SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

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

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

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LAW AND MOTION TENTATIVE RULINGS
DATE: MARCH 14, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV384595	Bonwell v. Silverado Senior Living Management, Inc. (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	21CV385298	Ibarra v. Lite-On, Inc., et al. (Class Action)	See Line 2 for tentative ruling.
LINE 3	19CV343871	Langlands, et al. v. Leland Stanford Junior University (Class Action/PAGA)	See Line 3 for tentative ruling.
LINE 4	23CV411121	Celestino v. Accurate Courier NCA, LLC (Class Action/PAGA)	See Line 4 for tentative ruling.
LINE 5	19CV348674	In Re Cloudera, Inc. Securities Litigation (formerly Lazard v. Cloudera, Inc., et al.) Lead Case/Consolidated Action	Tentative ruling provided directly to the parties.
LINE 6			
LINE 7			
LINE 8			
LINE 9			

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LAW AND MOTION TENTATIVE RULINGS

LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Aireen Bonwell v. Silverado Senior Living Management, Inc.*
Case No.: 21CV384595

This is a representative action under the Private Attorneys General Act ("PAGA"). Plaintiff alleges that Defendant Silverado Senior Living Management, Inc. committed wage statement violations and incorrectly calculated the pay rate used to pay meal and rest period premiums.

Before the Court is Plaintiff's motion for approval of PAGA settlement, which is unopposed. As discussed below, the Court GRANTS Plaintiff's motion.

I. BACKGROUND

As alleged in the operative complaint, Plaintiff worked for Defendant as an RN Case Manager from November 13, 2020 to June 28, 2021. (Second Amended Class Action Complaint for Damages ("SAC"), ¶ 6.) Plaintiff alleges that Defendant failed to provide her and other employees with accurate itemized wage statements and failed to pay meal and rest break premiums at the regular rate of pay. (*Id*., ¶ 18.) Specifically, whenever overtime incentive wages were paid, the wage statements failed to identify the correct rates of pay and applicable number of hours for such wages. (*Id*., ¶ 20.) Whenever meal and rest break premium wages were paid, the meal and rest break premium wages were paid at the base hourly rate of pay, which did not include the non-discretionary incentive wages received during the same period. (*Ibid*.)

Based on these allegations, the SAC initially asserted putative class claims for: (1) violation of
Labor Code section 226; (2) violation of Labor Code sections 226.7 and 512; and (3) violation of
Business & Professions Code section 17200 et seq.; and (4) a representative claim under PAGA.

In October 2022, Defendant moved to compel arbitration of all of Plaintiff's claims, including the PAGA claim, based on the U.S. Supreme Court's then recently-issued decision in *Viking River Cruises, Inc. v. Moriana* (2022) __ U.S. __ [142 S.Ct. 1906, 2022 U.S. LEXIS 2940]. In an order dated October 17, 2022, the Court granted Defendant's motion as to Plaintiff's individual claims under the Labor Code and Business and Professions Code, as well as her individual claim under PAGA. Pursuant to the subject arbitration agreement, the Court dismissed the putative class claims. Finally, Plaintiff's representative PAGA claim was stayed pending a decision by the California Supreme Court in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104.

The parties subsequently engaged in private mediation in September 2023 and reached the settlement agreement presently before the Court.

II. LEGAL STANDARD FOR APPROVING PAGA SETTLEMENT

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___, 2022 U.S. LEXIS 2940.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency (LWDA), leaving the remaining 25 percent for the employees. (*Ibid.*) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id.* at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

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.) "[C]lass certification is not required" in this context as in a class action. (*Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 (*Haralson*).)

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 (*Moniz*).) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson, supra,* 383 F. Supp. 3d at p. 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

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 PROCESS, AND THE PARTIES' AGREEMENT

On September 19, 2023, the parties engaged in private mediation with Christopher Panetta, Esq. In connection with the mediation, Defendant provided Plaintiff's counsel with information regarding the number of pay periods where meal and rest break premium wages and non-discretionary remuneration were paid during the same pay period and wage statements that included the foregoing. Based on this information, the parties conducted settlement negotiations and, after further post-mediation negotiations through Mr. Panetta, ultimately reached settlement of all claims.

Pursuant to the settlement agreement, Defendant will pay a gross amount of $250,000, of which $83,333.33 (one-third of the gross settlement) is allocated to attorney's fees, up to

$11,003.18 in litigation costs, $5,000 to Plaintiff in exchange for a general release, and up to $10,000 in administrative costs. The net settlement amount of $140,663.40 will be distributed 75 percent ($105,497.62) to the LWDA and 25 percent ($35,165.87) to "Aggrieved Employees," who are defined as "all current and former persons employed by Defendant as non-exempt hourly paid employees in California at any point during the period of July 15, 2020, to April 10, 2022," *and* who either, during the aforementioned period, (a) received meal period or rest period premium pay at a rate lower than the regular rate of pay or (b) was provided with "OT Incentive" or "Coefficient OT Amount" pay on a wage statement. These individuals will receive a payment that is proportionate to the number of pay periods worked in which one of the alleged issues in this matter occurred.

In exchange for settlement, the Aggrieved Employees will release:

> [A]ny and all claims under the PAGA alleged in the Complaint or could have been alleged based on the facts pertaining to Plaintiff and the Aggrieved Employees. This includes PAGA claims predicated on alleged violations of the California Labor Code sections 201, 202, 203, 226, 226.7, 512, and the applicable California Industrial Welfare Commission Wage Orders.

This release is effective during the PAGA period, which is defined as July 15, 2020, to April 10, 2022. The release is appropriately tailored to the allegations at issue, and does not release any claims other than those for PAGA penalties. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537; *Moniz, supra,* 72 Cal.App.5th at p. 82 [release of "all known and unknown claims under PAGA … that were or could have been pled based on the allegations of the Complaint" was appropriately approved].)

IV. DISCUSSION

A. Potential Verdict Value

As part of the settlement negotiations, Defendant provided Plaintiff with data concerning the number of pay periods at issue for each of the claims, and from this Plaintiff's counsel calculated Defendant's maximum exposure to be $4,281,650.

A court can decline to award the full amount of PAGA penalties where, "if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (See, e.g., *Carrington v. Starbucks Corp.* (2018) 390 Cal.App.5th 504, 517 [affirming trial court's 90% reduction of maximum PAGA penalty amount given employer's good faith attempt at complying with the law].) After calculating Defendant's maximum exposure, Plaintiff discounted that exposure for settlement purposes to account for the risks of continued litigation, as well as Defendant's arguments on the merits (including that it operated in good faith at all times with regards to its pay practices and wage statement penalties are not available for rate violations) and the likelihood that the Court would reduce the amount of penalties.

In consideration of the foregoing, the history of various similar PAGA decisions in which potential penalties were significantly reduced (i.e., in excess of 80%), and the risk that Plaintiff may recover nothing, the Court finds that the proposed settlement- which does not

extinguish any individual wage and hour claims- is fair to those affected and is genuine, meaningful, and reasonable in light of the statute's purposes.

B. Attorney Fees

While the PAGA statute does not expressly require judicial review of claimed attorney fees, the Court believes it cannot adequately fulfill its statutory duty to review the penalties associated with PAGA settlements without also considering attorney fees. The Court thus finds that it must scrutinize the attorney fee arrangement associated with a PAGA settlement. This is consistent with the observation of many courts that PAGA claims are analogous to "*qui tam*" suits like those under the federal False Claims Act: when reviewing settlements of *qui tam* claims, courts should and do consider any associated attorney fee arrangement. (See *U.S. v. Texas Instruments Corp.* (9th Cir. 1994) 25 F.3d 725, 728 [attorney fee award must be considered by the trial court as part of its review of the "entire settlement arrangement"].)

Plaintiff seeks a fee award of $83,333.33, one-third of the gross settlement, which is not an uncommon contingency fee allocation in similar actions. 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 submits a lodestar figure of $133,650, based on 128.50 hours spent on this case by counsel billing at a rate of $900 per hour. This amount far exceeds the fee requested by Plaintiff here, resulting in negative multiplier. Accordingly, the lodestar cross check supports the percentage fee actually requested and this amount is approved. (See *Laffitte v. Robert Half Intern. Inc.* (Cal. 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].)

C. Other Costs, Payments and Expenses

Counsel's request for actual litigation costs of $11,003.18 appears reasonable based on the supporting declarations provided, as is the request for up to $10,000 in administrative costs and a $5,000 service award to Plaintiff in exchange for her executing in a general release, as well as compensating her for the time spent on this case.

V. ADMINISTRATION PROCESS

The parties have agreed on Phoenix Settlement Administrators ("Phoenix") to handle administration of the settlement. Under the terms of the settlement, within five calendar days from the date the Court signs an Order and Judgment approving its terms, Defendant will provide Phoenix with a list of the Aggrieved Employees and their relevant identifying and contact information. Within 30 calendar days of the aforementioned date, Defendant will fully fund the gross settlement amount by transmitting the funds to Phoenix.

Within 10 days after the gross settlement amount is funded, Phoenix will disburse the various settlement amounts discussed above. Payments to Aggrieved Employees will be made by check via U.S. Mail, with Phoenix first having updated the addresses for these individuals using the National Change of Address database. Any checks returned as non-deliverable will be re-mailed to any forwarded address or updated address located by using the National Change of Address database, a skip trace, direct contact by the administrator with the

Aggrieved Employees, or any other reasonably available sources and methods. Checks shall remain valid for 180 days, and thereafter, will be cancelled, with associated funds transmitted to the State of California Controller's Unclaimed Property Fund in the name of the Aggrieved Employee.

These administrative procedures are appropriate and are approved.

VI. ORDER AND JUDGMENT

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

Plaintiff's motion for approval of PAGA settlement is GRANTED. The "Aggrieved Employees" are: "all current and former persons employed by Defendant as non-exempt hourly paid employees in California at any point during the period of July 15, 2020, to April 10, 2022," *and* who either, during the aforementioned period, (a) received meal period or rest period premium pay at a rate lower than the regular rate of pay or (b) was provided with "OT Incentive" or "Coefficient OT Amount" pay on a wage statement.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff shall take from the SAC only the relief set forth in the parties' settlement agreement and this order and judgment. The Court retains jurisdiction over the parties to enforce the terms of the PAGA settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **November 21, 2024 at 2:30 P.M.** in Department 7. At least ten court days before the hearing, Plaintiff's counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to the Controller's Office; the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel may appear at the compliance hearing remotely.

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: *Jaime Ibarra v. Lite-On, Inc., et al.*
Case No.: 21CV385298

This is a representative action under the Private Attorneys General Act ("PAGA"). Plaintiff Jaime Ibarra alleges that Defendants Lite On, Inc., Lite-On Technology Service, Inc. and Lite-On Trading USA, Inc. (collectively, "Defendants") 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.

Before the Court is Plaintiff's motion for approval of PAGA settlement, which is unopposed. As discussed below, the Court GRANTS Plaintiff's motion.

VII. BACKGROUND

According to the allegations of the operative First Amended Complaint, Plaintiff was employed by Defendants as a non-exempt employee from January 1, 2017, through March 25, 2021. Defendant Lite-On Inc. is engaged in the research, development, sale and distribution of optoelectronics, which are systems that detect and control light. Defendant Lite-On Technology Service, Inc. provides related electronic devices, while defendant Lite-On Trading USA, Inc. provides customer service, account management, and technical support for Lite-On products. Defendants allegedly 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.

Plaintiff initiated this action on August 6, 2021 with the filing of a putative class action complaint asserting nine causes of action. On September 8, 2021, Plaintiff filed the FAC, asserting an additional cause of action under PAGA based on the same purported Labor Code violations giving rise to the original nine causes of action.

VIII. LEGAL STANDARD FOR APPROVING PAGA SETTLEMENT

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___, 2022 U.S. LEXIS 2940.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency (LWDA), leaving the remaining 25 percent for the employees. (*Ibid.*) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id.* at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

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.) "[C]lass certification is not required" in this

context as in a class action. (*Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 (*Haralson*).)

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 (*Moniz*).) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson, supra,* 383 F. Supp. 3d at p. 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

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. PLAINTIFF'S INVESTIGATION, SETTLEMENT PROCESS, AND THE PARTIES' AGREEMENT

After the commencement of this action, the parties engaged in formal discovery, propounding various interrogatories and requests for productions of documents, as well as deposition notices. After issues developed with the sufficiency of the parties' responses to discovery, they engaged in an informal discovery conference in August 2022, and were able to resolve many of their disputes. In October 2022, Plaintiff propounded additional discovery and, through the responses to these requests, confirmed that there was a very limited number of employees within the potential class period. Consequently, the parties began informal settlement efforts to resolve the PAGA claims but were unable to reach an agreement.

On October 27, 2023, the parties attended an early settlement conference with the Court and, after debating their positions and providing analysis for the Court's consideration, accepted a proposal- made by the Court- to resolve the representative PAGA claims at issue for a gross settlement amount of $9,500. On November 7, 2023, the Court granted Plaintiff's request to dismiss his class claims without prejudice. The parties then spent time drafting, revising and negotiating the terms of a long form settlement agreement, resulting in the execution on January 17, 2024 of the Joint Stipulation of PAGA Settlement (the "Agreement") now before the Court.

Pursuant to the Agreement, Defendants will pay a non-reversionary gross settlement amount of $9,500, which is comprised of $3,166.67 in attorney's fees (one-third of the gross settlement amount) and $223.90 in litigation costs. There are no administrative costs because the parties have agreed that Defendants will handle the administration of the PAGA settlement. The net settlement of approximately $6,109.43 will be distributed 75 percent ($4,582.07) to the LWDA and 25 percent ($1,527.36) to the PAGA members (i.e., "Aggrieved Employees") on a

pro rata basis based on the number of pay periods each PAGA member worked during the PAGA period, i.e., the period of time from August 6, 2020 through October 27, 2023. It is estimated that there are approximately 268 pay periods within the foregoing period, however, if the actual number of pay periods exceeds this amount by more than 10%, the Agreement provides that Defendants will have the option to either increase the gross settlement amount on a pro rata basis equal to the percentage increase beyond this 10% threshold or cut off the PAGA period so that this escalator is not needed.

In exchange for settlement, Aggrieved Employees (and the State of California and the LWDA) will release Defendants from all claims under the California Labor Code Private Attorneys General Act of 2004 for civil penalties that arose during the PAGA Period and which could have been premised on the facts alleged in the PAGA Letter to the LWDA and/or in the operative complaint in in the Action including but not limited to penalties that could have been awarded pursuant to Labor Code sections 210, 226.3, 1197.1, 558, and 2699. The Released Claims expressly exclude all claims by PAGA Members for individual wage claims, vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, claims while classified as exempt, and claims outside of the PAGA Period. (See Settlement Agreement, ¶¶ 17, 18, 35-39.)

The release is appropriately tailored to the allegations at issue, and does not release any claims other than those for PAGA penalties. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537; *Moniz, supra,* 72 Cal.App.5th at p. 82 [release of "all known and unknown claims under PAGA … that were or could have been pled based on the allegations of the Complaint" was appropriately approved].)

X. DISCUSSION

D. Potential Verdict Value

Based on the data provided by Defendants, Plaintiff estimated the maximum exposure of the PAGA claims to be $168,500. Several factors reduced this amount, including the Court's expressed unwillingness to stack penalties; this factor alone reduced the value of Plaintiff's PAGA claim down to $76,500. Additionally, Plaintiff faced the difficulty of proving the underlying Labor Code violations, which was made particularly harder by the fact that the majority of the PAGA members were current employees who had provided declarations asserting that they had not suffered from any of the alleged Labor Code violations. Plaintiff also anticipated potential manageability issues. Based on the foregoing, Plaintiff further discounted Defendants' estimated liability, resulting in an adjusted amount of $9,359.24. In consideration of these facts, the history of various similar PAGA decisions and the risk that Plaintiff may recover nothing, the Court finds that the proposed settlement is fair to those affected and is genuine, meaningful, and reasonable in light of the statute's purposes.

E. Attorney Fees

While the PAGA statute does not expressly require judicial review of claimed attorney fees, the Court believes it cannot adequately fulfill its statutory duty to review the penalties associated with PAGA settlements without also considering attorney fees. The Court thus finds that it must scrutinize the attorney fee arrangement associated with a PAGA settlement. This is consistent with the observation of many courts that PAGA claims

are analogous to "*qui tam*" suits like those under the federal False Claims Act: when reviewing settlements of *qui tam* claims, courts should and do consider any associated attorney fee arrangement. (See *U.S. v. Texas Instruments Corp.* (9th Cir. 1994) 25 F.3d 725, 728 [attorney fee award must be considered by the trial court as part of its review of the "entire settlement arrangement"].)

Plaintiff seeks a fee award of $3,166.67, one-third of the gross settlement, which is not an uncommon contingency fee allocation in a wage and hour/PAGA action. Plaintiff also submits a lodestar figure of $19,410 based on 28.6 hours spent on this case by counsel billing at rates of $550 to $850 per hour. This amount far exceeds the fees requested by Plaintiff here, resulting in a negative multiplier. Accordingly, the lodestar cross check supports the percentage fee actually requested and this amount is approved. (See *Laffitte v. Robert Half Intern. Inc.* (Cal. 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].)

F. Other Costs and Expenses

Counsel's request for litigation costs of $223.90 appears reasonable based on the supporting declaration provided which establishes that counsel actually incurred costs in this amount and is approved.

XI. ADMINISTRATION PROCESS

The parties have agreed that no later than 14 days after the "Effective Date,"[1] Defendants will provide Plaintiff's counsel with an anonymized list with final calculations for their review and approval. Following this approval, and no later than twenty-eight days after the Effective Date, Defendants will pay the various amounts approved by the Court to Plaintiff's counsel, the LWDA, and each PAGA member. Each PAGA member will be sent a check in the appropriate amount and if such payment is returned to Defendants as undeliverable, they will search for a more current addresses and re-mail payment no later than five calendar days after the payment was returned. Any checks that remain uncashed after 180 days will be transmitted to Bay Area Legal Aid as the *cy pres* recipient. These administrative procedures are appropriate and are approved.

XII. ORDER AND JUDGMENT

Plaintiff's motion for approval of the parties' PAGA settlement is GRANTED. The PAGA members are: all current and former non-exempt employees of Defendants who for worked for Defendants in California at any time from August 6, 2020, through October 27, 2023.

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[1] This term is defined by the Agreement as the later of the following: (a) if no timely objections are filed or if all objections are withdrawn, the date 61 days after entry of the Court's Order approving the PAGA Settlement; (b) if an objection is filed and not withdrawn, the date for filing an appeal and no such appeal being filed; (c) if any timely appeals are filed, the date of the resolution (or withdrawal) of any such appeal in a way that does not alter the terms of the Settlement or Judgment.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff and the PAGA members shall take from the PAGA claim in their FAC only the relief set forth in the parties' settlement agreement and this order and judgment. The Court retains jurisdiction over the parties to enforce the terms of the PAGA settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **October 24, 2024 at 2:30 P.M.** in Department 7. At least ten court days before the hearing, Plaintiff's 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 Bay Area Legal Aid; the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel may appear at the compliance hearing remotely.

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: *Sara Langlands, et al. v. Leland Stanford Junior University*
Case No.: 19CV343871

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiffs Sara Langlands, Leighland Hooks and Marisol Hernandez (collectively, "Plaintiffs") allege that Defendant Leland Stanford Junior University ("Defendant" or "Stanford") failed to pay overtime and minimum wages, failed to provide meal and rest periods or pay associated premiums, and failed to provide code-complaint wage statements, among other Labor Code violations.

Before the Court is Plaintiffs' motion for preliminary approval of settlement, which is unopposed. As discussed below, if satisfactory clarification is provided concerning whether the notice will be provided in languages other than English, the Court will GRANT the motion.

XIII. BACKGROUND

According to the allegations of the operative Third Amended Complaint ("TAC"), Plaintiffs worked in different positions as non-exempt, non-unionized employees of Stanford in California. Sara Langlands worked for Stanford's Department of Music and Stanford Live for over five years as a part-time Administrative Assistant and as a Project Manager and Production Coordinator. (*Ibid*.) Leighland Hooks also worked in Stanford's Department of Music and Stanford Live. For approximately three years, his job duties involved setting up and operating sound and lighting equipment. (*Ibid*.) Marisol Hernandez worked as a Public Safety Officer for Stanford for over seven years.

Plaintiffs allege that Stanford failed to compensate them for hours worked in excess of eight hours per day and forty hours per week. (TAC, ¶¶ 12-17.) Defendant also failed to provide Plaintiffs with code-compliant meal and rest periods or the legally-mandated premiums for not doing so. (*Id*. at ¶¶ 18-22.) Defendant additionally failed to pay Plaintiffs for travel time between job locations and mandatory meetings, reimburse them for expenses incurred for such travel, and failed to provide them with accurate and itemized wage statements in accordance with California law. (*Id*. at ¶¶ 23-26.) Finally, Stanford failed to reimburse Plaintiffs for all business-related expenses as required, including expenses associated with work-related cell phone usage. (*Id*., ¶ 25.)

Based on the foregoing allegations, Plaintiffs assert the following causes of action: (1) failure to pay all overtime earned for hours worked; (2) failure to provide meal periods; (3) failure to provide rest periods; (4) failure to pay wages for all hours worked; (5) violation of Labor Code §§ 204 and 210; (6) failure to provide accurate wage statements; (7) violation of Business & Professions Code § 17200, et seq.; (8) expense reimbursement; (9) failure to produce records; (10) penalties under PAGA.

Plaintiffs now seek an order: preliminarily approving the proposed settlement; provisionally certifying the Class; provisionally approving Plaintiffs as class representatives; provisionally approving Plaintiffs' counsel as Class counsel; setting a final fairness and approval hearing; appointing ILYM Group as the settlement administrator; and approving and distributing notice of settlement to the Class.

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

As part of their investigation into their claims, Plaintiffs propounded four sets of written discovery and reviewed a large volume of documents, information, and data regarding the claims asserted in this action, along with Stanford's available defenses. Prior to mediation, the parties engaged in informal discovery, with Stanford producing and Plaintiffs' counsel reviewing a sample of the time records and wage statements for approximately ten percent of Class Members.

Plaintiffs' counsel retained an economist to conduct a damages analysis with the aforementioned data to calculate the violation rates and potential exposure of Plaintiffs' claims; the economist extrapolated damages for the ten percent of Class Members to generate a damages model for *all* Class Members from March 15, 2015 to August 15, 2023, i.e., the Class period.

On May 24, 2023, the parties participated in mediation with mediator Tripper Ortman, Esq. and, with his assistance, were able to resolve this matter, ultimately reaching and executing the settlement agreement currently before the Court.

XVI. SETTLEMENT PROVISIONS

The non-revisionary gross settlement amount is $6,000,000. Attorney fees of up to one-third of the gross settlement (currently $2,000,000), litigation costs not to exceed $75,000, and administration expenses not to exceed $100,000 will be paid from the gross settlement. $300,000 will be allocated to PAGA penalties, 75% of which ($225,000) will be paid to the LWDA. Plaintiffs will seek enhancement awards of $20,000 for Ms. Langlands, $20,000 for Mr. Hooks and $7,500 for Ms. Hernandez.

The net settlement will be allocated to Class Members on a pro rata basis based on the number of weeks worked during the Class period. For tax purposes, settlement payments will

be allocated 20% to wages, 60% to penalties and 20% to interest. The employer side payroll taxes on the settlement payments will be paid by Defendant separately from, and in addition to, the gross settlement amount.–100% of the PAGA settlement to "Aggrieved Employees" will be allocated to penalties. Funds associated with checks uncashed after 180 days will be donated to The Law Foundation of Silicon Valley, the designated *cy pres* recipient.

In exchange for settlement, Class Members who do not opt out will release:

> [A]ll all claims, charges, complaints, liens, demands, causes of action, obligations, damages, and liabilities, from March 6, 2015, through the earlier of December 31, 2023, or the date of preliminary approval of the Parties' Settlement Agreement by the Court (the Class Period), known or unknown, suspected or unsuspected, that each participating Class Member had, now has, or may hereafter claim to have during the Class Period against Defendant The Board of Trustees of the Leland Stanford Junior University, its agents, trustees, officers, employees, directors, owners, subsidiaries, DBA's, affiliates, and predecessors and successors (the Released Parties), and that were asserted in the Action, or that arise from or could have been asserted based on any of the facts, circumstances, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act alleged in Plaintiffs' Third Amended Complaint and Notice to the LWDA, regardless of whether such claims arise under federal, state, and/or local law, statute, ordinance, regulation, common law, or other source of law ….

"Aggrieved Employees" will also release "any claim for civil penalties pursuant to the California Labor Code Private Attorneys General Act of 2004, Labor Code section 2698 *et seq.* that arose during the PAGA Period, as asserted in the Action, or that could have been asserted based on the facts, claims, causes of action, and legal theories that were asserted in the Action and identified in the Notices to the LWDA dated March 7, 2019 and April 19, 2022." Consistent with the statute, Aggrieved Employees will not be able to opt out of the PAGA portion of the settlement.

The foregoing releases 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

Based on a review of available data and the analysis performed by Plaintiffs' retained expert, Plaintiffs' counsel estimated Defendant's maximum exposure for each claim at the following amounts: $4,420,566 (failure to pay overtime and double time wages); $14,128.545 (failure to provide meal periods); $0 (failure to authorize and permit rest periods); $64,460,504 (waiting time penalties); $0 (failure to pay timely wages); $4,377,928 (failure to provide accurate wage statements); $0 (failure to reimburse business expenses); $0 (failure to produce records); $0 (UCL); and $30,000,000 (PAGA penalties). However, Plaintiffs' counsel arrived at a reasonable settlement value for each of the foregoing claims by offsetting or reducing Stanford's maximum theoretical liability by: the risk of class certification being denied due to potential individualized issues; Defendant's arguments on the merits, including, among other things, that each (of 70 total) department handled overtime differently but in compliance with the law, that any violations were mistakes committed by employees and/or their managers, that Class Members were permitted to take meal breaks or were paid a premium when they were

not and that any of its actions were not willful; and the unmanageability of the PAGA claims given the amount of employees in this action and the fact that they worked in a large number of different locations, job classifications and departments. Plaintiffs submit that the aggregate reasonable settlement value for their claims, including the PAGA claims, is approximately $5,000,000.

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:

(1) all current and former non-exempt employees, defined as full and part time non-exempt employees whether paid on a salary or hourly basis who were included in pay groups NX1, NXH, HR2 and NX2, excluding enrolled students and bargaining unit members, who worked in California between March 6, 2015, and the earlier of December 31, 2023, or the date of preliminary approval of the parties' settlement agreement by the Court; and
(2) all current or former Contingent (non-exempt employees hired on a Casual or Temporary basis) non-exempt employees who worked in Stanford's Department of Public Safety, Department of Music, Bing Concert Hall, Music Library, Stanford Video, and CCRMA-Computer Music Lab, and Stanford Live, excluding students and bargaining unit members, who worked in California between March 6, 2015, and the earlier of December 31, 2023, or the date or preliminary approval of the parties' settlement agreement by the Court.

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 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 25,290 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 Stanford's wage and hour practices (and others) applied to the similarly-situated Class Members.

As for 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 employees in the specified departments 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 25,290 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 and 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 pay periods as reflected in Defendant's records and are instructed how to dispute this information. Class Members are given 60 days to request exclusion from the class or submit a written objection to the settlement.

Plaintiffs do not indicate whether the notice will be provided in any languages other than English and whether such translation would be reasonably necessary for the Class Members to understand the notice. The Court requests that Class counsel be prepared to discuss, at the hearing on this matter, whether notice should be provided in languages other than English and why or why not.

Otherwise, the form of notice is generally adequate, but must be modified to instruct Class Members that they may opt out of or object to the settlement simply by providing their name, without the need to provide their phone number or other personal information.

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 7 (Afternoon Session) or by calling the toll free conference call number for Department 7. Any class member who wishes to appear in person should check in at Court Services (1st floor, Downtown Superior Courthouse, 191 N. 1st St., San Jose) and wait for a sheriff's deputy to escort him or her to the courtroom for the hearing.

Turning to the notice procedure, the parties have selected ILY Group as the settlement administrator. The administrator will mail the notice packet no more than 45 days after preliminary approval of the parties' settlement, after updating Class Members' addresses through a search on the National Change of Address Database. Any returned notices will be re-mailed to any forwarded address provided or an updated address located through a skip trace. Class Members who receive a re-mailed notice will have an additional 10 days to respond. These notice procedures are appropriate and are approved.

XX. CONCLUSION

Presuming satisfactory clarification is provided concerning whether the notice will be provided in languages other than English, the Court will GRANT the motion for preliminary approval.

The final approval hearing shall take place on **September 19, 2024** at 1:30 in Dept. 7. The following class is preliminarily certified for settlement purposes:

1) all current and former non-exempt employees, defined as full and part time non-exempt employees whether paid on a salary or hourly basis who were included in pay groups NX1, NXH, HR2 and NX2, excluding enrolled students and bargaining unit members, who worked in California Between March 6, 2015, and the earlier of December 31, 2023, or the date of preliminary approval of the parties' settlement agreement by the Court; and
2) all current or former Contingent (non-exempt employees hired on a Casual or Temporary basis) non-exempt employees who worked in Stanford's Department of Public Safety, Department of Music, Bing Concert Hall, Music Library, Stanford Video, and CCRMA-Computer Music Lab, and Stanford Live, excluding students and bargaining unit members, who worked in California between March 6, 2015, and the earlier of December 31, 2023, or the date or preliminary approval of the parties' settlement agreement by the Court.

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: *George Celestino, et al. v. Accurate Courier NCA, LLC*
Case No.: 23CV411121

This a representative Private Attorneys General Act ("PAGA") action by Plaintiffs George Celestino and Cynthia Cuahutle for civil penalties based on Defendants Accurate Courier NCA, LLC d/b/a Accurate Courier Services, Accurate Consolidated Services, Inc. and Westside Accurate Services, Inc. (collectively, "Defendants") alleged failure to pay overtime and minimum wages, failure to provide meal and rest periods or pay associated premiums, failure to provide code-compliant wage statements, and other Labor Code violations.

Before the Court is Defendants' motion to (1) compel arbitration of Plaintiffs' individual PAGA claims and (2) stay the representative PAGA claim pending resolution of the arbitration, which is opposed by Plaintiffs. As discussed below, the Court GRANTS Defendants' motion to compel arbitration of Plaintiffs' individual PAGA claims. Plaintiffs' representative PAGA claim is stayed pending the outcome of their individual claims pursuant to Code of Civil Procedure section 1281.4.

XXI. BACKGROUND

Mr. Celestino initiated the instant action as a putative class action on February 15, 2023 asserting eight different causes of action for various Labor Code violations, as well as a claim for violation of California's Unfair Competition Law (Bus. & Prof., § 17200, et seq.). On July 26, 2023, Mr. Celestino and Ms. Cuahutle filed the operative First Amended Complaint ("FAC"), which asserts a single cause of action for civil penalties under PAGA based on the Labor Code violations previously asserted as individual causes of action in the original complaint.

XXII. DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

In support of their motion, Defendants requests that the Court take judicial notice of an order issued by this Court (Hon. Zayner) on June 16, 2022 in the action entitled *Molina v. Accurate Consolidate Service, Inc., et al.*, Case No. 22CV402121, granting the defendant's motion to compel arbitration as to the plaintiffs' individual PAGA claims, and staying plaintiffs' representative PAGA claims pending a decision in *Adolph v. Uber technologies, Inc.* (2023) 14 Cal.5th 1104. While the Court GRANTS Defendants' request of this court record as a proper subject of judicial notice pursuant to Evidence Code section 452, subdivision (d), it notes that the opinion has "no binding or precedential effect" and has "at most, some persuasive value." (*Becerra v. McClatchy Co.* (2021) 69 Cal.App.5th 913, 929.)

XXIII. MOTION TO COMPEL ARBITRATION

A. Legal Standard

There is no express discussion by the parties as to whether the Federal Arbitration Act ("FAA") or California statutory law applies to the instant motion. Consequently, the Court will discuss both.

In ruling on a motion to compel arbitration, the Court must inquire as to (1) whether there is a valid agreement to arbitrate, and (2) if so, whether the scope of the agreement covers the claims alleged. (See *Howsan v. Dean Witter Reynolds* (2002) 537 U.S. 79, 84.) "Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate. [Citations.] The threshold question requires a response because if such an agreement exists, then the court is statutorily required to order the matter to arbitration." (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 19 (*Fleming*), internal quotation marks omitted.)

Under California law, "[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement." (Code Civ. Proc., § 1281.2, subds. (a), (b).) "This initial issue also reflects the very plain principle that you cannot compel individuals or entities to arbitrate a dispute when they did not agree to do so." (*Fleming, supra*, 88 Cal.App.5th at p. 19.)

"Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement--either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see [Code Civ. Proc., § 1281.2, subds. (a), (b))--that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense. [Citation.]" (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) If the proponent of arbitration has shown the existence of an arbitration provision governing the claims at issue by a preponderance of the evidence, the burden then shifts to the resisting party to prove a ground for denial. (*Ibid*.)

"Federal law is wholly congruent with these principles. As the United States Supreme Court observed two decades ago: 'Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," [citation] we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.' (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 294 [].) 'For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' (*United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582.)" (*Fleming, supra,* 88 Cal.App.5th at pp. 19-20.) "The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) "If no agreement to arbitrate was formed, then there is no basis upon which to compel arbitration." (*Ahlstrom v. DHI Mortgage Co., L.P.* (9th Cir. 2021) 21 F.4th 631, 635.)

Under the FAA, the Court must grant a motion to compel arbitration if any suit is brought upon "any issue referable to arbitration under an agreement for such arbitration" (9 U.S.C. § 3), subject to "such grounds as exist at law or in equity for the revocation of any contract…" (9 U.S.C. § 2). The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of evidence].) The burden then shifts to the resisting party to prove a ground for denial, such as unconscionability. (*Pinnacle, supra,* 55 Cal.4th at 236.)

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

> But the FAA's policy favoring arbitration … is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. Or in another formulation: The policy is to make arbitration agreements as enforceable as other contracts, but not more so. Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind.

(*Morgan v. Sundance, Inc.* (2022) ___U.S.___ [142 S.Ct. 1708, 1713] (*Morgan*), internal citations and quotation marks omitted.)

B. Discussion

Defendants maintain that Plaintiffs are contractually obligated to arbitrate their individual PAGA claims having waived their right to bring the claim in this forum. They acknowledge that such waivers are unenforceable with respect to the representative PAGA claim pursuant to the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), but assert that the representative claim should be stayed pending resolution of the arbitration of the individual claim pursuant to *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 (*Adolph*).

1. *Existence of Agreement to Arbitrate*

According to Defendants, Plaintiffs were both requested by their employer to execute the subject agreement to arbitrate (the "Agreement"), and they submit declarations from Veniamin Pustynovich and Elisha Gilboa, who maintain Defendants' employee personnel files, who both affirm that Plaintiffs electronically executed the Agreement. Neither plaintiff disputes having executed these documents; instead, they attack its enforceability, arguing that it is unconscionable and the FAA does not apply to the Agreement because they are exempt from the FAA's terms by virtue of the nature of their employment. Given Defendants' showing, the Court finds that an arbitration agreement between Plaintiffs and Defendants was formed.

2. *Governing Law*

Defendants assert that based on its express terms, the FAA applies to the Arbitration Agreement. Indeed, the agreement expressly provides that "[t]his … Agreement is governed by the Federal Arbitration Act and evidences a transaction involving commerce. If the [FAA] is held not to apply, the arbitration laws of the State in which you performed the majority of your work for [Defendants] shall apply." (See Arbitration Agreement at § 1.) In opposition, Plaintiffs maintain that they are exempt from the FAA because they are employees engaged in interstate commerce. This issue has been the subject of some debate in the courts recently.

The basic coverage provision of the FAA "makes the law applicable to contracts evidencing a transaction 'involving commerce' (9 U.S.C. § 2), which language reflects that Congress intended the law's coverage to extend to the full reach of its commerce clause power." (*Nieto v. Fresno Beverage Co.* (2019) 33 Cal.App.5th 274, 279, internal citations omitted.) However, Section 1 of the FAA "provides a limited exemption from the law's coverage to 'contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' (9 U.S.C. § 1.) (*Ibid*.) Relying primarily on *Rittman v. Amazon.com, Inc.* (9th Cir. 2020) 971 F.3d 904, 909-910 (*Rittman*), Plaintiffs assert that they fall within this exemption as part of a "class of workers engaged in foreign or interstate commerce." As the party opposing arbitration, Plaintiffs bear the burden of demonstrating that this exemption applies. (See *Performance Team Freight Systems, Inc. v. Aleman* (2015) 241 Cal.App.4th 1233, 1241.)

In *Rittman*, the Ninth Circuit held that the exemption for employees engaged in interstate commerce applied to Amazon's so-called "last mile" delivery drivers, who did not actually drive beyond state lines because they were the "last leg" of interstate transport. Here, it is undisputed that Plaintiffs performed similar duties as part of their employment with Defendants. Nevertheless, Defendants insist that *Rittman's* holding is no longer viable in light of the U.S. Supreme Court's decision in *Southwest Airlines Co. v. Saxon* (2022) 142 S.Ct. 1783 (*Saxon*), and urges the Court to take the approach articulated by the Fifth Circuit Court of Appeals in light of *Saxon* in *Lopez v. Cintas Corp.* (5th Cir. 2022) 47 F.4th 428, 431-433. In *Saxon*, the court held that held that the exemption applied to a ramp supervisor employed by Southwest Airlines who frequently loaded and unloaded cargo on and off airplanes that travelled in interstate commerce belonged to a class of workers engaged in foreign or interstate commerce. (*Id.* at p. 1793.) The court explained that the determinative issue is not whether the employer's industry involves interstate commerce, but whether the class of workers to which the plaintiff belongs is engaged in interstate commerce. (*Id.* at p. 1788.)

Notably unmentioned by Defendants is the fact that the Ninth Circuit has since held that the holding of *Rittman* survived *Saxon*. (See *Carmona v. Domino's Pizza, LLC* (9th Cir. 2023) 73 F.4th 1135, 1136 (*Carmona*), see also *Miller v. Amazon.com, Inc.* (9th Cir. Sep. 1, 2023, No. 21-36048) 2023 U.S. App. LEXIS 23309, at *2.) In *Carmona*, which is cited by Plaintiffs, the court reasoned that the *Saxon* court expressly declined to decide whether "last leg" delivery drivers fell into the exception for employees engaged in interstate commerce. (*Carmona, supra*, 73 F.4th at p. 1137, quoting *Saxon, supra*, 142 S.Ct. at p. 1789, fn.2 [" 'We recognize that the answer will not always be so plain when the class of workers carries out duties further removed from the channels of interstate commerce or the actual crossing of borders. Compare, e.g., *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 915 (C.A.9 2020)

(holding that a class of 'last leg' delivery drivers falls within § 1's exemption), with, e.g., *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (C.A.7 2020) (holding that food delivery drivers do not). In any event, we need not address those questions to resolve this case.' "].)

Ultimately, this Court need not decide whether *Saxon* has eviscerated the holding in *Rittman* because California Courts of Appeal have held that local delivery drivers who deliver products that are transported in interstate commerce are engaged in interstate commerce for the purposes of 9 U.S.C. Section 1's exception. (See *Betancourt v. Transportation Brokerage Specialists, Inc.* (2021) 62 Cal. App. 5th 552, 554 ["last mile" delivery driver for company that provided drivers for Amazon exempt from FAA coverage as a transportation worker engaged in interstate commerce]; *Muller v. Roy Miller Freight Lines, LLC* (2019) 34 Cal. App. 5th 1056, 1069 [truck driver fits under exemption because "over 99 percent - of the goods Muller transported originated across state lines," so "even though Muller was not personally transporting goods from state to state, he played an integral role in transporting those goods through interstate commerce" and because he was subject to federal regulations]; *Nieto v. Fresno Beverage Co., Inc.* (2019) 33 Cal.App.5th 274, 284 [beverage delivery driver who only made intrastate deliveries still fell within the exemption because beverages were manufacturer out of state and driver was engaged in the "last phase of a continuous journey of the interstate commerce"].)

Given that *Saxon* did not expressly decide the question of whether "last mile" or "last leg" delivery drivers are engaged in interstate commerce and these cases are not wholly inconsistent with *Saxon*, the Court finds that they remain good law. Accordingly, the Court is bound by the decisions of the Court of Appeal and finds that Plaintiffs are employees engaged in interstate commerce within the meaning of Section 1 of the FAA. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [a lower court is without authority to rule in a way that is contrary to a higher court's ruling].)

Defendants argue that the Section 1 exemption still does not apply because the Arbitration Agreements are not "Contracts of Employment" and instead were executed separately and independently from such contracts. Plaintiffs, in contrast, insist that the Arbitration Agreement is contained in a "contract of employment" and any meaning ascribed to its "separation" from other relevant employment documents would elevate form over substance and allow employers to avoid Section 1's exemption merely by placing the arbitration provision in a separate document.

In making their argument, Defendants chiefly rely on *Harrington v. Atl. Sounding Co.* (2d Cir. 2010) 602 F.3d 113 (*Harrington*), where the Second Circuit Court of Appeal explained that:

> Although the FAA exempts form its coverage "contracts of employment of seaman, [… or any other class of workers engaged in foreign or interstate commerce]" [], the Supreme Court has *strongly suggested* that arbitration agreements such as the one at issue in this case do not constitute "contracts of employment" where the arbitration agreement is "not contained" in a broader employment agreement between the parties, (*Gilmer v. Interstate/Johnson Lane Corp.* (199) 500 U.S. 20, 25, fn. 2; see also *Terrebone v. K-Sea Transp. Corp.* (5th Cir. 2007) 477 F.3d 271, 279 [holding that the "maintenance and cure" provisions

> of an arbitration agreement, though "an intrinsic part of the employment relationship, [are] separate from the actual employment *contract*"]; *cf. Nunez v. Weeks Marine, Inc.* (E.D. La. 2007) 2007 U.S. Dist. LEXIS 10807, *3, fn. 4 [noting that, in *Gilmore*, the Supreme Court "d[id] not broadly define 'employment contract' as any contract that has some connection or relation to a party's employment"].) Moreover, the Supreme Court has recognized that if the term "contracts of employment" was read so broadly to include independent arbitration agreements, then *every* [contract for any other class of workers engaged in foreign or interstate commerce] would be exempt from the FAA, thereby rendering "the separate exemption for 'contracts of employment of […any other class of workers engaged in foreign or interstate commerce] …' pointless." (*Circuit City Stores v. Adams* (2001) 532 U.S. 105, 113.)

(*Harrington,* 602 F.3d at 121, emphasis added.)

Thus, *Harrington* appears to suggest that an arbitration agreement that is separate from and not contained in a broader employment contract is not subject to the Section 1 exemption because it is not a "contract of employment."

However, more recent California District Court decisions have come to a different conclusion. For example, in *Webb v. Rejoice Delivers LLC* (N.D Cal. 2023) 2023 U.S. Dist. LEXIS 216335 (*Webb*), the court rejected as "spurious" the defendant's argument that the subject arbitration agreement was not a "contract or employment" because it was not embedded within another document, such as a job offer, that outlined other terms of the plaintiff's employment, explaining that:

> Given these circumstances, to find that the Agreement- a document regarding "[d]isputes related to work," … that individuals were required to sign in order to begin employment and "start making deliveries," []- is not a contract of employment because it was not contained within another document containing a broader agreement would render FAA § 1 nearly meaningless and incentivize gamesmanship, as employers could avoid the exemption by always placing arbitration agreements in separate documents when onboarding new employees. [Citations.]

(*Webb*, 2023 U.S. LEXIS 216335, *19.)

In *Abrams v. C.R. England, Inc.* (C.D. Cal. 2020) 2020 U.S. Dist. LEXIS 158416 (*Abrams*), the court similarly rejected the employer's argument that a standalone arbitration agreement signed prior to hiring with other onboarding documents was not a contract of employment because "the Court must also not interpret [FAA § 1] in a manner that completely eviscerates its purpose." In reaching this conclusion, *Abrams* distinguished *Harrington* (and *Terrebonne, supra*, for similar reasons), explaining that the arbitration agreement at issue in that case was signed by an injured seaman in return for cash advances against his claims. In other words, the arbitration agreement was executed not as part of the employee's onboarding process, but well *after* that, and thus could not be considered a "contract of employment." In contrast, the plaintiff in *Abrams* had been presented with and executed his employment contract and arbitration agreement at the same time.

All told, these recent decisions do not appear to have rejected *Harrington* and its interpretation of U.S. Supreme Court decisions concerning the meaning of "contracts of employment" outright; instead, they distinguished the case based on the nature of the circumstances in which the arbitration agreements at issue were signed. Here, Plaintiffs do not expressly make clear *when* they executed the Arbitration Agreement relative to when they were hired, although a review of Ms. Cuahutle's declaration, wherein she states she began her employment with Defendants in May 2020, and the declaration of Elisha Gilboa, which indicates that Ms. Cuahutle executed the Arbitration Agreement on June 25, 2022, demonstrates that she did so well after she was hired. While the declaration of Veniamin Pustynovich states that Mr. Celestino executed the Arbitration Agreement on August 30, 2018, it is unclear when he began his employment with Defendants. Consequently, the circumstances surrounding his execution of the Arbitration Agreement are unknown. Arguably, despite knowing more details of Ms. Cuahutle's execution of the agreement, at least with regards to timing, the Court also does not know the actual circumstances of its execution in the way that the courts in *Webb*, *Abrams* and *Harrington* did. In the absence of such information, which is Plaintiffs' burden to provide as the party claiming that the FAA Section 1 exemption applies (see *Performance Team Freight Systems, Inc.*, *supra*, 241 Cal.App.4th at 1241), the Court does not believe it can conclude that the Arbitration Agreement is a "Contract of Employment" such that the FAA does not apply to its terms. Thus, the Court finds that the FAA so applies.

3. *Unconscionability*

Plaintiffs next assert that the Arbitration Agreement is unenforceable because it is unconscionable.

"[G]enerally applicable contract defenses, such as … unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA or California law." (*Oto, LLC v. Kho* (2019) 8 Cal.5th at 111, 125, internal citations and quotations omitted." "The unconscionability defense has long been recognized as a permissible ground for invalidating arbitration agreements under the FAA's savings clause …. [it] thus contemplates that unconscionability claims, like other state law contract defenses, will be resolved before arbitration is enforced." (*Id*., internal citations omitted.)

Unconscionability has both procedural and substantive elements. (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*); *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539 (Jones).) Both must appear for a court to invalidate a contract or one of its individual terms (*Armendariz, supra*, 24 Cal.4th at p. 114; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174), but they need not be present in the same degree: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa" (*Armendariz, supra*, 24 Cal.4th at p. 114). The burden of proving unconscionability rests upon the party asserting it. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911.)

Defendants maintain that the Arbitration Agreement is not procedurally or substantively unconscionable, but even if any portion is found to be substantively unconscionable, it is easily severed.

a. Procedural Unconscionability

Procedural unconscionability focuses on the elements of oppression and surprise. (*Armendariz, supra*, 24 Cal.4th at p. 114.) "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice," while "[s]urprise involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party is a superior bargaining position." (*Davis v. TWC Dealer Group, Inc.* (2019) 41 Cal.App.5th 662, 671, internal citation and quotation marks omitted.)

Plaintiffs contend that the Arbitration Agreement is procedurally unconscionable because it is a contract of adhesion and was offered as a mandatory condition of employment.

Analyzing procedural unconscionability "begins with an inquiry into whether the contract is one of adhesion" (*Armendariz*, 24 Cal.4th at 113) i.e., one that is "standardized, generally on a preprinted form, and offered by the party with superior bargaining power 'on a take-it-or-leave-it basis'" (*OTO, LLC, supra*, 8 Cal.5th at 126.) Arbitration agreements imposed as a condition of employment are typically deemed to be adhesive and the pertinent situation in such a circumstance is "whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required." (*Id*.) "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development, supra,* 55 Cal.4th at 247.) Circumstances relevant to establishing oppression include: the amount of time the party is given to consider the agreement; the amount and type of pressure exerted on them to sign; the length of the proposed contract and the length and complexity of the challenged provision; the education and experience of the party; and whether the party's review of the agreement was aided by an attorney. (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1348.) In pre-hiring settings, such as the one at bar, courts must be "particularly attuned" to the danger of oppression and overreaching. (*Armendariz, supra,* at 115.)

Here, while Plaintiffs make the aforementioned claims regarding procedural unconscionability, they offers no *evidence* of the same, as is their burden. (See *Sanchez v. Valencia Holding Co., LLC, supra* 61 Cal.4th at 911.) Thus, the Court cannot find that the Arbitration Agreement is procedurally unconscionable. Further, even if the Court were to assume, for the sake of argument, that the agreements *are* contracts of adhesion, in the employment context, a contract of adhesion contains only a modest amount of procedural unconscionability unless it involves surprise or other sharp practices. (*Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 248.) Plaintiffs have not demonstrated such surprise or other sharp practices here.

Given the foregoing, the Court finds that Plaintiffs have failed to establish that the Arbitration Agreement is procedurally unconscionable. Because *both* procedural *and* substantive unconscionability must be present in order for the Court to invalidate the Arbitration Agreement (see *Armendariz, supra*, 24 Cal.4th at p. 114; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174), the Court concludes that agreement is enforceable.

b. Substantive Unconscionability

Given its conclusion that the Arbitration Agreement is not procedurally unconscionable, the Court need not evaluate the merits of Plaintiffs' contentions regarding substantive unconscionability. However, even if it did, the Court finds that Plaintiffs have not established the presence of such unconscionability.

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create "overly harsh" or "one-sided results" (*Armendariz, supra*, 24 Cal.4th at p. 114, internal citation and quotations omitted), that is, whether they reallocate risks in an objectively unreasonable or unexpected manner (*Jones*, *supra*, 112 Cal.App.4th at p. 1539). "In assessing substantive unconscionability, the paramount consideration is mutuality." (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 241, internal citation and quotation marks omitted.) Arbitration agreements are substantively unconscionable where they lack a "modicum of bilaterality," "without at least some reasonable justification for such one-sidedness based on 'business realities.' " (*Armendariz, supra*, 24 Cal.4th at p. 117.) Terms that in the abstract might not support a finding of unconscionability "take on greater weight when imposed by a procedure that is demonstratively oppressive." (*OTO, LLC*, 8 Cal.5th at 130.)

Plaintiffs take issue with the way that the PAGA waiver provision is styled, arguing that it appears as an "opt-out" that deceives the employee into thinking that they cannot bring representative PAGA claims in the future. They continue that employees who *do* opt out are being tricked because they are giving up their right to PAGA representative arbitration in exchange for nothing at all. Finally, they maintain that the severability provisions are "intentionally ambiguous and confusing."

The PAGA Waiver provision that Plaintiffs challenge provides, in pertinent part, as follows:

> 7. Private Attorney General Waiver
>
> (a) Private Attorney General Waiver. There will be no right or authority for any dispute to be brought, heard or arbitrated as a private attorney general representative action ("Private Attorney General Waiver"). Notwithstanding any other provision of this Agreement or the AAA Rules, disputes regarding the validity, enforceability or breach of the Private Attorney General Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator. The Private Attorney General Waiver does not apply to any claim you bring in arbitration as a private attorney general solely on your own behalf and not on behalf of or regarding others. *The Private Attorney General Waiver shall be severable from this Agreement in any case in which (1) the dispute is filed as a private attorney general representative action and (2) there is a final judicial determination that all or part of the Private Attorney General Waiver is unenforceable, and to that extent the private attorney general representative action must be litigated in a civil court of competent jurisdiction, but the portion of the Private Attorney General Waiver that is enforceable shall be enforced in arbitration.*

> (b) Your Right to Opt Out of the Private Attorney General Waiver. Acceptance of the Private Attorney General Waiver is not a mandatory condition of your employment at the Company, and therefore you may submit a statement notifying the Company that you wish to opt out and not be subject to the Private Attorney General Waiver. In order to opt out, you must notify the Company of your intention to opt out of the Private Attorney General Waiver by submitting a written notice to Human Resources signed and dated by you stating that you are opting out of the Private Attorney General Waiver.

(Arbitration Agreement at 4, emphasis added.)

The agreement additionally states that "[e]xcept as stated in paragraphs 6 and 7 above, in the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be unenforceable."

The Court does not find any Plaintiffs' assertions persuasive. The Arbitration Agreement contains a severability clause specifically concerning the Private Attorney General Waiver. The California Supreme Court's conclusion in *Iskanian, supra*, that "an employee's right to bring a PAGA action is unwaivable," survived, with respect to representative PAGA claims *only*, the U.S. Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S. Ct. 1906 (*Vikiing River*) that the FAA preempted *Ishkanian's* additional holding that PAGA claims could not be split. In *Viking River*, the court further found that if the arbitration agreement containing a wholesale waiver of PAGA claims also contains a severability clause which provides that if the waiver is invalid in some respect, any portion that remains, i.e., an *individual* PAGA claim, is still to be enforced in arbitration, the employer is still entitled to enforce arbitration of that individual claim.

Here, the language contained in Section 7 of the Arbitration Agreement makes clear that *representative* PAGA claims cannot be brought in arbitration and that, when read with the language pertaining to the employee having to arbitrate his or her individual claims, makes clear that a representative PAGA claim *may* be pursued in the future, but only in a "civil court of competent jurisdiction." Even if the representative PAGA waiver provision was deemed unenforceable based on Plaintiffs' insistence that it is misleading, it is clearly and unequivocally severable from the rest of the agreement. In short, the Court is not persuaded that the Arbitration Agreement is substantively unconscionable.

As the Arbitration Agreement is not unconscionable, and the FAA applies, the Court finds that it must be enforced and thus, pursuant to its terms, Plaintiffs are contractually obligated to arbitrate their individual PAGA claims. The representative PAGA claims must be pursued in this Court. Under the California Supreme Court's recent decision in *Adolph, supra*, a PAGA plaintiff who is compelled to arbitrate his or her individual PAGA claims maintains standing to assert the remaining non-individual PAGA (i.e., representative) claims in court. (*Adolph*, 14 Cal.5th at 1123.) Consequently, dismissal of the non-individual PAGA claims is *not* required when arbitration of individual PAGA claims is compelled, and "the trial court may exercise its discretion to stay the non-individual claims pending the outcome of the arbitration pursuant to section 1281.4 of the Code of Civil Procedure." (*Ibid.*) Here, the Court elects to do so. Accordingly, Defendants' motion is GRANTED as to Plaintiffs' individual PAGA claims and the Court will stay their representative PAGA claim pending outcome of their individual claims pursuant to Code of Civil Procedure section 1281.4.

XXIV. CONCLUSION

Defendants' motion to compel is GRANTED with respect to Plaintiffs' individual PAGA claims. Plaintiffs' representative PAGA claim is stayed pending the outcome of their individual claims pursuant to Code of Civil Procedure section 1281.4.

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 5

Case Name: *In Re Cloudera, Inc. Securities Litigation*
Case No.: 19CV348674 (consolidated with Case Nos. 19CV348790 and 19CV348974)

Tentative ruling provided directly to the parties.

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