SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

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

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

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LAW AND MOTION TENTATIVE RULINGS
DATE: JULY 17, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV407445	Nava v. Performance First Building Services, Inc. (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	22CV405260	Palma-Hernandez v. JC Hamburgers, Inc., et al. (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	21CV387958	Beltran v. George Chiala Farms, Inc.	See Line 3 for tentative ruling.
LINE 4	21CV391898	Gatchalian v. CKS Prime Investments, LLC, et al. (Class Action)	See Line 4 for tentative ruling.
LINE 5	23CV422622	Lopez v. Moreno & Associates, Inc,. et al. (PAGA)	See Line 5 for tentative ruling.
LINE 6	22CV407799	Reedy, et al. v. Southwest Airlines Co. (Class Action)	See Line 6 for tentative ruling.
LINE 7	19CV346119	Market Street Development, LLC v. Avid Development, LLC, et al.	See Line 7 for tentative ruling.
LINE 8			

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LAW AND MOTION TENTATIVE RULINGS

LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Nava v. Performance First Building Services, Inc. (Class Action/PAGA)
Case No.: 22CV407445

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 17, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This action arises out of alleged wage and hour violations by defendant Performance First Building Services, Inc. ("Defendant"). On October 26, 2023, plaintiff Maura Munoz Nava ("Plaintiff") filed the operative First Amended Class Action Complaint ("FAC") against Defendant, setting forth the following causes of action: (1) Failure to Provide Required Meal Periods; (2) Failure to Provide Required Rest Breaks; (3) Failure to Pay Overtime Wages; (4) Failure to Pay Minimum Wages; (5) Failure to Pay Timely Wages; (6) Failure to Pay All Wages Due to Discharged and Quitting Employees; (7) Failure to Furnish Accurate Itemized Wage Statements; (8) Failure to Maintain Required Records; (9) Failure to Provide Supplemental COVID-19 Sick Leave; (10) Failure to Reimburse for Business Expenses; (11) Unfair Business Practices; (12) Failure to Pay Wages Under the Fair Labor Standards Act ("FLSA"); and (13) Penalties Under the Labor Code Private Attorneys General Act ("PAGA").

The parties have reached a settlement. On December 28, 2023, Plaintiff filed a motion for preliminary approval of the settlement. At the hearing on January 31, 2024, the court denied without prejudice the motion for preliminary approval of the settlement. (See January 31, 2024 Minute Order ("January 31 Minute Order"), p. 5.) The court discussed its concerns with the proposed hybrid class action and FLSA settlement. (*Id.* at pp. 3-5.) These concerns included the motion's failure to explicitly request certification of the FLSA collective action and the failure of the proposed class notice to adequately explain the hybrid nature of the action and the options available to recipients of class notice. (*Id.* at p. 4.)

Plaintiff now renews her motion for preliminary approval of the settlement, which she has amended in response to the concerns expressed by the court. The motion is unopposed.

II. Legal Standard

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

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

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

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

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

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

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 [Labor and Workforce Development Agency ("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.)

III. Discussion

A. The Settlement Groups

This case has been settled on behalf of three groups: (1) the "California Class" members; (2) the "FLSA Collective" members; and (3) the "PAGA Aggrieved Employees." (Declaration of Scott E. Wheeler in Support of Plaintiff's Renewed Motion for Preliminary Approval Class, Collective and PAGA Representative Action ("Wheeler Dec."), Ex. A ("Settlement Agreement"), ¶¶ 2, 17, 28.) As set forth below, the settlement agreement includes separate release provisions for each of these three groups. The settlement agreement defines the term "Defendant" as "Performance First Building Services, Inc." and defines "Released Parties" to include "(i) Defendant; and (ii) Defendant's current and former officers, directors, employees, and agents only." (Settlement Agreement, ¶¶ 12, 42.)

1. The California Class

The "California Class" is defined as "[a]ll nonexempt hourly employees who worked at any time for Defendant in the state of California from November 14, 2018 through November 19, 2023." (Settlement Agreement), ¶ 2.)

In exchange for the consideration provided under the settlement, the California Class members agree to release the Released Parties from "any and all claims … or causes of action, as alleged in the [FAC] … or which could have been alleged under the facts pleaded in the [FAC] and the LWDA Notice dated August 26, 2022." (Settlement Agreement, ¶ 39.) The settlement agreement's definition of "Released Claims by California Settlement Class Members" does not include mention of the FAC's twelfth cause of action for failure to pay wages under the FLSA, or otherwise reference the FLSA. (*Ibid.*)

2. The FLSA Collective

The "FLSA Collective" is defined as "all nonexempt hourly employees who worked at any time for Defendant from November 14, 2019 through November 19, 2023". (Settlement Agreement, ¶ 17.) The settlement agreement further states:

> Released Claims by "FLSA Settlement Class Members" means any and all claims to be released by the FLSA Collective Members, consisting of all claims under the Fair Labor Standards Act that were or could have been alleged based on the facts alleged in the [FAC], including all claims for failure to pay all wages and overtime. The FLSA Collective Released Claims shall include all Released Claims from November 14, 2019 through November 19, 2023.

(Settlement Agreement, ¶ 38.)

3. The PAGA Aggrieved Employees

The "PAGA Aggrieved Employees" are defined as "all hourly, non-exempt employees employed by Defendant in California at any time during the PAGA Period." (Settlement Agreement, ¶ 28.) The PAGA Period means the period between August 26, 2021 through November 19, 2023. (Settlement Agreement, ¶ 29.) The settlement agreement defines the released PAGA claims to include only those claims for penalties "only under PAGA …. as alleged or which could have been alleged under the facts pleaded in the [FAC] and the LWDA Notice dated August 26, 2022." (Settlement Agreement, ¶ 40.)

B. Provisions of the Settlement Agreement

According to the terms of the settlement, Defendant will pay a non-reversionary gross settlement amount of $300,000. (Settlement Agreement, ¶¶ 21.) The gross settlement amount includes attorney fees up to $100,000 (1/3 of the gross settlement amount), litigation costs not to exceed $14,500, a PAGA allocation of $20,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Aggrieved Employees), an FLSA Settlement allocation of $5,000, a service award up to $6,000, and settlement administration costs not to exceed $11,000. (Settlement Agreement, ¶¶ 20, 67(g)-67(j).) The net settlement amount will be distributed to California Class members and FLSA Collective members on a pro rata basis according to their respective number of compensable pay periods. (Settlement Agreement, ¶ 67(a).) Similarly, the portion of the PAGA allocation designated for PAGA Aggrieved Employees will be distributed based on their respective number of workweeks during the PAGA Period. (Settlement Agreement, ¶ 67(b).)

Checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be distributed to Legal Aid at Work's Wage Protection Clinic pursuant to California Code of Civil Procedure section 384. (Settlement Agreement, ¶¶ 67(c), 67(d).) The court approves the designated *cy pres* recipient. In addition to the releases

described above, Plaintiff agrees to a comprehensive general release. (Settlement Agreement, ¶ 37.)

D. Settlement of the FLSA Claim

As discussed above, the court previously continued the hearing on Plaintiff's preliminary approval of the settlement due to its concerns related to the settlement of the FLSA claim. (January 31 Minute Order, pp. 3-5.) The court identified four general concerns in this regard: (1) the lack of a written opt-in procedure, separate from the cashing of a settlement check; (2) the failure to request certification of the FLSA collective action; (3) the failure to allow putative class members to choose whether they would participate in only one of the hybrid (California Class and FLSA Collective) forms of the action; and (4) various defects in the class notice with respect to the FLSA claim. (*Id.* at p. 4.)

Following the court's ruling the continuing the hearing on this motion, the parties have amended the settlement agreement and class notice to indicate how the putative members of the FLSA Collective may opt-in to that group for purposes of settlement. (See Settlement Agreement, ¶ 48 and Ex. 1 ("Class Notice"), pp. 1-2.) However, the settlement agreement still provides that FLSA Collective members will opt-in by "accepting the payment allocated to the FLSA Settlement Amount." (*Ibid.*)

Plaintiff's renewed motion now explicitly request certification of the collective action. (Notice of Motion and Motion, ¶ 3.) The revised class notice also identifies a distinction between the California Class settlement and the FLSA Collective settlement and explains the options available to class members. (Class Notice, pp. 1-2, 6.) However, it remains unclear how a recipient of the class notice could choose between being a member of one of these two settlement groups and not the other. The language of the settlement agreement and the class notice suggests that putative members of these groups will be sent one "check" (as opposed to "checks") including their allotted amounts for both the California Class settlement and the FLSA Collective settlement. (Settlement Agreement, ¶¶ 61, 67(c); Class Notice, p. 4 ["the Settlement Administrator will send you a settlement check."]) And even if the putative class members were sent one check for the settlement of the FLSA Collective claim and a separate check or checks for the California Class and PAGA portions of the settlement, the court

remains unpersuaded that the cashing of a check satisfies the opt-in requirements for the settlement of the FLSA Collective claim.

As discussed in the court's January 31 Minute Order, unlike a class action brought under Code of Civil Procedure section 382, an FLSA collective action requires a fundamentally different "opt-in" procedure. The court in *Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067 (*Haro*), explained that the FLSA "govern[s] minimum wages and maximum hours." (At p. 1070.) Notably, the FLSA establishes an "opt-in" procedure for collective actions under its authority, which is essentially the opposite of the "opt-out" procedure typically employed in class actions. The "opt-in" procedure requires that aggrieved employees "give[] [their] consent in writing" to become a party to an FLSA action, which consent must be "filed in the court in which such action is brought." (29 U.S.C. § 216(b); *Haro, supra*, 174 Cal.App.4th at p. 1071.) As held by *Haro,* "[a]n FLSA action has to be litigated according to rules that are specifically applicable to these actions" and may not be prosecuted as a class action. (*Haro, supra,* 174 Cal.App.4th at p. 1077.)

While some unpublished federal decisions have approved "hybrid" class action and FLSA settlements, these settlements have not complied with the statutory requirement of written consents that are filed with the court. (See *Smothers v. Northstar Alarm Services, LLC* (E.D. Cal., Jan. 22, 2019, No. 217CV00548KJMKJN) 2019 WL 280294, at *10 ["Courts more elevated than this one have read the statutory language as requiring written consent filed with the court …."].) Many other courts have disapproved of this practice. (See *Haralson v. U.S. Aviation Services Corp.* (N.D. Cal. 2019) 383 F.Supp.3d 959, 968 ["[m]any courts" have rejected this opt-in by settlement check proposal]; see also *Beltran v. Olam Spices & Vegetables, Inc.* (E.D.Cal. Dec. Mar. 23, 2021, No. 1:18-cv-01676-) 2021 U.S.Dist.LEXIS 55013, at *8; *Anderson v. Safe Streets USA, LLC* (E.D.Cal. Dec. 20, 2022, No. 2:18-cv-00323-KJM-JDP) 2022 U.S.Dist.LEXIS 229149, at *20-21 ["[U]nder the current settlement agreement, class members opt into the collective action and release their FLSA claims when they cash, deposit, or endorse their settlement check. [] Such an opt-in procedure is prohibited under the FLSA. [Citation.]"].)

As before, Plaintiff cites *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521 (*Amaro*), 539, for the proposition that the settlement adequately complies with the opt-in requirement and lawfully releases claims under the FLSA. (Plaintiff's Memorandum of Points and Authorities in Support of Renewed Motion [] ("MPA"), pp. 11:20-23, 12:1-3.) However, as the court previously explained, *Amaro* is inapposite. There, the reviewing court found that the opt-in requirement did not apply because the plaintiff did not allege any claims under the FLSA. (*Amaro*, *supra*, 69 Cal.App.5th at p. 540.) Here, by contrast, the operative FAC sets forth the twelfth cause of action for failure to pay wages under the FLSA.

Plaintiff also relies upon *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 741 (*Bell*), for its position that a California class action settlement may resolve FLSA claims, and class actions offer a means of avoiding repetitious litigation. (MPA, p. 12:1-5.) However, *Bell* is also inapposite. There, the reviewing court addressed an appeal following a motion for summary judgment and post-trial proceedings rather than an opt-in procedure for the settlement of FLSA claims. (*Bell*, *supra*, 115 Cal.App.4th at pp. 719-720, 724-725.)

Despite the court's January 31 Minute Order, the parties have not altered the FLSA opt-in procedure, nor have they provided authority in support of their proposed opt-in procedure, i.e., by the cashing of the settlement check rather than by a separate writing to be filed with the court. Thus, the proposed settlement does not comply with the opt-in requirement applicable to the FLSA claim. (See 29 U.S.C. § 216, subd. (b); *Haro*, *supra*, 174 Cal.App.4th at p. 1071 [the opt-in procedure requires that aggrieved employees give their consent in writing to become a party to the FLSA action, and the written consent must be filed with the court in which the FLSA action is brought].) As it is evident that parties have expended significant effort in attempting to resolve this matter, the court will give the Plaintiff one final opportunity to address its concerns relating to the FLSA opt-in procedure.

IV. Conclusion

Accordingly, the motion for preliminary approval of the class and representative action settlement is CONTINUED to September 25, 2024 at 1:30 p.m. in Department 19. Plaintiff

shall file supplemental materials containing the information requested by the court, no later than September 9, 2024. No additional filings are permitted.

Plaintiff shall prepare the order.

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Calendar Line 2

Case Name: Palma-Hernandez v. JC Hamburgers, Inc., et al. (Class Action/PAGA)
Case No.: 22CV405260

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 17, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

Plaintiff Suyapa Liliana Palma-Hernandez ("Plaintiff") brings this wage and hour action against defendant JC Hamburgers, Inc., a California corporation d/b/a McDonald's, and Daniel Borba, an individual (collectively, "Defendants"). On October 24, 2022, Plaintiff filed the operative Class Action and Representative Action Complaint ("Complaint"), setting forth the following causes of action: (1) Failure to Provide Meal Periods and/or Pay Meal Period Premiums (Labor Code, §§ 226.7, 512); (2) Failure to Authorize and Permit Rest Breaks and/or Pay Rest Break Premiums (Labor Code, § 226.7); (3) Failure to Provide Complete and Accurate Wage Statements (Labor Code, § 226); (4) Failure to Timely Pay Final Wages (Labor Code, §§ 201-203); (5) Failure to Reimburse Necessary Business Expenses (Labor Code, § 2802); (6) Unfair Competition Law ("UCL") Violations (Business & Professions Code, §§ 17200-17204); (7) Penalties Pursuant to the Private Attorneys General Act ("PAGA") (Labor Code, §§ 2698-2699.5.)

The parties have reached a settlement. Plaintiff now moves for preliminary approval of the settlement. The motion is unopposed.

II. Legal Standard

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

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in

> settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

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

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

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

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

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.)

III. Discussion

A. Provisions of the Settlement

This case has been settled on behalf of the following class:

> Plaintiff and all other individuals who are or were employed by Defendants as non-exempt hourly-paid employees, who worked at least one shift in California during the Class Period.

(Declaration of Hengameh S. Safaei in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement ("Safaei Dec."), Ex. 1 ("Settlement Agreement"), ¶ 1.6.) The Class Period is defined as the period from October 24, 2018 through June 30, 2024, or the date of Preliminary Approval of the Settlement, whichever is sooner. (Settlement Agreement, ¶ 1.12.) The settlement defines the term "Defendants" as JC Hamburgers, Inc. d/b/a McDonald's and Daniel Borba. (Settlement Agreement, ¶ 1.17.)

The settlement also includes a subset PAGA Class of aggrieved employees (hereinafter, "Aggrieved Employees") who are defined as "Plaintiff and all other individuals who are or were employed by Defendants as non-exempt hourly-paid employees, who worked at least one shift in California from September 29, 2021 through June 30, 2024, or the date of Preliminary Approval of the Settlement, whichever is sooner." (Settlement Agreement, ¶ 1.5.)

According to the terms of the settlement, Defendants will pay a gross settlement amount of $900,000. (Settlement Agreement, ¶ 1.24, 3.1.) The settlement agreement provides that the gross settlement amount may be increased proportionately if the actual number of pay periods is determined to be incorrect by more than 15 percent. (Settlement Agreement, ¶ 4.1.) The gross settlement amount includes attorney fees up to $300,000 (1/3 of the gross settlement amount), litigation costs not to exceed $25,000, a PAGA allocation of $75,000 (75 percent of which will be paid to the Labor and Workforce Development Agency ("LWDA") and 25 percent of which will be paid to PAGA Employees as individual PAGA payments), a service award up to $7,500, and settlement administration costs not to exceed $10,450. (Settlement Agreement, ¶¶ 1.24, 3.2, 3.2.1-3.2.3, 3.2.5.)

The net settlement amount will be distributed to participating class members on a pro rata basis according to the number of workweeks they were employed by Defendants. (Settlement Agreement, ¶ 3.2.4.) Similarly, the portion of the PAGA allocation for individual PAGA payments will be distributed on a pro rata basis based on the number of pay periods worked. (Settlement Agreement, ¶ 3.2.5.1.) Checks remaining uncashed more than 180 days after mailing will be void, and the funds from those checks will be transmitted to the California State Controller's Unclaimed Property Fund. (Settlement Agreement, ¶¶ 4.3.1, 4.3.3.)

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

In exchange for the settlement, the class members agree to release Defendants from all claims that were alleged, or reasonably could have alleged, based on the facts pleaded in the Complaint occurring during the Class Period. (Settlement Agreement, ¶¶ 1.40, 1.42, 6.2.) PAGA Employees agree to release Defendants, and related entities and persons, from all claims for PAGA civil penalties that were alleged, or reasonably could have been alleged, based on facts pleaded in the Complaint and/or the notice Plaintiff sent to the LWDA. (Settlement Agreement, ¶¶ 1.41., 1.42, 6.3.)

B. Fairness of the Settlement

Plaintiff states that the settlement was reached through discovery, analysis, and mediation with Chris Barnes, Esq. (Safaei Dec., ¶¶ 8, 13-14, 22-23.) In anticipation of mediation, the parties conducted significant investigation of the facts through informal discovery, including Defendants' production of a random 20 percent of class member's time and pay records, average rates of pay during the Class Period, and related documents and information. (Safaei Dec., ¶ 13.) Plaintiff conducted a detailed review of the payroll records, time records, and other information provided by Defendants. (*Ibid.*) Defendants estimate that there are approximately 474 Class Members who worked approximately 11,389 workweeks within the Class Period. (Settlement Agreement ¶ 4.1.)

Plaintiff estimates that Defendants' maximum potential liability for all the claims is approximately $2,229,242. (Safaei Dec., ¶ 26.) Plaintiff provides a breakdown for this amount by claim. (*Ibid.*) Plaintiffs discounted the value of the claims given Defendants' defenses, the possibility that the court could substantially reduce any PAGA penalties, and the risks and costs

associated with class certification. (Safaei Dec., ¶¶ 27-36.) The average net payment to class members will be $1,016.98.

The gross settlement amount represents approximately 40 percent of the potential maximum recovery. The proposed settlement amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavasos v. Salas Concrete, Inc.* (E.D. Cal., Feb 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist. LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].)

Therefore, the court finds the terms of the settlement to be fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees, and Costs

Plaintiff requests an enhancement award of $7,500. (Settlement Agreement, ¶ 3.2.1.)

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

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

Plaintiff has submitted a declaration detailing her participation in this matter. (Declaration of Suyapa Liliana Palma-Hernandez [], ¶ 4.) Plaintiff states she has provided detailed factual accounts to her attorneys, gathered employed-related documents, reviewed documents prepared by her attorneys, and participated in numerous communications with her attorneys. (*Ibid*.) Plaintiff estimates that she has spent 25 hours of her time on this matter. (*Ibid*.)

In addition to the time Plaintiff has spent on this ligation, she also undertook risk by attaching her name to this case because it might impact her future employment. (See *Covillo v.*

Specialty's Café (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].).

Based on the foregoing, the court finds that a service award to Plaintiff is appropriate. Nevertheless, the court notes that the amount sought for the enhancement award is higher than the court typically awards in these types of cases. Consequently, the court approves a service award to Plaintiff in the amount of $2,500.

The settlement calls for a payment of $10,450 to the settlement administrator, identified as ILYM Group, Inc. ("ILYM Group"). (Settlement Agreement, ¶¶ 1.2, 3.2.3.) ILYM Group has provided a declaration indicating the administration costs will not exceed $10,450. (Declaration of Lisa Mullins of ILYM Group, Inc., ¶ 4, Ex. C.) The court approves ILYM Group as settlement administrator and administration costs not to exceed $10,450.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will seek attorney fees up to $300,000 (1/3 of the gross settlement amount) and litigation costs not to exceed $25,000. (Settlement Agreement, ¶ 3.2.2.) Prior to the final approval hearing in this matter, Plaintiff's counsel shall submit lodestar information (including hourly rate and hours worked) so the court can compare the lodestar information with the requested fees. Plaintiff's counsel shall also submit evidence of actual costs incurred as well as evidence of actual settlement administration costs.

D. Conditional Certification of Class

Plaintiff requests that the class be conditionally certified for purposes of the settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . .." As interpreted by the California Supreme Court, section 382 requires: (1) an ascertainable class;

and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

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

As explained by the California Supreme Court,

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

(*Sav-On, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiff states that there are approximately 474 class members who can be identified from a review of Defendants' records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

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

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

However, section 8 at page 30 of the class notice must be amended to clarify that recipients may attend the final hearing remotely, and shall include the following language:

> Class members may appear at the final approval hearing in person or remotely using the Microsoft Teams link for Department 19 (Afternoon Session). Instructions for appearing remotely are provided at: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members who wish to appear remotely are encouraged to contact class counsel at least three days before the hearing if possible, so that potential technology or audibility issues can be avoided or minimized.

Further, as discussed above, Plaintiff shall provide a *cy pres* recipient in compliance with Code of Civil Procedure section 384, and the class notice must be amended to indicate this change. The parties are ordered to submit an amended class notice making these changes to the court for approval prior to mailing.

IV. Conclusion

Accordingly, the motion for preliminary approval of the class and representative action settlement is CONTINUED to September 4, 2022 at 1:30 p.m. in Department 19. Plaintiff shall file a supplemental declaration no later than August 19, 2024, containing the information requested by the court. No additional filings are permitted.

Plaintiff shall prepare the order.

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Calendar Line 3

Case Name: Beltran v. George Chiala Farms, Inc.
Case No.: 21CV387958

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 17, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

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

The parties reached a settlement, and Plaintiff moved for preliminary approval of the settlement. The court initially continued the hearing on the motion, explaining that it had several concerns regarding the settlement. Thereafter Plaintiff's counsel filed a supplemental declaration in support of the motion for preliminary approval. On September 6, 2023, the court determined that Plaintiff's supplemental filing adequately addressed its concerns and granted the motion for preliminary approval of settlement. On September 21, 2023, the court entered a formal order memorializing its decision.

Now before the court is the unopposed motion for final approval of settlement. On June 12, 2024, the court continued the hearing on the motion for final approval. In its minute order, the court explained its concern regarding whether all class members had received notice packets as required by the settlement agreement. More specifically, the settlement administrator's initial declaration indicated that 17 individuals requested to be included in the class, and that they were then added to the class by agreement of the parties. However, the

declaration did not indicate whether these additional 17 class members were ever provided with notice packets.

On July 1, 2024, the settlement administrator filed a supplemental declaration as instructed by the court indicating that the 17 additional class members were mailed notice packets.

II. Legal Standard

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

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

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

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

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

> (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

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

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.)

III. Discussion

The case has been settled on behalf of the following class:

> [A]ll current and former non-exempt employees who worked for Defendant [George Chiala Farms, Inc. ("Defendant")] in California any time or times between April 13, 2017 through December 31, 2022 (the "Class Period"), and excluding any persons who: (1) opt out of the class; and/or (2) signed an arbitration agreement with Defendant that includes a class and/or representative action waiver on or before April 25, 2023.

The amended settlement agreement also includes PAGA Group Members, who are defined as "all current or former non-exempt employees who worked for Defendant in the State of California from April 13, 2020 through December 31, 2022."

Defendant will pay a maximum, non-reversionary settlement amount of $656,970 (increased from $610,000 by the settlement's escalator clause as the final number of workweeks totaled 40,553). The gross settlement amount includes attorney fees up to $218,990 (1/3 of the escalated gross settlement amount), litigation costs not to exceed $25,000, a PAGA allocation of $20,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be distributed to PAGA Group Members), an incentive award up to $2,500 for the class representative, and settlement administration costs up to $12,500. The net settlement amount will be distributed to participating class members pro rata basis. Checks that remain uncashed 180 days from the date the checks are dated will be void and the funds from those checks will be distributed to Legal Aid at Work.

In exchange for the settlement, the class members agree to release Defendant "each of Defendant's respective current and former, direct and indirect owners, parents, subsidiaries,

brother-sister companies, and their current and former partners, officers, directors, employees, attorneys, agents, shareholders, insurers, reinsurers, assigns, transferees, executors, administrators, predecessors, successors" ("Released Parties") from:

> all claims, charges, complaints, liens, demands, causes of action, obligations, damages and liabilities, known or unknown, suspected or unsuspected, that each participating class member had, now has, or may hereafter claim to have against 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 Plaintiff's Complaint, regardless of whether such claims arise under federal, state and/or local law, statute, ordinance, regulation, common law, or other source of law.

The amended settlement agreement further provides that PAGA Group Members agree to release the Released Parties from:

> all claims for civil penalties under Labor Code §§ 2698 et seq. exhausted in Plaintiff's notice(s) sent to the LWDA and alleged in the Action, and any and all PAGA claims which arose during the PAGA Period, that could have been asserted by the Labor Commissioner against Released Parties based on the factual allegations of Plaintiff's First Amended Complaint and Plaintiff's notice(s) sent to the LWDA, including claims for Labor Code sections §§ 201, 202, 203, 204, 205, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2800, and 2802 and the related IWC Wage Order(s). […] This settlement is also conditioned on the covenant that PAGA Group members will not participate in or receive recovery or monies in connection with any further proceeding seeking penalties under Section 2699, which arose during the PAGA Period for claims based on the allegations Plaintiff alleged in the Action.
>
> In addition, Plaintiff agrees to a comprehensive general release.

On October 20, 2023, the settlement administrator mailed notice packets to 802 class members. (Declaration of Chantal Soto-Najera on Behalf of CPT Group, Inc. Regarding Settlement Administration ("Soto-Najera Dec."), ¶¶ 4-6.) Ultimately, 22 notice packets were deemed undeliverable. (*Id.* at ¶ 7.) The highest settlement amount is estimated to be $2,756.77, the lowest settlement amount is estimated to be $9.79, and the average settlement amount is estimated to be $465.88. (*Id.* at ¶ 16.)

During the administration, the settlement administrator received requests from 17 individuals to be included in the class. (Supplemental Declaration of Chantal Soto-Najera on Behalf of CPT Group, Inc. Regarding Settlement Administration ("Supplemental Soto-Najera

Dec.") ¶ 2.) Defendant confirmed that those additional individuals should be included in the class such that the class is now comprised of 819 members. (*Ibid*.) Notice packets were mailed to each of these additional 17 individuals, with a 60-day response deadline. (*Ibid.*)

The settlement administrator declares that as of June 28, 2024, there were no objections, disputes class members to the information stated in the notice packets, or requests for exclusion. (Supplemental Soto-Najera Dec., ¶¶ 3-4.) Also as of that date, the settlement administrator reports a total of 819 settlement class members, representing 100 percent of the class. (*Id.* at ¶ 6.) The court finds that the settlement administrator's supplemental declaration adequately addresses the issue expressed by the court at the prior hearing on this motion for final approval of the class and representative action.

Plaintiff requests an incentive award in the amount of $2,500. The class representative filed a declaration detailing his participation in the action. Specifically, Plaintiff declares that he spent approximately 40 hours in connection with this action, including discussing the case with class counsel, gathering and reviewing documents, providing documents to class counsel, preparing for mediation, and reviewing settlement documents. (Declaration of Plaintiff Thomas Beltran in Support of Motion for Approval of Class and Representative PAGA Action Settlement, ¶¶ 5-12.)

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

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co*. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel seeks attorney fees of $218,990 (1/3 of the escalated gross settlement amount). Plaintiff's counsel provides evidence demonstrating a lodestar of $129,060. (Declaration of Jamie M. Loos in Support of Motion for Final Approval of Class and Representative PAGA Action

Settlement ("Loos Dec."), ¶¶ 40-42.) This results in a multiplier of 1.7. The court finds the attorney fees are reasonable as a percentage of the common fund and they are approved.

Plaintiff's counsel also requests costs in the amount of $21,426.40. Plaintiff's counsel provides evidence of incurred costs in that amount and the costs are approved. (Loos Dec., ¶ 45.) The settlement administration costs are also approved in the amount of $12,500. (Soto-Najera Dec., ¶ 19.)

IV. Conclusion

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

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

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Calendar Line 4

Case Name: Gatchalian v. CKS Prime Investments, LLC, et al. (Class Action)
Case No.: 21CV391898

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 17, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

Plaintiff Harriet Gatchalian ("Plaintiff") initiated this putative consumer class action by filing a complaint on December 14, 2021. On March 22, 2024, Plaintiff the operative First Amended Class Action Complaint for Declaratory Relief, Injunctive Relief, and Damages ("FAC") setting forth three causes of action against several defendants, including Webcollex, LLC, a Virginia limited liability company ("Webcollex").

Currently before the court is the motion by Webcollex's attorneys (Brian S. Whitemore and Justin M. Penn) to be relieved as counsel.[1] The motion is unopposed.

II. Discussion

Motions to be relieved of counsel are technical and governed by rule 3.162 of California Rules of Court ("Rule 3.1362"). Notice and motion must be directed to the client on Judicial Council Form MC-051. No memorandum is required. (Rule 3.1362(a) & (b).) Counsel must provide a declaration on Judicial Council Form MC-052 stating "in general terms and without compromising the confidentiality of the attorney-client relationship why a motion under Code of Civil Procedure section 284(2) is brought instead of filing a consent under Code of Civil Procedure section 284(1)."[2] (Rule 3.1362(c).)

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[1] Brian S. Whitemore and Justin M. Penn, are collectively referred to as "Counsel."

[2] Code of Civil Procedure section 284 provides, in its entirety,

> The attorney in an action or special proceeding may be changed at any time before or after judgment of final determination, as follows:
> 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes;
> 2. Upon the order of the court, upon the application of either client or attorney, after notice one to the other.

The notice of motion and motion, the declaration, and the proposed order must be served on the client and all parties "by personal service, electronic service, or mail." (Rule 3.1362(d)). Rule 3.1362(d) sets forth the services requirements, as follows:

> If the notice is served on the client by mail under Code of Civil Procedure section 1013, it must be accompanied by a declaration stating facts showing that either:
> (A) The service address is the current residence or business address of the client; or
> (B) The service address is the last known residence or business address of the client and the attorney has been unable to locate a more current address after making reasonable efforts to do so within 30 days before the filing of the motion to be relieved.

(Rule 3.1362(d).)

> The proposed order relieving counsel must be prepared on the Order Granting Attorney's Motion to Be Relieved as Counsel—Civil (form MC-053) and must be lodged with the court with the moving papers. The order must specify all hearing dates scheduled in the action or proceeding, including the date of trial, if known. If no hearing date is presently scheduled, the court may set one and specify the date in the order. After the order is signed, a copy of the signed order must be served on the client and on all parties that have appeared in the case. The court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the court.

(Rule 3.1362(e).)

Here, Counsel's declaration indicates the following as the reasons for the motion: professional considerations require termination of the representation; Counsel has been informed that Webcollex has closed its operations and is no longer a going concern; all prior client contacts are no longer employed by the company. Counsel's declaration indicates that the next hearing scheduled in this matter is a Case Management Conference set for August 7, 2024, and this is consistent with court records.

A proof of service indicates that the motion, declaration, and proposed order have been served on Webcollex via overnight mail. Counsel's declaration indicates that Counsel has confirmed within the past 30 days that the address is current by "UPS overnight delivery with tracking." However, according to the language of the Rule 3.1362(d), this does not appear to be sufficient for confirmation of the client's address:

> As used in this rule, "current" means that the address was confirmed within 30 days before the filing of the motion to be relieved. Merely demonstrating that

> the notice was sent to the client's last known address and was not returned or no electronic delivery message was received is not, by itself, sufficient to demonstrate that the address is current. If the service is by mail, Code of Civil Procedure section 1011(b) applies.

(Rule 3.1362(d).)

Here, the declaration does not show what efforts Counsel made – prior to mailing the documents – to confirm that the address is current. For example, the declaration does not indicate that Counsel attempted to confirm the address by mail (with return receipt requested), by telephone, or by conversion, i.e., the options indicated on Judicial Council Form MC-052 at paragraph 3(b)(1).

Rather, Counsel's declaration suggests that it has lost contact with the client, and that it may be more accurate to say that Counsel has been unable to confirm that the address is current. (See Judicial Council Form MC-052, ¶ 3(b)(2).) Counsel shall submit a new declaration to further explain their efforts to confirm the current address or explain why the court should grant the motion despite their inability to confirm a current address for their client.

The motion to be relieved as counsel is DENIED WITHOUT PREJUDICE.

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Calendar Line 5

Case Name: Lopez v. Moreno & Associates, Inc,. et al. (PAGA)
Case No.: 23CV422622

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 17, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

On September 11, 2023, plaintiff Jose Angel Lopez ("Plaintiff") filed a Complaint for Damages ("Complaint") against defendants Moreno & Associates, Inc. and J Ernesto Moreno ("Defendants") asserting the following causes of action: (1) Failure to Compensate for All Hours Worked; (2) Failure to Pay Minimum Wages; (3) Failure to Pay Overtime; (4) Failure to Provide Accurate Itemized Wage Statements; (5) Failure to Pay Wages When Employment Ends; (6) Failure to Pay Wages Owed Every Pay Period; (7) Failure to Give Rest Breaks; (8) Failure to Give Meal Breaks; (9) Private Attorneys General Act ("PAGA"); (10) Failure to Reimburse for Business Expenses; (11) Discrimination on the Basis of Physical Disability in Violation of the Fair Employment and Housing Act ("FEHA"); (12) Failure to Accommodate Physical Disability in Violation of the FEHA; (13) Failure to Engage in Interactive Process to Determine Reasonable Accommodation in Violation of the FEHA; (14) Retaliation in Violation of the FEHA; (15) Failure to Prevent Discrimination and Retaliation in Violation of the FEHA; (16) Wrongful Termination in Violation of Public Policy; (17) Violation of California Business and Professions Code section 17200.

Plaintiff negotiated an individual settlement of his claims for disability discrimination, retaliation, and wrongful termination. (Declaration of Jose Angel Lopez in Support of Plaintiff's Motion for Approval of PAGA Settlement ("Lopez Dec."), ¶ 6.) Plaintiff states that he is willing to provide his individual settlement to the court for *in camera* review if the court so requests. (*Id.* at ¶ 8.)

The parties have reached a settlement of the ninth cause of action for civil penalties under PAGA. Plaintiff motion for approval of the PAGA settlement is now before the court. The motion is unopposed.

II. Legal Standard

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.) Seventy-five 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.)

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) 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.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

As discussed by one court:

> PAGA does not establish a clear standard for evaluating PAGA settlements.
> …
> Accordingly, certain courts have been willing to approve PAGA settlements only if (1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals.

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061 at *2.)

As part of this analysis, courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel v. Nike Retail Services, Inc., supra*, 2019 WL 2029061 at *2.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel. (*Ibid*.)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *13.) The settlement must be reasonable in light of the potential verdict value. (See *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 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. Discussion

A. Provisions of the Settlement

The proposed settlement has been made with regard to "PAGA Employees," defined as "all current and former hourly, non-exempt employees of Defendants in the state of California at any time during the PAGA Settlement Period (as defined below)." (Declaration of Harout Messrelian in Support of Plaintiff's Motion for Approval of PAGA Settlement ("Harout Messrelian Dec."), Ex. 1 ("Settlement Agreement"), ¶ 2.) The term "Defendants" is defined in the settlement agreement as Moreno & Associates, Inc. and Ernesto Moreno. (Settlement Agreement, p. 1, first paragraph.) The "Settlement Period" is defined as the period commencing on December 15, 2021 and concluding on the date of settlement approval, i.e., the date on which the court approves the agreement with respect to settled PAGA claims. (Settlement Agreement, ¶¶ 12, 14.)

By the terms of the agreement, Defendants will pay a "Gross PAGA Settlement Amount" of $380,000. (Settlement Agreement, ¶¶ 15.) The settlement agreement provides that the Gross PAGA Settlement Amount may be increased proportionately if the actual number of pay periods is determined to be incorrect by more than 15%. (Settlement Agreement, ¶ 16.) The Gross PAGA Settlement Amount includes attorney fees of not more than 35% of the maximum settlement amount (currently estimated to be $133,000), litigation

costs not to exceed $10,500, and settlement administration costs not to exceed $5,000. (Settlement Agreement, ¶¶ 15, 18, 19.)

Of the remaining net settlement amount, 75 percent will be paid to the LWDA, and 25 percent will be paid to PAGA Employees based on the pro rata number of pay periods worked during the PAGA Period. (Settlement Agreement, ¶¶ 15, 17.) Funds from checks that are not cashed within 180 days from the date of mailing will be sent to the State Controller's Unclaimed Property Fund. (Settlement Agreement, ¶ 23.)

In exchange for the settlement, the PAGA Employees agree to release the "Released Parties" from the "Settled PAGA Claims," defined as:

> all claims, charges, complaints, liens, demands, causes of action, obligations, and liabilities, whether known or unknown, against the Released Parties (as defined below) for civil penalties predicated on any of the alleged violations of the California Labor Code, Industrial Welfare Commission Wage Orders, regulations, and/or other provisions of law that were alleged or asserted in the Action or any PAGA notice(s) filed by the Plaintiff, or that could have been asserted in the Action or any PAGA notice(s) filed by the Plaintiffs based on any facts or allegations therein, with respect to PAGA Employees during the PAGA Settlement Period.

(Settlement Agreement, ¶¶ 13, 15, 24.) The term "Released Parties" is defined as:

> (a) Moreno & Associates, Inc., (b) each of its officers, directors, members, partners, owners, shareholders, employees (excluding PAGA Employees), former employees, agents, servants, attorneys, assigns, affiliates, independent contractors, volunteers, predecessors, successors, parent companies and organizations, and (c) J. Ernesto Moreno.

(Settlement Agreement, ¶ 10.)

Plaintiff also provided with general release of all claims as part of an individual settlement agreement separate from the PAGA Settlement. (Harout Messrelian Dec., ¶¶ 28-29.) Plaintiff's individual settlement agreement does not provide for any additional attorney's fees or costs to Plaintiff's attorneys. (*Id.* at ¶ 29.) Plaintiff has not requested a service award. (*Id.* at ¶ 30.)

It is unclear to the court whether Plaintiff's individual settlement resolves all of the 16 non-PAGA claims set forth in the Complaint. The court would also like to verify that the attorney fees and costs provisions between the two different settlements are consistent.

Accordingly, prior to the continued hearing, Plaintiff shall provide a copy of the individual settlement agreement to the court for an *in camera* review.

B. Fairness of the Settlement

Plaintiff contends the PAGA settlement is fair, reasonable, and adequate. (Harout Messrelian Dec., ¶¶ 11, 14, 25; Memorandum of Points and Authorities in Support of the Motion ("MPA"), p. 7:6-7.) The parties participated in a full-day mediation with Hon. Brian C. Walsh (Ret.) on February 27, 2024. (Harout Messrelian Dec., ¶ 9.) Prior to the mediation, the parties engaged in informal discovery regarding Defendants' policies, practices, and operations. (*Ibid.*) Defendants provided Plaintiff time and payroll data for Plaintiff and other PAGA Employees. (*Ibid.*) Based on a review of its records, Defendant estimates that there are approximately 309 PAGA Employees who worked a total of 11,100 pay periods for all PAGA Employees during the PAGA Period. (Harout Messrelian Dec., ¶ 16; MPA, p. 9:14-16.)

Plaintiff's counsel estimates that Defendant's maximum potential liability for the PAGA civil penalties is $635,700. (Harout Messrelian Dec., ¶ 17, MPA, pp. 9:14-10:4.) Plaintiff provides a breakdown of the amount between the claims for meal period violations ($211,900) and rest break violations ($423,800). (*Ibid.*) Plaintiff's counsel considered the risks associated with litigation, including the defenses as to liability and the amount of civil penalties, presenting a risk that some or all of the PAGA penalties may not be awarded. (Harout Messrelian Dec., ¶¶ 18-24.) The parties arrived at the settlement through good faith, informed, and arms-length negotiations. (Harout Messrelian Dec., ¶ 25.) The settlement represents approximately 60% of the estimated maximum potential value of Plaintiff's PAGA claim.

The proposed settlement agreement regarding the PAGA claims generally appear to be fair and reasonable. It provides for a significant recovery and eliminates the risk and expense of continued litigation.

Plaintiff's counsel seeks attorney fees of $133,000 (35% of the gross settlement amount). (Harout Messrelian Dec., ¶¶ 31.) Plaintiff's counsel states that the total lodestar is $42,335 for 78 hours of work and does not include time incurred after the billing was finalized and the time spent completing the settlement. (Harout Messrelian Dec., ¶ 34, Ex. 5.) This

results in a multiplier of 3.142. The court finds the fees requested are reasonable as a percentage of the total recovery. However, as discussed above, the court would like to review Plaintiff's individual settlement before determining whether the requested attorney fees are appropriate.

Plaintiff's counsel also seeks litigation costs of $10,132.04 and provides a breakdown of costs incurred in that amount. (Harout Messrelian Dec., ¶ 35, Ex. 6.) The court finds costs in the amount of $10,132.04 to be reasonable. However, as discussed above, the court would like to review Plaintiff's individual settlement before determining whether the requested costs are appropriate.

The proposed settlement provides for settlement administration costs up to $5,000 to the agreed upon administrator, Simpluris, Inc. (Settlement Agreement, ¶¶ 11, 19.) Plaintiff provides a declaration from the settlement administrator demonstrating that costs associated with settlement administration will not exceed $5,000. (Declaration of Michael Bui in Support of Plaintiff's Motion for Approval of PAGA Settlement and Release, ¶ 9.) The court approves Simpluris, Inc. as the settlement administrator and settlement administration costs not to exceed $5,000.

IV. Conclusion

Accordingly, the motion for approval of PAGA settlement is CONTINUED to September 18, 2024 at 1:30 p.m. in Department 19. Plaintiff shall provide a copy of his individual settlement to the court for an *in camera* review no later than September 2, 2024.

Plaintiff shall prepare the order.

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Calendar Line 6

Case Name: Reedy, et al. v. Southwest Airlines Co. (Class Action)
Case No.: 22CV407799

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 17, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class action arising out of the practice of defendant Southwest Airlines Co. ("Defendant") of issuing travel credits that expire after one year to passengers who change or cancel their flights. Plaintiffs Claire Reedy, Victoria Rosales, and Roman Chepulskyy (collectively, "Plaintiffs") contend that Defendant advertises that it does not charge "change fees" or "cancel fees" for its plane tickets. They assert that they each purchased plane tickets from Defendant, but they later had to cancel or reschedule their flights. They were issued travel credits which displayed expiration dates. Because customers may not be able to use their travel credits before the stated expiration dates, Plaintiffs maintain that this practice of issuing travel credits that expire results in profits to Defendant and constitutes *de facto* charging of change or cancel fees.

The First Amended Class Action Complaint ("FAC"), filed on May 19, 2023, set forth the following causes of action: (1) intentional misrepresentation; (2) violation of California Unfair Competition Law (Business & Professions Code §§ 17200-17210) ("UCL"); (3) violation of California Consumer Legal Remedies Act (Civil Code § 1750, et seq.) ("CLRA"); (4) unjust enrichment; and (5) breach of contract.

Defendant demurred to the entirety of the FAC on the ground that the claims were preempted under the Airline Deregulation Act ("ADA"). Defendant also demurred to the breach of contract cause of action on the ground of failure to state a claim. On September 20, 2023, the court adopted its tentative ruling, and on September 26, 2023, the court entered a formal order memorializing its decision. (See Order Sustaining Defendant Southwest Airlines Co.'s Demurrer, Ex. 1 ("Sept. 26 Order").)

The court ordered that the FAC's non-contract causes of action (i.e., those for (1) intentional misrepresentation; (2) violation of the UCL; (3) violation of the CLRA; and (4) unjust enrichment) were preempted by the ADA, and therefore sustained Defendant's demurrer as to those causes of action without leave to amend. (Sept. 26 Order, p. 4.) The court sustained the demurrer to the breach of contract cause of action with leave to amend. (*Id.* at p. 6.) The court found that, while the ADA does not preempt the breach of contract cause of action, the FAC failed to sufficiently allege the material terms of the alleged contracts. (*Id.* at pp. 6-7.)

On November 2, 2023, Plaintiffs filed the operative Second Amended Class Action Complaint ("SAC"), setting forth one cause of action for breach of contract. Currently before the court is Defendant's demurrer to the SAC, which Plaintiffs oppose.

II. LEGAL STANDARD

As relevant here, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one more of the following grounds: … (e) The pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) A demurrer may be utilized by the party against whom a complaint has been filed to object to the legal sufficiency of the pleading as a whole, or to any cause of action stated therein, on one or more of the ground enumerated by statute. (Code Civ. Proc., §§ 430.50, subd. (a).)

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

III. DISCUSSION

Defendant demurs to the SAC's sole cause of action for breach of contract on the ground of failure to state sufficient facts to constitute a cause of action. Defendant contends the SAC fails to allege facts showing that Defendant breached any material provision of any contract. (Defendant's Notice of Demurrer, p. 1:9.)

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (See *Lewis v. YouTube, LLC* (2015) 244 Cal.App.4th 118, 124, quoting and citing *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

Defendant general sets forth two arguments in support of the demurrer: (1) that the allegations fail to establish the existence of a contract; and (2) that even if the SAC did sufficiently allege a contract, the allegations still do not establish Defendant's breach. As to its first argument, Defendant contends that advertisements are not normally treated as offers and that no exception applies here. (Defendant's Memorandum of Points and Authorities ("Dem."), pp. 4:3, 20-21, 6:23-25.)

As this court explained previously, advertisements are generally not considered offers for purposes of contract formation. (See Sept. 26 Order, p. 5.) "It is true that advertisements are not typically treated as offers, but merely as invitations to bargain. [Citations.]" (*Harris v. Time, Inc.* (1987) 191 Cal.App.3d 449, 455.) "There is, however, a fundamental exception to the rule: an advertisement can constitute an offer and form the basis of a unilateral contract, if it calls for performance of a specific act without further communication and leaves nothing for further negotiation. [Citations.]" (*Ibid.*) "Nevertheless, certain advertisements have been held to constitute offers where they invite the performance of a specific act without further communication and leave nothing for negotiation. Advertisements for reward typically fall within this category, because performing the requested act (e.g., returning a lost article or supplying particular information) generally is all that is necessary to accept the offer and conclude the bargain. [Citations.]" (*Donovan v. Rrl Corp.* (2001) 26 Cal.4th 261 (*Donovan*), 272.)

Relying upon *Donovan*, Defendant asserts the advertisements here cannot be considered offers because they do not ask the reader to do anything specific. (Dem., p. 5:14-16.) In *Donovan*, our high court found that a newspaper advertisement for the sale of a single specific vehicle at a specific price was an offer, stating: "because [Vehicle Code,] section 11713.1(e) makes it unlawful for a dealer not to sell a particular vehicle at the advertised price while the vehicle remains unsold and before the advertisement expires, plaintiff reasonably could believe that defendant intended the advertisement to be an offer." (*Donovan*, *supra*, 26 Cal.4th at p. 276.) Here, as Defendant points out, the advertisements are not for any specific flight, nor is any particular price alleged. (Dem, pp. 5:14, 5:26-6:2.)

In opposition, Plaintiffs argue that the advertisement included in the SAC is an offer because it "broadly applies 'with all fares.'" (Plaintiffs' Memorandum of Points and Authorities in Opposition ("Opp."), p. 12:19-21.) But this argument stands in stark contrast to the single specific vehicle at issue in *Donovan*, as well as other situations involving a specific requested act, such as an offer for a reward. Further, the advertisement that Plaintiff include in the SAC clearly indicates that there are different kinds of fares, each with different features. (SAC, ¶ 17.)

The court is not persuaded that a document describing the features of different kinds of fares, without reference to any specific flight or category of flights, can reasonably be construed as an "offer" to contract for all flights available. Plaintiffs do not direct the court to statutory authority, such as the Vehicle Code provision in *Donovan*, that would have affected a customer's reasonable expectations with the advertisements of commercial airline tickets. Nor do Plaintiffs provide case authority for the proposition that a defendant's advertisement can be deemed an offer for any and all of the defendant's different products or services.

Defendant further asserts that the advertisements cannot be considered offers because they lack nearly every material term. (Dem., p. 5:26-27.) In its prior order, the court found that the FAC did not allege the exact terms of the alleged contracts. (Sept. 26 Order, p. 5.) Plaintiffs now contend that, "the advertisements set forth all material terms," and that "the material terms of the contract are that Plaintiffs had to purchase *any* of [Defendant's] tickets, SAC ¶¶ 17, 68, and in exchange, [Defendant] had to refrain from charging change fees or

cancellation fees and had to provide 'travel funds' in exchange for changes or cancellations, *id.* at ¶¶ 17, 66-67." (Opp., p. 13:19-20.) Plaintiffs also assert they have identified the specific advertisement because they "have submitted screenshots of, and hyperlinks to, the advertisement itself." (Opp., p. 14:24-27, citing SAC, ¶ 17.)

However, the SAC includes one advertisement in paragraph 17. The SAC indicates that it is from 2023. The Plaintiffs here all purchased their flights before 2023. Ms. Reedy's "travel funds" expired in 2022, and there is no indication of how much she paid. (SAC, ¶ 32.) Ms. Rosales bought her ticket on October 20, 2019 for $150.00. (SAC, ¶ 35.) Mr. Chepulskyy purchased his ticket on February 7, 2018 for approximately $153.00. (SAC, ¶ 41.) The SAC's allegations do not appear to specify what kind(s) of tickets the Plaintiffs purchased from among the Defendant's various fares.

Plaintiffs apparently assert that the 2023 advertisement included in paragraph 17 of the SAC contains the same material terms as the advertisements allegedly relied upon by them – years earlier. Yet, Plaintiffs also state that online marketplace content can be updated instantly. (Opp., p. 17:20-2.) The SAC alleges that Defendant changed its policies and advertisements in 2022, i.e., after the Plaintiff's purchased their respective tickets and before the 2023 date of the advertisement included in paragraph 17 of the SAC. (SAC, ¶¶ 17, 44-45.)

Plaintiffs insist that the price of the airplane tickets is not a material term, but also that Defendant's alleged promise regarding the expiration of "travel funds" is a material term. But the SAC contains no allegation that Defendant promised Plaintiffs that their "travel funds" would never expire. Rather, it states that Defendant enforced a one-year expiration date on "travel funds." (SAC, ¶ 69.) Without ever setting forth a definition of the term "travel funds" as used by Defendant in its alleged offers, the SAC alleges that the "travel funds" provided by Defendant "actually failed to function as true travel funds." (SAC, ¶ 30.)

Even from the 2023 advertisement that the SAC does include, it is apparent that Defendant then sold at least four different kinds of tickets, each with different benefits explained in the fine print of 12 footnotes. (SAC, ¶ 17.) Two of the four are identified as "refundable," and the other two as "non-refundable," with different footnotes and descriptions for each of the two "non-refundable" kinds of fares. (*Ibid.*) Under such circumstances, it

would be unreasonable for a customer viewing this webpage to conclude that it was an offer by Defendant to sell all of its products with identical material terms.

Accordingly, the allegations in the SAC fail to cure the defect previously identified by the court because the pleading still does not allege the exact terms of the alleged contracts. Because the court concludes that the SAC does not sufficiently allege the existence of a contract, it declines to address Defendant's additional argument that the SAC does not sufficiently allege a breach.

Defendant argues that further leave to amend would be futile as the court has given Plaintiffs the opportunity to amend. Plaintiffs effectively concede this point by failing to address it in opposition, making no mention of how the pleading could be amended. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [burden is on plaintiff to show in what manner plaintiff can amend and how that amendment will the pleading's legal effect].)

IV. CONCLUSION

The demurrer to the SAC is SUSTAINED without leave to amend.

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

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Calendar Line 7

Case Name: Market Street Development, LLC v. Avid Development, LLC, et al.
Case No.: 19CV346119

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 17, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

A trial de novo concerning the valuation of nominal defendant MSD-DV, LLC ("MSD-DV") is scheduled to begin on August 12, 2024. Currently before the court are three motions *in limine* by Defendants Avid Development, LLC ("Avid"), and Eureka Development Company LLC. Plaintiff Market Street Development, LLC ("Plaintiff" or "Market Street") opposes.

II. Defendants' Motions

A. Motion *in Limine* No. 1

Defendant's first motion *in limine* regarding evidence related to the so-called "Priority Return" is DENIED.

By way of background, the operative Second Amended Complaint ("SAC") alleges that on September 19, 2011, Market Street and Avid executed a written operating agreement for MSD-DV. (SAC, ¶ 8, Ex. A ("Operating Agreement").) According to the allegations of the SAC:

> Section 5.3(b)(ii) [of the Operating Agreement] allows AVID to receive a priority return of twelve (12) percent annually, compounded annually ("the Priority Return"), on AVID's outstanding Cash Capital Account (a defined term), subject to conditions, i.e., sale of the Real Property after execution of a lease with DaVita and AIVD's obligation under Section 5.7(b) to minimize its equity (i.e., its Cash Capital Account) in MSD-DV. A reduction in AVID's equity in MSD-DV would have caused a corresponding reduction in payment of the Priority Return to AVID.

(SAC, ¶ 23(c).)

> AVID breached the Operating Agreement by continuing to pay the Priority Return to itself when it was obligated to sell the Real Property and to minimize its equity in MDS-DV. AVID and EUREKA have refused, and continue to refuse, to facilitate the sale of the Real Property in order to continue receiving the Priority Return, at the continuing expense and harm of Plaintiff.

(SAC, ¶ 24(c).)

> But for breaches of fiduciary duties by AVID and EUREKA and their failure to honor obligations under the Operating Agreement: (a) the Real Property would have been sold for fair market value, the Priority Return would have ceased to accrue, and Plaintiff would have received its share of the profits from the sale; (b) Plaintiff would have had the opportunity to acquire AVID's interest in MSD-DV, thereby becoming the exclusive owner of MSD-DV, and the Priority Return would have ceased to accrue; and (c) AVID and EUREKA would not have wrongfully paid themselves the priority return.

(SAC, ¶ 32.) Additional allegations regarding the Priority Return can be found throughout the operative complaint. (See SAC, ¶¶ 35, 38, 43, 44, 60, 64.)

Defendants seek an order prohibiting any reference to "potential ways to eliminate the Priority Return other than through the Company's excess operating income or the value of any claim based the continued payment of the Priority Return." (Mot., pp. 3:22-4:2.) Defendants assert that the SAC does not allege any derivative claims. (Mot., p. 2:16-19.) Defendants contend that the court should prevent Market Street from attempting to introduce evidence of any unpled derivative claim. (*Id.* at p. 8:2-3.)

In opposition, Market Street argues that Defendants signed a stipulation that expressly provided Market's Street Priority Return payments claim is a derivative claim. (Opp., p. 1:8-11.) Market Street references a stipulation entered by the court on April 21, 2020 and filed on April 29, 2020. (See Stipulation and Supplemental Order Regarding Appraisal Procedures, Derivative Claims, and Bond ("April 29, 2020 Stipulation"). In this stipulation, parties agreed to the following:

> However, in valuing the Plaintiff's 50 percent membership interest in MSD-DV, the Appraiser shall use his professional judgment to determine what impact, if any, Plaintiff's derivative claim that Defendants may have breached their of [sic] fiduciary duty to MSD-DV or Plaintiff, based on the Plaintiff's assertion that Defendants' should have caused MSD-DV to obtain third-party financing to reduce Defendants' capital contributions to MSD-DV, and thereby reduce or eliminate MSD-DV's obligation to pay Defendants a preferred return on their capital contributions.

(April 29, 2020 Stipulation, ¶ 4.) Market Street further contends that the evidence it intends to introduce will establish that Defendants breached their fiduciary duty as the manager of MSD-DV by continuing to make the Priority Return payments, and the breach of that duty caused

harm to both Market Street and MSD-DV. (Opp., p. 1:12-14.) Market Street argues that this motion *in limine* is tantamount to a dispositive motion. (*Id.* at p. 4:16-17.)

In reply, Defendants assert that this motion is not dispositive because Market Street's direct claims are stayed. (Reply, p. 2:23-24.) Defendants further argue that the parties' stipulation does not apply here because it was specific to the court-appointed appraiser's process, which has been concluded. (*Id.* at p. 3:7-8.) Defendants assert that the second amended complaint does not allege the existence of derivative claims. (*Id.* at p. 4:15-17.) Defendants contend Market Street cannot manufacture a derivative claim where it does not exist, and that a claim cannot be at once direct and derivative. (*Id.* at pp. 5:24-27, 9:1-3.)

Absent a stipulation by the parties, the court will not limit evidence regarding ways to eliminate the Priority Return because such evidence may be relevant to the valuation of MSD-DV based on the allegations of the SAC.

B. Motion *in Limine* No. 2

Defendants' second motion *in limine* regarding evidence of an obligation to sell commercial property in Santa Clara is DENIED.

Defendants seek an order excluding "any evidence of a past obligation to sell the property…." (Mot., p. 2:20.) Defendants explain that the parties formed MSD-DV Santa Clara, LLC "to purchase and develop a specific commercial property in Santa Clara with a DaVita dialysis center under contract to be the anchor tenant." (*Id.* at p. 2:8-10.) Defendants seek to exclude "any allegation, information or evidence that the parties allegedly agreed that the property would be sold at any specific point in time." (*Id.* at p. 9:1-2.)

In opposition, Market Street contends that evidence relating to intent is relevant to the court-appointed appraiser's valuation. (Opp., p. 2:10-11.) Market Street further argues that evidence relating to the parties' intent to sell the property when developed and leased is relevant to the derivative claims at issue in the evidentiary hearing. (*Id.* at p. 3:6-7.) Market Street further asserts that the motion is procedurally improper. (*Id.* at p. 6:18.)

In reply, Defendants contend that Market Street cannot introduce extrinsic evidence regarding the Operating Agreement without first proving its ambiguity. (Reply, p. 2:8-14.) Defendants assert that Market Street misquoted the Operating Agreement but acknowledge that

this was likely inadvertent. (*Id.* at pp. 4:1-13.) Defendants assert that the negotiating history of the Operating Agreement and post-contractual conduct are irrelevant because Market Street has not established ambiguity. (*Id.* at pp. 4:17-18, 5:17-18.)

Parol evidence is inadmissible if the judge finds that the written agreement is fully integrated. (Code Civ. Proc., § 1856, subd. (d).) However, there are exceptions to the parol evidence rule. (See Code Civ. Proc., § 1856, subd. (g) ["This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud"]; see also *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174-1175 [fraud exception].) At this stage, the court cannot say that the agreement is fully integrated or that no exception to the parol evidence rule applies.

C. Motion *in Limine* No. 3

Defendant's third motion *in limine* to prevent the admission of evidence as to whether MSD-DV was or could be dissolved is DENIED.

Defendants seek an order "prohibiting … any allegation, information, or evidence of Plaintiff's claim that the Company can be or has been dissolved by a vote of 50 percent of the membership interest." (Mot., p. 2:15-20.) Defendants contend that the court has already ruled that neither Market Street nor a purchaser of its interest has the ability to unilaterally dissolve the Company. (*Id.* at pp. 3:18-4:17 [quoting and citing the court's (Hon. Cynthia Lie) Order Re the Powers of Market Street Development, LLC's Membership Interest and Additional Instructions to Court-Appointed Appraiser Hemming Morse LP, filed on December 16, 2021].)

However, as Market Street argues in opposition, the court (Hon. Cynthia Lie) thereafter issued an order stating: "Neither the court's rulings to date—tentative or otherwise—nor its constructive of parties' stipulations are binding on any other judge fixing the value of Market Street's 50 percent interest in MSD-DV under [Corporations Code] section 17707.03." (Order Withdrawing Tentative Decision and Referring Matter for Reassignment, issued and filed on December 19, 2022; see also Opp., p. 2:5-10.)

Accordingly, Defendants argument relying upon prior rulings to prevent evidence being introduced in a trial de novo is unavailing.

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

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