Reyes to file a declaration supporting the request for an incentive award. Finally, the court directed Plaintiffs' counsel to file supplemental declarations setting forth the time that they actually billed in connection with this action.

On January 30, 2024, Plaintiffs filed supplemental declarations in support of the motion for final approval of settlement.

Now before the court is Plaintiffs' motion for final approval of settlement.

VIII. LEGAL STANDARD

Generally, "questions whether a 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*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the 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 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*., quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

IX. DISCUSSION

> The settlement provides that this case has been settled on behalf of the following class: [A]ll persons who are or were employed by [d]efendant [VITAS Healthcare Corporation of California ("Defendant")] in California classified as a non-exempt clinical employee during the Class Period.

The Class Period is defined as May 16, 2019 until January 16, 2023. The settlement also includes Aggrieved Employees, who are defined as "all persons who are or were previously employed by Defendant in California classified as a non-exempt clinical employee at any time from May 16, 2019, until January 16, 2023."

As discussed in connection with preliminary approval, Defendant will pay a maximum, non-reversionary settlement amount of $3,450,000. The gross settlement amount includes attorney fees up to $1,150,000 (1/3 of the gross settlement amount), litigation costs not to exceed $25,000, a PAGA allocation of $20,000 (75 percent of which will be paid to the LWDA), incentive awards in the total amount of $20,000 (up to $10,000 for each class

representative), settlement administration costs not to exceed $20,000, and an individual award to Williams in the amount of $15,000. The net settlement amount will be distributed to participating class members pro rata basis. Checks that remain uncashed 180 days from the date the checks are dated will be void and the funds from those checks will be distributed to Legal Aid at Work.

On August 11, 2023, the settlement administrator mailed notice packets to 2,227 class members. (Declaration of Kevin Lee with Respect to Notice and Settlement Administration in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Lee Dec."), ¶¶ 3-5.) Ultimately, 17 notice packets were deemed undeliverable. (*Id*. at ¶ 7.) As of November 30, 2023, there were no objections and three requests for exclusion. (*Id.* at ¶¶ 8-9.) The highest individual settlement share to be paid is approximately $32,142.43, the lowest individual settlement share to be paid is approximately $10.93, and the average individual settlement share to be paid is approximately $992.65. (*Id.* at ¶ 14.)

Plaintiffs' counsel and the settlement administrator have now provided supplemental declarations explaining that the actual number of settlement class members is 2,287 and notice was provided to all 2,287 class members. (Supplemental Declaration of Mehrdad Bokhour in Support of Plaintiffs' Motion […] ("Supp. Bokhour Dec."), ¶ 4; Supplemental Declaration of Kevin Lee […] ("Supp. Lee Dec."), ¶ 4.) Of the 2,287 class members, 60 individuals worked no workweeks during the Class Period. (*Ibid.*) Additionally, three class members who requested exclusion from the settlement are: Monica Burks, Derrick Felton, and Jane Litman. (Supp. Lee Dec., ¶ 3.)

The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiffs request incentive awards in the total amount of $20,000 (up to $10,000 for each class representative). Plaintiffs have now submitted declarations describing their participation in the action. Williams declares that she did not keep track of her hours in this case, but spent many hours assisting class counsel. (Declaration of Jazzina Williams in Support of Plaintiffs' Unopposed Motion for Attorney's Fees, Costs and Service Awards, ¶ 2.) Williams states that she provided facts and documents to class counsel, discussed the case with

class counsel, assisted in the preparation of pleadings and discovery, participated in mediation, and reviewed settlement documents. (*Id.* at ¶ 2.) Reyes declares that she spent approximately 23.5 hours in connection with this action, including discussing the case with class counsel, identifying potential witnesses, gathering documents, responding to discovery, preparing for and participating in mediation, and reviewing settlement documents. (Declaration of Plaintiff Erlinda Reyes in Support of Motion for Final Approval […], ¶¶ 4-8, 11.)

Moreover, Plaintiffs undertook risk by putting their names on the case because it might impact their future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].) However, the requested amount of $10,000 for each plaintiff is more than the court typically awards for the amount of time spent by Plaintiffs in connection with this action. Therefore, the court approves an incentive award in the total amount of $5,000 ($2,500 for each plaintiff).

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel seek attorney fees of 1,150,000 (1/3 of the gross settlement amount). Plaintiffs' counsel state that their total combined lodestar is $598,090. Plaintiffs' counsel provide sufficient evidence supporting the hourly rates and hours billed by Kevin Woodall, Collin Bowman, and Donna Pilling. (Declaration of Kevin Woodall in Support of Plaintiffs' Unopposed Motion for Attorney's Fees, Costs and Service Awards ("Woodall Dec."), ¶¶ 7-13.) While the initial declarations submitted by Mehrdad Bokhour ("Bokhour") and Joshua Falakassa ("Falakassa") established Bokhour's and Falakassa's hourly rates, their declarations did not demonstrate that they billed 142.5 hours and 128.5 hours, respectively, in connection with this action.

Bokhour and Falakassa have now provided supplemental declarations. Bokhour presents evidence that he has spent 132.5 hours on this case. (Supp. Bokhour Dec ¶ 7.) Falakassa presents evidence that he has spent 123.5 hours on this case. (Supplemental Declaration of Joshua Falakassa in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, ¶ 4.) Thus, Plaintiffs' counsel have now submitted evidence demonstrating

a total combined lodestar of $574,465 (based on fees actually incurred). This results in a multiplier of 2. The court finds the attorney fees are reasonable as a percentage of the common fund and are approved.

Plaintiffs' counsel also request litigation costs in the total amount of $18,343.05, but only provide evidence of incurred costs in the amount of $18,273.20. (Woodall Dec., ¶ 14; Declaration of Mehrdad Bokhour in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, ¶ 25.) Therefore, the litigation costs in the lesser amount of $18,273.20 are reasonable and approved. The settlement administration costs of $19,000 are also approved. (Lee Dec., ¶ 17.)

Accordingly, the motion for final approval of settlement is GRANTED subject to the reduction of the incentive awards.

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

The court will set a compliance hearing for October 23, 2024, 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 Defendant, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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Calendar Line 4

Case Name: Cole, et al. v. VMK, Inc., et al. (Class Action)
Case No.: 23CV413082

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on February 21, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

X. INTRODUCTION

This is a putative class action against defendants VMK, Inc. ("VMK), New World Health Staffing Company, Inc. ("New World"), Mathew Krishnamachari, Sara Krishnamachari, and Vanessa Karkabi (collectively, "Defendants") arising out of various alleged wage and hour violations. The Class Action Complaint ("Complaint"), filed by plaintiffs Chyna La She Cole ("Cole") and Alexander Jay Matua ("Matua") (collectively, "Plaintiffs") on March 24, 2023, sets forth causes of action for: (1) Failure to Pay Overtime Wages; (2) Failure to Pay Minimum Wages; (3) Failure to Provide Meal Periods; (4) Failure to Provide Rest Periods; (5) Waiting Time Penalties; (6) Wage Statement Violations; (7) Failure to Timely Pay Wages; (8) Failure to Indemnify; and (9) Unfair Competition.

Now before the court is Defendants' motion to compel Plaintiffs to arbitrate their individual claims and dismiss their class claims or, alternatively, stay the class claims pending completion of the individual arbitration. Plaintiffs oppose the motion.

II. LEGAL STANDARD

As a threshold matter, Defendants contend that the Federal Arbitration Act ("FAA") applies here. Plaintiffs disagree and argue that California Arbitration Act ("CAA") applies.

"The FAA, which includes both procedural and substantive provisions, governs agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840; see 9 U.S.C.A. § 2 [a written provision in a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, is valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract]; see also *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 272-274 [the phrase "evidencing a

transaction" means the transaction must turn out, in fact, to involve interstate commerce, and the phrase "involving commerce" is functionally equivalent to "affecting commerce"].)

Defendants assert that the FAA applies here because VMK and New World (together, the "Company Defendants") are nationwide companies engaged in interstate commerce. In support of their assertion, Defendants offer a declaration from Paul Rivera ("Rivera") with their moving papers. Rivera declares that he is the Chief Sales Officer (and former Director of Operations) of VMK; he is familiar with VMK's business operations including the merchandise it buys and sells and where the merchandise is sourced from; and VMK sources various paraphernalia and labeling items from Michigan and Florida that are transported to California to be sold locally throughout California. (Declaration of Paul Rivera in Support of Defendants' Motion to Compel Arbitration and Dismiss or Stay Proceedings, ¶¶ 1, 4, & 5.)

However, with their reply papers, Defendants submit a declaration from Josephine Ramirez ("Ramirez"), VMK's Inventory Manager, who declares that VMK first began sourcing paraphernalia and labeling items from Michigan and Florida in 2023. (Declaration of Josephine Ramirez in Support of Defendants' Reply to Plaintiffs' Opposition to Motion to Compel Arbitration, ¶ 5.) The products are shipped through a third-party shipping company directly to VMK's facility in San Jose, California, where they come to rest and are immediately displayed for sale at the facility. (*Ibid.*) Ramirez further declares that Plaintiffs no longer worked for Defendants by November 2022, and therefore VMK did not source any paraphernalia or labeling items from Michigan and Florida during Plaintiffs' employment. (*Id.* at ¶ 6.)

Because Defendants' evidence establishes that the Company Defendants did not engage in interstate commerce until 2023, i.e., after Plaintiffs' employment contracts ended, Defendants fail to meet their burden to demonstrate that the employment agreements with Plaintiffs involved interstate commerce. (See *Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 214 [the moving party bears the burden to establish that the FAA applies]; see also *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1286 ["[E]videncing a transaction involving commerce" (9 U.S.C. § 2) simply means that "the

'transaction' in fact 'involv[e]' interstate commerce, even if the parties did not contemplate an interstate commerce connection."].) Consequently, the CAA applies here.

The CAA provides that a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp*. (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal*, *supra*, 14 Cal.4th at p. 413.)

III. DISCUSSION

Defendants move for an order compelling arbitration of Plaintiffs individual claims and dismissing Plaintiffs class claims. Defendants argue that Plaintiffs entered into written arbitration agreements in connection with their employment with the Company Defendants, which expressly cover all causes of action arising out of or relating to their employment relationship with Company Defendants. Defendants assert that Cole electronically signed the arbitration agreement on February 28, 2022, and signed the arbitration agreement by hand on March 18, 2022. Defendants assert that Matua signed the arbitration agreement by hand on November 17, 2022. Defendants further contend that the individual defendants—Mathew Krishnamachari, Sara Krishnamachari, and Vanessa Karkabi—are agents of the Company Defendants, as Plaintiffs allege in their Complaint, and therefore may also enforce the arbitration agreements despite not being signatories. Lastly, Defendants argue that Plaintiffs agreed to arbitrate their claims on an individual basis and, consequently, their class-wise claims should be dismissed.

In opposition, Plaintiffs argue that Defendants do not present sufficient evidence to establish the existence of an agreement to arbitrate. Specifically, Plaintiffs contend that

Defendants fail to authenticate the agreements. Additionally, Cole declares that she has no recollection of electronically signing an arbitration agreement on February 28, 2022; however, she signed a document approximately one month later regarding possible litigation against the Company Defendants. (Declaration of Chyna Cole in Support of Plaintiff's Opposition to Defendant's Motion to Compel Arbitration and Stay Proceedings, ¶¶ 4-6.) Cole states that Defendants did not explain the document to her and she would not have signed it if she had understood it was an arbitration agreement. (*Id.* at ¶ 6.) Matua declares that he signed a large number of documents in connection with his onboarding, but he felt pressured to sign everything quickly, he did not have time to read most of what he was signing, he does not recall signing an arbitration agreement, no one explained to him that he was signing an arbitration agreement, and he would not have signed the agreement if he had understood it was an arbitration agreement. (Declaration of Alexander Matua in Support of Plaintiff's Opposition to Defendant's Motion to Compel Arbitration and Stay Proceedings, ¶¶ 4-5.) Next, Plaintiffs argue that the class action waiver is unenforceable under *Gentry v. Superior Court* (2007) 42 Cal. 4th 443 (*Gentry*). Plaintiffs also contend that Labor Code section 229 prohibits arbitration of their wage and hour claims. Finally, Plaintiffs argue that the arbitration agreements are procedurally and substantively unconscionable.

A. Existence of the Arbitration Agreements

With their moving papers, Defendants submit copies of the arbitration agreements purportedly bearing Plaintiffs handwritten signatures. This is sufficient for Defendants to meet their initial burden to show the existence of an agreement. (See *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165; see also *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747, 755 (*Iyere*).)

In opposition, Plaintiffs do not offer evidence creating a factual dispute as to the authenticity of their hand-written signatures. Cole admits that she signed a document approximately one month after her onboarding regarding possible litigation with the Company Defendants and she does not deny that the hand-written signature on the arbitration agreement is her own. Similarly, Matua admits that he signed a large number of documents on the date in question and he does not deny that the hand-written signature on the arbitration agreement is

his own. This evidence supports Defendants' contention that Plaintiffs signed the arbitration agreements. (See *Iyere, supra*, 87 Cal.App.5th at p. 756; see also *Prostek v. Lincare Inc*. (E.D.Cal. Mar. 21, 2023, No. 1:22-CV-1530 AWI BAM) 2023 U.S.Dist.LEXIS 48155, at *20-22 ["The Court finds the analysis of *Iyere* to be persuasive and more consistent with the prior relevant California authority cited by *Gamboa* […]. […] Under Iyere, [the plaintiff's] acknowledgement that she signed a 'stack of documents,' combined with her failure to deny the authenticity of her handwritten signature on the Arbitration Agreement is determinative."].) And although Plaintiffs do not specifically recall seeing or reviewing the arbitration agreements, there is no conflict between their having signed the documents and now being unable to recall doing so.

Even if Plaintiffs' assertions that they did not recall signing the agreements were considered sufficient to shift the burden back to Defendants, Defendants produce further evidence in reply that is sufficient to identify and authenticate the agreements and Plaintiffs' signatures. (Declaration of Veronica Mendoza in Support of Defendants' Reply to Plaintiffs' Opposition to Motion to Compel Arbitration, ¶¶ 5-14 [declaring that she personally witnessed Plaintiffs signing the subject arbitration agreements].)

B. Enforceability Under *Gentry*

Although *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 359-360 held that the holding in *Gentry* regarding FAA preemption was abrogated, California courts have continued to rely on *Gentry*'s analysis even after *Iskanian*. (See, e.g., *Garrido v. Air Liquide Industrial U.S. LP* (2015) 241 Cal.App.4th 833, 845 (*Garrido*) ["We believe that the *Gentry* rule likewise may be asserted in matters governed by the [CAA] and not the FAA. In *Iskanian*, our Supreme Court had the opportunity to find *Gentry* comprehensively invalidated. It did not do so. While *Iskanian* made clear that the *Gentry* rule is preempted by the FAA, it did not go beyond that finding. Therefore, the *Gentry* rule remains valid under the CAA."].)

The *Gentry* court identified four factors to be considered in determining the enforceability of an arbitration agreement. These are " '[1] the modest size of the potential individual recovery, [2] the potential for retaliation against members of the class, [3] the fact

that absent members of the class may be ill informed about their rights, and [4] other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration.' (*Gentry, supra*, 42 Cal.4th at p. 463.)" (*Garrido, supra*, 241 Cal.App.4th at p. 845.)

> *Gentry* held that a class action waiver must be invalidated if the trial court concludes, based on these factors, that class arbitration is 'likely to be a significantly more effective practical means of vindicating the rights of affected employees than individual litigation or arbitration,' and that there would be a 'less comprehensive enforcement' of the applicable laws if the class action device is disallowed. (*Gentry, supra*, 42 Cal.4th at p. 463.)

(*Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 507-508.)

Plaintiffs contend that their potential individual recovery, which they argue is approximately $20,000 each, is modest. However, the only evidence Plaintiffs provide on this point are declarations establishing their hourly rates of pay; Plaintiffs do not present any evidence regarding the number of hours they were undercompensated and their calculations do not include a valuation for all of their claims. (See *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 510 [the party opposing arbitration present substantial evidence supporting the *Gentry* factors], disapproved on other grounds in *Sandquist v. Lebo Automotive, Inc*. (2016) 1 Cal.5th 233, 260, fn. 9.) Thus, the court finds that Plaintiffs have not shown that the first *Gentry* factor applies in this case.

With respect to the second *Gentry* factor, the potential for retaliation against class members, Plaintiffs declares that if they had known their statutory rights were being violated during their employment, they would not have been willing to bring a lawsuit because of fear of retaliation. Plaintiffs' declarations are insufficient to establish that there is a significant potential for retaliation against class members. Plaintiffs do not explain the basis for their fear of retaliation and there is no evidence that there is any reasonable basis for their concern. Further, Plaintiffs have not provided any evidence that other employees may be afraid to attempt to enforce their rights due to fear of retaliation by Defendants.

With respect to the third *Gentry* factor, Plaintiffs declare that Defendants did not inform them or other employees of their rights under the wage and hour laws. Although Plaintiffs state that others similarly situated to them were not informed of their rights, it is not clear how they would be aware of what other employees were told. Moreover, the record evidence

demonstrates that Plaintiffs received several documents in connection with the onboarding process, such as the Employee Handbook and various employment forms, that contained at least some information regarding employee's rights under the Labor Code. Accordingly, although Plaintiffs state that they were not informed about their rights, their statements are contradicted by the record evidence and it is not clear that other employees would not have been informed.

With respect to the fourth *Gentry* factor, Plaintiffs argues that a class action would be more cost effective than individual lawsuits. However, in light of the fact that the court has rejected Plaintiffs' arguments with respect to the first three *Gentr*y factors, the court finds that, even if a class action is superior to individual lawsuits, this is insufficient to invalidate the arbitration agreement under *Gentry*.

For these reasons, the court finds that the arbitration agreement is enforceable under *Gentry.*

C. Labor Code Section 229

Plaintiffs argue that they are not required to arbitrate their wage and hour claims under Labor Code section 229, which provides, in part, "Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate."

> [Labor Code s]ection 229 is found in article 1 of division 2, part 1, chapter 1 of the Labor Code, encompassing sections 200 through 244. Thus, if a cause of action seeks to collect due and unpaid wages pursuant to sections 200 through 244, that action can be maintained in court, despite an agreement to arbitrate.

(*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 684 (*Lane*).)

The United States Supreme Court and at least one California Court of Appeal have concluded that Labor Code section 229 is preempted by the FAA. (See *Perry v. Thomas* (1987) 482 U.S. 483, 491; *Nixon v. AmeriHome Mortgage Co., LLC* (2021) 67 Cal.App.5th 934, 947.) But, where the FAA does not apply, the Court of Appeal has held that Labor Code section 229 is not preempted. (*Lane, supra*, 224 Cal.App.4th at p. 687.) Here, the court has determined that the FAA does not apply. Accordingly, Labor Code section 229 applies in this case.

The Complaint alleges claims for: (1) Failure to Pay Overtime Wages; (2) Failure to Pay Minimum Wages; (3) Failure to Provide Meal Periods; (4) Failure to Provide Rest Periods; (5) Waiting Time Penalties; (6) Wage Statement Violations; (7) Failure to Timely Pay Wages; (8) Failure to Indemnify; and (9) Unfair Competition. Plaintiffs argue that each and every one of their causes of action seek "due and unpaid wages" and, therefore, are not arbitrable. Notably, Defendants do not dispute this argument in their reply papers.

Plaintiffs point out that there is case law providing that missed break and overtime claims are not subject to Labor Code section 229. The *Lane* court held that, " 'Failure To Pay Unpaid Meal and Rest Period Wages' under [Labor Code] section 226.7, it is not, in fact, an action for the 'collection of due and unpaid wages,' but one for a failure to provide mandated meal or rest breaks. [Citation.]" (*Lane, supra*, 224 Cal.App.4th at p. 684.) Similarly, the *Lane* court held that failure to provide itemized wage statements is not an action for the collection of due and unpaid wages. (*Ibid*.)

However, Plaintiffs argue that *Lane* has been impliedly overruled by *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93 (*Naranjo*). The *Naranjo* court held that the "extra pay for missed breaks constitutes 'wages' that must be reported on statutorily required wage statements during employment (Lab. Code, § 226) and paid within statutory deadlines when an employee leaves the job (id., § 203)[.]" (*Id*. at p. 102.) *Naranjo* did not mention Labor Code section 229, nor did it discuss *Lane*. However, the court finds that the holding in *Naranjo* is irreconcilable with a conclusion that Labor Code section 229 does not apply to claims for meal and rest periods under Labor Code section 226.7.

> The *Naranjo* court explained
> Although the extra pay is designed to compensate for the unlawful deprivation of a guaranteed break, *it also compensates for the work the employee performed during the break period*. [Citation.] The extra pay thus constitutes wages subject to the same timing and reporting rules as other forms of compensation for work.

(*Naranjo, supra*, 13 Cal.5th at p. 102, italics added.) As in *Naranjo*, here, Plaintiffs state a claim for premium pay for meal and rest break violations under Labor Code section 226.7.

> The Naranjo court reasoned
> The Court of Appeal was correct that premium pay is a statutory remedy for a legal violation. But the court's further conclusion that premium pay cannot

> constitute wages rests on a false dichotomy: that a payment must be either a legal remedy or wages. For these purposes, section 226.7 is both. That is because under the relevant statute and wage order, an employee becomes entitled to premium pay for missed or noncompliant meal and rest breaks precisely because she was required to work when she should have been relieved of duty: required to work too long into a shift without a meal break; required in whole or part to work through a break; or, as was the case here, required to remain on duty without an appropriate agreement in place authorizing on-duty meal breaks. [Citations.]

(*Naranjo, supra*, 13 Cal.5th at pp. 106-107.) The *Naranjo* court also reasoned that "the Legislature requires employers to pay missed-break premium pay on an ongoing, running basis [citation], just like other forms of wages (see Lab. Code, § 204)." (*Id*. at p. 110.) The court finds that Plaintiffs' causes of action are therefore exempt from arbitration under Labor Code section 229.

Accordingly, Defendants motion to compel arbitration and dismiss the action or, alternatively, stay the action is DENIED.

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

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Calendar Line 5

Case Name: Wenzel v. Zscaler, Inc. (PAGA)
Case No.: 23CV416842

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on February 21, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XI. INTRODUCTION

On December 4, 2023, plaintiff Sandra S. Wenzel ("Plaintiff") filed the operative Second Complaint ("SAC") against defendant ZScaler, Inc. ("Defendant"), which sets forth the following causes of action: (1) Civil Penalties Under PAGA for Violations of Labor Code Section 2751(a) and (b); (2) Civil Penalties Under PAGA for Violations of Labor Code Section 1102.5; (3) Civil Penalties Under PAGA for Violations of Labor Code Section 232.5; and (4) Civil Penalties Under PAGA for Violations of Labor Code Section[s] 201, 202, and 203.

Now before the court is Defendant's demurrer to the first through third causes of action of the SAC on the ground of failure to allege sufficient facts to state a cause of action (see Code Civ. Proc., § 430.10, subd. (e)) and alternative motion to strike the representative retaliation claims from the SAC. Plaintiff opposes the demurrer and alternative motion to strike.

II. DEMURRER

A. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, " '[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice' [citation]." (*Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 353; see Code Civ. Proc., § 430.30, subd. (a).) " 'It is not the ordinary function of a demurrer to test the truth of the … allegations [in the challenged pleading] or the accuracy with which [the plaintiff] describes the defendant's conduct. … .' [Citation.] Thus, … 'the facts alleged in the pleading are deemed to be true,

however improbable they may be. [Citation.]' [Citations.]" (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958.)

B. First Cause of Action

Defendant demurs to the first cause of action for Civil Penalties Under PAGA for Violations of Labor Code Section 2751(a) and (b) on the ground that it fails to state a claim because Labor Code section 2751 is a notice provision and PAGA expressly precludes recovery of civil penalties for alleged violations of a "posting, notice, agency reporting, or filing requirement …." (Lab. Code, § 2699, subd. (g)(2).) Defendant argues that Labor Code section 2751 is a notice provision because it related to information given about something that is going to happen in the future. Defendant contends that Labor Code section 2751 is similar to other statutes, such as Labor Code section 2810.5, that have been deemed to be notice requirements.

In opposition, Plaintiff persuasively argues that Labor Code section 2751 is not a notice provision, but a substantive statute that mandates the form and contents of contracts between employers and their employees who are paid at least in part by commissions. Labor Code section 2751 states, in relevant part:

> (a) Whenever an employer enters into a contract of employment with an employee for services to be rendered within this state and the contemplated method of payment of the employee involves commissions, the contract shall be in writing and shall set forth the method by which the commissions shall be computed and paid.
>
> (b) The employer shall give a signed copy of the contract to every employee who is a party thereto and shall obtain a signed receipt for the contract from each employee. In the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party.

The plain language of the statute does not simply require an employer to provide notice to employees of certain rights. Rather, the statute dictates the form and contents of contracts involving commissions.

Notably, as Plaintiff points out, Defendant does not cite any legal authority holding that Labor Code section 2751 fits within the exception set forth in Labor Code section 2699, subdivision (g)(2). And Plaintiff cites to several federal cases which have held that a violation of Labor Code section 2751 may form the basis of a PAGA claim. (See e.g., *Piccarreto v.*

Presstek, LLC (C.D.Cal. Aug. 23, 2017, No. CV 16-1862 DMG (JCx)) 2017 U.S.Dist.LEXIS 137255, at *16; *Harper v. Charter Communs., LLC* (E.D.Cal. Oct. 12, 2021, No. 2:19-cv-00902 WBS DMC) 2021 U.S.Dist.LEXIS 197870, at *23-24.); *Harper v. Charter Communs., LLC* (E.D.Cal. Feb. 12, 2021, No. 2:19-cv-00902 WBS DMC) 2021 U.S.Dist.LEXIS 28747, at *29-33.)

Accordingly, the demurrer to the first cause of action of the SAC is OVERRULED.

C. Second and Third Causes of Action

Defendant demurs to the "representative portions" of the second cause of action for Civil Penalties Under PAGA for Violations of Labor Code Section 1102.5 and the third cause of action for Civil Penalties Under PAGA for Violations of Labor Code Section 232.5, which assert retaliation claims, on the grounds that Plaintiff fails to plead facts showing that any other employee experienced retaliation and Plaintiff fails to identify with any specificity the group of aggrieved employees she allegedly seeks to represent.

Here, Defendant's demurrer fails to dispose of the second and third causes of action in their entirety. Defendant expressly states that it only demurs to the representative portions of those claims; it does not challenge Plaintiff's individual PAGA claims. Thus, the demurrer cannot be granted with respect to the second and third causes of action. (See *PHII, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 [a demurrer cannot be granted as to only a portion of a claim].)

Accordingly, the demurrer to the second and third causes of action of the SAC is OVERRULED.

III. ALTERNATIVE MOTION TO STRIKE

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, the court reads the pleading as a whole,

all parts in their context, and assuming the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 citing *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

B. Discussion

Defendant moves to strike paragraphs 31, 46, and 56 of the SAC, which set forth allegations supporting the "representative portions" of the second cause of action for Civil Penalties Under PAGA for Violations of Labor Code Section 1102.5 and the third cause of action for Civil Penalties Under PAGA for Violations of Labor Code Section 232.5, on the grounds that Plaintiff fails to plead facts showing that any other employee experienced retaliation and Plaintiff fails to identify with any specificity the group of aggrieved employees she allegedly seeks to represent.

In opposition, Plaintiff argues that she has adequately pleaded her representative PAGA claims. Plaintiff asserts that Defendant improperly relies on cases using the federal pleading standard and that the SAC alleges the ultimate facts necessary to support her claims.

In the SAC, Plaintiff asserts claims on behalf of "other aggrieved employees in California whom [Defendant] has employed since April 26, 2022." (SAC, ¶ 2.) Plaintiff alleges, on information and belief, that Defendant has "unlawfully retaliated against numerous other employees who disclosed information to other [Defendant] employees, and/or externally to the public or third parties, about its working conditions"; Defendant has "retaliated against other [Defendant] employees after they made protected disclosures that some in [Defendant] engaged or could engage in unlawful activity"; and Defendant "similarly disciplined, discharged, or otherwise discriminated against other [Defendant] employees who also reported or disclosed working conditions at [Defendant]." (SAC, ¶¶ 31, 46, & 56.)

Consistent with the PAGA statute itself, the "aggrieved employees" in this actionare those who suffered the alleged violations at issue. (See Lab. Code § 2699, subd. (c) ["For purposes of this part, 'aggrieved employee' means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed."].)

Defendant contends, not unreasonably, that the group of aggrieved employees at issue here is vaguely defined and potentially very broad. But Defendant cites no California authority

imposing a requirement that a PAGA plaintiff define this group with specificity at the pleading stage. To the contrary, California authorities hold that a PAGA representative action is not a class action and is not subject to the same manageability requirements as a class action. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969 [an employee need not satisfy class action requirements to bring a representative action under PAGA]; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 551 (*Williams*) ["That the eventual proper scope of a putative representative action is as yet uncertain is no obstacle to discovery; a party may proceed with [discovery] precisely in order to ascertain that scope."].)

> As explained by the California Supreme Court in *Williams*, under PAGA, [s]uit may be brought by any "aggrieved employee" (Lab. Code, § 2699, subd. (a)); in turn, an "'aggrieved employee'" is defined as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed" (id., subd. (c), italics added). If the Legislature intended to demand more than mere allegations as a condition to the filing of suit or preliminary discovery, it could have specified as much. That it did not implies no such heightened requirement was intended.

(*Williams, supra*, 3 Cal.5th at p. 546; compare *Khan v. Dunn-Edwards Corp*. (2018) 19 Cal.App.5th 804, 809 [PAGA notice that "expressly applied only to [plaintiff]" and not to any group of other aggrieved employees was inadequate].)

While the court recognizes Defendant's legitimate concerns regarding the manageability of the specific claims at issue, it is not without tools to address these concerns as the case proceeds. For example, discovery must be reasonable and proportional, and may be restricted upon a showing of undue burden or expense. (See, e.g., Code Civ. Proc., § 2019.030, subd. (a)(2) [court shall restrict discovery that is "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation"].) The court also has the ability to order Plaintiff to submit a trial plan at the appropriate juncture. (See *Zackaria v. Wal-Mart Stores, Inc*. (C.D. Cal. 2015) 142 F.Supp.3d 949, 960.) But the court is not authorized to simply strike claims that may be difficult to manage or prove, be they PAGA claims or any other claims not subject to the unique requirements imposed in class actions.

Defendant's motion to strike Plaintiff's representative allegations based on the definition of the aggrieved employees in this action must be rejected.

Defendant also moves to strike the representative allegations on the ground that Plaintiff alleges no facts to support the conclusion that other employees suffered the violation at issue.

But to survive a pleading challenge, "the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872 [identities of allegedly negligent employees need not be provided to state a claim against school district].) With limited exceptions not applicable here, the rules of pleading require no more than "general allegation[s] of ultimate fact." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 [allegation that asserted nuisance "affect[s] a substantial number of people at the same time" suffices to state a claim although it mirrors the element of the claim].) "The pleading is adequate so long as it apprises the defendant of the factual basis for the claim." (*Id.* at p. 1549.)

Here, Plaintiff clearly alleges that she was not the only one who experienced discrimination and retaliation. As Defendant acknowledges, she alleges that employees were disciplined, discharged, or discriminated against after making complaints about unlawful workplace conduct. These allegations state a claim under PAGA. (See *Williams, supra*, 3 Cal.5th at p. 551.)

Accordingly, Defendant's alternative motion to strike is DENIED.

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

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Calendar Line 6

Case Name: Cervantez v. Garden City, Inc.
Case No.: 22CV392905

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on February 21, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XII. INTRODUCTION

This is a putative class and representative action brought by plaintiff Joe Cervantez ("Plaintiff") alleging various wage and hour violations. The operative First Amended Complaint, filed on June 22, 2022, sets forth the following causes of action: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods; (4) Failure to Permit Rest Breaks; (5) Failure to Reimburse Business Expenses; (6) Failure to Provide Accurate Itemized Wage Statements; (7) Failure to Pay All Wages Due Upon Separation of Employment; (8) Violation of Business and Professions Code §§ 17200, et seq.; and (9) Enforcement of Labor Code §§ 2698, et seq. ("PAGA".)

On February 10, 2023, the court entered an Order on Defendant's Motion to Compel Arbitration, Dismiss Class Action, and Stay Proceedings, which sent Plaintiff's individual claims to arbitration and stayed Plaintiff's representative claims pending completion of the arbitration.

Now before the court is the motion by Aegis Law Firm, P.C. ("Aegis") to be relieved as counsel of record for Plaintiff. The motion is unopposed.

II. LEGAL STANDARD

California Rules of Court, rule 3.1362 sets forth the requirements for a motion to be relieved as counsel. That rule provides that "[a] notice of motion and motion to be relieved as counsel under Code of Civil Procedure section 284(2) must be directed to the client and must be made on the Notice of Motion and Motion to Be Relieved as Counsel-Civil (form MC-051)." (Cal. Rules of Ct., rule 3.1362(a).) "[N]o memorandum is required to be filed or served with a motion to be relieved as counsel." (Cal. Rules of Ct., rule 3.1362(b).) "The motion to be relieved as counsel must be accompanied by a declaration on the Declaration in Support of

Attorney's Motion to Be Relieved as Counsel-Civil (form MC-052)," which "must state 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)." (Cal. Rules of Ct., rule 3.1362(c).)

"The notice of motion and motion, the declaration, and the proposed order must be served on the client and on all other parties who have appeared in the case. The notice may be by personal service, electronic service, or mail." (Cal. Rules of Ct., rule 3.1362(d).) If the notice is served on the client by mail, it must be accompanied by a declaration stating facts showing that either: (1) the service address is the current residence or business address of the client; or (2) 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. (Cal. Rules of Ct., rule 3.1362(d)(1).) "If the notice is served on the client by electronic service under Code of Civil Procedure section 1010.6 and rule 2.251, it must be accompanied by a declaration stating that the electronic service address is the client's current electronic service address." (Cal. Rules of Ct., rule 3.1362(d)(2).) As used in the rule, "current" means that the address was confirmed within 30 days before the filing of the motion to be relieved. (*Ibid.*)

"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." (Cal. Rules of Ct., rule 3.1362(e).) "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." (*Ibid.*)

The determination of whether to grant a motion to withdraw as counsel lies in the sound discretion of the trial court. (See *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1133; see also *People v. Horton* (1995) 11 Cal.4th 1068, 1106.)

III. DISCUSSION

Aegis seeks to be relieved as counsel of record for Plaintiff on the grounds that there has been an irreparable breakdown of the attorney-client relationship.

However, the motion to be relieved as counsel fails to comply with California Rules of Court, rule 3.1362. Plaintiff's counsel submits a declaration stating that the motion papers were served on Plaintiff by mail at Plaintiff's last known address. (Declaration in Support of Attorney's Motion to be Relieved as Counsel – Civil, ¶ 3(a)(2).) Plaintiff's counsel further declares that he confirmed that the address was current within the last 30 days through a search of public records on December 14, 2023. (*Id.* at ¶ 3(b)(1)(d).) But the proof of service filed with the moving papers does not reflect that Plaintiff was served via mail at his last known address. Instead, the proof of service states that service was made on Plaintiff via electronic transmission. Moreover, the proof of service does not list the email where Plaintiff was purportedly served. Additionally, there does not appear to be any evidence in the record establishing that Plaintiff's counsel confirmed that any purported email for Plaintiff was current within the last 30 days.

Accordingly, the motion to be relieved as counsel is DENIED without prejudice.

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: Sheppard v. Staffmark Investment LLC (Class Action/PAGA)
Case No.: 20CV365260

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on February 21, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XIII. INTRODUCTION

This is a class and representative action arising out of alleged wage and hour violations. The operative Second Amended Complaint ("SAC"), filed on January 11, 2023, sets forth the following causes of action: (1) Failure to Provide Meal Periods; (2) Failure to Permit Rest Breaks; (3) Failure to Provide Accurate Itemized Wage Statements; (4) Failure to Pay All Wages Due Upon Separation of Employment; (5) Violation of Business and Professions Code §§ 17200, et seq. ("UCL"); (6) Failure to Reimburse Business Expenses; and (7) Enforcement of Labor Code § 2698 et seq. ("PAGA").

The parties reached a settlement. Plaintiff Tracee Sheppard ("Plaintiff") moved for preliminary approval of the settlement.

On May 10, 2023, the court continued the motion for preliminary approval of settlement to July 12, 2023. In its minute order, the court directed Plaintiff to identify a new *cy pres* recipient in compliance with Code of Civil Procedure section 384, ordered the parties to meet and confer regarding the scope of the PAGA release, and to modify the settlement agreement to provide for two separate payments and calculations (one for PAGA claims and one for class claims). The court otherwise found the settlement fair. The court also requested the parties make several changes to the class notice.

On June 28, 2023, Plaintiff filed a supplemental brief and supplemental declarations in support of her motion.

On July 28, 2023, the court granted preliminary approval of the settlement and approved the amended class notice.

Plaintiff moved for final approval of the settlement. The motion was unopposed.

On January 24, 2024, the court continued the motion for final approval of settlement to February 21, 2024. The court explained that it had concerns regarding the adequacy of class notice and directed Plaintiff to file a supplemental declaration clarifying when the one additional class member was mailed a notice packet, how many notice packets were ultimately undeliverable, and why notice packets were only mailed to 5,494 class members (instead of 5,500 class members).

Now before the court is Plaintiff's motion for final approval of settlement.

XIV. LEGAL STANDARD

Generally, "questions whether a 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*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the 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 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*., quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

XV. DISCUSSION

> The case has been settled on behalf of the following class:
> [A]ll current and former non-exempt employees who are or were employed by [defendant Staffmark Investments LLC ("Staffmark")] and placed on temporary work assignment with [defendant UPS Mail Innovations, Inc. ("UPSMI")] in California at any time during the Class Period.

The Class Period is defined as the time period on March 19, 2019 through June 2, 2022. The settlement also includes PAGA Group Members, who are defined as all class members. The PAGA Period is the same as the Class Period.

As discussed in connection with preliminary approval, Staffmark and UPSMI (collectively, "Defendants") will pay a maximum, non-reversionary settlement amount of $2,400,000. The gross settlement amount includes attorney fees up to $800,000 (1/3 of the gross settlement amount), litigation costs not to exceed $20,000, a PAGA allocation of $50,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be allocated to PAGA Group Members), an incentive award up to $10,000 for the class representative, and settlement administration costs not to exceed $35,000. The net settlement amount will be distributed to participating class members pro rata basis. Checks that remain uncashed 180 days from the date the checks are dated will be void and the funds from those checks will be distributed to Bay Area Legal Aid.

On August 2, 2023, the settlement administrator mailed notice packets to 5,493 class members. (Declaration of Kevin Lee Regarding Notice and Settlement Administration ("Lee Dec."), ¶¶ 3-5.) During the response period, one individual requested to be added to the class. (*Id.* at ¶ 6.) Notice was mailed to this additional individual such that notice was sent to a total of 5,494 class members. (*Ibid.*) The settlement administrator initially declared that "sixty-five (65) Notice Packets remain undeliverable, specifically sixty-six (66) are undeliverable since an updated address could not be obtained via skip trace, while fifty-eight (58) are undeliverable since they were returned by the Post Office after a second mailing." (*Id.* at ¶ 8.) As of November 6, 2023, there were no objections and no requests for exclusion. (*Id.* at ¶¶ 9-10.)

The highest individual settlement share to be paid is approximately $4,067.81, the lowest individual settlement share to be paid is approximately $22.60, and the average individual settlement share to be paid is approximately $271.61. (Lee Dec., ¶ 15.)

Plaintiff's counsel has now submitted a supplemental declaration advising that there are only 5,494 class members. (Supplemental Declaration of Fawn R. Bekan in Support of Motion for Final Approval of Class Action Settlement, ¶ 3.) In addition, the settlement administrator has also submitted a supplemental declaration stating that the one additional class member was mailed a notice packet on August 30, 2023, and therefore the deadline for that individual to respond elapsed on October 30, 2023. (Supplemental Declaration of Kevin Lee Regarding Notice and Settlement Administration, ¶ 4.) The settlement administrator further clarifies that ultimately 124 notice packets remain undeliverable. (*Id.* at ¶ 6.)

The supplemental declarations adequately address the court's concerns regarding the adequacy of the notice. The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests an incentive award up to $10,000 for the class representative. Plaintiff submitted a declaration in support of the request, detailing her participation in the action. Plaintiff declares that she spent approximately 50 hours in connection with this lawsuit, including searching for and providing documents to class counsel, discussing the case with class counsel, identifying potential witnesses, reviewing discovery, participating in settlement discussions, and reviewing settlement documents. (Declaration of Tracee Sheppard in Support of Motion for Final Approval of Class Action Settlement, ¶ 7.)

Moreover, Plaintiff undertook risk by putting her name on the case because it might impact his future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].)

However, the requested service award in the amount of $10,000 is excessive. Each class member will receive approximately $271.61. Consequently, the sought-after service award would amount to more than 36 times the estimated average payout. Additionally, the amount requested is higher than the court typically awards for the amount of Plaintiff time

spent in connection with this action. In light of the foregoing, the court finds that a service award in the amount of $5,000 is reasonable and it approves the award in that lesser amount.

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 seek attorney fees in the amount of $800,000 (1/3 of the gross settlement amount). Plaintiff's counsel provide evidence demonstrating a lodestar of $413,370. (Declaration of Fawn F. Bekam in Support of Motion for Final Approval of Class Action Settlement ("Bekam Dec."), ¶¶ 18-19.) This results in a multiplier of 1.94. The court finds the attorney fees are reasonable as a percentage of the common fund and are approved.

Plaintiff's counsel also requests litigation costs in the amount of $12,793.33, and provides evidence of incurred costs in that amount. (Bekam Dec., ¶ 20 & Ex. 1.) Consequently, the litigation costs are reasonable and approved. The settlement administration costs of $35,000 are also approved. (Lee Dec., ¶ 18.)

Accordingly, the motion for final approval of the class and representative action settlement is GRANTED.

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

The court will set a compliance hearing for October 23, 2024, 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 Defendant, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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