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 10, 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	23CV413379	Cruz, et al. v.Total Quality Maintenance, Inc. (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	17CV310844	Espinoza v. Warehouse Demo Services, Inc. (Class Action)	See Line 2 for tentative ruling.
LINE 3	23CV424799	Sorto v. Clark Pest Control of Stockton, Inc., et al. (Class Action)	See Line 3 for tentative ruling.
LINE 4	19CV360648	Dancy v. Walmart Inc., et al. [Included in Walmart Wage and Hour Cases, JCCP5136, Santa Clara] (Class Action)	See Line 4 for tentative ruling.
LINE 5	21CV375222	Macias, et al. v. First Technology Federal Credit Union (Class Action)	See Line 5 for tentative ruling.
LINE 6			
LINE 7			
LINE 8			
LINE 9			

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LAW AND MOTION TENTATIVE RULINGS

LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Cruz, et al. v. Total Quality Maintenance, Inc. (Class Action/PAGA)
Case No.: 23CV413379

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 10, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This class and representative action arises out of various alleged wage and hour violations. On April 3, 2023, Plaintiffs Erika Sanchez Cruz ("Cruz") and Esperanza Gomez ("Gomez") (collectively, "Plaintiffs') filed their Class Action and PAGA Representative Complaint against defendant Total Quality Maintenance, Inc. ("Defendant"), setting forth causes of action for : (1) Failure to Pay Straight Wages; (2) Failure to Pay All Overtime Earned for Hours Worked in Violation of Labor Code, §§ 510 and 1194 and [Industrial Welfare Commission, ("IWC")] Wage Orders; (3) Failure to Provide Meal Periods in Violation of Labor Code, §§ 226.7 and 512 and IWC Wage Orders; (4) Failure to Provide Rest Breaks; (5) Failure to Provide an Accurate Itemized Wage Statement for Violation of Labor Code, § 226; (6) Waiting Time Penalties for Failure to Pay Wages for All Hours Worked in Violation of Labor Code, §§ 201, 202 and 203; (7) Violation of Labor Code, §§ 204 and 210; (8) Unfair Business Practices; (9) Private Attorney General Act ("PAGA"); and (10) Civil Penalties Under Labor Code, § 558.

The parties have reached a settlement. Plaintiffs' motion for preliminary approval of the settlement is now before 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 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

The court has reviewed the materials filed by Plaintiffs in support of this unopposed motion for preliminary approval of the settlement agreement. However, the court has been

unable to locate a copy of the settlement agreement (or the class notice) in question.[1] As explained above, a trial court being asked to grant approval of a class settlement must examine and scrutinize the proposed settlement. (*Wershba*, *supra*, 91 Cal.App.4th at p. 245.) The court cannot grant preliminary approval of a settlement agreement that it has not had the opportunity to review. For instance, the court must scrutinize the language of the releases to ensure that they are narrowly tailored to the language of the claims.

Accordingly, the motion for preliminary approval is continued. Prior to the continued hearing (and if possible before the July 10, 2024 hearing) Plaintiffs shall file a supplemental declaration containing the settlement agreement.

B. Class Notice

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(f) ["[i]f 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."). Thus, the court must examine the language of the class notice itself to ensure that it is accurate and thorough.

The class notice must make clear that class members may object in writing or by appearing at the final approving hearing without providing notice of their intention to appear. Further, this Department requires the following language regarding the final approval hearing to be included in the class notice:

> 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.

Plaintiffs are ordered to provide the class notice to the court prior to the continued hearing, and if possible, before the hearing on July 10, 2024.

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[1] It appears that Plaintiffs' counsel intended to include the settlement agreement as exhibit to his declaration, but no such exhibit is attached in version the document that the court was able to access. (See Declaration of Cary Kletter in Support of Plaintiffs' Motion for Preliminary Approval of Class and Representative Action Settlement, ¶ 37.)

IV. CONCLUSION

The motion for preliminary approval of the class and representative action settlement is CONTINUED to August 28, 2024, in Department 19 at 1:30 p.m. Plaintiffs shall file a supplemental declaration containing the settlement agreement and proposed class notice no later than August 12, 2024. No further filings are permitted.

Plaintiffs shall prepare the order.

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Calendar Line 2

Case Name: Espinoza v. Warehouse Demo Services, Inc. (Class Action)
Case No.: 17CV310844

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 10, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This class and representative action arises out of various alleged wage and hour violations. As relevant here, plaintiff Georgina Espinoza filed her operative First Amended Class Action Complaint on July 27, 2017, setting forth causes of action for: (1) Failure to Pay Wages and/or Overtime Under Labor Code, §§ 510, 1194, and 1199; (2) Failure to Provide Meal Breaks Pursuant to Labor Code, §§ 226.7 and 512; (3) Failure to Provide Rest Breaks Pursuant to Labor Code, § 226.7; (4) Failure to Pay Reporting Time Pay; (5) Penalties Pursuant to Labor Code, § 203; (6) Violation of Business & Professions Code, § 17200; (7) Penalties Pursuant to Labor Code, § 2699, *et seq.*

The parties have reached a settlement.[2] Plaintiff Espinoza's motion for preliminary approval of the settlement is now before 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,

[2] This settlement follows Plaintiff's successful appeal of the court's order granting the defense's motion for summary judgment based on the outside salesperson exemption.

> 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 & 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. Provisions of the Settlement

The settlement agreement is between plaintiffs Georgina Espinoza and Yesenia Quintero (collectively, "Plaintiffs") and defendants Warehouse Demo Services, Inc. ("WDS") and Club Demonstration Services ("CDS") (collectively, "Defendants"). (Declaration of Ari J.

Stiller in Support of Motion for Preliminary Approval of Class Action Settlement [] ("Stiller Dec."), Ex. 1 ("Settlement Agreement"), ¶ 1.5.)

As an initial matter, Plaintiff requests leave to file a Second Amended Complaint. (See Plaintiff's Notice of Motion and [] Memorandum of Points and Authorities ("MPA"), pp. 6:17-19, 30:25-31:5.) More specifically, Plaintiff asserts that Yesenia Quintero is the plaintiff in a related case that the parties have resolved as part of the settlement. (*Id.* at p. 3:3-7, fn. 1.) The settlement provides that Defendant will not oppose amending the complaint to add Ms. Quintero as a plaintiff for purposes of settlement, and that Plaintiffs will file a dismissal of the Quintero action in the event court does grant final approval of the settlement. (Settlement Agreement, ¶ 6.) The court grants Plaintiffs' request for leave to file a Second Amended Complaint, subject to the provisions set forth in the settlement agreement.

> The agreement settles this case on behalf of the following class:
>
> [A]ll current and former non-exempt employees of Defendants who are working or worked as "demonstrator," "sales advisors," "breaker," "shift supervisor," "lead demonstrator," "lead sales advisor," "coordinator," "event specialist," or equivalent title at Costco Warehouse locations in the State of California during the Class Period."

(Settlement Agreement, ¶ 1.5.) The Class Period is defined as "the period from April 28, 2015 through November 3, 2023 for WDS employees and from March 18, 2017 through November 3, 2023 for CDS employees." (Settlement Agreement, ¶ 1.12.)

The settlement agreement also settles PAGA claims on behalf of Aggrieved Employees, defined as:

> [A]ll current and former non-exempt employees of Defendants who are working or worked as "demonstrator," "sales advisors," "breaker," "shift supervisor," "lead demonstrator," "lead sales advisor," "coordinator," "event specialist," or equivalent title at Costco Warehouse locations in the State of California During the PAGA Period."

(Settlement Agreement, ¶ 1.4.) The PAGA Period is defined as "the period from May 23, 2016 through November 3, 2023 for WDS employees, and March 18, 2020 through November 3, 2023 for CDS employees. (Settlement Agreement, ¶ 1.29.)

According to the terms of the settlement, Defendants will pay a gross settlement amount of $10,200,000. (Settlement Agreement, ¶¶ 1.21, 3.1.) The gross settlement amount includes attorney fees up to $3,400,000 (1/3 of the gross settlement amount), litigation costs

not to exceed $80,000, a PAGA allocation of $100,000 (75 percent (i.e., $75,000) to be paid to the LWDA and the remaining 25 percent (i.e., $25,000) to be paid to Aggrieved Employees), enhancement awards up to a total amount of $32,500 (with $15,000 allocated to plaintiff Georgina Espinoza, $7,500 allocated to plaintiff Yesenia Quintero, and $5,000 each allocated to alternate class representatives Carla Funk and Maryury Becerra), and settlement administration costs not to exceed $75,000. (Settlement Agreement, ¶¶ 3.2, 3.2.1-3.2.4.) The court approves Phoenix Class Action Administration Solutions as administrator and actual costs not to exceed $75,000. (See Declaration of Kevin Lee in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement, ¶ 15, Ex. B.)

The remaining net settlement amount will be distributed to participating class members on a pro rata basis based on the number of workweeks worked during the Class Period. (Settlement Agreement, ¶ 3.2.4.) Similarly, Aggrieved Employees will receive a pro rata share of the $25,000 portion of the PAGA allocation, based on the number of pay periods worked during the PAGA period. (Settlement Agreement, ¶ 1.23.) Funds from checks that remain uncashed after the void date shall be transmitted to the California Controller's Unclaimed Property Fund, or if required by the court, to a *cy pres* charitable entity agreed upon by the parties and approved by the court. (Settlement Agreement, ¶ 4.4.3.)

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 member funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent." Plaintiffs are directed to provide a new *cy pres* in compliance with Code of Civil Procedure section 384, prior to the continued hearing date.

In the settlement agreement, Plaintiffs agree to a comprehensive general release. (Settlement Agreement, ¶¶ 5.1, 70.) The settlement agreement defines "Released Parties" as Defendants and related persons and entities. (Settlement Agreement, ¶ 1.38.) Any class

member who does not submit a timely request for exclusion (i.e., a "Participating Class Member") releases Released Parties from:

> all claims that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaints or the LWDA Notices, including any and all claims that Defendants failed to pay all wages due, including minimum wages and overtime, including but not limited to at the regular rate or failing to pay for time spent in security check lines, or rounding; failed to provide sick pay at the regular rate; failed to provide meal and rest periods; pay meal and rest period premiums, including at the regular rate of pay; failed to pay reporting time pay; failed to furnish accurate itemized wages statements; failed to keep accurate records; or failed to pay all wages due to discharged employees, during the Class Period. The released claims include but are not limited to claims for wages, statutory penalties, civil penalties, attorneys' fees and costs, interest, or other relief brought under California Labor Code sections 201-204, 218.5, 226, 226.3, 226.7, 510, 512, 516, 558, 1174, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, California Business and Professions Code sections 17200-17208, and the Industrial Welfare Commission Wage Orders. Except as set forth in Section 5.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation.

(Settlement Agreement, ¶ 5.2.) The agreement also includes a release of PAGA claims by Plaintiffs and class members who opt-out of the settlement:

> Plaintiffs, on behalf of the LWDA, and all Non-Participating Class Members who are Aggrieved Employees, are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors and assigns, the Released Parties from all claims for PAGA penalties that were alleged, or reasonable could have been alleged, based on the facts stated in the Operative Complaints and the LWDA Notices, including any and all claims that Defendant failed to pay all wages due, including minimum wages and overtime, including but not limited to at the regular rate or failing to pay for time spent in security check lines, or rounding; failed to provide sick pay at the regular rate, failed to provide meal and rest periods; pay meal and rest period premiums, including at the regular rate of pay; failed to pay reporting time pay; failed to furnish accurate itemized wage statements; failed to keep accurate records; or failed to pay all wages due to discharged employees, during the PAGA Period. The released claims include but are not limited to claims for statutory penalties under PAGA for violations of California Labor Code sections 201-204, 218.5, 226, 226.3, 226.7, 510, 512, 516, 558, 1174, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, California Business and Professions Code sections 17200-17208, and the Industrial Welfare Commission Wage Orders.

(Settlement Agreement, ¶ 5.3.)

B. Fairness of the Settlement

Plaintiffs state that the settlement was reached through discovery, analysis, and mediation with Lynn Frank of Frank and Feder Mediators. (Stiller Dec., ¶¶ 24-29.). Throughout the history of this action, Plaintiffs have engaged in significant formal discovery, including special interrogatories, requests for productions of documents, and several PMK depositions. (Stiller Dec., ¶¶ 8-14, 20.) Plaintiffs have also obtained additional informal discovery, including updated employee timekeeping records, applicable policies, counts of current and former employees, workweeks and pay periods in the Class Period and PAGA Period, and available arbitration agreements for putative class members. (Stiller Dec., ¶¶ 20, 25.)

From the information provided, Plaintiffs determined that the proposed class contains approximately 18,520 members. (Stiller Dec., ¶¶ 30-33.) Plaintiffs estimate that Defendants' maximum potential liability for all the claims is approximately $122,098,797 (i.e., $76,786,097 for the class claims and $45,312,700 for the PAGA claim). (Stiller Dec., ¶¶ 117-126.). Plaintiffs provide a breakdown of this amount by claim. (*Ibid.*) Plaintiffs discounted the value of the claims given the Defendants' defenses, the possibility that the court could substantially reduce any PAGA penalties, and the risks and costs associated with class certification. (*Ibid.*) The average net recovery per class member is $356.85.

The gross settlement amount represents approximately 8.4% 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

Plaintiffs request enhancement awards in the amount of $22,500, with $15,000 to be allocated to plaintiff Georgina Espinoza and $7,500 to plaintiff Yesenia Quintero. (Settlement

Agreement, ¶ 3.2.1.) The settlement agreement further states that Plaintiffs' counsel may also apply for a service award of up to $5,000 each for class members Carla Funk and Maryury Becerra, each of whom are subject to the general release applicable to the Plaintiffs and class representatives. (Settlement Agreement, ¶¶ 3.2.1, 5.1.) Plaintiffs' counsel has requested these additional service awards to Ms. Funk and Ms. Becerra, bringing the total amount of enhancement awards requested to $32,500. (Stiller Dec., ¶¶ 140-143.)

> 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 Espinoza has submitted a declaration describing her participation in this action. (Declaration of Georgina Espinoza in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, ¶¶ 4-7.). Ms. Espinoza states that she spent significant time on this litigation, including by assisting the attorneys with gathering information, providing relevant documents, assisting with discovery responses, and appearing at multiple full-day mediations. (*Ibid.)* Ms. Espinoza also reviewed and verified discovery responses, prepared for a deposition, and had her deposition taken. (*Id.* at ¶¶ 6-7.)

Plaintiff Quintero has a submitted a declaration describing her participation in this action. (Declaration of Yesenia Quintero in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, ¶¶ 6-8.). Ms. Quintero states that she has been actively involved in this litigation, including by providing information to her attorneys, participation in various phone calls with her attorneys, and making herself available during the full-day mediation that led to this settlement. (*Id.* at ¶ 8.) Ms. Quintero also provided input and a declaration to help

her attorney successfully oppose arbitration. (*Ibid*.) Ms. Quintero estimates that she has spent approximately 30 to 35 hours in total in connection with this litigation. (*Ibid.*)

Carla Funk has a submitted a declaration describing her participation in this action. (Declaration of Carla Funk in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, ¶¶ 4-8.). Ms. Funk states that she stepped forward to make herself available as an alternate class representative, assisted the attorneys with investigation and gathering information, maintained contact with class counsel, and made herself available as needed to assist with this litigation. (*Id.* at ¶¶ 4-5.). Ms. Funk chose to help with this lawsuit while knowing that her involvement could make it more difficult to obtain employment. (*Id.* at ¶ 6.)

Maryury Becerra has submitted a declaration describing her participation in this action. (Declaration of Maryury Becerra in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, ¶¶ 4-6.). Ms. Becerra states that she stepped forward to make herself available as an alternate class representative and spent significant time throughout this action working with class counsel. (*Id.* at ¶ 4.) Ms. Becerra assisted the attorneys with gathering information, provided all relevant documents in her possession, and made herself available as needed. (*Id.* at ¶¶ 4-5.). Ms. Becerra chose to help with this lawsuit while knowing that her involvement could make it more difficult to obtain employment. (*Id.* at ¶ 6.)

Each of these individuals have spent time in connection with this litigation and undertook risk by becoming involved with this case because it might impact their future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].).

However, the amounts requested are higher than the court typically awards in such situations. Further, Yesenia Quintero's declaration provides an estimate of the amount of time she had spent in connection with this case, but the other declarations do not contain a similar time estimate. Accordingly, prior to the final approval hearing, Georgina Espinoza, Carla Funk, and Maryury Becerra shall file supplemental declarations further describing their participation in the action and including an estimate of the hours spent in connection with this litigation.

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.) Plaintiffs' counsel will seek attorney fees up to $3,400,000 (1/3 of the gross settlement amount) and litigation costs not to exceed $80,000. Plaintiffs' counsel shall submit lodestar information (including hourly rate and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiffs' counsel shall also submit evidence of actual costs incurred as well as evidence of any 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 18,520 class members, who can be identified from a review of Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. 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, the first paragraph on page 2 of the class notice is misleading as it states that class members "have two basic options under the Settlement": (1) "Do Nothing"; and (2) "Opt-Out of the Class Settlement." This portion of the class notice must be modified to reflect that class members have a third option—they may object to the settlement.

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

> Class members may appear at the final approval hearing in person or remotely using the Microsoft Teams link for Department 19 (Afternoon Session). Instructions for appearing remotely are provided at: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members who wish to appear remotely are encouraged to contact class counsel at least three days before the hearing if possible, so that potential technology or audibility issues can be avoided or 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, 2024 at 1:30 p.m. in Department 19. Plaintiff shall file a supplemental declaration no later than August 19, 2024, identifying a new *cy pres* recipient and including an amended class notice. No additional filings are permitted.

Plaintiff shall prepare the order.

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Calendar Line 3

Case Name: Sorto v. Clark Pest Control of Stockton, Inc., et al. (Class Action)
Case No.: 23CV424799

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 10, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This putative class action arises out of various alleged wage and hour violations. On October 26, 2023, plaintiff Nelson Sorto ("Plaintiff") filed the operative Class Action Complaint against defendants Clark Pest Control of Stockton, Inc. ("CPCS") and Larry Bragg ("Bragg") (collectively, "Defendants"), setting forth causes of action for: (1) Failure to Pay Overtime Wages; (2) Failure to Minimum Wages; (3) Failure to Provide Meal Periods; (4) Failure to Provide Rest Periods; (5) Waiting Time Penalties; (6) Wage Statement Violations; (7) Failure to Timely Pay Wages; (8) Failure to Indemnify; (9) Unfair Competition.[3]

Now before the court is Defendants' motion to compel arbitration of Plaintiff's claims and dismiss or, alternatively, stay this action. Plaintiff does not oppose the request to compel arbitration but contends this action should be stayed pending the outcome of arbitration, rather than dismissed.

II. LEGAL STANDARD

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc*. (2018) 20 Cal.App.5th 835, 840.) Here, there is no dispute that the FAA applies, as the arbitration agreement expressly so provides. (See *Davis v. Shiekh Shoes, LLC* (2022) 84 Cal.App.5th 956, 963 [the FAA applies if it is so stated in the agreement since arbitration is a matter of contract].) However, "[t]he procedural aspects of the

[3] On January 8, 2024, Plaintiff filed a separate action in this court against Defendants, seeking penalties under the Private Attorneys General Act, Labor Code section 2698, et seq. (See *Nelson Sorto v. Clark Pest Control of Stockton, Inc., et al*, Santa Clara County Superior Court, Case No. 24CV428713.)

FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.)

The California Arbitration Act provides that a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp*. (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal, supra*, 14 Cal.4th at p. 413.) "In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

III. DISCUSSION

Defendants move for an order compelling the parties to binding arbitration and dismissing, or alternatively, staying Plaintiff's claims in this action. (Notice and Defendants' Petition to Compel Binding Arbitration and Dismiss Action, pp. 1:22-2:1.) Defendants assert that Plaintiff signed an arbitration agreement by hand on March 22, 2023, thereby agreeing to arbitrate his employment claims with CPCS. (Declaration of Heather Garcia in Support of Defendants' Petition to Compel Binding Arbitration and Dismiss Action ("Garcia Dec."), ¶¶ 3-5, Ex. 1 ("Agreement").)

Plaintiff is a former employee of CPCS who was hired on or about April 19, 2011 and who voluntarily quit on July 28, 2023, without notice or explanation. (Garcia Dec., ¶ 5.) All CPCS employees are required to sign a mutual arbitration agreement with CPCS as condition of their new or continued employment. (Garcia Dec., ¶ 3.) Plaintiff first signed an arbitration

agreement with CPCS on April 25, 2011, soon after he was first hired. (Garcia Dec., ¶ 6.) Plaintiff later signed an updated arbitration agreement on June 23, 2015. (*Ibid.*) Most recently, Plaintiff signed the Agreement in question on March 22, 2023. (*Ibid.*)

Defendants contend that Plaintiff's individual wage and hour claims are subject to binding arbitration and Plaintiff cannot pursue class action claims on behalf of others due to an enforceable class action waiver. (Defendants' Memorandum of Points and Authorities in Support of Defendant's Petition to Compel Binding Arbitration and Dismiss Action ("MPA"), p. 1:5-8.) Defendants further contend the Agreement meets all requirements for fundamental fairness as set forth by our high court in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.

Here, page 1 of the Agreement contains the following language:

> In order to obtain a speedy and just determination of the parties' rights and obligations and to avoid the costly expense and lengthy delays typically associated with court actions, Employee and CPC voluntarily agree to submit (with the limited exceptions noted below) any and all claims, disputes, or controversies they may have against each other which arise from the employment relationship between Employee and CPC or the termination of the employment relationship to final and binding arbitration before a neutral arbitrator, and not to any court, a trial by a jury, or any other forum, including, but not limited to, an administrative hearing before the California Labor Commissioner.

(Agreement, p. 1.)

Defendants argue that this language of the Agreement expressly encompasses the claims brought by Plaintiff in this case. (MPA, pp. 3:26-4:4.) Defendants further assert that the court should dismiss Plaintiff's purported class claims due to a valid class action waiver. (MPA, pp. 4:26-27.)

Plaintiff submitted a very brief (two page) response, expressing that he "does not oppose Defendants' Motion to the extent Defendant seeks to compel Plaintiff's claims to arbitration." (Plaintiff's Notice of Non-Opposition []; Request to Stay, p. 2:6-7.) Plaintiff opposes the request to dismiss his individual allegations pending the outcome of arbitration, contending that the claims should be stayed. (*Id.* at p. 2:7-11.) Plaintiff's response makes no mention of Defendant's request to dismiss Plaintiff's purported class claims. (*Ibid.*)

In reply, Defendants emphasize that Plaintiff does not dispute their position that arbitration agreement contains a valid class action waiver: "Plaintiff has never asserted, whether in opposition to Defendant's motion or in meet and confer efforts, that the class action waiver is unenforceable or invalid." (Reply in Support of Defendants' Petition to Compel Binding Arbitration and Dismiss Action, p. 2:6-7.) Defendants direct the court to the following language in support of its position in favor of dismissing the class claims:

> To the maximum extent that can be restricted by applicable law, any claims in arbitration by either party can be maintained only the party's individual capacity and not as a plaintiff or class member in any purported class, collective or other representative capacity, including, but not limited to, representative action on behalf of other aggrieved employees pursuant to the California Private Attorneys General Act. ("PAGA").

(Agreement, p. 2.) Defendant construes this language as a valid waiver of class action claims, a point which Plaintiff does not contest. Further, to the extent the above paragraph is not construed as a complete waiver of class action claims, the Agreement also contains the following language:

> EMPLOYEE AND CPC AGREE THAT ARBITRATION IS THE EXCLUSIVE MEANS FOR RESOLVING ANY DISPUTES BETWEEN THEM. EMPLOYEE AND CPC EXPRESSLY WAIVE ANY RIGHT TO SEEK RESOLUTION OF ANY CLAIM OR DISPUTE IN ANY OTHER FORUM INCLUDING SEEKING RESOLUTION OF ANY CLAIM OR DISPUTE IN COURT OR IN A TRIAL BY JURY EXCEPT AS PROVDIED IN THIS AGREEMENT.

(Agreement, p. 3, emphasis original.)

Defendants' position that the class claims should be dismissed is supported by the language of the Agreement and is unopposed by Plaintiff. Thus, to the extent that the motion seeks dismissal of Plaintiff's class claims alleged in the operative complaint, the motion is GRANTED.

Similarly, Plaintiff does not oppose Defendants' position that he should be compelled to submit his individual claims to arbitration, and the language of the Agreement support this conclusion. Thus, to the extent that the motion seeks to compel Plaintiff to submit his individual claims to arbitration, the motion is GRANTED.

Finally, the only point of contention between the parties is whether Plaintiff's individual claims should be dismissed or stayed pending arbitration. Defendants assert

that this court has the authority to dismiss all of Plaintiff's claims because they are arbitrable under the Agreement. (MPA, p. 9:1-13.) Defendants cite several federal cases in support of their position that the court *may* dismiss rather than stay claims pending arbitration, when appropriate. (*Ibid.* [citing *Sparling v. Hoffman Constr. Co.* (9th Cir. 1988) 864 F.2d 635, 638; *Thinket Ink Info. Res., Inc. v. Sun Microsytems, Inc.* (9th Cir. 2004) 368 F.3d 1053, 1060; and *Lewis v. UBS Fin. Servs.* (N.D. Cal. 2011) 818 F.Supp.2d 1161, 1165].) However, Defendant does not contend that this court *must* dismiss Plaintiff's individual claims pending arbitration in this case, nor does Defendant explain how doing so on discretionary basis here would be appropriate.

Moreover, Defendant's argument in favor of dismissing Plaintiff's individual claims pending arbitration appears to be at odds with the express terms of the Agreement, which contemplate staying the action pending arbitration:

> If under applicable law a representative claim or any other legal claim is found not to be arbitrable and such action is pursued in court, the Employee CPC and [sic] such representative or other non-waivable legal claim in court will be stayed pending resolution of claims that are subject to arbitration.

(Agreement at p. 2.)

Accordingly, the action will be stayed pending arbitration, and the motion is denied to the extent Defendant alternatively seeks the dismissal of Plaintiff's individual claims pending arbitration.

IV. CONCLUSION

Defendants' motion to compel arbitration is GRANTED. With respect to Plaintiff's individual claims, the action is stayed pending resolution of arbitration. Defendants' motion to dismiss Plaintiff's class action claims 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: Dancy v. Walmart Inc., et al. [Included in Walmart Wage and Hour Cases, JCCP5136, Santa Clara] (Class Action)
Case No.: 19CV360648

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 10, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This consolidated action involves two cases: (1) *Lynette Branco v. Wal-Mart Associates, Inc.* (Stanislaus County Superior Court, 2020, Case No. CV-20-002265) ("*Branco*"); and (2) *Tamara Dancy v. Walmart, Inc., et al.* (Santa Clara County Superior Court, 2019, Case No. 19CV360648) ("*Dancy*").

On September 28, 2020, Ms. Branco filed a petition for coordination with the Judicial Council to coordinate the *Branco* and *Dancy* actions. On December 16, 2020, the judge who heard the coordination motion judge granted it and coordinated the two actions under the title *Walmart Wage and Hour Cases*, Judicial Council Coordination Proceeding No. 5136 ("JCCP No. 5136").

Thereafter, the parties in *Dancy* reached a settlement as to Ms. Dancy's individual claims. On June 22, 2021, the court granted Ms. Dancy's request to dismiss her individual claims with prejudice and dismiss her class action claims on behalf of absent, putative class members without prejudice. The *Branco* action remains pending, and the motion for class certification in *Branco* is scheduled to be heard on October 30, 2024.

Now before the court is a petition for coordination filed by defendant Wal-Mart Associates, Inc. ("Defendant") to coordinate the *Branco* action with *Crystal Lau v. Wal-Mart Associates, Inc.* (Butte County Superior Court, 2023, Case No. 23CV02704) ("*Lau*").

II. LEGAL STANDARD

> When civil actions sharing a common question of fact or law are pending in different courts, a petition for coordination may be submitted to the Chairperson of the Judicial Council, by the presiding judge of any such court, or by any party to one of the actions after obtaining permission from the presiding judge, or by all of the parties plaintiff or defendant in any such action. A petition for

> coordination, or a motion for permission to submit a petition, shall be supported by a declaration stating facts showing that the actions are complex, as defined by the Judicial Council and that the actions meet the standards specified in Section 404.1. On receipt of a petition for coordination, the Chairperson of the Judicial Council may assign a judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate, or the Chairperson of the Judicial Council may authorize the presiding judge of a court to assign the matter to judicial officers of the court to make the determination in the same manner as assignments are made in other civil cases.

(Code Civ. Proc., § 404.)

> Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.

(Code Civ. Proc., § 404.1.)

III. DISCUSSION

The complaint in *Branco*, filed on May 8, 2020, sets forth the following causes of action: (1) Failure to Provide Required Meal Periods; (2) Failure to Provide Required Rest Breaks; (3) Failure to Pay All Wages Due; (4) Failure to Pay Overtime Compensation; (5) Failure to Provide Accurate Pay Statements; (6) Failure to Pay All Wages Due to Discharged or Quitting Employees; (7) Unlawful Collections of Wages by Employer; (8) Unlawful Business Practices; (9) Failure to Provide Notice of Obtaining Consumer Report; and (10) Representative Action for Civil Penalties.

The operative second amended complaint in *Lau*, filed by plaintiff Crystal Lau ("Plaintiff") on January 25, 2024, sets forth the following causes of action: (1) Failure to Pay Minimum Wages; (2) Unpaid Overtime: (3) Meal Break Violations; (4) Rest Break Violations; (5) Failure to Timely Pay Wages During Employment; (6) Failure to Provide Accurate Wage Statements; (7) Final Wages Not Timely Paid; (8) Failure to Reimburse Necessary Business Expenses; (9) Unpaid Vacation Time; (10) Unfair and Unlawful Business Practices; and (11) Private Attorneys General Action.

Defendant argues that the *Lau* action should be coordinated with JCCP 5136 as an add-on case because: (1) there is substantial overlap between the allegations in *Branco* and *Lau*; (2) coordinating *Lau* as an add-on case will not result in the delay of either proceeding; (3) coordination will serve the convenience of the parties, witnesses, and counsel, promote judicial efficiency and economy; and (4) coordination will avoid the risk of duplicative or inconsistent rulings, orders, or judgments. (Defendant's Memorandum of Points and Authorities in Support of Petition for Coordination [] ("MPA"), p. 11-20.)

More specifically, Defendant argues that there is substantial overlap between the cases because plaintiffs Branco and Lau both seek to represent certain managerial employees in California whom Walmart classifies as exempt. (MPA, p. 7:5-9.) Both cases reach back four years before the filing of their respective complaints. (*Id.* at p. 4:10-12.) Both cases assert claims based on a theory that Defendant misclassifies certain managerial employees as exempt, including claims for: failure to pay wages; failure to provide meal and rest periods; failure to timely pay wages during employment and upon termination; failure to provide accurate itemized wage statements; statutory unfair competition; and PAGA penalties. (*Id.* at p. 7:8-19.)

In response, Plaintiff agrees that *Lau* should be added-on to JCCP No. 5136 but clarifies that she only consents to coordination for pre-trial purposes. (Plaintiff Lau's Response to [] Petition for Coordination [] ("Response"), p. 2:2-6.) Plaintiff states she reserves the right to engage in discovery and motion practice separate from *Branco*, as well as her right to have the case "transferred to the proper judge responsible for overseeing trial proceedings in this matter." (*Id.* at p. 2:6-9; see also MPA at p. 4:21-22, fn. 2 ["Walmart reserves all rights and arguments regarding whether the coordination trial judge should oversee any trial proceedings in *Lau*."]) Plaintiff further states that she disagrees with Defendant's argument that there is overlap between purported class in *Branco* and *Lau*, contending that the proposed class in *Lau* is much broader because it includes, for example, "all coaches, not just overnight coaches." (Response, p. 2:10-11.)

Even when actions are coordinated, a party may request that a coordinated action be transferred to another court for one or more purposes, and coordination of cases does not mean that the cases must be tried together. (*Ford Motor Warranty Cases* (2017) 11 Cal.App.5th 626, 644 ["Coordination does not mean that all the cases must be tried in one forum"].) California Rules of Court, rule 3.541, subdivision (b), provides as follows, in pertinent part:

> The coordination trial judge must assume an active role in managing all steps of the pretrial, discovery, and trial proceedings to expedite the just determination of the coordinated actions without delay. The judge may, for the purpose of coordination and to serve the ends of justice:
>
> (1) Order any coordinated action transferred to another court under rule 3.543;
>
> (2) Schedule and conduct hearings, conferences, and a trial or trials at any site within this state that the judge deems appropriate with due consideration to the convenience of parties, witnesses, and counsel; to the relative development of the actions and the work product of counsel; to the efficient use of judicial facilities and resources; and to the calendar of the courts; and
>
> (3) Order any issue or defense to be tried separately and before trial of the remaining issues when it appears that the disposition of any of the coordinated actions might thereby be expedited.

Rule 3.543, in turn, provides that the parties to a coordinated action may request by noticed motion that the court transfer a coordinated action or a severable claim. (California Rules of Court, rule 3.543, subds. (a), (b).) Thus, even with coordination, the parties may seek further relief from the court with respect to concerns related to discovery or transfer for trial purposes. Therefore, the concerns expressed by Plaintiff in response to the motion do not present an obstacle to coordination.

Moreover, Plaintiff does not dispute that there are common issues of fact or law or that coordination will increase judicial efficiency and decrease the chance of duplicative or inconsistent rulings. Both the *Branco* action and *Lau* action bring wage and hour claims against Defendant on behalf of putative classes of managerial employees who were allegedly misclassified as exempt. While there are some differences between the cases, there are significant similarities and common issues such that coordination will add to judicial efficiency and aid in the resolution of the cases. Moreover, if the cases are not coordinated, there is a danger of conflicting rulings because of the overlapping parties and claims.

Accordingly, the petition for coordination is GRANTED, with the Santa Clara County Superior Court designated as the court to hear the coordinated actions. The Sixth Appellate District of the Court of Appeal is designated as the reviewing court having appellate jurisdiction.

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

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Calendar Line 5

Case Name: Macias, et al. v. First Technology Federal Credit Union (Class Action)
Case No.: 21CV375222

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 10, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a wage and hour putative class action and Private Attorneys General Act ("PAGA") action. On September 30, 2021, plaintiffs Lauren Macias, Harlowe Kiliani, and Travis Sancrant (collectively, "Plaintiffs") filed the operative Third Amended Class Action Complaint for Damages ("TAC") against defendant First Technology Federal Credit Union d/b/a First Tech Federal Credit Union ("Defendant"), setting forth the following causes of action: (1) Violation of California Labor Code, § 204 (Failure to Pay for All Hours Worked); (2) Violation of California Labor Code, §§ 510 and 1198 (Unpaid Overtime); (3) Violation of California Labor Code, §§ 226.7 and 512(a) (Unpaid Meal and Rest Period Premiums); (4) Violation of California Labor Code, §§ 1194 and 1197 (Unpaid Minimum Wages); (5) Violation of California Labor Code, §§ 201-203 (Final Wages Not Timely Paid); (6) Violation of California Labor Code, § 226(a) (Non-Compliant Wage Statements); (7) Violation of California Labor Code, §§ 2800 and 2802 (Unreimbursed Business Expenses); (8) Violation of California Business & Professions Code, §§ 17200, *et seq.*; (9) Penalties Pursuant to California Labor Code, § 2699(a) (Labor Code Private Attorneys General Act of 2004); (10) Penalties Pursuant to California Labor Code § 2699(f) (Labor Code Private Attorneys General Act of 2004).

According to the allegations of the TAC, Defendant has subjected Plaintiffs and putative class members to Defendant's timekeeping and payroll policies and practices. (TAC, ¶ 5.) Plaintiff and putative class members frequently work before and after their shifts without compensation because Defendant pays them based on their scheduled hours, regardless of how long they actually work. (TAC, ¶ 6.) The TAC identifies two categories of putative class members: (1) the "Branch Class" comprised of current and former hourly-paid or non-exempt

employees working at Defendant's credit union branch locations; and (2) the "Call Center Class" comprised of current and former hourly-paid or non-exempt employees working at Defendant's customer service call centers. (TAC, 94, 99.)

Defendant requires plaintiff Macias and Branch Class Members to perform opening and closing security procedures before or after scheduled shifts and/or before or after clocking in or out for the day, and the time spent off the clock is uncompensated. (TAC, ¶ 7.) Similarly, Defendant requires plaintiffs Kiliani and Sancrant and the members of the Call Center Class to arrive at their workstations at least ten minutes before the beginning of a scheduled shift, and they are not compensated for the time they spend logging into approximately eight different programs before they are able to take calls. (TAC, ¶ 9.)

Currently before the court is Plaintiffs' motion to compel further responses to plaintiff Harlowe Kiliani's requests for production of documents ("Kiliani RPD"), set two, Nos. 60-61, and set three, Nos. 62-63, and plaintiff Lauren Macias' request for production of documents, set two ("Macias RPD"), No. 61.

II. LEGAL STANDARD

If a party demanding a response to a request for production of documents deems that an objection is without merit or too general, that party may move for any order compelling a further response. (See Code Civ. Proc., § 2031.310, subd. (a).) On a motion to compel a further response to a request for production of documents, it is the moving party's burden to demonstrate good cause for the discovery. (*Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) Once good cause has been shown, the burden shifts to the responding party to justify any objections.

III. DISCUSSION

A. Discovery in Dispute

The disputed Kiliani RPDs seek the following: No. 60 asks Defendant to provide all badge swipe or similar entry records for Call Center Class members; No. 61 asks Defendant to provide all records reflecting access or usage of computers by Plaintiff; No. 62 asks Defendant to provide scheduling records for Plaintiff and Call Center Class members during the relevant time period; no. 63 asks Defendant to provide all documents listing the scheduled shift start

and end time for all Call Center Class members during the class period. Defendant served objection-only responses to the Kiliani RPDs, Nos. 60-63.

Macias RPD, No. 61 asks Defendant to provide all badge swipe or similar entry records for Branch Center Class members. Defendant served objection-only responses to Macias RPD, No. 61.

As an initial matter, there is generally good cause for the discovery sought. The records regarding facility entry, computer access, and scheduling information are relevant to Plaintiffs' Labor Code claims for wage and hour violations. Such records relate directly to the TAC's allegations concerning uncompensated work occurring before and after scheduled shifts. (See Plaintiff's Memorandum of Points and Authorities in Support of Motion to Compel ("MPA"), pp. 5:28-6:28; see also TAC, ¶¶ 5, 6, 94, 99.) As Plaintiffs argue, the records in question will help establish whether Defendant employed a common policy of requiring class members to work outside of their scheduled hours and could also counter Defendant's anticipated opposition to class certification. (MPA at p. 6:1-14; see also Defendant's Opposition to Plaintiffs' Motion to Compel [], ("Opp."), p. 2-4.)

Except as expressly discussed below, Defendant does not defend its objections to the requests. For example, Defendant objected to each request on the ground that is vague and ambiguous but does not address these objections in its opposition papers. Thus, the undefended objections are without merit and are overruled. (See *Williams v. Superior Court* (2017) 3 Cal.5th 531 (*Williams*), 541 ["While the party propounding [discovery] may have the burden of filing a motion to compel if it finds the answers it receives unsatisfactory, the burden of justifying any objection and failure to respond remains at all times with the party resisting [the discovery]. [Citation.]"]; *Coy v. Superior Court* (*Wolcher*) (1962) 58 Cal.2d 210, 220-221 [same])

Defendant objected to each of the RPDs in question on the basis that the requests are overbroad. Defendant defends the overbreadth objection by asserting that the RPDs go beyond the scope of pre-certification discovery and "are improperly sought to test the merits of Plaintiffs' claims." (Opp., p. 3:25-26.)

Defendant's overbreadth objections lack merit because – in the absence of a contrary court order – a civil litigant's right to discovery is broad. "[A]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action … if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.010.)

The scope of discovery is defined by the pleadings. (*Williams*, *supra*, 3 Cal.5th at p. 551 ["That the eventual proper scope of a putative representative action is as yet uncertain is no obstacle to discovery; a party may proceed with interrogatories and other discovery methods precisely in order to ascertain that scope. [Citation.]"]; *Garza v. Brinderson Constructors, Inc.* (N.D.Cal. July 5, 2017, No. 15-cv-057420EJD (SVK)) 2017 U.S.Dist.LEXIS 103755, at *10 [determining the scope of "relevant and appropriate discovery" based on the class as defined in the complaint]; see also *Limon v. Circle K Stores Inc.* (E.D.Cal. Mar. 30, 2020, No. 1:18-cv-01689-SKO) 2020 U.S.Dist.LEXIS 56415, at *13 ["[C]ourts routinely permit precertification discovery on issues like typicality, commonality, and adequacy if it would substantiate the class allegations[.]"].) As Plaintiffs point out, certification issues such as whether common or individual predominate can overlap with issues closely tied to the merits.[4] (See MPA, p. 6:16-28, citing *Binker Restaurant Corp. v Superior Court* (2012) 53 Cal.4th 1004, 1024 ["[W]hether common or individual issues predominate will often depend upon resolution of issues closely tied to the merits. [Citations.]"])

Defendant's citations to authorities discussing precertification attacks on pleadings are not persuasive in light of *Williams* because they do not directly address the issue of precertification discovery. (See Opp., p. 3:4-11, citing *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1076 [motion for judgment on the pleadings prior to certification]; *Home Sav. & Loan Assn. v. Superior Court* (1974) 42 Cal.App.3d 1006, 1008 [appellate court reversed the

[4] The court notes that Plaintiff has cited to California trial court decisions in support of their motion. (See MPA at pp. 5:20-23, 6:19-20.) However, in the absence of an additional showing such as claim or issue preclusion, the rulings of other trial court judges are irrelevant. (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 448; see also *Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 738 ["[A] written trial court ruling has no precedential value. [Citation.]".) Plaintiffs are admonished to refrain from citing to trial court rulings in the future unless they can make an additional showing as to the relevance of the ruling.

trial court order's determining the substantive validity of claims prior to certification]; *Tarkington v. Cal. Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1500, 1510, fn. 9 [demurrer prior to certification]; *Travelers Ins. Co. v. Superior Court* (1977) 65 Cal.App.3d 751 [trial court had no discretion to proceed with trial of a class action before determining the identity of the class and the manner of notice to that class].)

Furthermore, cases often settle as the certification motion is being prepared, and some amount of merits discovery may be necessary for the plaintiff to meet its burden of showing that the settlement is fair and reasonable. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 [the most important factor in assessing a class action settlement is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement"].)

Next, Defendant objected to each of the RPDs in question on the basis that the requests are unduly burdensome. In support of this objection, Defendant submits a declaration from its Employment Relations Manager, Jazzmyn Hunsaker ("Hunsaker Dec."). Regarding scheduling data, Hunsaker declares that it will take approximately one week to prepare a report dating back to November 2022 (on its "Calabrio" program), reflecting the detailed scheduled activity for non-exempt call center employees. (Hunsaker Dec., ¶¶ 5-6.) Hunsaker states that Defendant could also produce a separate scheduling report from the Calabrio program, and this would take approximately one to two weeks. (*Id.* at ¶¶ 7-8.) Hunsaker explains that Defendant has access to another program, "ICBM" (Genesys), that can produce scheduling records from 2017 up to November 2022. (*Id.* at ¶¶ 4, 10.) Hunsaker states that a report from ICBM would produce approximately 16,000 pages, but she does not provide an estimate of the time required to produce this ICBM report. (*Id.* at ¶ 10.)

Hunsaker further declares that Defendant's security team is able to pull badge reports showing when employees first entered its offices and/or moved around the building to areas requiring a badge to enter. (Hunsaker Dec., ¶ 11.) Hunsaker states that completing reports from this data will take between approximately 40 to 50 hours and would require between 13 and 17 weeks to complete due to competing priorities. (*Id.* at ¶ 12.)

Here, Hunsaker's declaration demonstrates that some burden will be imposed on Defendant to substantively respond to Plaintiffs' RFPs requesting badge swipe and scheduling information. However, Defendant makes no assertion that it has attempted to meet and confer with Plaintiffs or offered to permit a limited inspection that can be allowed under the circumstances. Further, the court does not find the burden described by Defendant to be unusually excessive, especially given that the parties can meet and confer to reasonably limit the scope of the responses and Defendant can move for a protective order if necessary. Therefore, Defendant's undue burden objections are overruled.

IV. CONCLUSION

Accordingly, Plaintiffs' motion to compel further responses to the RPDs is GRANTED. Within 30 days from the date of the filing of the order on this matter, Defendant shall serve Plaintiff with further, code-compliant responses to the Kiliani RPDs, Nos. 60-63, and to the Macias RPD, No. 61, without objection (except for those based on the attorney-client privilege and work product doctrine, which are preserved). The parties are directed to meet and confer regarding the scope of the documents to be produced in accordance with Defendant's further responses. If the parties are unable to reach an agreement, they shall contact the complex coordinator to schedule an informal discovery conference. If any responsive documents are withheld from production on the ground that they are protected by the attorney-client privilege or work product doctrine, Defendant shall produce a privilege log identifying each item withheld from production and setting forth sufficient facts to permit an evaluation of the merits of the asserted objection.

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

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