SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department7@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV374355	Silvaco, Inc. v. Andersen, et al.	The court invites argument for this matter.
LINE 2	22CV393580	Martinez, et al. v. Pacific Catch, Inc. (Class Action/PAGA) (Lead Case; Consolidated with 23CV420141)	See Line 2 for tentative ruling.
LINE 3	22CV400335	Walker, et al. v. DJO, LLC (Class Action) (LEAD CASE; consolidated with 22CV401621)	See Line 3 for tentative ruling.
LINE 4	19CV346694	Moncada v. AJ's Restaurant & Bar, et al. (Class Action)	See Line 4 for tentative ruling.
LINE 5	22CV401053	Velasco v. Bright Matters, Inc., et al. (PAGA)	See Line 5 for tentative ruling.
LINE 6			
LINE 7			
LINE 8			
LINE 9			

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LAW AND MOTION TENTATIVE RULINGS

LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name:
Case No.:

- oo0oo -

Calendar Line 2

Case Name: *Martinez, et al. v. Pacific Catch, Inc.*
Case No.: 22CV393580 (lead case consolidated with Case No. 22CV393580)

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiffs Rosa Esmeralda Esteban Martinez, Mirian Gonzalez Orellano and Kelly Stover allege that Defendant Pacific Catch, Inc., who operates five seafood restaurants in the San Francisco Bay Area, failed to pay overtime and minimum wages, failed to provide compliant meal and rest periods or pay associated premiums, and failed to provide code-complaint wage statements, among other Labor Code violations.

Now before the Court are Plaintiffs' motion for final approval of a settlement and motion for attorneys' fees, costs and enhancement awards, which are unopposed. As discussed below, the Court GRANTS the motions.

I. BACKGROUND

On January 24, 2022, Ms. Martinez and Ms. Orellano filed a PAGA Complaint against Defendant in this Court in the action captioned *Martinez, et al. v. Pacific Catch, Inc.*, Case No. 22CV393580, alleging various wage and hour law violations and seeking civil penalties for those violations. On July 25, 2022, Ms. Stover filed class action complaint in Marin County Superior Court in the action captioned *Stover v. Pacific Catch, Inc.*, Case No. CIV2202328, alleging that Defendant violated numerous wage and hour laws.

On September 13, 2022, Ms. Martinez and Ms. Orellano filed a First Amended Class and PAGA Complaint. Two weeks later, on September 27, 2022, Ms. Stover filed a PAGA complaint against Defendant in Marin County Superior Court, Case No. CIV2203099, which alleged the same wage and hour violations as those raised in her class action complaint. Ms. Martinez and Ms. Orellano filed a Second Amended Class and PAGA Complaint ("SAC"), adding a claim for Defendant's alleged failure to properly pay tips.

On March 7, 2023, the Marin County Superior Court entered an order consolidating the *Stover* Class Action and the *Stover* PAGA Action, with the former serving as the lead case. On March 13, 2022, the Marin County Superior Court entered an order transferring the *Stover* actions to this Court (assigned Case No. 23CV420141). On August 18, 2023, the *Stover* Actions were consolidated with the *Martinez* Action, with the latter serving as the lead case.

According to the SAC, Ms. Martinez was employed by Defendant as an hourly, non-exempt employee as, at different times, a Dishwasher, Butcher, Prep Cook and Line Cook from approximately May 2019 to May 2021. (SAC, ¶ 6.) Ms. Orellano was employed as an hourly, non-exempt Line Cook from approximately September 2020 to June 2021. (*Id.*, ¶ 7.) Both allege that they and other employees were not paid for all hours worked because Defendant failed to record all of those hours. This included overtime hours, as well as off-the-clock work for which they were entitled to minimum wages. (*Id*., ¶¶ 20-23.) They further allege that Defendant failed to provide them with the meal and rest periods to which they were entitled, and premiums for the same, and implemented an unlawful tipping policy which required them and other employees to turn over portions of the gratuities they received to Defendant. (*Id*., ¶¶ 29-30.) Defendant also allegedly required Plaintiffs and other employees to work more than

six consecutive days without a day of rest in violation of relevant provisions of the Labor Code, and failed to reimburse them for business-related costs and expenses incurred during the course and scope of their employment.

Based on the foregoing, Ms. Martinez and Ms. Orellano assert the following causes of action: (1) for Civil Penalties under PAGA; (2) Failure to Pay Overtime (Violation of Labor Code §§ 510, 1194, 1197 and 1198); (3) Failure to Pay Minimum Wages (Violation of Labor Code §§ 204, 210, 216, 558, 1182.12, 1194, 1194.2, 1197, 1197.1 and 1198); (4) Failure to Provide and Record Meal Periods (Violation of Labor Code §§ 218.6, 226.7, 512 and 1198); (5) Failure to Authorize and Permit Rest Periods (Violation of Labor Code §§ 218.6, 226.7, 516 and 1198); (6) Failure to Provide and Maintain Compliant Wage Statements (Violation of Labor Code §§ 226(a), 1174 and 1198); (7) Failure to Pay Wages Upon Termination (Violation of Labor Code §§ 201, 202 and 203); (8) Failure to Timely Pay Wages During Employment (Violation of Labor Code §§ 204, 218.5, 218.6, 226.7, 510, 1194, 1197.1 and 1197.5); (9) Failure to Reimburse Necessary Business Expenses (Violation of Labor Code § 2802); (10) Unlawful Business Practices (Violation of Business & Professions Code §§ 17200, et seq.); and (11) Unfair Business Practices (Violation of Business & Professions Code §§ 17200, et seq.).

According to the *Stover* Class Action Complaint, Ms. Stover was employed by Defendant as an hourly, non-exempt server from approximately March 3, 2017 through July 25, 2021. Ms. Stover makes similar allegations to those pleaded in the *Martinez* SAC and asserts the following claims in the Class Action Complaint: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Owed; (3) Failure to Provide Lawful Meal Periods; (4) Failure to Authorize and Permit Rest Periods; (5) Failure to Timely Pay Wages Owed During Employment; (6) Failure to Timely Pay Wages Owed Upon Separation from Employment; (7) Failure to Furnish Accurate Itemized Wage Statements; and (8) Violation of Unfair Competition Law. In her PAGA Complaint, Ms. Stover asserts a single cause of action for penalties under PAGA for the same wage and hour violations alleged in her Class Action Complaint.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

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

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of relevant factors, depending on the circumstances of each case. (*Wershba, supra,* 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.) The trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra,* 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 2022 U.S. LEXIS 2940.)

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

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. SETTLEMENT CLASS

For settlement purposes only, Plaintiff requests the following class be certified:

> All non-exempt, hourly-paid employees of Defendant deployed in California at a restaurant at any time during the Class Period of January 24, 2018 through February 28, 2023.

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On Drug Stores*).) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

At preliminary approval, the Court provisionally certified the above-described class, determining that Plaintiffs had demonstrated by a preponderance of the evidence (1) an ascertainable class, (2) a well-defined community of interest among the class members and (3) that a class action provides substantial benefits to both litigants and the Court. Consequently, the Court will certify the class for settlement purposes as requested.

IV. TERMS AND ADMINISTATION OF SETTLEMENT

The non-reversionary gross settlement amount is $1,926,308.31.[1] Attorney fees of up to $600,000 (one-third of the gross settlement), litigation costs and expenses of up to $25,000, and $25,000 costs will be paid from the gross settlement. $100,000 will be allocated to PAGA

[1] At preliminary approval, this amount was $1,800,000 but has been increased due to the triggering of the escalator clause of the parties' agreement.

penalties, 75% of which ($75,000) will be paid to the LWDA. The named plaintiffs seek enhancement awards of $5,000 and General Release Payments of $5,000 each.

The net settlement will be allocated to class members on a pro-rata basis according to the number of weeks each member worked during the class period. The remaining 25% of the PAGA settlement amount will be distributed to aggrieved employees in the same manner except it will be based on the number of weeks worked during the PAGA period of November 18, 2020 through February 28, 2023. Class members will not be required to submit a claim to receive their payments. For tax purposes, settlement payments will be allocated 20% to wages, 40% interest on the unpaid wages, and 40% to penalties, and the required withholdings and taxes (including all payroll taxes) will be withheld by the administrator prior to remitting payment to class members. Funds associated with the checks uncashed after 180 days will be transferred to the State of California's Unclaimed Property Fund in the name of the participating class member/aggrieved employee.

In exchange for the settlement, class members who do not opt out will release any and all claims that "arise from the facts, matters, transactions or occurrences alleged in the [*Martinez* and *Stover* actions] or that could have been alleged in [these] Actions based on such facts," including specified wage and hour claims. The PAGA release provides that in exchange for the PAGA amount received, Plaintiffs "forever and completely release and discharge Defendant and each of the Released Parties from the PAGA Claims that arose during the PAGA Period." "PAGA Claims" means claims for penalties under PAGA that (a) "arise from the facts, matters, transactions or occurrences alleged in the [*Martinez* and *Stover* actions] or that could have been alleged in those actions based on such facts," and/or (b) "arise from the facts, matters, transaction or occurrences alleged, or that could have been alleged, in the PAGA Notice Letters sent by … Plaintiffs to the [LWDA] …." Consistent with the statute, aggrieved employees will not be able to opt out of the PAGA portion of the settlement. As the Court determined in its order preliminarily approving the settlement, the releases are appropriately tailored to the factual allegations at issue. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.)

The notice period has now been completed. According to the declaration of a case manager with settlement administrator CPT Group, Inc. ("CPT"), Kaylie O'Connor, submitted in support of the instant motions, on November 9 and 13, 2023 and January 2 and 10, 2024, CPT received from Defendant the names and identifying information (including last known mailing address) for each settlement class member and subsequently processed these items against the National Change of Address database to confirm and update the relevant information. On January 17, 2024, Notice Packets were mailed via first class mail to the 3,192 class members identified in the list provided to CPT. As of the date of Ms. O'Connor's declaration, March 25, 2024, 238 Notice Packets have been returned without a forwarding address. CPT performed a skip trace on these returned packets and obtained 180 updated addressed, to which packets were promptly re-mailed. At present, 109 Notice Packets have been deemed undeliverable. CPT has received 1 request for exclusion and no objections to the settlement. The administrator estimates that the average payment to be received by the 3,191 participating class members is $359.23, with a high payment of $2,237.22. The average PAGA payment to be received by the 2,071 PAGA members is estimated to be $12.07, which a high payment of $40.07.

At preliminary approval, the Court found that the proposed settlement provides a fair and reasonable compromise to Plaintiffs' claims, and that the PAGA settlement is genuine,

meaningful, and fair to those affected. It finds no reason to depart from these findings now, especially considering that there are no objections. Therefore, the Court finds that the settlement is fair and reasonable for the purposes of final approval.

V. MOTION FOR ATTORNEYS FEES, COSTS AND INCENTIVE AWARD

As articulated above, Plaintiffs' counsel seeks a fee award of $600,000, or one-third of the gross settlement, which is not an uncommon contingency fee allocation in a wage and hour class action. This award is facially reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiffs also provide a lodestar figure of $426,022.50, based on 613.9 hours at billing rates of $475 to $950, resulting in a modest multiplier of 1.4. This is well within the range of multipliers that courts typically approve. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488, 503–504 (*Laffitte*) [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13]; *Wershba, supra,* 91 Cal.App.4th at p. 255 ["[m]ultipliers can range from 2 to 4 or even higher"]; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051, fn. 6 [stating that multipliers ranging from one to four are typical in common fund cases and citing the court's own survey of large settlements finding "a range of 0.6–19.6, with most (20 of 24, or 83%) from 1.0–4.0 and a bare majority (13 of 24, or 54%) in the 1.5–3.0 range"].)

"While the percentage method has been generally approved in common fund cases, courts have sought to ensure the percentage fee is reasonable by refining the choice of a percentage or by checking the percentage result against a lodestar- multiplier calculation." (*Laffitte, supra*, 1 Cal.5th 480, 494-495.) Applying this latter approach,

> [T]he percentage-based fee will typically be larger than the lodestar based fee. Assuming that one expects rough parity between the results of the percentage method and the lodestar method, the difference between the two computed fees will be attributable solely to a multiplier that has yet to be applied. Stated another way, the ratio of the percentage-based fee to the lodestar-based fee implies a multiplier, and that implied multiplier can be evaluated for reasonableness. If the implied multiplier is reasonable, then the cross-check confirms the reasonableness of the percentage-based fee; if the implied multiplier is unreasonable, the court should revisit its assumptions.

(*Laffitte, supra*, 1 Cal.5th at p. 496, quoting Walker & Horwich, *The Ethical Imperative of a Lodestar Cross-check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases* (2005) 18 Geo. J. Legal Ethics 1453, 1463.) As described by the California Supreme Court, "[i]f the multiplier calculated by means of a lodestar crosscheck is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Laffitte, supra*, 1 Cal.5th at 505.)

Here, as the multiplier sought by Plaintiffs' counsel is relatively modest, well within the range of modifiers typically approved by courts and is supported by the percentage cross-check the Court finds counsel's requested fee award is reasonable.

Plaintiffs' counsel also seeks $22,263.18 in litigation costs, which is below the $25,000 limit provided by the Settlement and appears reasonable. The $25,000 in administrative costs are also approved.

Finally, Plaintiffs request incentive awards of $5,000 each and general release payments in the same amount, each. To support their requests, they submit declarations describing their efforts in the case. The Court finds that the class representatives are entitled to such payments and that the amounts requested are reasonable.

VI. CONCLUSION

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiffs' motion for final approval and motion for attorneys' fees, costs and enhancement awards are GRANTED. The following class is certified for settlement purposes only:

> All non-exempt, hourly-paid employees of Defendant deployed in California at a restaurant at any time during the Class Period" of January 24, 2018 through February 28, 2023.

Judgment will be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff and the members of the class will take from their complaint only the relief set forth in the settlement agreement and this order and judgment. Pursuant to Rule 3.769(h) of the California Rules of Court, the Court will retain jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **December 19, 2024 at 2:30 P.M.** in Department 7. 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 pursuant to Code of Civil Procedure section 384, subdivision (b); the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 3

Case Name: *Tamika Walker, et al. V. DJO, LLC*
Case No.: 22CV400335 (consolidated with Case No. 22CV401621)

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiffs Tamika Walker and Shannon Peete allege that Defendant DJO, LLC, which makes orthopedic devices, failed to provide employees with compliant meal and rest breaks, failed to pay minimum and overtime wages, issued noncompliant wage statements, and committed other wage and hour violations.

Before the Court is Plaintiffs' motion for final approval of settlement, which is unopposed. As discussed below, the Court GRANTS the motion.

I. BACKGROUND

Plaintiffs began employment with Defendant in September 2019 and ended their employment in April 2022. (First Amended Class Action Complaint ("FAC"), ¶ 3.) Both Plaintiffs were employed by Defendant as hourly, non-exempt employees. (*Ibid*.)

According to Plaintiffs, they were sometimes required to work while clocked out for their meal breaks and they were not paid to participate in required drug and other testing or COVID-19 screening. (FAC, ¶ 8.) And, Defendant utilized an unlawful rounding policy resulting in employees not being paid for all hours worked. (*Id*.) Further, while employees routinely earned non-discretionary incentive wages, overtime pay and meal and rest period premium pay was paid at their base pay rate rather than the regular rate of pay. (*Id*., ¶ 10.) Defendant also required employees to use their personal cellular phones for work purposes without compensation. (*Id*., ¶ 23.)

Based on these allegations, Plaintiffs assert, in the operative First Amended Complaint, putative class claims for: (1) violation of Business and Professions Code section 17200, et seq.; (2) failure to pay minimum wages, in violation of Labor Code sections 1194, 1197, and 1197.1; (3) failure to pay overtime wages, in violation of Labor Code section 510, et seq.; (4) failure to provide meal periods, in violation of Labor Code sections 226.7 and 512 by and the relevant Industrial Wage Commission order; (5) failure to provide rest breaks, in violation of Labor Code sections 226.7 and 512 by and the relevant wage order; (6) violation of Labor Code section 226 by failing to provide accurate itemized wage statements; (7) failure to reimburse employees for required expenses under Labor Code section 2802; (8) failure to provide wage when due under Labor Code sections 201 through 203; (9) failure to pay sick wages in violation of Labor Code 201 through 204, 233, and 246, and (10) a representative claim for PAGA penalties (Lab. Code, § 2698, et seq.).[2]

[2] Plaintiffs initially filed a class action complaint raising no PAGA claim in Case No. 22CV400335. Thereafter, they filed a PAGA only action in Case No. 22CV401621. The cases have now been consolidated and the operative First Amended Complaint, filed May 11, 2023, asserts both classand PAGA claims.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

B. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

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

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of relevant factors, depending on the circumstances of each case. (*Wershba, supra,* 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.) The trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra,* 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639.)

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

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra*, 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. SETTLEMENT CLASS

For settlement purposes only, Plaintiffs request the following class be certified:

> All individuals who currently or previously have worked for Defendant in California, including both Defendant's employees and temporary workers employed by third-party staffing agencies and assigned to work for Defendant, in non-exempt positions at any time during the Class Period" of August 2, 2018 to July 11, 2023.

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On Drug Stores*).) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this

respect. (*Id.* at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

At preliminary approval, the Court determined that Plaintiffs had demonstrated by a preponderance of the evidence (1) an ascertainable class, (2) a well-defined community of interest among the class members and (3) that a class action provides substantial benefits to both litigants and the Court. Consequently, the Court will certify the class for settlement purposes as requested.

IV. TERMS AND ADMINISTATION OF SETTLEMENT

At preliminary approval, the non-reversionary gross settlement amount was $1,500,000. However, because the escalator provision in the parties' agreement was triggered, the gross settlement amount has increased to $1,950,515.97. Attorney fees of up to $650,171.99 (one-third of the gross settlement), litigation costs of up to $21,500, and $12,430.88 in administration costs will be paid from the gross settlement. One hundred fifty thousand dollars of the gross settlement amount will be allocated to PAGA penalties, 75 percent of which ($112,500) will be paid to the LWDA, leaving 25 percent ($37,500) for the aggrieved employees. The named plaintiffs seek incentive awards of $10,000 each for a total of $20,000. The net settlement amount of $1,096,413.10 will be allocated to the 1,609 participating class members (i.e., those who did not submit timely and valid requests for exclusion) proportionally based on their pay periods worked during the class period. The PAGA payment will be allocated to aggrieved employees on a pro rata basis based on their number of pay periods worked during the PAGA period of August 2, 2022 to July 11, 2023.

The highest individual settlement payment is estimated to be approximately $5,344.92, the lowest $20.72, and the average $681.85. The highest individual PAGA payment is estimated to be $208.18, the lowest $1.78, and the average $39.60. For tax purposes, settlement payments will be allocated 20 percent to wages and 80 percent to penalties and interest. The employer's share of payroll taxes will be paid in addition to the gross settlement. Funds associated with checks uncashed after 180 days will be paid to the California Controller's Unclaimed Property Fund in the name of the class member, which class counsel contends will leave no unpaid residue subject to the requirements of Code of Civil Procedure section 384, subdivision (b).

In exchange for the settlement, class members who do not opt out will release "all class claims pled, or that could have been pled, in the Operative Complaint and PAGA Notice, based on the factual allegations contained therein which occurred during the Class Period." As the Court determined in its order preliminarily approving the settlement, the release is appropriately tailored to the factual claims at issue. (See *Amara v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.) And the PAGA release is appropriately limited to "all PAGA claims pled, or that could have been pled, in the Operative Complaint and PAGA Notice, based on the factual allegations contained therein which occurred during the PAGA Period as to the Aggrieved Employees(,)" not including the underlying wage and hour claims. Consistent with the statute, aggrieved employees will not be able to opt out of the PAGA portion of the settlement.

The notice period has now been completed. According to the declaration of case manager Cassandra Polites with settlement administrator ILYM Group, Inc. ("ILYM") submitted in support of the instant motion, on August 24, 2023, ILYM received from Defendant's counsel the names and identifying information (including last known mailing address) for each settlement class member and subsequently processed these items against the National Change of Address database to confirm and update the relevant information. While Defendant had estimated at preliminary approval that the class consists of approximately 458 class members who collectively worked a total of 37,000 workweeks during the class period, the actual class list submitted to ILYM contained 1,609 individuals who worked a total of 52,924 work weeks. This triggered the escalator clause of the parties' settlement agreement and when prompted by ILYM, Defendant elected to increase the gross settlement amount pursuant to this clause.

On January 11, 2024, the class Notice Packet was mailed, both in English and Spanish, via first class mail to all 1,609 individuals contained in the class list provided to ILYM. The deadline to submit a request for exclusion, a challenge to the amount of workweeks listed, or an objection to the settlement was March 11, 2024.

As of the date of Ms. Polites' declaration, March 14, 2024, 326 Notice Packets have been returned, 14 of which included a forwarding address. ILYM performed a skip trace on the 312 returned packets that did not have forwarding address, and obtained 186 updated addresses. The foregoing packets have been re-mailed. At present, 126 Notice Packets remain undeliverable. ILYM has not received any requests for exclusion, objections to the settlement, or workweek disputes.

At preliminary approval, the Court found that the proposed settlement provides a fair and reasonable compromise to Plaintiffs' claims, and that the PAGA settlement is genuine, meaningful, and fair to those affected. It finds no reason to depart from these findings now, especially considering that there are no objections. Therefore, the Court finds that the settlement is fair and reasonable for the purposes of final approval.

V. ATTORNEYS FEES, COSTS AND INCENTIVE AWARD

As articulated above, Plaintiffs' counsel seeks a fee award of $650,171, or one-third of the gross settlement amount, which is not an uncommon contingency fee allocation in a wage and hour class action. This award is facially reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiffs also provide a lodestar figure of $235,046.25, based on 304 hours at billing rates of $450 to $995, resulting in a multiplier of 2.8.[3] This is within range of multiplier's that courts typically approve. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488, 503–504 (*Laffitte*) [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13]; *Wershba, supra,* 91 Cal.App.4th at p. 255 ["[m]ultipliers can range from 2 to 4 or even higher"]; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051, fn. 6 [stating that multipliers ranging from one to four are typical in common fund cases and citing

[3] Plaintiffs' counsel explains that it will be performing additional work that is not included in this lodestar amount but if factored in, would result in a 2.5 lodestar multiplier cross-check.

the court's own survey of large settlements finding "a range of 0.6–19.6, with most (20 of 24, or 83%) from 1.0–4.0 and a bare majority (13 of 24, or 54%) in the 1.5–3.0 range"].)

"While the percentage method has been generally approved in common fund cases, courts have sought to ensure the percentage fee is reasonable by refining the choice of a percentage or by checking the percentage result against a lodestar- multiplier calculation." (*Laffitte, supra*, 1 Cal.5th 480, 494-495.) Applying this latter approach,

> [T]he percentage-based fee will typically be larger than the lodestar based fee. Assuming that one expects rough parity between the results of the percentage method and the lodestar method, the difference between the two computed fees will be attributable solely to a multiplier that has yet to be applied. Stated another way, the ratio of the percentage-based fee to the lodestar-based fee implies a multiplier, and that implied multiplier can be evaluated for reasonableness. If the implied multiplier is reasonable, then the cross-check confirms the reasonableness of the percentage-based fee; if the implied multiplier is unreasonable, the court should revisit its assumptions.

(*Laffitte, supra*, 1 Cal.5th at p. 496, quoting Walker & Horwich, *The Ethical Imperative of a Lodestar Cross-check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases* (2005) 18 Geo. J. Legal Ethics 1453, 1463.) As described by the California Supreme Court, "[i]f the multiplier calculated by means of a lodestar crosscheck is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Laffitte, supra*, 1 Cal.5th at 505.)

Here, the multiplier sought by Plaintiffs' counsel is well within the acceptable range and is supported by the percentage cross-check. As such, the Court finds counsel's requested fee award is reasonable.

Plaintiffs' counsel also seeks $21,500 in litigation costs, which is the maximum permitted by the settlement agreement and is below the costs actually incurred by counsel. This amount is reasonable and therefore approved. The $12,430.88 in administrative costs are below the limit provided by the agreement ($15,000) and are approved.

Finally, Plaintiffs request incentive awards of $10,000 each. To support these requests, Plaintiffs submit declarations describing their efforts on the cases. The Court finds that the class representatives are entitled to enhancement awards and the amounts requested are reasonable.

VI. CONCLUSION

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiffs' motion for final approval is GRANTED. The following class is certified for settlement purposes only:

> All individuals who currently or previously have worked for Defendant in California, including both Defendant's employees and temporary workers employed by third-party staffing agencies and assigned to work for Defendant, in non-exempt positions at any time during the Class Period" of August 2, 2018 to July 11, 2023.

Judgment will be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiffs and the members of the class will take from their complaint only the relief set forth in the settlement agreement and this order and judgment. Pursuant to Rule 3.769(h) of the California Rules of Court, the Court will retain jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **December 19, 2024 at 2:30 P.M.** in Department 7. 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 pursuant to Code of Civil Procedure section 384, subdivision (b); the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 4

Case Name: *Diedra Moncada v. AJ's Restaurant & Bar, et al.*
Case No.: Case No. 19CV346694

This is a putative class action seeking, among other things, recovery of unpaid wages. Before the Court is Defendant AJ's Restaurant & Bar, LLC's ("AJ's LLC") demurrer to the Second Amended Complaint ("SAC"). As discussed below, the Court SUSTAINS the demurrer WITHOUT LEAVE TO AMEND.

I. BACKGROUND

Plaintiff Diedra Moncada, a dancer who apparently worked at AJ's Restaurant & Bar ("AJ's"), alleges that she and similarly-situated dancers were employed by Defendants AJ's LLC and its owner, Paul Gill, from approximately May 1, 2013, until April 22, 2017, but were misclassified as independent contractors. AJ's Restaurant & Bar ("AJ's") was a fictitious name for a sole proprietorship owned by Andrea Russo until he passed away in May 2021. The restaurant closed in 2020 during the Covid pandemic and never reopened, as admitted by Plaintiff s counsel previously in this case. (See Court's March 13, 2023 Order, at l.) Later in 2021, AJ's LLC opened a restaurant in the same location.

Plaintiff initially filed suit for unpaid wages and various other Labor Code violations against AJ'S, the Estate of Anthony Kralyevich, Madalyn Kralyevich, Anthony Kralyevich Jr., and Mr. Gill. Plaintiff was subsequently granted leave to file a first amended complaint ("FAC"), wherein she dismissed the Estate of Anthony Kralyevich, Madalyn Kralyevich, and Anthony Kralyevich Jr. but added AJ's LLC and Mr. Russo as Defendants.

AJ's LLC and Mr. Gill both demurred to the FAC and collectively moved to strike portions of the FAC, including any references to AJ's LLC and allegations of alter ego. In support of its demurrer, AJ's LLC argued that it did not exist during the alleged employment period and could not have employed Ms. Moncada and other putative class members. Based on materials that it had taken judicial notice of, the Court determined that Ms. Moncada could not validly allege that AJ's LLC employed her or any other members during the stated class period of May 1, 2013 through April 22, 2017, because it did not exist at that time. While it sustained AJ's LLC's demurrer on this basis, it granted Ms. Moncada leave to add successor liability allegations and "beef up (if possible)" her alter ego and "reverse veil piercing" allegations.

Ms. Moncada filed the operative SAC on September 7, 2023, asserting the following causes of action: (1) failure to pay minimum wage in violation of the Labor Code; (2) failure to pay minimum wage in violation of San Jose Municipal Code; (3) failure to provide rest and meal breaks; (4) failure to provide paid sick leave; (5) failure to provide accurate wage statements; (6) failure to pay wages upon termination; (7) failure to reimburse business expenses; (8) conversion; and (9) unfair competition.

II. DEMURRER

A. AJ LLC's Request for Judicial Notice

In support of its demurrer, AJ's LLC requests, as it did in connection with its prior demurrer to the FAC, that the Court take judicial notice of Mr. Russo's death certificate and documents issued by the California Secretary of State reflecting AJ's Restaurant & Bar, LLC's articles of organization and AJ's Restaurant & Bar's fictitious business name registration. The Court again grants this request, though it reiterates, as explained in the preceding order on the demurrers to the FAC, that while it may be able to take judicial notice of the articles of organization and fictitious business name registration, it cannot take notice of the truth of the matters asserted within the documents.

Accordingly, AJ's LLC's request for judicial notice is GRANTED.

B. Legal Standard

In ruling on a demurrer, a court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff" s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

C. Discussion

AJ's LLC maintains that its demurrer to the SAC should be sustained because Ms. Moncada has not alleged sufficient facts that (1) it is liable as the successor-in-interest to Mr. Russo's sole proprietorship or (2) it is liable as the alter ego of Mr. Russo or Mr. Gill under a reverse piercing theory.

1. *Successor Liability*

In the SAC, Ms. Mondaca alleges that AJ's LLC "is a successor corporation of Andrea Russo dba AJ's Bar & Restaurant" (SAC, ¶ 6), and on this basis assumes Mr. Russo's liability for the alleged wage and hour violations suffered by her and putative class members. She further alleges that AJ's LLC was "formed after this lawsuit to circumvent California Labor Laws …." (SAC, ¶ 27.) AJ's LLC insists that Plaintiff has not pleaded sufficient facts to establish either of the foregoing allegations and cannot do so.

"Successor liability is almost always couched in terms of liability flowing from one corporation to another corporation. Thus, legal discussion begins with the 'rule ordinarily applied to the determination of whether a corporation purchasing the principal assets of another

corporation assumes the other's liabilities.'"[4] (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1327, quoting *Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28 (*Ray*).) "As typically formulated the rule states that the purchaser does not assume the seller's liabilities unless (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts." (*Ray, supra,* 19 Cal.3d at 28.)

Ms. Moncada appears to be relying on the third and fourth bases for successor liability, i.e., the "continuation of seller" theory and that the new entity was formed to evade the liability of the former. With regard to the continuation of seller theory, it has long been held that "corporations cannot escape liability by a mere change of name or a shift of assets when and where it is shown that the new corporation is, in reality, but a continuation of the old." (*Blank v. Olcovich Shoe Corp.* (1937) 20 Cal.App.2d 456, 461.) As explained in *Ray*, "California decisions holding that a corporation acquiring the assets of another corporation is the latter's mere continuation and therefore liable for its debts have imposed such liability only upon a showing of one or both of the following factual elements: (1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations." (*Ray,* 19 Cal.3d at 29.)

AJ's LLC asserts that Ms. Moncada has failed to state sufficient facts to state a claim for successor liability based on either theory. With regard to the continuation of seller theory, AJ's LLC explains that it was not formed until October 2021, approximately five months after Mr. Russo's passing, and thus there was no "continuation" of Mr. Russo. Second, it continues, there are no facts pleaded that it acquired assets from Mr. Russo, nor that it paid him inadequate consideration. Neither of the foregoing can be alleged, AJ's LLC maintains, because Mr. Russo was deceased before it came into existence. With respect to the second theory, AJ's LLC explains that there are no facts pleaded which support Ms. Moncada's allegations, on information and belief, that it was formed after this action was filed in order to circumvent any wage and hour violations committed against her and similarly situated employees.

In her opposition, Ms. Moncada responds that AJ's LLC *can* be liable as Mr. Russo's successor because it *might* have existed while he was alive or that it *could* have acquired assets from Mr. Russo prior to his death.

Problematically for Ms. Moncada, there are no facts pleaded which suggest that AJ's LLC actually existed while Mr. Russo was alive or that it acquired assets from him before he passed. More fundamentally, it is not clear to the Court *how* AJ's LLC can be held to have existed *prior* to filing the requisite articles of organization with the California Secretary of State. In fact, subdivision (d) of Corporations Code section 17702.01 expressly provides that "[a] limited liability company is *formed* when the Secretary of State has filed the articles of organization." Ms. Moncada urges that the Court should not accept as true the contents of the

[4] While the discussion of successor liability in case law generally involves a predecessor *corporation*, and this action involves a predecessor *sole proprietorship*, courts have observed that this "this difference, standing alone, is not conceptually significant …." (*Rawlings v. D.M. Oliver, Inc.* (1979) 97 Cal.App.3d 890, 900.)

judicially noticed articles of organization for AJ's LLC, and confusingly points to her allegation that in November 2022, AJ's LLC posted a sign outside of its location advertising its 30th anniversary party as evidence that it was conducting business prior to its filing with the Secretary of State and thus existed prior to October 2021. But Ms. Moncada is suing a specific limited liability corporation, and it is irrefutable that that limited liability corporation did not legally exist until October 2021, *after* Mr. Russo died. Thus, the Court finds persuasive AJ's LLC's assertion that Ms. Moncada has not pleaded, and indeed cannot plead, a basis for successor liability based on it being the continuation of a sole proprietorship because it could not have "obtained" assets from a deceased individual nor could that individual have had a role in an entity that only came into existence after his death.

2. *Alter Ego Allegations and Reverse Piercing*

Next, AJ's LLC asserts that Ms. Moncada cannot use reverse piercing to assert that it is the alter ego of Mr. Russo or Mr. Gill.

"Under the standard alter ego doctrine, in appropriate circumstances the corporate form may be disregarded and the corporate veil pierced so that an individual shareholder may be held personally liable for claims against the corporation." (*Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510, 1513 ("*Postal*").) The essential elements of an alter ego claim are (1) a unity of interest, and (2) inequitable results if the corporate separateness is respected. (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811-812.) In considering whether to invoke the alter ego doctrine, courts look to a variety of factors and circumstances. (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 155, *citing Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538–539 [internal citations and quotation marks removed]; see *Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 510–513.) "Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other. Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied." (*Ibid.*) "This long list of factors is not exhaustive. The enumerated factors may be considered [a]mong others under the particular circumstances of each case." (*Zoran Corp. v. Chen, supra,* 185 Cal.App.4th at p. 812 [internal citations and quotation marks removed].) But, "difficulty in enforcing a judgment does not alone satisfy [the second] element." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 418.) Plaintiffs must also allege "some conduct amounting to bad faith that makes it inequitable for [a defendant] to hide behind the corporate form." (*Ibid.*)

Some jurisdictions recognized a variant of the alter ego doctrine known as "reverse veil piercing" by which the corporate veil is pierced to permit a third-party creditor to reach corporate assets to satisfy claims against an individual. (*Postal, supra,* 162 Cal.App.4th at 513.) Ms. Moncada seeks to do so here.

AJ's LLC insists the doctrines of alter ego and reverse piercing are inapplicable to the circumstances of this action as alleged by Ms. Moncada because there are no allegations that the LLC was using Mr. Russo to perpetuate a fraud, and she *cannot* plead a unity of interest

between Mr. Russo and AJ's LLC because it did not come into existence until after his death. Perhaps cognizant of this, Ms. Moncada also pleads that there exists a unity of interest between Mr. Russo dba AJ's, AJ's LLC and *Mr. Gill* so as to make AJ's LLC a "mere instrumentality or mere adjunct or Andrea Russo." (SAC, ¶ 27.) Ms. Moncada pleads that AJ's LLC is liable as Mr. Russo's alter ego because *Mr. Gill* purportedly controlled both AJ's and AJ's LLC, "commingled the assets" of AJ's and the LLC, and "used [AJ's LLC] as a shield against AJ's obligations, among other things." (*Id*., ¶ 28.) But the SAC's allegations of Mr. Gill's involvement in AJ's LLC are still directed at the claim that AJ's LLC is the alter ego of Mr. Russo and *not* Mr. Gill, so to the extent that any reverse piercing can be alleged, it must be based on Mr. Russo's conduct and not Mr. Gill's. That is, there are no facts pleaded demonstrating that Mr. Gill disregarded the LLC's separate legal existence in order to prevent Ms. Moncada from reaching *his* personal assets, a circumstance which is necessary in order to reach the assets of the LLC. Ultimately, the Court agrees with AJ's LLC that Ms. Moncada cannot plead the requisite unity of interest between Mr. Russo and AJ's LLC because AJ's LLC did not exist until after he died. As a consequence, she has not stated a basis for liability against AJ's LLC under the doctrine of alter ego and reverse piercing.

In accordance with the foregoing, the Court SUSTAINS AJ's demurrer to the SAC and does so WITHOUT LEAVE TO AMEND.[5] (See *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890 [leave to amend may be denied where "it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a claim"].)

III. CONCLUSION

AJ's LLC's demurrer to the SAC on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

[5] In its order on the demurrers to the FAC, the Court noted that the SAC was "likely Ms. Moncada's last change to fix her complaint against AJ's LLC" and that "leave for further amendments [was] unlikely."

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Case Name: *Esmerelda Velasco v. Bright Matters, Inc., et al.*
Case Nos.: 22CV401053

This is an action for various wage and hour violations and, as a result of those violations, a claim for penalties under the Private Attorneys General Act ("PAGA"). Before the Court is Plaintiff Esmerelda Velasco's motion to compel further responses to discovery from Defendants Bright Matters, Inc. ("Bright Matters") and Alejandro Navarro (collectively, "Defendants"), which is unopposed.[6] As discussed below, Plaintiff's motion is GRANTED.

I. BACKGROUND

According to the allegations of the operative Complaint ("Complaint"), Ms. Velasco was employed by Bright Matters, which provides cleaning and janitorial services throughout the state of California, as a janitor from approximately September 2021 until her termination in January 2022. Ms. Velasco alleges that she and other aggrieved employees were willfully misclassified as independent contractors, were not timely paid all wages due upon termination or separation, and were not provided accurate itemized wage statements.

Based on the foregoing, on July 22, 2022, Ms. Velasco initiated the instant action asserting the following claims: (1) PAGA penalties; (2) failure to pay earned wages upon discharge; (3) failure to provide accurate wage statements; and (4) failure to provide employment records.

II. MOTION TO COMPEL FURTHER RESPONSES

Plaintiff moves to compel further responses to Request for Production of Documents ("RPD"), Set One, Nos. 1-12 and Special Interrogatories, Set One, Nos. 2-4 from Bright Matters, and Form Interrogatories, Set One, Nos. 2.6(b), 3.6, 3.7(c), 12.1-12.7, 13.1 and 13.2 from Mr. Navarro, and the production of a privilege log in the event that any responsive documents are withheld on the grounds of privilege.

A. Legal Standard

A party propounding a request for production may move for an order compelling a further response if it deems that a statement of compliance is incomplete, a representation of inability to comply is inadequate, or an objection is without merit. (Code Civ. Proc., § 2031.310, subd. (a).) The motion must set forth "specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Proc., § 2031.310, subd. (b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) Good cause is established simply by a fact-specific showing of relevance. (*Id.* at 98.) If good cause is shown, the burden shifts to the responding party to justify any objections. (*Ibid*.)

[6] At present, Defendants are not represented by counsel, with their former counsel's motion to be relieved from the representation having been granted in September 2023, and the resulting order deemed effective November 3, 2023 with the filing of the proof of service of that order.

A party propounding interrogatories may also move for an order compelling further responses if it deems an answer is evasive or incomplete and/or an objection is without merit or too general. (Code Civ. Proc., § 2030.300, subd. (a).) The statutes do not require any showing of good cause in support of such a motion. (See id., §§ 2030.300 and 2033.290; see also *Coy v. Superior Court* (1962) 58 Cal.2d 210, 220–221.) The burden is on the responding party to justify any objections or failure to fully answer. (*Id.* at 220–221.)

B. Discussion

On December 9, 2022, Plaintiff propounded the discovery at issue. Defendants provided initial responses on January 24, 2023, followed by supplemental responses on February 8, 2023. Discovery was stayed by the Court on March 2, 2023, in light of Defendants' request to move to arbitrate Plaintiff's claims, but was ultimately lifted on July 27, 2023 after they elected not to pursue arbitration. After Defendants' former counsel's motion to be relieved from the representation was granted, Plaintiff's counsel attempted to meet and confer with the unrepresented parties. However, these attempts were unsuccessful, and Plaintiff obtained potential hearing dates for a motion to compel from the Court. Plaintiff's counsel attempted to meet and confer with Mr. Navarro to discuss dates for his deposition and a briefing schedule for the instant motion but once again, Plaintiff's communications went unanswered.

On November 30, 2023, Mr. Navarro finally responded, stating in a brief email that he was unable to attend any "meetings" until after the holidays and securing counsel. Plaintiff's counsel responded via email and attempted to communicate by phone but received no further responses from Mr. Navarro. Consequently, this motion followed.

As the moving party, Plaintiff bears the burden to establish the existence of good cause for the RPDs at issue. While Plaintiff does not make an express effort to make this showing, it is clear to the Court that such good cause exists as these requests[7] directly relate to the claims at issue.

The Court treats Defendants' failure to oppose this motion as an implied concession of its merits. (See *Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 20; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566.) Accordingly, the objections asserted by Defendants in their responses are without merit (excluding those based on privilege) and further responses and production are warranted. To the extent that any responsive items are withheld on the basis of privilege, Defendants must produce a privilege log identifying all documents withheld and setting forth a factual basis for the privilege claimed.

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[7] These requests seek all documents: reflecting the compensation paid to Ms. Velasco; Defendants' employment policies in the relevant time period; constituting all contracts between Ms. Velasco and any party to this action; signed by Ms. Velasco; constituting communications between Defendants and defendant Kellermeyer Bergensons Services, LLC ("KBS"); reflecting communications with various state and federal labor enforcement agencies regarding Defendants' compliance with applicable wage and hour laws and regulations; and exchanged between Defendants and KBS concerning Plaintiff and the aggrieved employees during the claim period.

In accordance with the foregoing, Plaintiff's motion to compel is GRANTED.

III. CONCLUSION

Plaintiff's motion to compel further responses is GRANTED. Defendants' must provide further responses, without objections (barring those based on privilege) to the requests at issue within 30 days' of this order.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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