SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2110

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department1@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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- If any party wants a Court Reporter, the appropriate form must be submitted. The Reporter can appear in person or remotely.
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LAW AND MOTION TENTATIVE RULINGS
DATE: OCTOBER 26, 2023 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	21CV384674	Aguilar v. T&K, L.P. (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 2	22CV393408	Daguil v. Roche Sequencing Solutions, Inc. (Class Action/PAGA)	See tentative ruling. The Court will prepare the final order.
LINE 3	22CV393580	Martinez, et al. v. Pacific Catch, Inc. (Class Action/PAGA) (Lead Case; Consolidated with 23CV420141)	See tentative ruling. The Court will prepare the final order.
LINE 4	21CV381526	Joven v. IMPEC Group, Inc. (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 5			
LINE 6			
LINE 7			

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LAW AND MOTION TENTATIVE RULINGS

LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Aguilar, et al. v. T&K, L.P., et al.*
Case No.: 21CV384674

This is a putative class action and Private Attorneys General Act ("PAGA") action. Plaintiffs James E. Aguilar and Pamela Cazares allege that Defendant T&K, L.P., which operates a chain of franchised Taco Bell restaurants in California, 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 a settlement and motion for attorney fees, both of which are unopposed. As discussed below, the Court GRANTS the motions.

I. BACKGROUND

Mr. Aguilar began employment with Defendant in August 2020 and Ms. Cazares began employment with Defendant November 2020. (First Amended Class Action Complaint ("FAC"), ¶ 3.) They were both employed by Defendant until March 2021 as non-exempt employees. (*Ibid*.)

According to Plaintiffs, their wages were paid late. (FAC, ¶ 8.) And, while employees routinely earned non-discretionary incentive wages but overtime, double time, and sick pay was paid at their base pay rate rather than the regular rate of pay. (FAC, ¶ 11.) Further, Defendant did not have an immutable time keeping system to record all hours worked and utilized an unlawful rounding policy resulting in employees not being paid for all hours worked. (FAC, ¶ 12.) Employees frequently had to work through their meal and rest periods. (FAC, ¶¶ 14-15.) Plaintiffs also allege that Defendant failed to provide them with paper wage statements or the option to receive paper wage statements. (FAC, ¶ 20.) Defendant also required employees to use their personal vehicles and cellular phones for work purposes without compensation. (FAC, ¶ 22.)

Based on these allegations, Plaintiff asserts putative class claims for: (l) 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 rest breaks violation of Labor Code sections 226.7 and 512 by and the relevant Industrial Wage Commission order; (5) failure to provide rest breaks 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 provide wage when due under Labor Code sections 201 through 203; (8) failure to reimburse employees for required expenses under Labor Code section 2802; and (9) a representative claim for PAGA penalties (Lab. Code, § 2698, et seq.).

In March 2023, Plaintiffs moved for an order preliminarily approving the settlement of the class and PAGA claims, provisionally certifying the settlement class, approving the form and method for providing notice to the class, and scheduling a final fairness hearing. On May 30, 2023, the Court granted Plaintiffs' motion. Plaintiff now moves for an order granting final approval of the Class Action and PAGA Settlement and entering judgment based on the order.

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) ___U.S.___, 2022 U.S. LEXIS 2940.)

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

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

III. SETTLEMENT CLASS

For settlement purposes, the class is defined as "all individuals who are or previously were employed by Defendant in California and classified as a non-exempt employee at any time during the Class Period," and the "Class Period," in turn, is defined as the period commencing July 23, 2017 up to and including October 29, 2022.

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 Plaintiff 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.

IV. TERMS AND ADMINISTRATION OF SETTLEMENT

The non-reversionary gross settlement amount is $2,000,000. Attorney fees of up to $666,666.66 (one-third of the gross settlement), litigation costs of up to $25,000, and administration costs of $25,000 will be paid from the gross settlement. $100,000 of the gross settlement will be allocated to PAGA penalties, 75% of which ($75,000) will be paid to the LWDA. The named Plaintiffs will seek incentive awards of $10,000 each.

The net settlement amount of approximately $1,163,333.34 will be allocated to class members 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 May 19, 2020 up to and including October 29, 2022. The average payment received by class members, who number 1,904, will be $613.57. Class members will not be required to submit a claim to receive their payments. For tax purposes, settlement payments will be allocated 10 percent to wages and 90 percent to penalties and interest, with PAGA payments treated 100 percent as penalties. 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 Child Advocates of Silicon Valley, an IRS 401(c) nonprofit organization.

In exchange for settlement, class members who do not opt out will release "all claims that were alleged or reasonabll could have been alleged in the Complaint based on the facts contained therein, arising during the Class Period," including specified wage and hour and expense reimbursement claims. As the Court determined in its order preliminarily approving the settlement, the release is appropriately tailored to the factual allegations at issue. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.) Further, the PAGA release is appropriately limited to "all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts stated in the complaint, first amended complaint, and PAGA notice provided to the LWDA pursuant to Labor Code section 2699.3, subd. (a), including but not limited to," specified Labor Code violations. 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. There were no objections to the settlement and eight requests for exclusion from the class. Of the 1,904 notice packets sent, 359 were returned to the administrator, 342 of which did not have a forwarding address. A skip trace performed on the returned notices produced 113 updated addresses, to which the notices were re-mailed. Ultimately, 229 notices remain undeliverable. The administrator estimates that the average payment will be $613.57, with a maximum payment of $3,881.73 and a minimum payment of $1.98.

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. The Court finds that the settlement is fair and reasonable for the purposes of final approval.[1]

V. MOTION FOR ATTORNEY FEES, COSTS AND INCENTIVE AWARD

Plaintiffs seek a fee award of $666,666.66, 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 $346,650.50, based on 712.8 hours spent on the case by counsel with billing rates of $375-575 per hour, resulting in a modest multiplier of 1.92. As a cross-check, the lodestar supports the percentage fee requested, particularly given the lack of objections to the attorney fee request. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488, 503-504 [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].)

Plaintiffs also request up to $25,000 in litigation costs, which appear to be reasonable based on the billing records provided and are approved.

Finally, Plaintiffs request service awards of $10,000 each. To support their requests, they submit declarations describing their efforts on the case. The Court finds that the class representatives are entitled to enhancement awards and the amount requested is reasonable.

VI. ORDER AND JUDGMENT

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

Plaintiffs' motion for final approval and motion for attorney fees and costs are GRANTED. The following class is certified for settlement purposes:

> All individuals who are or previously were employed by Defendant in California and classified as a non-exempt employee at any time during the Class Period," and the "Class Period," in turn, is defined as the period commencing July 23, 2017 up to and including October 29, 2022.

Excluded from the class are the eight individuals who submitted timely requests for exclusion.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiffs and the members of the class shall take from their complaint only the relief set forth in the settlement agreement and this order and judgment. Pursuant to Rule

[1] This includes the $25,000 in administrative costs, which is sought as part of the motion for final approval rather than the motion for attorney fees and costs.

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

The Court sets a compliance hearing for **June 27, 2024 at 2:30 P.M.** in Department 1. 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 2

Case Name: *Daguil v. Roche Sequencing Solutions, Inc.*
Case No.: 22CV393408

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Joseph Daguil is an employee of Defendant Roche Sequencing Solutions, Inc., which provides diagnostic solutions in the healthcare industry. Plaintiff initiated this action alleging that Defendant failed to provide employees with compliant meal and rest breaks, failed to pay minimum and overtime wages, failed to provide accurate itemized wage statements, and committed other wage and hour violations.

Before the Court is Plaintiffs' motion for final approval of settlement and motion for attorney fees and costs, both of which are unopposed. As discussed below, the Court GRANTS both motions.

VII. BACKGROUND

Plaintiff began employment as a non-exempt employee with Defendant in 2013 and it appears that he remains employed by Defendant. According to Plaintiff, he was not paid for all hours worked and Defendants failed to provide him and other class members with uninterrupted meal and rest periods. (First Amended Complaint ("FAC"), ¶¶ 8, 11, 12.) Defendant also paid non-discretionary incentive payments that were not included in calculating the regular rate of pay for overtime, sick time, and meal and rest premiums. (*Id*., ¶¶ 10, 19.) Plaintiff also alleges that Defendant failed to provide employees with accurate wage statements. (*Id*., ¶ 14.) Defendants also required employees to use their personal cell phones for work purposes without compensation. (*Id*., ¶ 23.)

Based on these allegations, Plaintiff asserts putative class claims for: (1) unfair competition under Business and Professions Code section 17200, et seq.; (2) failure to pay minimum wages, in violation of Labor Code sections 1194, 1194.2, and 1197; (3) failure to pay overtime wages, in violation of Labor Code section 510; (4) failure to provide meal breaks, in violation of Labor Code sections 226.7 and 512 and the applicable Industrial Wage Commission ("IWC") wage order; (5) failure to provide rest breaks, in violation of Labor Code sections 226.7 and 512 and the applicable IWC wage order; (6) failure to provide accurate itemized wage statements under Labor Code section 226; (7) failure to reimburse employees for required expenses under Labor Code section 2802; and (8) a PAGA Violation.

Plaintiff is also involved in a related case against Defendant in which Plaintiff raises only a claim for whistleblower retaliation under Labor Code section 1102.5 in docket 22CV393406, also pending before this Court. According to the parties' joint case management conference statement in that case, the parties have been unable to settle that claim. The settlement agreement provides that Plaintiff does not release this claim.

In May 2023, Plaintiff moved for an order preliminarily approving the settlement of the class and PAGA claims, provisionally certifying the settlement class, approving the form and method for providing notice to the class, and scheduling a final fairness hearing. On June 20, 2023, the Court granted Plaintiff's motion. Plaintiff now moves for an order granting final

approval of the Class Action and PAGA Settlement and entering judgment based on the order, as well as for attorney fees and costs.

VIII. 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) ___U.S.___, 2022 U.S. LEXIS 2940.)

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

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

IX. SETTLEMENT CLASS

For settlement purposes, the class is defined as "All individuals who were employed by Defendant in California and classified as a non-exempt employee at any time during the Class Period" of January 18, 2018 to February 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 Plaintiff 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.

X. TERMS AND ADMINISTATION OF SETTLEMENT

The non-reversionary gross settlement amount is $800,000. Attorney fees of up to $266,666 (one-third of the gross settlement), litigation costs of $19,729.14, and up to $9,950 in administration costs will be paid from the gross settlement. $20,000 of the gross settlement will be allocated to PAGA penalties, 75% of which ($15,000) will be paid to the LWDA. Plaintiff will seek an incentive award of $7,500.

The net settlement of $476,244 will be allocated to class members proportionally based on their pay periods worked during the class period of January 18, 2018 until February 1, 2023. The PAGA payment will be allocated to approximately 133 aggrieved employees on a pro rata basis based on their number of pay periods worked during the PAGA period of October 22, 2020 until February 1, 2023. Class members will not be required to submit a claim to receive their payments. 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 will be paid to the Children's Advocacy Institute.

In exchange for settlement, class members who do not opt out will release "all claims that were alleged, or reasonably could have been alleged, based on facts stated in the Operative Complaint which occurred during the Class Period." The release is appropriately tailored to the factual allegations at issue. (See *Amara v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.) The PAGA release is appropriately limited to "all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint and the PAGA Notice, which occurred during the PAGA Period." 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. There were no objections to the settlement and one request for exclusion from the class. Of the 210 notice packets sent, 13 were returned to the administrator of which none were returned with a forwarding address. A skip trace performed on the returned notices produced 10 updated addresses, to which the notice packets were re-mailed. Ultimately, three notices remain undeliverable. The administrator estimates that the average payment will be $2,278.68, with a maximum payment of $6,327.95 and a minimum payment of $99.61.

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. The Court finds that the settlement is fair and reasonable for the purposes of final approval.[2]

XI. MOTION FOR ATTORNEY FEES, COSTS AND INCENTIVE AWARD

Plaintiff seeks a fee award of $266,666, 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. Plaintiff also provides a lodestar figure of $191,001.25, based on 246 hours spent on the case by counsel with billing rates of $450-995, resulting in a modest multiplier of approximately 1.4. As a cross-check, the lodestar supports the percentage fee requested, particularly given the lack of objections to the attorney fee request. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488, 503-504 [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].)

Plaintiff also requests $19,729.14 in litigation expenses, which appear to be reasonable based on the billing records provided and are approved.

Finally, Plaintiff requests a service award of $7,500. To support his request, he submits a declaration (attached as an exhibit to the declaration of his counsel) describing his efforts on the case. The Court finds that the class representative is entitled to an enhancement award and the amount requested is reasonable.

XII. ORDER AND JUDGMENT

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

Plaintiff's motion for final approval and motion for attorney fees and costs are GRANTED. The following class is certified for settlement purposes:

> "All individuals who were employed by Defendant in California and classified as a non-exempt employee at any time during the Class Period" of January 18, 2018 to February 2023.

Excluded from the class is the one individual who submitted a timely request for exclusion.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff and the members of the class shall 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 retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

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[2] This includes $9,590 in actual administrative costs, which is sought as part of the motion for final approval rather than the motion for attorney fees and costs.

The Court sets a compliance hearing for **June 27, 2024 at 2:30 P.M.** in Department 1. 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: *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 is Plaintiff's motion for preliminary approval of a settlement, which is unopposed. As discussed below, the Court GRANTS Plaintiffs' motion.

XIII. 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.

Now, Plaintiffs move for an order preliminarily approving the settlement of the class and PAGA claims, provisionally certifying the settlement class, appointing them as class representatives and counsel as class counsel, approving the form and method for providing notice to the class, and scheduling a final fairness hearing.

XIV. 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) ___U.S.___, 2022 U.S. LEXIS 2940.)

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

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum

even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

XV. SETTLEMENT PROCESS

According to Plaintiffs' counsel, they interviewed Plaintiffs and conducted a preliminary investigation into their claims prior to drafting the complaint, including a careful examination of their employment records. Then, in response to formal and informal discovery requests, counsel received and reviewed a sample of employees' contact information, Defendant's labor policies and procedures manuals covering a broad range of topics, including employee clock-in policies and procedures, attendance policies, meal and rest periods, overtime and premium pay, etc. This allowed counsel to fully assess the nature and magnitude of the claims at issue and the impediments to recovery.

On November 28, 2022, the parties participated in mediation with Louis Marlin, Esq., an experienced mediator of wage and hour class actions and were able to reach a settlement.

XVI. SETTLEMENT PROVISIONS

The non-reversionary gross settlement amount is $1,800,000. 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 penalties, 75% of which ($75,000) will be paid to the LWDA. The named plaintiffs will seek enhancement awards of $5,000 and General Release Payments of $5,000 each.

The net settlement, approximately $1,020,000, 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. The average payment (including PAGA payments) will be approximately $310 to each of the 3,300 class members. 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.

The foregoing are both appropriately tailored to the allegations at issue. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.)

XVII. FAIRNESS OF SETTLEMENT

Plaintiff valued the claims in this action as follows: The off-the-clock claim was valued at $1,227,750. The meal period and rest period claims each had an estimated value of $1,964,400. The business expense reimbursement claim was estimated at $120,000, with the day's rest in seven claim valued at $600,000. The wage statement claim was estimated at $1,250,000 and the final pay claim was valued at $7,857,600. These claims were collectively valued at $14,984,150. Defendant's maximum PAGA exposure was calculated to be $2.5 million based on the aggrieved employees having worked approximately 25,000 pay periods during the PAGA Period.

Plaintiffs' counsel determined an appropriate range of recovery for settlement purposes by offsetting Defendant's maximum theoretical liability by: the strength of the defenses to Plaintiffs' claims; the risk of class certification being denied; the risk of losing on a dispositive motion; the risk of losing at trial; the chance of a favorable verdict being reversed on appeal; and the difficulties attendant to collecting on a judgment. After taking the foregoing into account, Plaintiffs' counsel determined that it would be reasonable to settle for approximately 12% of Defendant's maximum exposure, which is the product of the probability of: certification being granted on all claims (~ 50%); prevailing on dispositive motions on all claims (~ 50%); and prevailing at trial on all claims (~ 50%).

With regard to the PAGA penalties, Plaintiffs determined an appropriate range of settlement as a percentage of the settlement range that was consistent with other hybrid class/PAGA settlements approved by California courts.

Considering the portion of the case's value attributable to uncertain penalties, claims that could be difficult to certify for class treatment, and the multiple, dependent contingencies that Plaintiffs would have had to overcome to prevail on their claims, the settlement achieves a good result for the class. For purposes of preliminary approval, the Court finds that the settlement is fair and reasonable to the class, and the PAGA allocation is genuine, meaningful, and reasonable in light of the statute's purposes.

Of course, the Court retains an independent right and responsibility to review the requested attorney fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127–128.) Counsel shall submit lodestar information prior to the final approval hearing in this matter so the Court can compare the lodestar information with the requested fees. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 504 [trial courts have discretion to double-check the reasonableness of a percentage fee through a lodestar calculation].)

XVIII. PROPOSED SETTLEMENT CLASS

Plaintiffs request that the following settlement class be provisionally 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.[3]

A. Legal Standard for Certifying a Class for Settlement Purposes

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.)

B. Ascertainable Class

A class is ascertainable "when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).) A class definition satisfying these requirements

> puts members of the class on notice that their rights may be adjudicated in the proceeding, so they must decide whether to intervene, opt out, or do nothing and live with the consequences. This kind of class definition also advances due

[3] Class Period is defined in the Settlement Agreement as "the period from January 24, 2018 through the earlier of (a) February 28, 2023, or (b) the date the Court grants preliminary approval of the class settlement." As this motion is being heard well after February 28, 2023, that is the end point for the class period.

> process by supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment.

(*Noel, supra,* 7 Cal.5th at p. 980, citation omitted.)

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel, supra,* 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on another ground by *Noel, supra,* 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

Here, the estimated 3,300 class members are readily identifiable based on Defendant's records, and the settlement class is appropriately defined based on objective characteristics. The Court finds that the settlement class is numerous, ascertainable, and appropriately defined.

C. Community of Interest

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, supra*, 34 Cal.4th at pp. 326, 332.)

For the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also examine evidence of any conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be good for the judicial process and to the litigants. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104–1105 (*Lockheed Martin*).) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks, supra,* 89 Cal.App.4th at p. 916.)

Here, common legal and factual issues predominate. Plaintiffs' claims all arise from Defendant's wage and hour practices applied to the similarly-situated class members.

As to the second factor,

> The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class

> certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

(*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations, brackets, and quotation marks omitted.)

Like other members of the class, Plaintiffs were employed by Defendant as non-exempt, hourly-paid employees and allege that they experienced the violations at issue. The anticipated defenses are not unique to Plaintiffs, and there is no indication that Plaintiffs' interests are otherwise in conflict with those of the class.

Finally, adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba, supra,* 91 Cal.App.4th at p. 238.) "Differences in individual class members' proof of damages [are] not fatal to class certification. Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid*., internal citations and quotation marks omitted.)

Plaintiffs have the same interest in maintaining this action as any class member would have. Further, they have hired experienced counsel. Plaintiffs have sufficiently demonstrated adequacy of representation.

D. Substantial Benefits of Class Certification

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.)* "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id*. at pp. 120–121, internal quotation marks omitted.)

Here, there are an estimated 3,300 class members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

XIX. NOTICE

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

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

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement (except the PAGA component) or object. The gross settlement amount and estimated deductions are provided. Class members are informed of their qualifying workweeks as reflected in Defendant's records and are instructed how to dispute this information. Class members are given 45 days to request exclusion from the class or submit a written objection to the settlement.

The notice is generally adequate. Class members' workweek information must be displayed in bold within a box set off from the rest of the text on the first page of the notice. And class members must be informed of how notice of final judgment will be provided (for example, by posting the judgment to a settlement web site).

Regarding appearances at the final fairness hearing, the notice shall be further modified to instruct class members as follows:

> The judge overseeing this case encourages remote appearances. (As of August 15, 2022, the Court's remote platform is Microsoft Teams.) Class members who wish to appear remotely should contact class counsel at least three days before the hearing if possible. Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members may appear remotely using the Microsoft Teams link for Department 1 (Afternoon Session) or by calling the toll free conference call number for Department 1. Any class member who wishes to appear in person can do so as well.

Turning to the notice procedure, the parties have selected CPT Group, Inc. as the settlement administrator. The administrator will mail the notice packet within 30 days of preliminary approval, after updating class members' addresses using the National Change of Address Database. Any returned notices will be re-mailed to any forwarding address provided or better address located through a skip trace or other search. Class members who receive a re-mailed notice will have at least 15 days to respond. These notice procedures are appropriate and are approved.

XX. CONCLUSION

Plaintiffs' motion for preliminary approval is GRANTED. The final approval hearing shall take place on **April 18, 2024** at 1:30 in Dept. 1. The following class is preliminarily certified for settlement purposes:

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

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: *Matilde Joven v. Impec Group, Inc., et al.*
Case No.: 21CV381526

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Matilde Joven alleges that Defendant Impec Group, Inc. failed to pay overtime, failed to provide meal and rest breaks, and committed other wage and hour violations.

Before the Court is Defendant's motion for a protective order and monetary sanctions, which is opposed by Plaintiff. As discussed below, the Court DENIES the motion without prejudice. Plaintiff's request for monetary sanctions is GRANTED IN PART.

XXI. BACKGROUND

According to the allegations of the operative First Amended Complaint ("FAC"), Ms. Joven was employed by Defendant as an hourly paid, non-exempt custodian from approximately April 2004 to August 2020. (FAC, ¶ 4.) She alleges that Defendant failed to pay all minimum and overtime wages, failed to provide employees with all rest and meal periods that they were entitled to, failed to provide accurate wage statements, failed to reimburse employees for business expenses incurred by them during the course and scope of their employment, and failed to maintain accurate and complete payroll records.

Based on the foregoing, Plaintiff initiated this action in March 2021 and filed the FAC on June 7, 2021, asserting the following causes of action: (1) unpaid overtime; (2) unpaid minimum wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) non-compliant wage statements and failure to maintain payroll records; (6) failure to timely pay wages on termination; (7) failure to timely pay wages during employment; (8) unreimbursed business expenses; (9) civil penalties under PAGA; (10) Unlawful Business Practices; and (11) Unfair Business practices.

XXII. MOTION FOR PROTECTIVE ORDER

Defendant moves for an order pursuant to Code of Civil Procedure sections 2025.470[4], 2025.420 and 2023.010 prohibiting Plaintiff's counsel from unilaterally stopping depositions to coach witnesses off the record about testimony and for monetary sanctions against Plaintiff and

[4] This code section provides that a deposition officer "may not suspend the taking of testimony without the stipulation of all parties present unless any party attending the deposition, including the deponent, demands that the deposition officer suspend taking the testimony to enable that party or deponent to move for a protective order under Section 2025.420 on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that deponent or party." Here, however, the deposition in which the conduct complained of occurred was being taken by *Defendant* and was unilaterally suspended by *its* counsel in order to move for a protective order, and *not* any of the parties attending the deposition, including the deponent. Thus, it would appear to the Court that Code of Civil Procedure section 2025.470 is not implicated here.

her counsel in the amount of $2,000.[5] In opposition, Plaintiff also requests monetary sanctions against Defendant and its counsel in the amount of $6,000.[6]

A. Legal Standard

Code of Civil Procedure section 2025.420 provides that a party may move for a protective order before, during, or after a deposition and that the court, for good cause shown, may make any order that justice requires to protect the party from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. (Code Civ. Proc., § 2025.420, subds. (a).) The protective order may include, for example, directions as to the terms and conditions on which the deposition may be taken. (Code Civ. Proc., § 2025.420, subd. (b)(5).)

B. Discussion

As stated above, Defendant seeks an order prohibiting Plaintiff's counsel from unilaterally stopping depositions to coach witnesses off the record about testimony and precluding counsel from speaking objections. Defendant asserts that if opposing counsel wants to confer with a witness off the record about her testimony, she should wait until after defense counsel has completed his questions respecting the subject matter and explains that after extensive meet and confer, plaintiff's counsel refused to do so.[7] Defendant's motion was triggered by events that took place during the July 13, 2023 deposition of another Impec employee represented by Plaintiff's counsel, Elvia Huerta Rivera, with Defendant highlighting this particular exchange as the impetus behind its motion:

Q (Defendant's counsel): Did you work hours at Impec that you were not paid for? Yes or No.

A: No.

Q: Do you have any knowledge that Maria Ramirez worked hours at Impec for which she was not paid?

A: No, I have no knowledge.

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[5] In support of its motion, Defendant submits the declaration of another Impec employee, Marietta Gardner, to negate the allegations of the FAC. Plaintiff objects to the declaration in its entirety as irrelevant to the motion at hand. The Court agrees and therefore will not consider the contents of this filing in issuing its ruling.

[6] Plaintiff's request for judicial notice of a Formal Ethics Opinion issued by the Los Angeles County Bar Association is GRANTED. (Evid. Code, § 452, subd. (h).)

[7] During the parties' September 9, 2023 IDC, a tentative agreement was reached for bilateral parameters for depositions going forward, which included an agreement that counsel could request to confer with their client so long as no question was pending, and if the witness changed their testimony after such conference, the deposing party could ask questions probing the reasons for such change. However, Defendant's counsel subsequently requested additional parameters be imposed on Plaintiff's counsel (not bilaterally), namely that "Plaintiff [sic] or her counsel may request a break when there is no question pending. However, absent an emergency, prior to the break Defense Counsel may continue to ask up to 10 questions related to the subject matter(s) covered during the previous 10 questions." Plaintiff disagreed with the additional, one-sided parameter and this motion followed.

Q: Do you –

Plaintiff's counsel: Can we take a break, please?
Defendant's counsel: I have one more question, and then we can take a break. Okay?
Plaintiff's counsel: Well, I think there's a problem in her understanding of the questions, and I don't want the thread to continue without addressing it first.
Defendant's counsel: Are you saying that you're insisting on going off the record and speaking with your client?
Plaintiff's counsel: Yes, I am.
Defendant's counsel: All right. Well, I can't stop you from doing that. I understand what you're going to do. And so, of course, I can't stop you. So, yes, please, if that's what you insist on doing, that's what you will do. Thank you.

(Huerta Depo. at 41:1-42:2.)

Following the break, Defendant's counsel had the court reporter read back the last two questions and answers, and asked Ms. Huerta if she wanted to change her answers. She corrected some of her testimony, including answering that there *were* hours for which she was not paid while she worked at Impec:

Q: Now, after you gave that testimony and then the question after it about Maria, your lawyer asked to speak with you; is that true? Yes or no.
A: Yes.
Q: And then did you speak with your lawyer; true?
A: Yes.
Q: And now after you've spoken with your lawyer, you would like to change your answer from no to yes; is that true?
A: Yes.

Defendant's counsel: All right. So this is now meet-and-confer on the record. Counsel, I think you probably understand that what has happened here is patently illegal. It is coaching the witness, and you can't do that. What you can do is if there is testimony that you think is unclear or there's been some confusion, what you can do is at the end of the deposition, you can ask her questions designed to clear that up. But what you can't do is stop the deposition in the middle of it and then confer with your client and have her change her testimony. And so what I need you to do now is provide me with an unconditional agreement that you are never going to do that again in this deposition, that that's the last time you're going to do that. You're never going to do it again. I need to hear an unconditional agreement to that effect.
Plaintiff's counsel: You've mischaracterized what happened. She didn't understand what you were asking her. I mean, she's testified all day that she wasn't paid for her hours that she worked. And then you asked a question, and she says, "No, I was always paid for hours that I worked." She didn't understand it. You don't know what the contents of our conversation was. I was not coaching her. I was asking her if she understood what the questions were that were being asked. So I – I don't know what kind of a [sic] agreement that you want, but there's – I know I did nothing wrong here.
Defendant's counsel: At this time, we will suspend the deposition. I will seek a protective order. Thank you all for coming. I do appreciate your time. And, again, thank you all and have a great day.

> **Plaintiff's counsel**: I'll just note for the record that we've made our – our witness available today for her deposition, that counsel is concluding it early, and we do not agree that there's any basis to do so. If the judge agrees with us, we will be limiting or refusing to produce her for additional time.

(Huerta Depo. at 48:9-50:14.)

Based solely on the foregoing exchange, the Court does not believe that Defendant has demonstrated that good cause exists to issue the requested protective order.

First, Plaintiff provides important context for the quoted testimony, citing to earlier portions of the deposition in which Ms. Huerta testified that she was required to note on her timecard that she took a rest period even if she did not take it (Huerta Depo. at 30:8-31:9) and that the portion of Maria Ramirez's declaration stating that she was *not* forced to work hours for which she was not paid was false because Impec "*did* obligate [employees] to work extra hours" (Huerta Depo. at 33:15-21; 37:14-38:8). This testimony lends credence to Plaintiff's contention that her counsel sought a break to speak to Ms. Huerta to clarify the meaning of the question she had responded "No" to immediately prior to that request and not coach her to change her testimony. That is, Ms. Huerta responding "No" to Defense counsel's question of whether she worked hours for Impec that she was not paid for appeared to be inconsistent with her prior testimony such that Plaintiff's counsel suspicion that Ms. Huerta, a Spanish-speaker who requires the use of an interpreter to understand English, did not understand exactly what she was being asked was well-founded.

Second, while it is certainly within the Court's discretion under the Discovery Act to issue a protective order prohibiting witness-coaching by counsel during a deposition, the Court does not believe that a *single* interruption in a deposition that may or may not have involved witness coaching is enough of a disruption to warrant such a response here, i.e., a one-sided order that would affect a deponent's right to counsel. Though it clearly has no precedential value here, a Formal Ethics Opinion issued by the Los Angeles Bar Association in March 1999 and cited by Plaintiff in her opposition provides interesting commentary on the conduct of an attorney during his or her client's deposition. In this opinion, the bar stated that an attorney has no ethical duty to refrain from interrupting a deposition to consult with a client during breaks/recesses and "[i]ndeed, in some circumstances … may have an ethical duty to interrupt the deposition to privately consult with the client." This includes, for example, a situation in which an attorney, in order to best advocate for his client's interests, may need to "interrupt a deposition to consult with the client *if the client is confused or is otherwise unable to provide complete and accurate responses* to the deposition questions." Such a consultation "allows *inaccurate* or misleading testimony to be avoided, or at least corrected during the deposition." Given Plaintiff's counsel candid statement on the record *prior* to taking a break to consult with Ms. Huerta that she believed there was "a problem in [Ms. Huerta's] understanding of the questions" and she did not "want the thread [of questions] to continue without addressing it first," the interruption appears to have been in good faith. Without more, the Court will not assume, as Defendant's counsel did, that Ms. Huerta changed her testimony as a result of unethical conduct by her attorney, i.e. coaching and issue a protective order as a result.

Finally, the Court also believes that Defendant's counsel's unilateral decision to suspend the deposition was premature, as was the decision to move for a protective order based on what preceded the suspension, particularly given the fact that counsel did not ask any

further questions of Ms. Huerta when her deposition resumed to probe the reasons why she corrected her prior response.

In sum, the Court finds that no good cause exists to issue the protective order requested by Defendant, at least at this point in time, and therefore denies the motion without prejudice. The parties are encouraged to re-visit the tentative agreement they had reached after the September 2023 IDC for bilateral parameters for depositions moving forward.

C. Requests for Sanctions

Both parties make requests for monetary sanctions, Defendant on the basis of opposing counsel's conduct during Ms. Huerta's deposition necessitating the instant motion, and Plaintiff for having to oppose what it characterizes as an unjustified motion. Because Defendant has not succeeded on this motion, it is not entitled to monetary sanctions.

As for Plaintiff, as she notes, Code of Civil Procedure section 2025.420, subdivision (h), provides that the court shall impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. Defendant's motion is unsuccessful, and the Court is not persuaded that it and its counsel were substantially justified in bringing the motion because it was entirely premature to do so. Plaintiff requests that the Court impose $6,000 in sanctions against Defendant and its counsel, which is supported by the declaration of her counsel stating that he spent 10 hours preparing the opposition to Defendant's motion at a rate of $600 per hour. The Court believes the hours stated to be excessive given the issues involved and will award sanctions based on 6 hours for a total of $3,600. Thus, Plaintiff's request for sanctions is GRANTED IN PART.

XXIII. CONCLUSION

Defendant's motion for a protective order is DENIED WITHOUT PREJUDICE. Plaintiff's request for monetary sanctions is GRANTED IN PART in the amount of $3,600.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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