SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Theodore C. Zayner Presiding

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

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

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- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

LAW AND MOTION TENTATIVE RULINGS
DATE: MARCH 20, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV363833	Hernandez v. Burdick Painting (Lead Case; Consolidated with Case No. 20CV366446)	See Line 1 for tentative ruling.
LINE 2	22CV394401	Nguyen v. Port Plastics, Inc. (PAGA Representative Action) (Lead Case; Consolidated with 22CV394403/Class Action)	See Line 2 for tentative ruling.
LINE 3	22CV401365	Hathaway v. Alliance Roofing Company, Inc. (Class Action)	See Line 3 for tentative ruling.
LINE 4	22CV398878	Zoom Video Communications, Inc. v. Certain Underwriters at Lloyd's, London, et al.	Unopposed application for admission pro hac vice is GRANTED. No appearance necessary. Court will sign proposed order.
LINE 5	22CV407317	Horna Alcantara v. Lugg, Inc. (Class Action/PAGA)	See Line 5 for tentative ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	18CV335538	Evans v. Dolgen California, LLC (Class Action/PAGA)	See Line 6 for tentative ruling.
LINE 7	19CV344971	Alorica Inc. v. Fortinet, Inc.	Hearing on trial motions CONTINUED to March 25 at 1:30 p.m.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Hernandez v. Burdick Painting (Lead Case; Consolidated with Case No. 20CV366446)
Case No.: 20CV363833

The above-entitled actions come on for hearing before the Honorable Theodore C. Zayner on March 20, 2024, at 9:00 a.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This consolidated action is comprised of two cases: (1) *David Villagran Hernandez v. Burdick Painting* (Santa Clara County Superior Court, Case No. 20CV363833) ("First Action"); and (2) *David Hernandez v. Burdick Painting* (Santa Clara County Superior Court, Case No. 20CV366446) ("Second Action"). Both cases are putative class actions arising out of alleged wage and hour violations.

The Class Action Complaint filed in the First Action on February 21, 2020, sets forth the following causes of action: (1) Failure to Pay All Wages; (2) Failure to Pay Reporting Time Pay in Violation of California Labor Code §§ 218, 1194; (3) Missed Rest Breaks in Violation of California Labor Code §§ 200, 226.7, 512, and Wage Order; (4) Failure to Furnish an Accurate Itemized Wage Statement Upon Payment of Wages in Violation of California Labor Code § 226; (5) Failure to Reimburse Expenses in Violation of California Labor Code § 2802; and (6) Violations of California Business & Professions Code §§ 17200, et seq.

The Class Action Complaint filed in the Second Action on May 8, 2020, sets forth the following causes of action: (1) Violation of Labor Code §§ 204, 206, 510, 1194, 1194.2, 1197, 1197.1, 1182.12 (Failure to Pay All Wages); (2) Violation of Labor Code §§ 226.7, 512 (Meal Period Violations); (3) Violation of Labor Code §§ 226.7 (Rest Period Violations); (4) Violation of Labor Code §§ 201, 202, 203 (Failure to Pay Wages Due at Separation of Employment); (5) Violation of Labor Code §§ 226, subd. (a), (e), 226.3, 1174, 1174.5 (Failure to Issue Accurate Itemized Wage Statements); (6) Violation of Labor Code § 2802 (Failure to Indemnify for Expenditures or Losses in Discharge of Duties); and (7) Violation of Bus. & Prof. Code §§ 17200 et seq. (Unfair Business Practices).

On March 10, 2022, the court granted plaintiff David Hernandez's ("Plaintiff") motion to consolidate the cases.

On June 2, 2022, the court entered a Joint Stipulation for Plaintiff to File a First Amended Complaint and Order Thereon.

On June 8, 2022, Plaintiff filed a First Amended Complaint for Damages, which set forth causes of action for: (1) Violation of Labor Code §§ 204, 206, 510, 1194, 1194.2, 1197, 1197.1, 1182.12 (Failure to Pay All Wages); (2) Violation of Labor Code §§ 218, 1194 (Failure to Pay Reporting Time Pay); (3) Violation of Labor Code §§ 226.7, 512 (Meal Period Violations); (4) Violation of Labor Code §§ 226.7 (Rest Period Violations); (5) Violation of Labor Code §§ 201, 202, 203 (Failure to Pay Wages Due at Separation of Employment); (6) Violation of Labor Code §§ 226, subd. (a), (e), 226.3, 1174, 1174.5 (Failure to Issue Accurate Itemized Wage Statements); (7) Violation of Labor Code § 2802 (Failure to Indemnify for Expenditures or Losses in Discharge of Duties); and (8) Violation of Bus. & Prof. Code §§ 17200 et seq. (Unfair Business Practices).

On May 16, 2023, the court entered a Joint Stipulation for Plaintiff to File Second Amended Complaint and Order Thereon.

On May 17, 2023, Plaintiff filed a Second Amended Complaint for Damages, which set forth causes of action for: (1) Violation of Labor Code §§ 204, 206, 510, 1194, 1194.2, 1197, 1197.1, 1182.12 (Failure to Pay All Wages); (2) Violation of Labor Code §§ 218, 1194 (Failure to Pay Reporting Time Pay); (3) Violation of Labor Code §§ 226.7, 512 (Meal Period Violations); (4) Violation of Labor Code §§ 226.7 (Rest Period Violations); (5) Violation of Labor Code §§ 201, 202, 203 (Failure to Pay Wages Due at Separation of Employment); (6) Violation of Labor Code §§ 226, subd. (a), (e), 226.3, 1174, 1174.5 (Failure to Issue Accurate Itemized Wage Statements); (7) Violation of Labor Code § 2802 (Failure to Indemnify for Expenditures or Losses in Discharge of Duties); (8) Violation of Bus. & Prof. Code §§ 17200 et seq. (Unfair Business Practices); and (9) Violation of Private Attorneys General Act (PAGA) (Lab. Code §§ 2698 et seq.).

The parties have reached a settlement.

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

On February 7, 2024, the court continued the motion for preliminary approval of the settlement to March 20, 2024. The court noted that the proposed settlement represented approximately 1.3 percent of the maximum potential value of Plaintiff's claims and was significantly below the general range of percentage recoveries that California courts have found to be reasonable. The court explained

that Plaintiff had not adequately explained why such a substantial discount of his claims was fair and reasonable. The court directed Plaintiff to file a supplemental declaration explaining in greater detail the factual basis for, and the rationale behind, the discount applied to each of his claims and addressing whether the class members suffered any harm as a result of the alleged violations, Defendant's knowledge of the alleged wage and hour violations prior to the action being filed, and whether Defendant made good faith attempts to comply with the law. The court also instructed the parties to make certain changes to the class notice and submit an amended class notice for approval.

On March 4, 2024, Plaintiff's counsel filed a supplemental declaration in support of the motion for preliminary approval of settlement.

II. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

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

(*Wershba, supra,* 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba, supra,* 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid*., quoting *Dunk, supra,* 48 Cal.App.4th at p. 1801 and *Officers, supra,* 688 F.2d at p. 625, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the

> settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba*, *supra*, 91 Cal.App.4th at p. 245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

A. Provisions of the Settlement

As a preliminary matter, the settlement agreement purports to settle this consolidated action as well as a different case, *David Hernandez v. Burdick Painting* (Santa Clara County Superior Court, Case No. 20CV367255) ("PAGA Action"). (Declaration of Berkeh Alemzadeh in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("Alemzadeh Dec."), Ex. A ("Settlement Agreement"), ¶ 1.) The PAGA Action, which was also before this court, was dismissed without prejudice on May 18, 2023.

The settlement provides that this consolidated action and the PAGA Action have been settled on behalf of the following class:

> [a]ll current and former non-exempt employees of Burdick Painting employed in California during the Class Period.

(Settlement Agreement, ¶¶ 1, 6.) The "Class Period" is defined as February 21, 2016, to the date of the preliminary approval order. (Settlement Agreement, ¶ 8.) The class includes a subset of PAGA Members, who are defined as "all current and former non-exempt employees of Burdick Painting employed in the State of California during the PAGA Period." (Settlement Agreement, ¶ 24.) The "PAGA Period" is February 21, 2019, through the date of the preliminary approval order. (Settlement Agreement, ¶ 25.)

According to the terms of settlement, defendant Burdick Painting ("Defendant") will pay a non-reversionary, gross settlement amount of $420,150. (Settlement Agreement, ¶¶ 18.) The gross settlement amount includes attorney fees of $140,050 (1/3 of the gross settlement amount), litigation costs not to exceed $45,000, a service award for the class representative not to exceed $5,000, settlement administration costs not to exceed $9,000, and a PAGA allocation of $25,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Members). (Settlement Agreement, ¶¶ 3, 4, 18, 23, 31, 34, 50.)

The net settlement amount will be distributed to the class members on a pro rata basis based on the number of workweeks worked during the Class Period. (Settlement Agreement, ¶ 19.) Similarly, PAGA Members will receive a pro rata share of the 25 percent portion of the PAGA payment allocated to them based on the number of workweeks worked during the PAGA Period. (Settlement Agreement, ¶ 23.)

Checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be distributed to the Katherine and George Alexander Community Law Center. (Settlement Agreement, ¶ 61.) The *cy pres* recipient is approved.

In exchange for the settlement, class members agree to release Defendant, and related persons and entities, from claims that were asserted, or could have been asserted, in the operative complaint based on the facts or allegations in the complaint. (Settlement Agreement, ¶¶ 29, 35, 48.) PAGA Members agree to release Defendant, and related persons and entities, from claims for civil penalties that were asserted, or could have been asserted, in the operative complaint based on the facts or allegations in the complaint and PAGA Notice. (Settlement Agreement, ¶¶ 29, 36, 49.)

B. Fairness of the Settlement

Plaintiff asserts that the settlement is fair, reasonable, and adequate. Plaintiff indicates that the settlement resolves claims on behalf of 650 class members. Prior to mediation, the parties engaged in extensive formal written discovery. Plaintiff's counsel reviewed a representative sampling of time and payroll records for the class and engaged an expert to create a comprehensive damages analysis. The parties participated in a full-day mediation with Mark LeHockey, Esq. on November 9, 2022, and reached a settlement. The average estimated individual settlement payment is $301.69.

In the moving papers initially filed with the court, Plaintiff stated that Defendant's maximum potential exposure for the claims is 32,394,995.57. Plaintiff provided a detailed breakdown of this amount by claim. Plaintiff contended that a discount of 80 percent should be applied to the claims for unpaid wages and meal/rest period violations because of difficulties proving liability and damages and obtaining class certification. Plaintiff further asserted that a 70 percent discount should be applied to the inaccurate wage statement claim because of difficulties proving liability and obtaining class certification. Plaintiff also asserted that a 70 percent discount should be applied to the unpaid business expenses claim, but he did not explain why a such a discount is warranted. Similarly, Plaintiff

contended that a discount of 80 percent should be applied to the claim for waiting time penalties, but he did not explain why such a discount is warranted. Finally, Plaintiff asserted that a 94 percent discount should be applied to the PAGA claim given the risks associated with the underlying claims and the possibility that the court might reduce PAGA penalties. In light of the foregoing, Plaintiff contended that a more realistic valuation of the claims in this case is $1,625,284.11.

Plaintiff's counsel has now submitted a supplemental declaration addressing the court's concerns regarding the basis for the discounts applied to Plaintiff's claims. As is relevant here, Plaintiff's counsel states that a 70 percent discount was applied to the unpaid business expenses claim because there were minimal records supporting the claim and Plaintiff was required to make assumptions regarding whether each class member purchased tools in connection with their employment. Plaintiff's counsel asserts that the difficulties in proving the claim and the potentially individualized nature of the claim warranted the reduction in value of the claim. Next, Plaintiff's counsel states that a discount of 80 percent was applied to the claim for waiting time penalties because it is wholly derivative of the claims for unpaid wages, meal period violations, and rest period violations, and Defendant had facially-compliant written policies for reporting time worked, meal periods, and rest breaks that warranted the reduction in value of the claims. Finally, with respect to the PAGA claim, Plaintiff's counsel clarifies that the estimated maximum potential value of the claims (i.e., $25,926,200) was based on stacking penalties; however, Plaintiff believes that he could only recover penalties for the initial violation during each pay period as the LWDA has not issued any citations for violations during the PAGA Period. Consequently, the actual exposure for the PAGA claim is $231,000.

In light of the foregoing, it appears that the maximum potential value of Plaintiff's claims is more accurately estimated to be $6,699,795.50 and, consequently, the settlement represents approximately 6.2 percent of the maximum potential value of Plaintiff's claims. Thus, the proposed settlement amount is within general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D.Ca|. Feb. 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].)

Overall, the court finds the settlement is fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees, and Costs

> Plaintiff requests a service award in the amount of $5,000.
> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

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

Prior to the final approval hearing, the class representative shall file a declaration specifically detailing his participation in the action and an estimate of time spent. The court will make a determination at that time.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will seek attorney fees of $140,050. Plaintiff's counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiff's counsel shall also submit evidence of actual costs incurred.

D. Conditional Certification of Class

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

and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

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, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

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

(*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiff states there are approximately 650 class members that can be ascertained from Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. In sum, the court finds that the proposed class should be conditionally certified for settlement purposes..

E. Class Notice

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

Plaintiff's counsel has now submitted an amended class notice. (Supplemental Declaration of Kevin Mahoney in Support of Preliminary Approval of Class Action Settlement ("Supp. Mahoney Dec."), Exs. A-B.) The amended class notice makes some of the changes requested by the court and generally complies with the requirements for class notice. It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion.

However, the first sentence of the second paragraph in Section 7 continues to state, "[i]f you wish to object, you *must* submit your objection in writing […]." (Supp. Mahoney Dec., Exs. A-B, italics added.) The parties shall remove the term "must" and replace it with "may." The parties are ordered to submit a second amended class notice making this change to the court for approval prior to mailing.

IV. CONCLUSION

Accordingly, the motion for preliminary approval of the class action settlement is GRANTED subject to the court's approval of the second amended class notice. The final approval hearing is set for September 25, 2024, at 1:30 p.m. in Department 19.

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

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Calendar Line 2

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

The above-entitled actions come on for hearing before the Honorable Theodore C. Zayner on March 20, 2024, at 9:00 a.m. in Department 19. The court now issues its tentative ruling as follows:

III. INTRODUCTION

This consolidated action is comprised of two cases: (1) *Kenneth Nguyen v. Port Plastics, Inc.* (Santa Clara County Superior Court, Case No. 22CV394401) ("First Action"); and (2) *Kenneth Nguyen v. Port Plastics, Inc.* (Santa Clara County Superior Court, Case No. 22CV394403) ("Second Action").

The Representative Action Complaint filed in the First Action on February 15, 2022, set forth a single cause of action for Civil Penalties Pursuant to Labor Code §§ 2699, et seq. ("PAGA") based on underlying wage and hour violations.

The Class Action Complaint filed in the Second Action on February 15, 2022, alleged causes of action for: (1) Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200, et seq.; (2) Failure to Pay Minimum Wages in Violation of Cal. Lab. Code §§ 1194, 1197 & 1197.1; (3) Failure to Pay Overtime Wages in Violation of Cal. Lab. Code § 510; (4) Failure to Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Required Rest Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (6) Failure to Provide Accurate Itemized Statements in Violation of Cal. Lab. Code § 226; (7) Failure to Reimburse Employees For Required Expenses in Violation of Cal. Lab. Code § 2802; (8) Failure to Provide Wages When Due in Violation of Cal. Lab. Code §§ 201, 202 and 203; (9) Discrimination and Retaliation in Violation of FEHA; and (10) Wrongful Termination in Violation of Public Policy. Notably, the ninth and tenth causes of action were individual claims alleged on behalf of plaintiff Kenneth Nguyen ("Plaintiff").

On June 24, 2022, the court entered a Joint Stipulation to Consolidate Two Matters, consolidating the First and Second Actions.

On July 28, 2022, Plaintiff filed a Consolidated Class Action and Representative Complaint, which sets forth causes of action for: (1) Unfair Competition in Violation of Cal. Bus. & Prof. Code

§§ 17200, et seq.; (2) Failure to Pay Minimum Wages in Violation of Cal. Lab. Code §§ 1194, 1197 & 1197.1; (3) Failure to Pay Overtime Wages in Violation of Cal. Lab. Code § 510; (4) Failure to Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Required Rest Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (6) Failure to Provide Accurate Itemized Statements in Violation of Cal. Lab. Code § 226; (7) Failure to Reimburse Employees For Required Expenses in Violation of Cal. Lab. Code § 2802; (8) Failure to Provide Wages When Due in Violation of Cal. Lab. Code §§ 201, 202 and 203; (9) Discrimination and Retaliation in Violation of FEHA; (10) Wrongful Termination in Violation of Public Policy; and (11) Violation of the Private Attorneys General Act [Labor Code §§ 2698, et seq.]. The ninth and tenth causes of action are alleged by Plaintiff as an individual.

On November 16, 2022, the court entered a Joint Stipulation and Order to Stay the Case Including All Discovery Deadlines in Preparation for Private Mediation, which stayed the action through the completion of private mediation.

On January 19, 2023, the court entered an Amended Joint Stipulation and Order to Stay the Case Including All Discovery Deadlines in Preparation for Private Mediation, which extended the stay pending completion of the parties' private mediation.

The parties have reached a settlement.

Plaintiff now moves for preliminary approval of the settlement. The motion is unopposed.

IV. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

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

(*Wershba*, *supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba*, *supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid*., quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba*, *supra*, 91 Cal.App.4th at p. 245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

B. Provisions of the Settlement

The proposed settlement provides that this consolidated action has been settled on behalf of the following class:

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

(Declaration of Kyle Nordrehaug in Support of Motion for Preliminary Approval of Class Settlement ("Nordrehaug Dec."), Ex. 1 ("Settlement Agreement"), ¶ 1.5.) The "Class Period" is defined as the period of time from February 15, 2018, through the earlier of the date of an order approving Plaintiff's motion for preliminary approval, or August 1, 2023. (Settlement Agreement, ¶ 1.13.) The class includes a subset of Aggrieved Employees, who are defined as "all individuals who worked for [Defendant] in California who were classified as non-exempt and/or hourly paid employees and who worked at any time during the PAGA Period." (Settlement Agreement, ¶ 1.4.) The "PAGA Period" is defined as the period of time from December 9, 2020, through the earlier of the date of an order

approving Plaintiff's motion for preliminary approval, or August 1, 2023. (Settlement Agreement, ¶ 1.31.)

According to the terms of settlement, Defendant will pay a non-reversionary, gross settlement amount of $350,000. (Settlement Agreement, ¶¶ 1.22, 3.1.) The gross settlement amount includes attorney fees of $116,666 (1/3 of the gross settlement amount), litigation costs not to exceed $21,000, a service award for the class representative not to exceed $10,000, settlement administration costs not to exceed $5,500, and a PAGA allocation of $15,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to Aggrieved Employees). (Settlement Agreement, ¶¶ 1.3, 1.7, 1.15, 1.22, 1.24, 1.27, 1.28, 1.34, 3.2.)

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

Checks remaining uncashed more than 120 days after mailing will be void and the funds from those checks will be distributed to the California Controller's Unclaimed Property Fund. (Settlement Agreement, ¶¶ 5.2-5.4.)

The parties' proposal to send funds from uncashed checks to the Controller of the State of California does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class member funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent." The parties are directed to identify a new *cy pres* in compliance with Code of Civil Procedure section 384 prior to the continued hearing date.

In exchange for the settlement, class members agree to release Defendant, and related persons and entities, from "all class claims pled or which reasonably could have been pled based on the factual allegations contained in the Operative Complaint which occurred during the Class Period, expressly excluding Plaintiff's individual claims alleged in the Operative Complaint […]." (Settlement

Agreement, ¶¶ 1.38, 1.40, 6.2.) Aggrieved Employees agree to release Defendant, and related persons and entities, from "all PAGA claims pled or which reasonably could have been pled based on the factual allegations contained in the Operative Complaint and Plaintiff's December 9, 2021 Letter to the Labor and Workforce Development Agency which occurred during the PAGA Period." (Settlement Agreement, ¶¶ 1.39, 1.40, 6.3.) Plaintiff also agrees to release Defendant, and related persons and entities, from all claims that were, or reasonably could have been, alleged based on the facts contained in the operative complaint and all PAGA claims that were, or reasonably could have been, alleged based on facts contained in the operative complaint and Plaintiff's PAGA notice. (Settlement Agreement, ¶¶ 1.40, 6.1.) However, Plaintiff's release does not extend to his individual claims for discrimination, retaliation, and wrongful termination. (Settlement Agreement, ¶¶ 1.40, 6.1.) Notably, the settlement agreement does not address what will happen to Plaintiff's individual claims following approval of the proposed settlement.

B. Fairness of the Settlement

Plaintiff asserts that the settlement is fair, reasonable, and adequate. Plaintiff indicates that the settlement resolves claims on behalf of 69 class members, who worked a total of 10,510 workweeks. (Nordrehaug Dec., ¶ 6.) Prior to mediation, the parties engaged in informal discovery. Plaintiff's counsel reviewed payroll and employment data, information concerning the composition of the class, Defendant's wage and hour policies, Plaintiff's employment files, and samples of wage statements provided by Defendant. (*Id.* at ¶¶ 10, 14.) The parties participated in a full-day mediation with Louis Marlin on April 27, 2023, and reached a settlement. (*Id.* at ¶ 12.) The net settlement about is approximately $181,834 and the average estimated payment is $,635.27 for each class member. (*Id.* at ¶ 6.) Plaintiff estimates that Defendant's maximum potential exposure for all claims is between $2,714,742 and $2,826,792. (*Id.* at ¶¶ 6, 23-25, 33.) Plaintiff provides a detailed breakdown of this amount by claim. (*Ibid.*)

The proposed settlement represents approximately 12.3-12.8 percent of the maximum potential value of Plaintiff's claims. Thus, the proposed settlement amount is within general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D.Ca|. Feb. 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].)

Overall, the court finds the settlement is fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

However, , the proposed settlement only purports to resolve Plaintiff's class and PAGA claims. Plaintiff's moving papers, and the proposed settlement agreement, do not address what will happen to Plaintiff's individual claims for discrimination, retaliation, and wrongful termination following approval of the proposed settlement. Prior to the continued hearing, Plaintiff shall file a supplemental declaration addressing how the action is to proceed as to his individual claims.

C. Incentive Award, Fees, and Costs

Plaintiff requests a service award in the amount of $10,000.

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

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

Plaintiff submits a declaration detailing his participation in the action. Specifically, Plaintiff declares that he spent approximately 30-40 hours in connection with this litigation, including discussing the case with class counsel, providing documents to class counsel, answering questions from class counsel, reviewing documents, and discussing the settlement with class counsel. (Declaration of Kenneth Nguyen in Support of Motion for Preliminary Approval of Class Settlement, ¶¶ 6, 10-12.)

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

However, the requested amount of $10,000 is more than the court typically awards for the amount of time Plaintiff spent in connection with this action (i.e., 30-40 hours). Notably, although Plaintiff states that he executed a general release of claims, the release itself makes clear that Plaintiff is not releasing his individual claims. Rather, he is only releasing those class and PAGA claims possessed by all other class members and aggrieved employees. In light of the foregoing, the court finds that a service award in the lesser amount of $5,000 is reasonable and it is approved.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will seek attorney fees of $116,666 (1/3 of the gross settlement amount). Plaintiff's counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiff's counsel shall also submit evidence of actual costs incurred.

D. Conditional Certification of Class

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

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, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of

establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

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

(*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiff states there are approximately 69 class members that can be ascertained from Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. In sum, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

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

The notice generally complies with the requirements for class notice. (Settlement Agreement, Ex. A.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion.

However, the second paragraph on page 2 of the class notice is misleading as it states that class members "have two basic options under the Settlement": (1) "Do Nothing"; and (2) "Opt-Out of the Class Settlement." This portion of the class notice must be modified to reflect that class members have a third option—they may object to the settlement.

Next, page 3, Section 8 on page 9, and Section 9 on page 10 of the class notice must be amended to include the following language regarding the final approval hearing:

> Class members may appear at the final approval hearing in person or remotely using the Microsoft Teams link for Department 19 (Afternoon Session). 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 who wish to appear remotely are

encouraged to contact class counsel at least three days before the hearing if possible, so that potential technology or audibility issues can be avoided or minimize.

The amended notice shall be provided to the court for approval prior to the continued hearing date.

IV. CONCLUSION

Accordingly, the motion for preliminary approval of the class action settlement is CONTINUED to May 8, 2024, at 1:30 p.m. in Department 19. Plaintiff shall file a supplemental declaration no later than April 24, 2024, identifying a new *cy pres* recipient, addressing what will happened to his individual claims following approval of the proposed settlement, and including an amended class notice. No additional filings are permitted.

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

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Calendar Line 3

Case Name: Hathaway v. Alliance Roofing Company, Inc. (Class Action)
Case No.: 22CV401365

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 20, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. PROCEDURAL HISTORY

On October 4, 2022, plaintiff Chad Hathaway ("Plaintiff") filed the operative First Amended Class Action Complaint against defendant Alliance Roofing Company, Inc. ("Defendant"), which sets forth the following causes of action: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods; (4) Failure to Permit Rest Breaks; (5) Failure to Reimburse Business Expenses; (6) Failure to Provide Accurate Itemized Wage Statements; (7) Failure to Pay Wages Timely During Employment; (8) Failure to Pay All Wages Due Upon Separation of Employment (9) Violation of Business and Professions Code §§ 17200, et seq.; and (10) Enforcement of Labor Code §§ 2698 et seq. ("PAGA").

On March 15, 2024, the court dismissed the tenth cause of action as requested by Plaintiff.

II. DISCOVERY DISPUTE

On August 8, 2023, Plaintiff served Defendant with a second set of requests for production ("RPD").

On September 11, 2023, Defendant served Plaintiff with objection only responses to the requests.

On November 16, 2023, the parties attended an informal discovery conference ("IDC") regarding Defendant's responses. However, they were unable to informally resolve their discovery dispute.

Now before the court is Plaintiff's motion to compel Defendant to provide further responses to RPD Nos. 11-15 and for an award of monetary sanctions in the amount of $2,125 against Defendant and/or its counsel.[1] Defendant opposes the motion.

III. LEGAL STANDARD

If a party demanding a response to a request for production of documents deems that a statement of compliance with the demand is incomplete, a representation of inability to comply is inadequate, incomplete, or evasive, or an objection in the response is without merit or too general, that party may move for an order compelling a further response. (See Code Civ. Proc., § 2031.310, subd. (a).) On a motion to compel a further response to a request for production of documents, it is the moving party's burden to demonstrate good cause for the discovery sought. (*Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98 (*Kirkland*).) "Good cause" requires a showing of both relevance to the subject matter (e.g., how the information in the documents would tend to prove or disprove some issue in the case) and specific facts justifying discovery (e.g., why such information is necessary for trial preparation or to prevent surprise at trial). (*Glenfed Develop. Corp. v. Superior Court* (1997) 53 Cal.4th 1113, 1117.) Once good cause has been shown, the burden shifts to the responding party to justify any objections. (*Kirkland*, *supra*, 95 Cal.App.4th at p. 98.)

III. DISCUSSION

A. Timeliness

As a threshold matter, Defendant asserts that Plaintiff's motion is untimely.

"On receipt of a response to a demand for inspection, copying, testing, or sampling, the demanding party may move for an order compelling further response to the demand if the demanding party deems that any of the following apply: (1) A statement of compliance with the demand is incomplete. (2) A representation of inability to comply is inadequate, incomplete, or evasive. (3) An objection in the response is without merit or too general." (Code Civ. Proc., § 2031.310, subd. (a).) "Unless notice of this motion is given within 45 days of the service of the verified response, or any supplemental verified response, or on or before

[1] In his moving papers, Plaintiff states that he moves to compel further responses to RPD Nos. 10-15. But this appears to be a typographical error as Plaintiff's motion, and Defendant's opposition, discuss Defendant's responses to RPD Nos. 11-15. Thus, the court construes the motion as being directed to only RPD Nos. 11-15.

any specific later date to which the demanding party and the responding party have agreed in writing, the demanding party waives any right to compel a further response to the interrogatories." (Code Civ. Proc., § 2031.310, subd. (c).)

Depending upon the manner of service of the responses, additional time may be added to the time to file and serve the motion; for example, if responses are served by email, two court days are added to the time to make the motion. (Code Civ. Proc., § 1010.6, subd. (a)(3)(B) ["Any period of notice, or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic means by two court days …"].)

Here, Defendant served Plaintiff with its objection-only responses to the second set of RPD via email on September 11, 2023. Thus, Plaintiff had until October 30, 2023, to file his motion to compel further responses. (See *Golf & Tennis Pro Shop, Inc. v. Superior Court* (2022) 84 Cal.App.5th 127, 132-137 [the responding party electronically served responses on March 23, 2021, and the court held that the correct filing date for the motion to compel was 45 days after March 23, 2021, plus two court days (i.e., May 11, 2021)].)

On October 30, 2023, Plaintiff requested an IDC regarding the discovery dispute. Under the Santa Clara County Complex Civil Guidelines, Section VI.3, Plaintiff's request for an IDC tolled the time for bringing a motion to compel. (Complex Civil Guidelines, § VI.3 ["Consistent with the Court's obligation and authority to manage complex litigation under the California Rules of Court and established case law, the time for bringing any motion to compel is tolled starting on the date a party makes the email request for an IDC to the Court, and as further ordered by the Court at or after the IDC."].) The parties IDC took place on November 16, 2023. Plaintiff filed his motion the following day. Consequently, Plaintiff's motion is timely.

B. RPD Nos.

RPD Nos. 11-15 ask Defendant to produce documents regarding .

Defendant objected to RPD Nos. 11-15 on the grounds that they were duplicative of prior discovery requests.

As an initial matter, there is generally good cause for the sought-after discovery. Information regarding the dates of each pay period for class members during the class period, class members' location or jobsite for each work day, class members' contact information, class members' dates of employment, class members' job titles, the hourly pay rates for class members is directly relevant to Plaintiff's wage and hour claims. Such information will allow Plaintiff to evaluate the merit of his claims and prepare for trial.

Next, Defendant attempts to justify its objection to the requests as duplicative. Defendant asserts that Plaintiff served a first set of discovery, consisting of special interrogatories and requests for production of documents, on April 5, 2023, and the second set of discovery at issue in the instant motion seeks the same information as the first round of discovery. Defendant contends that Plaintiff failed to timely move to compel further responses to the first round of discovery and, therefore, should not be allowed a second bite at the apple.

Defendant's objection is not well-taken. In its opposition papers, Defendant does not identify any particular RPD in the first set of discovery that asks the same question as RPD Nos. 11-15. (See *Prof'l Career Colleges, Magna Inst. v. Superior Court* (1989) 207 Cal.App.3d 490, 493-494 [holding that a party who fails time limits to bring a motion to compel may avoid the consequences of the delay and lack of diligence "by propounding the same question again"].) Furthermore, as Plaintiff persuasively argue, RPD No. 11-15 contain significant differences from the first set of RPD as they also seek class members' job titles, work locations, contact information, pay period dates, and hourly rates. For these reasons, Defendant's objection is overruled.

Finally, Defendant argues that the court should stay any non-party discovery to allow for an evaluation of the good-faith nature of Plaintiff's allegations (which would include a deposition of Plaintiff) because it believes Plaintiff's claims are frivolous and Plaintiff is potentially violent and dangerous. Defendant's argument lacks merit. Defendant did not raise any objection to RPD Nos. 11-15 on these grounds in its responses to the requests. Consequently, its objection is waived. (See *Scottsdale Ins. Co. v. Superior Court* (1997) 59 Cal.App.4th 263, 273 [waiver of an objection occurs when there is a failure to include that objection in the original response to the discovery request]; see also *Stadish v. Superior Court*

(1999) 71 Cal.App.4th 1130, 1141 [a party whose response fails to set forth a particular ground for objection waives its right to raise that objection later]; Code Civ. Proc., § 2031.240, subd. (b).) Furthermore, Defendant has not moved for a protective order staying discovery on these grounds. Consequently, the request for a stay of discovery is not properly before the court.

In light of the foregoing, further responses are warranted to RPD Nos. 11-15.

C. Request for Monetary Sanctions

Plaintiff requests an award of monetary sanctions in the amount of $2,125 against Defendant and/or its counsel pursuant to Code of Civil Procedure section 2031.310, subdivision (h).

That statute provides for an award of monetary sanctions against any party, person, or attorney who opposes a motion to compel further response to a demand, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

Here, Plaintiff prevailed on his motion. Furthermore, Defendant did not act with substantial justification and there are no other circumstances making the imposition of sanctions unjust. Plaintiff's counsel submits a declaration demonstrating that counsel spent three hours preparing the instant motion at his hourly rate of $500. (Declaration of Steven A. McNicholl in Support of Plaintiff's Motion to Compel Further Responses […], ¶¶ 10-12.) Plaintiff's counsel also states that he anticipates spending an additional two hours in connection with the motion and there was a filing fee for the motion. (*Id.* at 11-13.) However, anticipated time is not recoverable as sanctions. (See *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1551.) And Plaintiff's counsel does not present evidence establishing the amount of the filing fee incurred.

Consequently, Plaintiff's evidence supports an award of monetary sanctions in the lesser amount of $1,500.

D. Conclusion

Accordingly, Plaintiff's motion to compel Defendant to provide further responses to RPD Nos. 11-15 is GRANTED. Within 30 days of the date of the filing of the order on this matter, Defendant shall serve Plaintiff with code-compliant, further responses to RPD Nos. 11-

15, without objections (except for those based on the attorney-client privilege and work product doctrine which are preserved), and produce documents in accordance with its further responses. If any responsive documents are withheld from production on the grounds they are protected by the attorney-client privilege or work product doctrine, Defendant shall produce a privilege log identifying each item withheld from production and setting forth sufficient facts to permit evaluation of the merits of the asserted objection. Additionally, within 30 days of the date of the filing of the order on this matter, Defendant and/or its counsel shall pay Plaintiff's counsel monetary sanctions in the amount of $1,500.

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

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Calendar Line 4

Case Name:
Case No.:

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Calendar Line 5

Case Name: Horna Alcantara v. Lugg, Inc. (Class Action/PAGA)
Case No.: 22CV407317

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 20, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

On November 23, 2022, plaintiff Jorge Antonio Horna Alcantara ("Plaintiff") filed a Complaint against defendant Lugg, Inc. ("Defendant"), which sets forth a single cause of action for civil penalties under Labor Code §§ 2698 et seq. ("PAGA").

On November 30, 2022, the court entered an Order Deeming Case Complex and Staying Discovery and Responsive Pleading Deadline.

On December 5, 2022, Plaintiff filed a Proof of Service of Summons, stating that the summons and complaint was served on Defendant's registered agent on December 2, 2022.

The minute order from a Case Management Conference on April 19, 2023, states that the court lifts the stay on the responsive pleading deadline and Defendant's responsive pleading is due within 30 days.

The minute order from a Case Management Conference on August 23, 2023, states that the matter will proceed via default and Plaintiff is to file for default within 10 days.

On November 22, 2023, Plaintiff filed a motion for default judgment, which is now before the court. The motion is unopposed.

II. LEGAL STANDARD

As a threshold matter, Plaintiff does not identify the statutory basis for his motion for default judgment. Nonetheless, it appears to the court that Plaintiff's motion is brought pursuant to Code of Civil Procedure section 585, subdivision (b). (See *Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 98-99 (*Bae*) ["The procedure for obtaining a default judgment ordinarily applicable in all actions—other than those for the recovery of a determinate amount of money based on a contract or judgment—is set forth in subdivision (b) of Code of Civil Procedure section 585, as well as sections 580 and 587 of that code."].)

Under that statute, if the defendant has been served and a responsive pleading has not been filed within the time allowed, the clerk, upon written application of the plaintiff, shall enter the default of the defendant. (Code Civ. Proc., § 585, subd. (b); *Bae*, *supra*, 245 Cal.App.4th at p. 99.) Thereafter, a plaintiff may bring a motion for default judgment, seeking the relief demanded in the complaint. (*Ibid.*) On a motion for default judgment, "[t]he court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff's favor for that relief, not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115, as appears by the evidence to be just." (*Ibid*.) The plaintiff must establish a prima facie case to support the allegations in the complaint. (See *Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361-362.)

"A party seeking a default judgment on declarations must use mandatory Request for Entry of Default (Application to Enter Default) (form CIV-100). . . . The following must be included in the documents filed with the clerk:

> (1) Except in unlawful detainer cases, a brief summary of the case identifying the parties and the nature of plaintiff's claim;
>
> (2) Declarations or other admissible evidence in support of the judgment requested;
>
> (3) Interest computations as necessary;
>
> (4) A memorandum of costs and disbursements;
>
> (5) A declaration of nonmilitary status for each defendant against whom judgment is sought;
>
> (6) A proposed form of judgment;
>
> (7) A dismissal of all parties against whom judgment is not sought or an application for separate judgment against specified parties under Code of Civil Procedure section 579, supported by a showing of grounds for each judgment;
>
> (8) Exhibits as necessary; and
>
> (9) A request for attorney fees if allowed by statute or by the agreement of the parties."

(Cal. Rules of Court, rule 3.1800(a); *Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1432 (*Holloway*).)

An application by a plaintiff for entry of default under subdivision (b) of Section 585 "shall include an affidavit stating that a copy of the application has been mailed to the defendant's attorney of record or, if none, to the defendant at his or her last known address and the date on which the copy was mailed. If no such address of the defendant is known to the plaintiff or plaintiff's attorney, the affidavit shall state that fact." (Code Civ. Proc., § 587.)

III. DISCUSSION

Here, Plaintiff's motion for default judgment suffers from multiple procedural defects. First, Plaintiff did not use the mandatory Request for Entry of Default (Application to Enter Default) (form CIV-100) to make his motion as required by California Rules of Court, rule 3.1800(a). Rather, Plaintiff simply filed a memorandum of points and authorities, two declarations, and a notice of errata in support of his motion. Second, Plaintiff did not file an affidavit attesting that the motion had been mailed to Defendant's attorney of record, or to Defendant at its last known address, as required by Code of Civil Procedure section 587. (See *Bae, supra*, 245 Cal.App.4th at p. 106 [Code of Civil Procedure section 587 "was enacted 'to prevent the taking of default against an unwary litigant.' "].) Notably, Plaintiff did not file any proof of service in connection with the instant motion. Additionally, Plaintiff never filed a notice of motion reflecting the date, time, and location of the hearing on his motion for default judgment. Consequently, there is no evidence in the record that Plaintiff provided, or that Defendant received, notice of the instant motion. The foregoing procedural defects are fatal to Plaintiff's motion. (See *Holloway, supra*, 242 Cal.App.4th at p. 1433 [the trial court did not err in refusing to enter the default judgment when the plaintiff failed to submit the documents required for entry of default judgment].)

Accordingly, Plaintiff's motion for default judgment is DENIED without prejudice.

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

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Calendar Line 6

Case Name: Evans v. Dolgen California, LLC (Class Action/PAGA)
Case No.: 18CV335538

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 20, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. PROCEDURAL HISTORY

On September 27, 2018, plaintiff James Evans ("Plaintiff") filed a Class Action Complaint against defendant Dolgen California, LLC ("Defendant"), which set forth the following causes of action: (1) Violation of 15 U.S.C. §§ 1681b(b)(2)(A) (Fair Credit Reporting Act); (2) Violation of 15 U.S.C. §§ 1681d(a)(1) and 1681g(c) (Fair Credit Reporting Act); (3) Violation of California Civil Code § 1786 et seq. (Investigative Consumer Reporting Agencies Act); (4) Violation of California Civil Code § 1785 et seq. (Consumer Credit Reporting Agencies Act); (5) Failure to Provide Meal Periods (Lab. Code §§ 204, 223, 226.7, 512 and 1198); (6) Failure to Provide Rest Periods (Lab. Code §§ 204, 223, 226.7 and 1198); (7) Failure to Pay Hourly Wages (Lab. Code §§ 223, 510, 1194, 1194.2, 1197, 1997.1 and 1198); (8) Failure to Provide Accurate Written Wage Statements (Lab. Code §§ 226(a)); (9) Failure to Timely Pay All Final Wages (Lab. Code §§ 201, 202 and 203); and (10) Unfair Competition (Bus. & Prof. Code §§ 17200 et seq.).

On December 7, 2018, Plaintiff filed a First Amended Class Action Complaint ("FAC"), which added an eleventh cause of action for Civil Penalties (Lab. Code §§ 2698, et seq.).

That same day, Defendant removed the case to federal court.

On February 4, 2019, the federal court entered an order granting the parties' stipulation to dismiss class claims and remand the remaining claim under the Private Attorneys General Act of 2004 ("PAGA") to state court.

On May 10, 2019, Defendant filed a demurrer to the FAC, and alternative motion to stay, on the grounds that previously filed actions encompassed same claims on behalf of the same parties.

On June 10, 2019, Plaintiff filed a Second Amended Complaint ("SAC") asserting a single cause of action for Civil Penalties (Lab. Code §§ 2698, et seq.).

On July 15, 2019, Defendant filed a demurrer to the SAC, and alternative motion to stay, on the grounds that the same cause of action was pending between the same parties in another case.

On August 22, 2019, the court issued an order staying the action due to pending coordination proceedings.

On January 30, 2020, the petition for coordination was denied.

On August 17, 20221, Defendant moved to compel individual arbitration of Plaintiff's PAGA claim. Defendant later withdrew the motion on November 16, 2021.

On September 14, 2022, the court entered an order approving the parties' stipulation to allow Plaintiff leave to file a Third Amended Complaint ("TAC").

That same day, Plaintiff filed the operative TAC, which sets forth a single cause of action for Civil Penalties (Lab. Code §§ 2698, et seq.).

Defendant subsequently moved to strike portions of the TAC. On February 21, 2023, the court granted the motion to strike only as to the allegations that Defendant violated Labor Code sections 212 and 223.

II. DISCOVERY DISPUTE

On July 16, 2021, Plaintiff served Defendant with special interrogatories, set one ("SI"), and requests for production of documents, set one ("RPD").

On August 31, 2021, following a two-week extension of time to respond, Defendant served Plaintiff with objection-only responses to the requests.

On March 15, 2022, Defendant served Plaintiff with supplemental responses to SI No. 1 and RPD Nos. 3 and 4.

The parties engaged in lengthy meet and confer efforts regarding the discovery sought by SI No. 1 and RPD Nos. 3 and 4. The parties also participated in Informal Discovery Conferences regarding the requests on June 23, 2023 and February 21, 2024. However, the parties were unable to informally resolve their discovery dispute.

Now before the court is Plaintiff's motion to compel Defendant to provide further responses to SI No. 1 and RPD Nos. 3 and 4.[2] Defendant opposes the motion and requests an award of monetary sanctions in the amount of $14,150 against Plaintiff and his counsel.

III. LEGAL STANDARD

If a party demanding a response to an interrogatory deems that an answer to a particular interrogatory is evasive or incomplete, an exercise of the option to produce documents is unwarranted or inadequate, or an objection to an interrogatory is without merit or too general, that party may move for an order compelling a further response. (Code Civ. Proc., § 2030.300, subd. (a)(1)–(3).) If a timely motion to compel a further response to an interrogatory has been filed, the burden is on the responding party to justify any objection to the discovery request. (*Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255; *Coy v. Superior Court* (*Wolcher*) (1962) 58 Cal.2d 210, 220-221 (*Coy*).)

If a party demanding a response to a request for production of documents deems that a statement of compliance with the demand is incomplete, a representation of inability to comply is inadequate, incomplete, or evasive, or an objection in the response is without merit or too general, that party may move for an order compelling a further response. (See Code Civ. Proc., § 2031.310, subd. (a).) On a motion to compel a further response to a request for production of documents, it is the moving party's burden to demonstrate good cause for the discovery sought. (*Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98 (*Kirkland*).) "Good cause" requires a showing of both relevance to the subject matter (e.g., how the information in the documents would tend to prove or disprove some issue in the case) and specific facts justifying discovery (e.g., why such information is necessary for trial preparation or to prevent surprise at trial). (*Glenfed Develop. Corp. v. Superior Court* (1997) 53 Cal.4th 1113, 1117.) Once good cause has been shown, the burden shifts to the responding party to justify any objections. (*Kirkland, supra*, 95 Cal.App.4th at p. 98.)

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[2] In his moving papers, Plaintiff states that he moves to compel further responses to RPD Nos. 4 and 5. But this appears to be a typographical error as Plaintiff's motion, and Defendant's opposition, discuss Defendant's responses to RPD Nos. 3 and 4. Thus, the court construes the motion with respect to the RPD as being directed to RPD Nos. 3 and 4.

Plaintiff also requested an award of monetary sanctions in the amount of $7,560 against Defendant and its counsel. However, Plaintiff withdrew the request for monetary sanctions on March 6, 2024.

IV. DISCUSSION

A. SI No. 1

SI No. 1 asks Defendant to identify each and every aggrieved employee, and each employee who supervised them, during the relevant time period, and state each location where aggrieved employees worked.

Defendant initially provided an objection-only response to the request.

In its most recent response to the request, Defendant re-asserts its earlier objections. Defendant also provides a substantive response with respect to Plaintiff, which identifies Plaintiff's dates of employment, job position, and job location. In addition, Defendant states that subject to a confidentiality order and an agreed-upon *Belaire-West* notice, it offers to produce a random sampling of contact information and job history for certain putative aggrieved employees in Plaintiff's position and Plaintiff's district during the relevant period.

After the filing of the instant motion, Plaintiff filed a notice with the court it was only seeking the sought-after discovery for a randomized sample of 5,000 potentially aggrieved employees (i.e., approximately 20 percent of the total aggrieved employees).

Except as expressly discussed below, Defendant does not defend its objections to the request. Thus, the undefended objections are without merit and are overruled. (See *Coy, supra*, 58 Cal.2d at pp. 220-221.)

In its opposition, Defendant objects to producing a random sampling of contact information and job history for more than 2,293 potentially aggrieved employees (i.e., approximately 10 percent of the total aggrieved employees). Defendant contends that information regarding the larger group of potentially aggrieved employees is irrelevant because Plaintiff's expert plans to complete a modest survey of only 380 witness and rely on the results of the survey to inform his theories of liability and damages. Defendant concludes that the offered sample of 10 percent of potential aggrieved employees should be sufficient to develop the survey proposed by Plaintiff's expert because Plaintiff's expert expects a response rate of 25 percent. Defendant also contends that Plaintiff's expert should not need a sample size of more than 10 percent of the total aggrieved employees because the plan proposed by Plaintiff's expert to exclude potential aggrieved employees who worked 20 shifts or less is unreasonable

and an attempt to drive up the estimated penalties. Defendant further asserts that Plaintiff's expert's conclusion that 20-30 percent of the sample will not be reachable cause they have changed their phone numbers is unsubstantiated. Defendant also asserts that Plaintiff, himself, is an inadequate witness because Plaintiff's expert states that employees who worked less than 20 shifts should not be included in the survey. Finally, Defendant objects to the disclosure of information regarding all potentially aggrieved employees on the ground of privacy.

Here, the discovery sought by SI No. 1 is indisputably relevant to Plaintiff's claim as it seeks to identify potential aggrieved employees. Defendant's argument in opposition—that Plaintiff is an inadequate witness and his claim is not representative of other aggrieved employees—is not a basis for denying discovery. In *Williams v. Superior Court* (2017) 3 Cal.5th 531, 551 court explained,

> "The Legislature was aware that establishing a broad right to discovery might permit parties lacking any valid cause of action to engage in "fishing expedition[s]," to a defendant's inevitable annoyance. [Citation.] It granted such a right anyway, comfortable in the conclusion that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." [Citation.]

(*Williams, supra*, 3 Cal.5th at p. 551.) Consequently, that the claim, as alleged by the plaintiff, may be invalid for various reasons is not a basis for denying discovery. For these reasons, Defendant's overbreadth objection is overruled.

> Next, Defendant's privacy objection is not well-taken.
> The state Constitution expressly grants Californians a right of privacy. [Citation.] Protection of informational privacy is the provision's central concern. [Citation.] In *Hill*, we established a framework for evaluating potential invasions of privacy. The party asserting a privacy right must establish a legally protected privacy interest, an objectively reasonable expectation of privacy in the given circumstances, and a threatened intrusion that is serious. [Citation.] The party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy. A court must then balance these competing considerations. [Citation.]
>
> The *Hill* test, conceived in the context of a pleaded cause of action for invasion of privacy, has been applied more broadly, including to circumstances where litigation requires a court to reconcile asserted privacy interests with competing claims for access to third party contact information. [Citations.] In *Pioneer Electronics*, we used the *Hill* framework to resolve the same question the trial court faced here—the extent to which a litigant should have access to nonparty contact information. In the context of a consumer class action, we concluded fellow consumers who had already complained about a product defect had little or no expectation their contact information would be withheld from a plaintiff seeking relief from the manufacturer on behalf of consumers [citation], that disclosure would involve "no serious invasion of privacy" [citation], and in any event that conditioning disclosure on an opt-in notice might significantly limit

> the ability of named plaintiffs "to redress a variety of social ills" through collective action [citation].
>
> In turn, *Pioneer Electronics* was extended to wage and hour class actions by *Belaire-West Landscape, Inc. v. Superior Court*…. Before class certification, the named plaintiff sought statewide employee contact information for the preceding five years. While fellow employees generally had a reasonable expectation of privacy in their contact information, the court doubted they would have "wish[ed] it to be withheld from a class action plaintiff who seeks relief for violations of employment laws." [Citation.] Nor was any prospective invasion of privacy serious: "the information, while personal, was not particularly sensitive, as it was contact information, not medical or financial details." [Citation.] Moreover, the balance of competing interests favored disclosure even more clearly than in *Pioneer Electronics*; "at stake [was] the fundamental public policy underlying California's employment laws." [Citation.] The *Belaire-West* trial court was correct to order disclosure, subject to employees being given notice of the action, assurance they were under no obligation to talk to the plaintiffs' counsel, and an opportunity to opt out of disclosure by returning an enclosed postcard.
>
> Courts subsequent to *Belaire-West* have uniformly applied the same analysis to reach the same conclusion: In wage and hour collective actions, fellow employees would not be expected to want to conceal their contact information from plaintiffs asserting employment law violations, the state policies in favor of effective enforcement of these laws weigh on the side of disclosure, and any residual privacy concerns can be protected by issuing so-called *Belaire-West* notices affording notice and an opportunity to opt out from disclosure. [Citations.]

(*Williams, supra,* 3 Cal.5th at pp. 552-553.)

Here, although absent employees have a bona fide interest in the confidentiality of their contact information, fellow employees might reasonably expect that their names and addresses would be given to a plaintiff seeking to vindicate their rights and, at a minimum, would have no reason to expect their information would be categorically withheld. (*Williams, supra*, 3 Cal.5th at p. 554.) Moreover, the law is well-settled that contact information is not particularly sensitive information; consequently, its disclosure fails to amount to a serious invasion of the right to privacy. (See *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1253 ["[T]he requested information, while personal, is not particularly sensitive, as it is merely contact information, not medical or financial details, political affiliations, sexual relationships, or personnel information."].) In this case, the disclosure of the potential aggrieved employees' contact information is necessary to the prosecution of this matter as the aggrieved employees are potential witnesses to Defendant's alleged wage and hour violations. Thus, the privacy interest in the employees' contact information is minimal and outweighed by Plaintiff's interest in discovering relevant information.

Furthermore, Plaintiff has stated that he is willing to accept, as a condition of disclosure, a *Belaire-West* notice to employees affording them an opportunity to opt out of having their information shared. In the court's view, any privacy concerns can be mitigated by conditioning discovery on a *Belaire-West* notice. For these reasons, Defendant's privacy objection is overruled.

Defendant's final objection—that Plaintiff does not need a sample size of more than 10 percent of the total aggrieved employees for Plaintiff's expert to conduct an adequate survey—is not well-taken. As Plaintiff persuasively argues, the contact information of the aggrieved employees is relevant for an additional purpose, beyond the employees' participation in the survey, because aggrieved employees are potential witnesses to Defendant's alleged wage and hour violations. Thus, the fact that Plaintiff's expert may not need a sample size of 20 percent of the total aggrieved employees in order to conduct his survey does not demonstrate that the contact information for those aggrieved employees is irrelevant.

Because all of Defendant's objections are overruled, a further response to SI No. 1 is warranted.

B. RPD Nos. 3 and 4

RPD No. 3 asks Defendant to produce all payroll data, wage records, wage statements, paycheck stubs or other documents that pertain to wages paid to each and every aggrieved employee during the relevant time period. RPD No. 4 asks Defendant to produce, for each aggrieved employee, all documents that describe the hours worked for Defendant during the relevant time period.

Defendant initially provided objection-only responses to the requests.

In its most recent responses to the request, Defendant re-asserts its earlier objections. Defendant also provides substantive responses stating that it produced payroll records, including itemized wage statements, for Plaintiff. In addition, Defendant states that subject to a confidentiality order and an agreed-upon *Belaire-West* notice, it offers to produce a random sampling of contact information, job history, and payroll records for certain putative aggrieved employees in Plaintiff's position and Plaintiff's district during the relevant period.

After the filing of the instant motion, Plaintiff filed a notice with the court it was only seeking the sought-after discovery for a randomized sample of 5,000 potentially aggrieved employees (i.e., approximately 20 percent of the total aggrieved employees).

As a threshold matter, there is generally good cause for the sought-after discovery. Documents showing the hours worked by, and the wages paid to, the potential aggrieved employees are directly relevant to the claimed wage and hour violations. Such information would tend to prove or disprove Plaintiff's PAGA claim and will allow Plaintiff to evaluate the merit of his claim.

With respect to Defendant's objections, except as expressly discussed below, Defendant does not defend its objections to the request. Thus, the undefended objections are without merit and are overruled. (See *Coy, supra*, 58 Cal.2d at pp. 220-221.)

In its opposition, Defendant attempts to justify the same objections that it raised with respect to SI No. 1. For the reasons already explained above, those objections are not well-taken and are overruled.

For these reasons, further responses to RPD Nos. 3 and 4 are warranted.

C. Request for Monetary Sanctions

Defendant requests an award of monetary sanctions in the amount of $14,150 against Plaintiff and his counsel pursuant to Code of Civil Procedure sections 2030.300 and 2031.310.

Those statutes provide for an award of monetary sanctions against a party or attorney who unsuccessfully brings a motion to compel further responses to interrogatories and request for production of documents.

Here, Defendant did not prevail in its opposition to the instant motion. Consequently, it is not entitled to an award of monetary sanctions.

D. Conclusion

Accordingly, Plaintiff's motion to compel Defendant to provide further responses to SI No. 1 and RPD Nos. 3 and 4 is GRANTED. Within 30 days of the date of the filing of the order on this matter, Defendant shall serve Plaintiff with code-compliant, further responses to SI No. 1 and RPD Nos. 3 and 4 (except as to those aggrieved employees who have opted-out pursuant to the *Belaire-West* process), without objections (except for those based on the attorney-client privilege and work product doctrine which are preserved), and produce documents in accordance with its further responses. If any responsive documents are withheld from production on the grounds they are protected by the attorney-client privilege or work product doctrine, Defendant shall produce a privilege log identifying each item withheld from production and setting forth sufficient facts to permit evaluation of the merits of the asserted objection. Defendant's request for an award of monetary sanctions is DENIED.

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

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