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: AUGUST 7, 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	20CV370503	Velocity Investments LLC v. Sipin	**Rescheduled to 9/11/24 at 1:30 p.m.**
LINE 2	23CV427713	Brackett v. Select Comfort Retail Corporation (Class Action)	See Line 2 for tentative ruling.
LINE 3	23CV410334	Becerril v. Watersavers Irrigation, Inc. (Class Action)	See Line 3 for tentative ruling.
LINE 4	21CV385614	Smith, et al. v. Advanced Clinical Employment Staffing, LLC (Class Action)	See Line 4 for tentative ruling.
LINE 5	22CV402965	Legarde v. Spectra360, Inc. (PAGA)	See Line 5 for tentative ruling.
LINE 6			
LINE 7			
LINE 8			
LINE 9			
LINE 10			

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LAW AND MOTION TENTATIVE RULINGS

LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name:
Case No.:

- oo0oo -

Calendar Line 2

Case Name: Brackett v. Select Comfort Retail Corporation (Class Action)
Case No.: 23CV427713

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on August 7, 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 alleged wage and hour violations. On December 15, 2023, plaintiff Michael Brackett ("Plaintiff") filed a complaint against Select Comfort Retail Corporation ("Defendant") as a putative wage and hour class action (the "Complaint"). The still-operative Complaint alleges causes of action for: (1) failure to pay wages for all hour worked at minimum wage in violation of Labor Code sections 1194 and 1197; (2) failure to pay overtime wages daily overtime worked violation of Labor Code sections 510 and 1194; (3) failure to authorize or permit meal periods in violation of Labor Code sections 512 and 226.7; (4) failure to authorize or permit rest periods in violation of Labor Code section 226.7; (5) failure to provide complete and accurate wage statements in violation of Labor Code section 226; (6) failure to timely pay all earned wages and final paychecks due at time of separation of employment in violation of Labor Code sections 201, 202, and 203; and (7) unfair business practices in violation of Business and Professions Code sections 17200, *et seq.*

On December 28, 2023, the court entered an order deeming the case complex and staying discovery and responsive pleading deadlines. At the hearing on May 8, 2024, the court lifted the stay on responsive pleadings and the stay on discovery as to the arbitration issue only.

Now before the court is Defendant's motion, filed on June 7, 2024, seeking: (1) an order compelling Plaintiff to arbitrate all of his individual causes of action pleaded in the Complaint; (2) an order dismissing the putative class claims alleged in the Complaint; and (3) an order staying the remaining action pending completion of the arbitration. (Defendant's Notice of Motion and Motion to Compel Arbitration, to Dismiss Class Claims, and to Stay Further Proceedings (hereinafter, "Defendant's Motion"), p. 2:2-9.)

The parties agreed to a stipulation regarding the briefing schedule for the instant motion, and the court entered an order on that stipulation. (See Joint Stipulation and Order Re Briefing, filed on June 18, 2024 (the "Stipulation").) According to the Stipulation, the parties mutually agreed to a hearing date of August 7, 2024 for Defendant's Motion. (*Id.* at p. 2:13-15.) The parties also agreed, and the court ordered, that Plaintiff's deadline to serve and file an opposition would be July 10, 2024 at 5:00 p.m., and that Defendant's deadline to serve and file a reply would be July 24, 2024 at 5:00 p.m. (*Id.* at ¶¶ 1-2, p. 2:21-26.)

On July 16, 2024, Plaintiff filed an ex parte application to continue the hearing on Defendant's Motion. Defendant filed an opposition to the ex parte.

On July 24, 2024, Defendant filed a notice of Plaintiff's non-opposition to Defendant's Motion.

On July 29, 2024, the court entered an order denying Plaintiff's ex parte application to continue the hearing on Defendant's Motion.

II. Discussion

A. Legal Standard

Defendant contends that the Federal Arbitration Act ("FAA") applies in this case. Plaintiff has not filed an opposition.

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, court's 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 (*Pinnacle*).) "The procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement. [Citations.]" (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840, fn. omitted.)

In ruling on a motion to compel arbitration, the court must inquire as to (1) whether there is valid agreement to arbitrate, and (2) if so, whether the scope of the agreement covers the claims alleged. (See *Howson v. Dean Witter Reynolds* (2002) 537 U.S. 79, 84; see also *Pinnacle, supra*, 55 Cal.4th at p. 236 ["[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate."].)

Code of Civil Procedure section 1281.2 provides, in relevant part: "On a petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refused to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate that controversy if it determines that an agreement to arbitrate the controversy exists."

"Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate. [Citations.] The threshold question requires a response because if such an agreement exists, then the court is statutorily required to order the mater to arbitration." (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 19 (*Flemming*), internal quotation marks and citation omitted.)

"As the United States Supreme Court observed two decades ago: 'Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," [citation] we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.' (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 294 [].) 'For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' (*United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582.)" (*Flemming*, *supra*, 88 Cal.App.5th at pp. 19-20.)

"The trial court may resolve motions to compel arbitration in summary proceedings, in which the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." (*Mendoza v. Trans Valley Transport* (2022) 75 Cal.App.5th 748, 763.) "The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability." (*Pinnacle*, *supra*, 55 Cal.4th at p. 236.)

A moving party can meet their initial burden by showing that an agreement to arbitrate the dispute exists. (*Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1060 (*Espejo*).) "A plain reading of [Code of Civil Procedure section 1281.2] indicates that as a preliminary matter the court is only required to make a finding of

the agreement's existence, not an evidentiary determination of its validity." (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 710 (*Molecular*), quoting and citing *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219.)

"If the moving party meets its initial prima facie burden and the opposing party disputes the agreement, then in the second step, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement." (See *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165 (*Gamboa*).) "The purpose of arbitration is to have a simple, quick and efficient method to resolve controversies. For this reason, there is a strong public policy favoring contractual arbitration." (*Molecular*, *supra*, 186 Cal.App.4th at p. 704.)

B. Analysis

1. Defendant's Initial Burden

As the moving party, it is Defendant's burden to establish the existence of an arbitration agreement. Defendant contends Plaintiff entered into a valid and enforceable agreement to arbitrate all disputes arising out of his employment with Defendant. (Defendant's Motion, p. 2:10-12; Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Compel Arbitration, to Dismiss Class Claims, and to Stay Further Proceedings ("MPA"), p. 8:14-15.)

Defendant submits a document entitled "Voluntary Mutual Agreement to Arbitrate." (Declaration of Nou Yang in Support of Defendant's Motion to Compel Arbitration, to Dismiss Class Claims, and to Stay Proceedings ("Yang Dec."), ¶ 9, Ex. 3 (the "Agreement").) Defendant further presents evidence that Plaintiff electronically signed the Agreement with his initials "MB" on October 11, 2022 in the course of his hiring. (Yang Dec., ¶¶ 3-9.) Defendant asserts Plaintiff signed the Agreement using a unique login and password for Defendant's human resources management platform called Workday. (*Ibid.*)

Defendant presents evidence that, prior to filing this motion, its counsel requested that Plaintiff stipulate to arbitration of Plaintiff's individual claims, and that Plaintiff refused.

(Declaration of Jamie B. Laurent in Support of Defendant's Motion to Compel Arbitration, to Dismiss Class Claims, and to Stay Proceedings, § 2.)

Defendant argues that the Agreement covers the claims pleaded in the Complaint. (MPA, p. 17:26.) The Agreement contains the following provisions:

> [Plaintiff and Defendant] hereby agree that, except as otherwise provided in this Agreement, any and all disputes, claims or controversies between the parties, including but not limited to any dispute arising out of or relating to this Agreement, the employment relationship between the parties, or the formation or termination of the employment relationship, that are not resolved by their mutual agreement shall be resolved by final and binding arbitration by a neutral arbitrator.

(Agreement, p. 1.)

> The "Claims" covered by this Agreement include, but are not limited to, claims for: … wages or other compensation due; penalties; benefits; reimbursement of expenses; … violation of any federal, state other governmental constitution, statute, ordinance or regulation (as originally enacted and as amended), including but not limited to … the California Labor Code, the California Civil Code, and the California Wage Orders.

(*Id.* at § 4, pp. 1-2.)

> BY SIGNING THIS AGREEMENT, YOU AGREE THAT YOU MAY BRING AND PURSUE CLAIMS AGAINST THE COMPANY ONLY IN YOUR INDIVIDUAL CAPACITY, AND MAY NOT BRING, PURSUE OR ACT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR COLLECTIVE PROCEEDING.

(*Id.* at § 5, p. 2.)

> BY SIGNING THIS AGREEMENT, YOU ACKNOWLEDGE AND AGREE THAT THE PARTIES HEREBY WAIVE THEIR RIGHT TO HAVE ANY DISPUTE, CLAIM, OR CONTROVERSY DECIDED BY A JUDGE OR JURY IN A COURT.

(*Id.* at p. 4.)

Here, the class action Complaint alleges seven causes of action, six of which are for violations of the California Labor Code. (Complaint, pp. 1-2.) The seventh cause of action for unfair business practices under California Business and Professions Code sections 17200, *et seq.*, is based upon the alleged violations of California Labor Code. (Complaint, ¶ 104.) The Complaint's seven causes of action are within the scope of the Agreement because, by the plain terms of the Agreement itself, claims for violations of the California Labor Code are within the scope of the Agreement. (Agreement, § 4, pp. 1-2.)

Based on the forgoing, the court finds that Defendant has met its initial burden on its petition to compel arbitration of Plaintiff's individual claims. Defendant has submitted an arbitration agreement signed by Plaintiff, the Complaint's claims fall within the scope of the arbitration agreement, and Plaintiff has refused Defendant's demand for arbitration. (See *Pinnacle*, *supra*, 55 Cal.4th at p. 236 ["party seeking arbitration bears the burden of proving the existence of an arbitration agreement"]; see also *Espejo*, *supra*, 246 Cal.App.4th at p. 1060 [moving party meets initial burden by submitting a copy of the purported arbitration agreement bearing opposing party's electronic signature]; see also Code Civ. Proc., § 1281.2 [unless an exception applies, court shall order arbitration upon a petition showing "the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy"].)

2. Plaintiff's Non-Opposition

As Defendant notes, Plaintiff has failed to oppose Defendant's Motion. (See Defendant's Notice of Plaintiff's Non-Opposition to Defendant's Motion to Compel Arbitration, to Dismiss Class, and the Stay Further Proceedings in Lieu of a Reply, pp. 2:5-21.) Defendant's counsel stated that he or his office alerted Plaintiff's counsel of Plaintiff's failure to file an opposition by the stipulated deadline and that Defendant's counsel agreed to an extension of the deadline for the filing of Plaintiff's opposition. (Declaration of Jamie B. Laurent in Support of Defendant's Notice of Plaintiff's Non-Opposition [], ¶¶ 2-9.) According to Defendant's counsel, Plaintiff's counsel explained that there was no opposition filed due to a calendaring error. (*Id.* at ¶¶ 5-7.) Notably, even after being alerted that the deadline had passed and requesting an extension to that deadline, Plaintiff has not filed an opposition. (*Ibid.*)

As discussed above, after the parties submitted a stipulation, the court ordered the following: "The deadline for Plaintiff to file and serve Plaintiff's Opposition to Defendant's Motion to Compel Arbitration, to Dismiss Class Claims and to Stay Further Proceedings shall be no later than 5:00 pm on July 10, 2024." (Stipulation, ¶ 1.) Nonetheless, court records contain no opposition from Plaintiff, nor any indication of Plaintiff's attempt to file an opposition to the motion now before the court. Instead of filing an opposition by July 10 deadline as it agreed to do, Plaintiff filed an ex parte application on July 16, asking the court to

continue the hearing on Defendant's Motion. The court considered Plaintiff's ex parte application and denied it under Rules of Court 3.1200-3.1207.

Code of Civil Procedure section 1290.6 governs the time for serving and filing a response to a petition to compel arbitration, and provides as follows in full:

> A response shall be served and filed within 10 days after service of the petition except that if the petition is served in the manner provided in paragraph (2) of subdivision (b) of Section 1290.4 [regarding service outside California], the response shall be served and filed within 30 days after service of the petition. The time provided in this section for serving and filing a response may be extended by an agreement in writing between the parties to the court proceeding or, for good cause, by order of the court.

Rule of Court 8.54, subdivision (c), states that "[a] failure to oppose a motion may be deemed a consent to the grant of the motion."

By failing to file any response or opposition to Defendant's petition to compel arbitration, Plaintiff has failed to meet his burden. (See *Gamboa*, *supra*, 72 Cal.App.5th at p. 165 ["If the moving party meets its initial prima facie burden and the opposing party disputes the agreement, then in the second step, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement."])

Here, Plaintiff has produced no evidence whatsoever to challenge the validity of the Agreement. While Plaintiff contends (in his ex parte application) that Defendant's discovery responses are subject to a motion to compel further responses, such a contention does not amount to admissible evidence calling into question the validity of the Agreement. (See Plaintiff's Ex Parte Application to Continue Hearing ("Ex Parte"), p. 4:22-24.)

Plaintiff argues that he requires information "such as the Plaintiff's job description" to assess "whether Plaintiff and the putative class qualify for the FAA exemption as a transportation worker." (Ex Parte, p. 7:6-9.) Plaintiff also makes the following contentions:

> Only Defendant has access to metadata and other information that can be used to account for the veracity of Plaintiff's purported signature. This is especially relevant since Plaintiff does not recall signing the arbitration agreement the only source of verification absent discovery is a declaration by one of Defendant's agents.

(Ex Parte, p. 7:9-14.) However, counsel's arguments in support of an ex parte application are not admissible evidence sufficient to meet Plaintiff's burden in opposing Defendant's Motion. Plaintiff has offered no argument as how an exemption to the FAA might apply here.

Counsel's declaration in support of Plaintiff's ex parte application makes no reference to any calendaring error, nor does it offer any explanation for Plaintiff's agreement to the July 10, 2024 deadline for Plaintiff's opposition. (Declaration of Aleksandra Urban in Support of Plaintiff's Ex Parte Application to Continue Hearing ("Urban Dec."), ¶¶ 1-15.) Plaintiff's discovery requests also appear to go well beyond the issue of arbitration, thus violating the stay on discovery as to non-arbitration issues. (See, e.g., Urban Dec., Ex. C, p. 7 ["REQUEST FOR PRODUCTION NO. 5: [¶] Any and all PAYROLL RECORDS for NON-EXEMPT EMPLOYEES during the LIABILITY PERIOD."])

The court has already ruled on Plaintiff's ex parte application for a continuance as to Defendant's Motion, and there is no pending request for a continuance before the court. As is evident from Defendant's opposition to Plaintiff's prior ex parte application, the parties here do not stipulate to a continuance under Code of Civil Procedure section 592.2 ("Section 592.2").[1] Even if there were such a stipulation, Plaintiff is not entitled to a continuance as a matter of right because such an entitlement "would infringe upon the 'judicial power' of the court under our state Constitution." (*Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 15; see also *Briggs v. Brown* (2017) 3 Cal.5th 808, 853 [Section 592.2's provision are "directory only, to avoid impinging on the court's inherent authority to control the order of their business."]) Under Local Civil Rule 8(D), a scheduled motion may be continued only upon application to the judge who is to hear the motion, upon a showing of good cause. Plaintiff has failed to make such a showing here.

Accordingly, Plaintiff has failed to meet his burden in response to Defendant's Motion and has failed to establish good cause for a continuance.

III. Conclusion

[1] Code of Civil Procedure section 595.2 states in full: "In all cases, the court shall postpone a trial, or the hearing of any motion or demurrer, for a period not to exceed thirty (30) days, when all attorneys of record of parties have appeared in the action agree in writing to such postponement."

The motion to compel arbitration and stay proceeding as to the Complaint's individual claims is GRANTED. The motion to dismiss the Complaint's putative class claims is GRANTED.

A status conference concerning the progress of arbitration will be set by the Court. _____.

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

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Calendar Line 3

Case Name: Becerril v. Watersavers Irrigation, Inc. (Class Action)
Case No.: 23CV410334

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on August 7, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a class and representative action arising out of alleged wage and hour violations brought by plaintiffs Isaiah Becerril and Brian Cruz (collectively, "Plaintiffs") against defendant Watersavers Irrigation, Inc. ("Defendant"). On January 25, 2023, Plaintiff Becerril initiated this action by filing a Class Action Complaint for Damages, setting forth several causes of action under the California Labor Code and one cause of action for violation of California Business & Professions Code, section 17200, *et seq.* (the Unfair Competition Law ["UCL"].) On June 29, 2023, Plaintiff Becerril filed a First Amended Complaint, setting forth a sole cause of action for violation of the UCL.

The operative Second Amended Class Action Complaint ("SAC"), filed on January 1, 2024, adds Mr. Cruz as a Plaintiff and sets forth the following causes of action: (1) Violation of California Labor Code, §§ 510 and 1198 (Unpaid Overtime); (2) Violation of California Labor Code, §§ 226.7 and 512, subd. (a) (Unpaid Meal Period Premiums); (3) Violation of California Labor Code, § 226.7 (Unpaid Rest Period Premiums); (4) Violation of California Labor Code, §§ 1194 and 1197 (Unpaid Minimum Wages); (5) Violation of California Labor Code, §§ 201 and 202 (Final Wages Not Timely Paid); (6) Violation of California Labor Code, § 226, subd. (a) (Non-Complaint Wage Statements); (7) Violation of California Labor Code, §§ 2800 and 2802 (Unreimbursed Business Expenses); (8) Violation of California Labor Code, § 2698, *et seq.* (Private Attorneys General Act of 2004); (9) Violation of California Business & Professions Code, § 17200, *et seq.*

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:

> [A]ll current and former hourly-paid or non-exempt employees of Defendant within the State of California at any time during the Class Period [January 25, 2019, to January 11, 2024].

(Declaration of Douglas Han in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement [] ("Han Dec."), Ex. 2 ("Settlement Agreement"), ¶¶ I(D), I(J).)

The settlement also includes a subset PAGA Class of aggrieved employees [hereinafter "PAGA Employees"] who are defined as "all current and former hourly-paid or non-exempt employees of Defendant within the State of California at any time during the PAGA Period [October 13, 2022, to January 11, 2024]."[2]

According to the terms of the settlement, Defendant will pay a non-reversionary gross settlement amount of $395,000.[3] The settlement agreement provides that the gross settlement amount may be increased proportionately if the actual number of workweeks is determined to be incorrect by more than 10 percent.[4] The gross settlement amount includes attorney fees up to 38 percent of the gross settlement amount (currently estimated to be $150,100), litigation costs not to exceed $20,000, a PAGA allocation of $30,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Employees as individual PAGA payments), service awards totaling $10,000 ($5,000 per class representative), and settlement administration costs not to exceed $10,000.[5] The court approves ILYM Group, Inc., as settlement administrator and administration costs not to exceed $10,000.[6]

The net settlement amount will be distributed to participating class members on pro rata basis according to the number of workweeks they were employed by Defendant.[7] Similarly,

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[2] Settlement Agreement, ¶¶ I(C) at p. 1, I(X) at p. 3.
[3] Settlement Agreement, ¶ III(A) at p. 6.
[4] Settlement Agreement, ¶ III(C)19 at p. 22.
[5] Settlement Agreement, ¶¶ III(A) at p. 6, III(B)(1)-III(B)(4) at pp. 6-7.
[6] See Settlement Agreement, ¶ I(B) at p. 1.
[7] Settlement Agreement, ¶ III(C)(2) at pp. 7-8.

the portion of the PAGA payment allocated to PAGA Employees will be distributed to them based on their number of paychecks received during the PAGA Period.[8]

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 as the designated *cy pres* recipient. (Settlement Agreement, ¶ III(E)(9) at p. 15.) Legal Aid at Work is a nonprofit organization providing civil legal services to the indigent, and primarily devotes its resources to protecting to workplace rights of California's low wage workers. (See Declaration of Joan Graff (President of Legal Aid at Work), ¶ 4.) The court approves the designated *cy pres* recipient.[9]

In exchange for the settlement, the class members agree to release Defendant, and related entities and persons, from all claims that were asserted, or that could have been asserted, based on the facts pleaded in the SAC occurring during the Class Period.[10] The PAGA Employees agree to release Defendant, and related entities and persons, from all claims for PAGA civil penalties that were asserted, or that could have been asserted, based on facts pleaded in the SAC or the amended notice Plaintiffs sent to the LWDA.[11] Plaintiffs also agree to a comprehensive general release.[12]

B. Fairness of the Settlement

Plaintiff states that the settlement was reached through discovery, analysis, and mediation with David Phillips. (Han Dec., ¶¶ 12, 16-17.) In anticipation of mediation, the parties engaged in discovery on an informal basis, and Defendant produced documents relating to its relevant policies, as well as time records, wage statements, and data regarding the size and scope of the class. (Han Dec., ¶¶ 16-17.) Plaintiff conducted a detailed review of the payroll records, time records, and other information provided by Defendant. (Han Dec., ¶¶ 17-26.) Defendant represented that there are approximately 206 Class Members who worked

[8] Settlement Agreement, ¶ III(B)(4) at p. 7.
[9] Code of Civil Procedure section 384 requires that the unpaid residue or abandoned class member funds be paid 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."
[10] Settlement Agreement, ¶¶ I(CC), III(F)(1) at p. 15.
[11] Settlement Agreement, ¶¶ I(CC)-I(DD) at pp. 3-4, III(F)(2) at p. 16.
[12] Settlement Agreement, ¶¶ III(F)(3) at p. 16.

approximately 12,358 workweeks within the Class Period, and 84 PAGA Employees who worked a total of 1,519 pay periods within the PAGA Period. (Han Dec., ¶¶ 8, 36, 39, 42, 61.)

Plaintiff estimates that Defendant's maximum potential liability for all the claims is approximately $1,829,844.70. (Han Dec., ¶ 50.) Plaintiff provides a breakdown for this amount by claim. (Han Dec., ¶¶ 37-50.) Plaintiff discounted the value of the claims given Defendant's defenses, the possibility that the court could substantially reduce any PAGA penalties, and the risks and costs associated with class certification. (*Ibid*.)

The gross settlement amount represents approximately 21.6% 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 *Cavazos 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 total amount of $10,000 ($5,000 each).

> 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, internal punctuation and citations omitted.)

Here, Plaintiffs have not supported their requests for enhancement awards with declarations describing their participation in this action. Therefore, prior to the final approval hearing, Plaintiff Becerril and Plaintiff Cruz shall each file a declaration specifically describing

their participation, including an estimate of the time they have spent participating in this action. The court will rule on the requested enhancement awards at that time.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will seek attorney fees up to 38% of the gross settlement amount (currently estimate to be $150,100 and litigation costs not to exceed $20,000. 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 206 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 last paragraph beginning on page 1 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, either in writing or by attending the final approval hearing.

The parties are ordered to submit an amended class notice making this change to the court for approval prior to mailing.

IV. Conclusion

Accordingly, on the condition that the parties submit an amended class notice to the court prior to mailing, the motion for preliminary approval of the class and representative action settlement is GRANTED. The final approval hearing is scheduled for April 9, 2025 at 1:30 p.m. in Department 19.

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

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Calendar Line 4

Case Name: Smith, et al. v. Advanced Clinical Employment Staffing, LLC (Class Action)
Case No.: 21CV385614

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on August 7, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a class and representative action brought by plaintiffs Ashley Smith and Donna Chang ("Plaintiffs") against defendants Advanced Clinical Employment Staffing, LLC ("ACES"), Regina Allcorn, and Mary Pat Flanagan (collectively, "Defendants"). On August 12, 2021, Plaintiffs initiated this action by filing a Class Action Complaint against ACES, setting forth the following causes of action: (1) Failure to Pay for All Hours Worked; (2) Failure to Pay Minimum Wage; (3) Failure to Pay Overtime; (4) Failure to Authorize and/or Permit Meal Breaks; (5) Failure to Authorize and/or Permit Rest Breaks; (6) Failure to Reimburse Business-Related Expenses; (7) Failure to Furnish Accurate Wage Statements; (8) Waiting Time Penalties; (9) Unfair Business Practices.

On September 20, 2021, ACES removed the Class Action to the United States District Court, Northern District of California. (Declaration of Ashkan Shakouri in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement ("Shakouri Dec."), ¶ 13.) On August 19, 2022, Plaintiffs filed the operative First Amended Class Action Complaint, adding Regina Allcorn and Mary Pat Flanagan as Defendants. (*Ibid*.) On April 29, 2024, the U.S. District Court entered an order on the parties' stipulation to remand the action to this court. (*Ibid.*)

The parties have reached a settlement. Plaintiffs now move 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.)

III. Discussion

A. Provisions of the Settlement

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

> [A]ll of ACES's non-exempt employees who were assigned to work at any facility inside California during the Class Period [August 12, 2017 to April 22, 2024].

(Shakouri Dec., Ex. 1 ("Settlement Agreement"), ¶¶ 1.4, 1.11.) The Settlement Agreement defines "Defendants" as ACES, Regina Alcorn, and Mary Pat Flanagan. (Settlement Agreement, ¶ 1.15.)

According to the terms of the settlement, Defendants will pay a gross settlement amount of $450,000. (Settlement Agreement, ¶ 3.1.) The 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 ten percent. (Settlement Agreement, ¶ 8.) The gross settlement amount includes attorney fees up to 1/3 of the gross settlement amount (currently estimated to be $150,000), litigation costs not to exceed $25,000, service awards in the total amount of $20,000, and settlement administration costs not to exceed $11,000.[13] (Settlement Agreement, ¶¶ 3.2, 3.2.1-3.2.3.) The net settlement amount will be distributed to participating class members on pro rata basis according to their number of workweeks. (Settlement Agreement, ¶ 3.2.4.)

Checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be distributed to the California Controller's Unclaimed Property Fund. (Settlement Agreement, ¶¶ 4.4.1, 4.4.3.) The parties' proposal to send funds from uncashed checks issued to class member to the State of California's 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."

The parties are ordered to provide a new *cy pres* recipient in compliance with Code of Civil Procedure section 384. If possible, the parties are encouraged to address the *cy pres* issue in writing (for example, by stipulation) prior to the hearing. Otherwise, the hearing on the motion for preliminary approval shall be CONTINUED.

In exchange for the settlement, participating class members agree to release Defendants, and related entities and persons, from all claims that were alleged, or reasonably

[13] The court approves Phoenix Settlement Administrators as settlement administrator and settlement administration costs up to $11,000. (See Settlement Agreement, ¶¶ 1.2, 3.2.3.)

could have been alleged based on the facts pleaded in the Complaint occurring during the Class Period. (Settlement Agreement, ¶¶ 1.30, 1.31, 5.2.) Plaintiffs also agree to a comprehensive general release. (Settlement Agreement, ¶ 5.1.)

B. Fairness of the Settlement

Plaintiffs assert that the settlement was reached through discovery, analysis, and mediation with Hon. Carl J. West (Ret.) on July 18, 2023. (Shakouri Dec., ¶ 4.) Prior to mediation, Plaintiffs obtained relevant information through informal discovery, including a sampling of time and payroll records for the putative class, relevant policies and procedures, and figures and information regarding the class size and pertinent number of workweeks. (*Ibid.*) Plaintiffs propounded extensive formal discovery after filing the action, and the parties thereafter agreed to stay formal discovery and proceed with informal discovery and private mediation. (Shakouri Dec., ¶ 14.) Defendants produced an approximate 20% randomized sampling of time and payroll records for class members along with relevant company policies, signed agreements, and information regarding class size and composition. (*Ibid.*) Plaintiffs conducted a detailed review of the payroll records, time records, and other information provided by Defendants. (*Ibid.*) Plaintiffs' counsel used these records, along with the assistance of a retained expert, to analyze Defendants' potential exposure. (*Ibid.*) Defendants represented that there are approximately 564 Class Members who worked approximately 9,458 workweeks within the Class Period. (Shakouri Dec., ¶ 39; Settlement Agreement, ¶¶ 4.1, 8.)

Plaintiffs estimate that Defendants' maximum potential liability for all the claims is approximately $7,023,251. (Shakouri Dec., ¶ 22.) Plaintiffs provide a breakdown for this amount by claim. (*Ibid.*) Plaintiffs discounted the value of the claims given Defendants' defenses and the risks and costs associated with class certification. (Shakouri Dec., ¶¶ 23-29.) Plaintiffs assert that the proposed settlement is fair, reasonable, and in the best interests of the Class, considering the risks and obstacles associated with proving the allegations at trial. (Shakouri Dec., ¶¶ 30-31.)

The gross settlement amount represents approximately 6.4% 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 *Cavazos 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 approving settlements within a range of 5 to 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 total amount of $20,000 ($10,000 each).

> 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, internal punctuation and citations omitted.)

Plaintiff Ashley Smith submitted a declaration describing her participation in this action. (Declaration of Ashley Smith in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (*Id.* at ¶¶ 6-7, 12-13.) Ms. Smith states she spent considerable time on this case, including by gathering documents, answering her attorneys' questions, reviewing pleadings, reaching out to co-workers, and ongoing communication with her attorneys. (*Id.* at ¶¶ 12-13.) Ms. Smith estimates that she spent approximately 40 hours working on this case. (*Id.* at ¶ 16.)

Plaintiff Dona Chang also submitted a declaration describing her participation in this action. (Declaration of Dona Chang in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement ("Chang Dec."), ¶¶ 6-7, 12-13.) Ms. Chang states she spent considerable time on this case, including by gathering documents, answering her attorneys' questions, reviewing pleadings, reaching out to co-workers, and ongoing

communication with her attorneys. (*Id.* at ¶¶ 12-13.) Ms. Chang estimates that she spent approximately 40 hours working on this case. (*Id.* at ¶ 16.)

Plaintiffs spent time in connection with this litigation and took risk by attaching their names to this case. (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].).

For the forgoing reasons, the court finds that service awards to Plaintiffs are warranted. However, the court notes that the amounts sought for the enhancement awards ($10,000 each) is higher than the court typically awards in these types of cases. Therefore, the court approves a service award of $5,000 to Plaintiff Ashley Smith and a service award of $5,000 to Plaintiff Dona Chang, for a total of $10,000 in approved service awards.

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 1/3 of the gross settlement amount (currently estimated to be $150,000) and litigation costs not to exceed $25,000. 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

Plaintiffs request 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.)

Plaintiffs state that there are approximately 564 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 Plaintiffs as class representatives. 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 last paragraph beginning on page 1 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, either in writing or by attending the final approval hearing. 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, unless the parties are able to the resolve the *cy pres* issue prior to the upcoming hearing, the motion for preliminary approval of the class and representative action settlement shall be CONTINUED to February 5, 2025, at 1:30 p.m. in Department 19. Plaintiffs' counsel shall file a supplemental declaration no later than January 21, 2025 containing the information requested by the court.

Plaintiffs shall prepare the order.

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Calendar Line 5

Case Name: Legarde v. Spectra360, Inc. (PAGA)
Case No.: 22CV402965

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on August 7, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

On September 12, 2022, plaintiff Jeremy Legarde ("Plaintiff") filed a Representative Action Complaint under the Private Attorneys General Act ("PAGA") against defendant SPECTRA360, Inc. dba Raso Solutions ("Defendant"), which set forth a single cause of action for Penalties Pursuant to Labor Code section 2699, et seq., for violations of Labor Code sections 201, 202, 203, 226(a), 226.7, and 2802. Defendant moved to compel arbitration of Plaintiff's individual PAGA claim and dismiss Plaintiff's representative PAGA claim. Plaintiff opposed the motion.

On May 18, 2023, the court denied Defendant's motion to compel arbitration. Defendant appealed the court's order, and the parties subsequently reached a settlement of the PAGA claim. Defendant asked the Sixth District Court of Appeal to stay the appeal to allow for approval of settlement in the trial court. On November 7, 2023, the appellate court granted Defendant's request to stay the appeal.

On December 14, 2023, Plaintiff filed the motion now before the court, a motion for approval of the PAGA settlement. On April 24, 2024, the court continued the motion to June 26, 2024. (See April 24, 2024 Minute Order, p. 4.) In its minute order, the court asked Plaintiff to file supplemental declarations addressing, among other things, the fact that the settlement agreement's definition of "Aggrieved Employees" and the definition of the "PAGA Period" had different end dates. (*Id.* at p. 3.) Plaintiff then filed supplemental declarations.

On June 26, 2024, the court continued the motion for approval of PAGA settlement to August 7, 2024. (See June 26, 2024 Minute Order ("June 26 Minute Order"), p. 8.) In the June 26 Minute Order, the court found that Plaintiff's supplemental declarations had addressed most of the issues outlined in the April 24 minute order. (*Ibid.*) However, the court noted that the

settlement agreement's definition of Aggrieved Employees and the definition of the PAGA Period still had different end dates. (*Id.* at p. 5.) Accordingly, the court instructed the parties to meet and confer to discuss an amendment to the definition of Aggrieved Employees to make it consistent with the defined PAGA Period. (*Id.* at pp. 5, 8.)

On July 3, 2024, Plaintiff's counsel filed a second supplemental declaration. (Second Supplemental Declaration of Liane Katzenstein Ly in Support of Motion for Approval of Representative Action Settlement. ("Second Supp. Ly Dec.").) Counsel states that the parties have agreed to amend the definition of Aggrieved Employees, and the declaration includes an executed Addendum to that effect. (*Id.* at ¶ 4, Ex. A.)

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 [the 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, these 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 …." (*O'Connor v. Uber Technologies, Inc*. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1133.) The settlement must be reasonable in light of the potential verdict value. (*Id.* at 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, 2016 U.S. Dist. LEXIS 140759 at *8-9,)

III. Discussion

As mentioned above, the court previously identified a defect in the settlement papers relating to the consistency of definitions, specifically those of "Aggrieved Employees" and the "PAGA Period." (See June 26 Minute Order, pp. 5, 8.) Plaintiff's counsel has since submitted an executed Addendum to the settlement agreement, which states:

> Paragraph 1.4 is entirely replaced a follows: "Aggrieved Employees" means all employees who are employed or have been employed as an hourly employee by SPECTRA360, INC. DBA RASO SOLUTIONS, in the State of California who worked one or more pay periods since July 8, 2021 to September 18, 2023. ("aggrieved employees").

(Second Supp. Ly Dec., Ex. A, ¶ 1.)

The settlement agreement defines the PAGA Period as the period of time from July 8, 2021 to September 18, 2023. (Declaration of Liane Katzenstein Ly in Support of Motion for Approval of Representative Action Settlement ("Ly Dec."), Ex. 1 ("Settlement Agreement"),

¶ 1.19.) The Settlement Agreement's definitions—as amended by the Addendum—of "Aggrieved Employees" and of "PAGA Period" are now consistent with respect to both their start and end dates. Therefore, the court finds that the parties have sufficiently addressed the court's previously stated concerns in this regard.

Under the terms of the settlement, Defendant will pay a non-reversionary maximum settlement amount of $95,000. (Settlement Agreement, ¶¶ 1.10, 3.1.) This amount includes attorney fees of not more than $31,666.66 (1/3 of the maximum settlement amount), litigation costs not to exceed $8,500, an enhancement award up to $5,000 for Plaintiff, and settlement administration costs not to exceed $3,000). (Settlement Agreement, ¶¶ 1.3, 1.11, 1.14, 1.15, 1.17, 1.22, 3.2.) Of the remaining net settlement amount, 75 percent will be paid to the LWDA and 25 percent will be distributed to aggrieved employees based on the pro rata number of pay periods worked by each aggrieved employee during the Representative Period. (Settlement Agreement, ¶¶ 1.11, 1.14, 1.15, 1.22.)

Funds from checks that are not cashed within 180 days from the date of mailing will be sent to the California Controller's Unclaimed Property Fund. (Settlement Agreement, ¶ 4.4.)

In exchange for the settlement, the aggrieved employees agree to release Defendant, and related persons and entities, from "all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice." (Settlement Agreement, ¶¶ 1.25, 1.26, 5.)

Plaintiff also advises the court that the parties entered into a separate, confidential settlement of Plaintiff's individual claims. Since the initial filing of the instant motion, Plaintiff's counsel has submitted a copy of the individual settlement agreement and a supplemental declaration providing additional information about the individual settlement. (June 26 Minute Order, p. 5; Supplemental Declaration of Liane Katzenstein Ly in Support of Plaintiff's Motion for Approval of Representative Action Settlement ("Supp. Ly Dec.), ¶¶ 7-11.) According to Plaintiff's counsel, the individual settlement: releases and resolves all possible claims Plaintiff could have alleged; includes a 1542 waiver; and releases Plaintiff's individual claims for off-the-clock work, rest period violations, necessary business expenses, wage statement violations, and waiting time penalties. (June 26 Minute Order, p. 5.) Plaintiff's

counsel states that the individual settlement amount is the result of a compromise on Plaintiff's claims outside of the PAGA action. (*Id.* at pp. 5-6.) The court continues to find that the additional information provided by Plaintiff's counsel adequately addresses the court's concerns regarding the individual settlement. (*Id.* at p. 6.)

Plaintiff contends the PAGA settlement is fair, reasonable, and adequate. Plaintiff indicates that the settlement resolves PAGA claims on behalf of 53 aggrieved employees who collectively worked 1,139 pay periods during the PAGA Period. (Ly Dec., ¶ 15.) Prior to mediation, Plaintiff's counsel obtained a sampling of time and payroll data from Defendant as well as Plaintiff's personnel records. (*Id.* at ¶ 14.) The parties participated in a full-day mediation with Alan Berkowitz, Esq. on September 18, 2023, and reached a settlement. (*Id.* at ¶ 16.) Plaintiff estimates that Defendant's maximum potential exposure for the PAGA claim is $113,9000.

As previously addressed by the court, Plaintiff's initial moving papers did not set forth details regarding the calculation of Defendant's maximum potential liability. (June 24 Minute Order, p. 6.) Plaintiff's counsel has now filed a supplemental declaration providing a breakdown of the maximum potential exposure based on the underlying Labor Code violations. Plaintiff's counsel states that the value of the PAGA claim based on Defendant's alleged failure to reimburse necessary business expenses is $113,9000 (i.e., 1,139 pay periods multiplied by

$100 per pay period); the value of the rest period claim for every pay period increases the value of the case to $227,800; and the value of the wage statement and waiting time penalty claims for every pay period increases the value to $455,600. (Supp. Ly Dec., ¶¶ 13-15.) Plaintiff's counsel further states that the value of the case would be $911,200 if the court awarded $200 per pay period instead of $100 per pay period. (*Id.* at ¶ 16.) Plaintiff's counsel states that the reimbursement claims is the strongest given that the employees worked remotely, and the settlement amounts to an award of approximately $83.41 per pay period. (*Id.* at ¶¶ 17-18.)

Based on the supplemental information, the gross settlement amount represents approximately 20.8 percent of the potential maximum recovery. As such, the proposed settlement amount is within general range of percentage recoveries that California courts have

found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D.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].) In light of the foregoing, the court continues to find that the settlement is generally fair as it provides for some recovery for each class member and eliminates the risk and expense of further litigation. (June 26 Minute Order, p. 6.)

As part of the settlement, Plaintiff seeks an enhancement award in the amount of $5,000. Although service awards are common in class actions, there is less authority regarding the propriety of service awards in PAGA cases. Nevertheless, a PAGA case is a representative action like a class action, and it has been recognized that an individual's willingness to act as a private attorney general may merit a service award. (See *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 959.)

With his moving papers, Plaintiff submitted a declaration generally detailing his participation in the action. Plaintiff has also filed a supplemental declaration specifically estimating that he spent approximately 25-35 hours in connection with the PAGA action, including discussing the case with counsel, providing employment information to counsel, preparing for meditation, and reviewing settlement documents. (Supplemental Declaration of Jeremy Legarde in Support of Motion for Representative Action Settlement, ¶¶ 5-6.)

Plaintiff also undertook risk by putting his name on the case because it might impact his future employment. (See *Covillo v. Specialty's Cafe* (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 court finds the requested incentive award in the amount of $5,000 to be excessive, and therefore approves a service award to Plaintiff in the amount of $2,500. (See June 26 Minute Order, p. 7.)

Plaintiff's counsel seeks attorney fees of $31,666.66 (1/3 of the maximum settlement amount). Plaintiff's counsel states that the total combined lodestar is $32,482.50 (based on 46.9 hours of work). However, a portion of that amount is based on anticipated hours of work that has not yet been performed. The evidence demonstrates that the actual total combined lodestar

is $28,907.50 (based on 41.9 hours of work). (Ly Dec., ¶¶ 60-62, 64-79.) This results in a multiplier of 1.1.

The court continues to find that the fees requested are generally reasonable as a percentage of the total recovery. (June 26 Minute Order, p. 7.) Plaintiff's counsel submitted a supplemental declaration stating that no payment for attorney fees was received in connection with the individual settlement, addressing the court's prior concerns. (Supp. Ly Dec., ¶ 12.) Therefore, an award of attorney fees in the amount of $31,666.66 is approved.

Plaintiff s counsel also requests litigation costs in the total amount of $6,723.01. (Ly Dec., ¶¶ 20, 83-88.) Plaintiff's counsel presents evidence of incurred costs of a lesser amount of $6,465.26. (Ly Dec., ¶¶ 20, 83-88.) Thus, the litigation costs were proven up to the amount $6,465.26. Plaintiff's counsel has now clarified that no payment for these costs was received in connection with Plaintiff s individual settlement. (Supp. Ly Dec., ¶ 12.) Therefore, litigation costs in the lesser amount of $6,465.26 are approved.

Plaintiff also asks for settlement administration costs in the amount of $3,000. (Ly Dec., ¶ 19.) Plaintiff provides a declaration from the settlement administrator demonstrating that costs associated with settlement administration do not exceed $3,500. (Declaration of Sean Hartranft of Apex Class Action Administrators Regarding Settlement Administration, ¶ 7.) Consequently, the court approves settlement administration costs in the lesser amount of $3,000. (June 26 Minute Order, pp. 7-8.)

IV. Conclusion

For the forgoing reasons, and in accordance with the terms approved above, the motion for approval of PAGA settlement is GRANTED.

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

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