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

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LAW AND MOTION TENTATIVE RULINGS
DATE: MAY 22, 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	23CV417565	James Irrigation District v. McMullian Area Groundwater Sustainability Agency (CEQA)	See Line 1 for tentative ruling.
LINE 2	22CV393492	Perez v. Best Overnite Express, Inc. (Class Action)	See Line 2 for tentative ruling.
LINE 3	19CV342014	Hoang v. Tran, et al.	Hearing continued on court's motion to May 23, 2024 at 10:00 a.m. See Line 3 below.
LINE 4	18CV335706	Moniz v. Service King Paint & Body, LLC (Class Action/PAGA)	See Line 4 for tentative ruling.
LINE 5	20CV366939	ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)	VACATED. No hearing required. Parties to submit proposed orders.
LINE 6			
LINE 7			

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LAW AND MOTION TENTATIVE RULINGS

LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: James Irrigation District v. McMullian Area Groundwater Sustainability Agency (CEQA)
Case No.: 23CV417565

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on May 22, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a petition for writ of mandate. According to the allegations of the operative First Amended Petition ("FAP") petitioner James Irrigation District ("Petitioner" or "District") is a public agency that provides water service to landowners and water users within its boundaries for irrigation purposes. (See FAP at ¶¶ 1, 7.) Petitioner has historically relied upon, and continues to rely upon, water supplies from extraction from the Well Field in carrying out its obligations under the Irrigation District Law and other authorities to furnish water to its landowners and water users for irrigation, municipal and industrial purposes. (*Id*. at ¶¶ 7, 8, 12.)

Petitioner also formed and acts as the Groundwater Sustainability Agency ('GSA") for the portions of the Kings Subbasin (Cal. Dept. of Wat. Resources ("DWR") Bulletin 118 Basin Number 5-022.08 (2020) (the "Subbasin") situated within its boundaries, and is responsible for adoption, implementation, and enforcement of a Groundwater Sustainability Plan ("GSP") for the District's portion of the Subbasin pursuant to the Sustainable Groundwater Management Act ("SGMA," Water Code sections 10720 et seq.). (See FAP at ¶ 2.)

Respondent McMullin Area Groundwater Sustainability Agency ("Respondent" or "MAGSA") is also a public agency and a joint powers authority created by an agreement between the Mid-Valley Water District, the Raison City Water District, and the County of

Fresno. MAGSA serves as the GSA for its portion of the Subbasin ("MAGSA Management Area"). (See FAP at ¶¶ 3-4.) Petitioner and Respondent's portions of the Kings Subbasin share an adjoining boundary overlying a hydrologically connected groundwater Subbasin. (*Id.* at ¶ 13.)

On December 9, 2020, MAGSA adopted a "Groundwater Export Policy," ("Policy") the purpose of which was to "authorize the establishment of a framework to implement the objectives identified in the GSP regarding pumping of groundwater from within MAGSA for any use outside of MAGSA." (See FAP at ¶ 10 and exhibit B to the FAP.)

On April 22, 2022, MAGSA adopted "Implementing Rules and Regulations of the McMullin Area Groundwater Sustainability Agency Regulating Export of Groundwater in Support of Sustainable Groundwater Management," ('Rules") which set forth a permitting and fee structure for exportation of groundwater extracted from within the MAGSA Management Area. (See FAP at ¶ 11 and Exhibit C.) The Rules expressly provide that: "Nothing in this Resolution determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights." (See FAP, exhibit C, ¶ 12 "No Change to Rights.")

After adopting the Policy MAGSA reached out to the District to attempt to reach an agreement on surface and groundwater management. These efforts were unsuccessful. (See FAP at ¶¶ 16-21.) Attached as exhibit D to the FAP is a copy of a November 22, 2022 letter from MAGSA to the District seeking a response to a draft agreement. The letter also reminded the District that "[r]estarting the JID pumps located within MAGSA cannot occur without the permit process being completed." (See FAP, exhibit D, page 2.)

On February 28, 2023, the District filed a petition for writ of mandate and complaint for declaratory and injunctive relief. The action was originally filed in Fresno County and later transferred to Santa Clara County on May 25, 2023.

Previously MAGSA brought a demurrer to the original petition for failure to state a claim and on the grounds that it was barred by the applicable statutes of limitation. On September 20, 2023, the court (Judge Kuhnle) issued an order sustaining that demurrer with leave to amend.[1] The operative FAP was filed on October 23, 2023. The FAP states five causes of action: (1) Violation of CEQA; (2) "Violations of Prop 218/26"; (3) "Ultra Vires Regulation"; (4) Violation of SGMA; and (5) Violation of the Equal Protection Clause.

Currently before the court is MAGSA's demurrer to the FAP, filed on November 22, 2023. The District's opposition to the demurrer was filed on January 4, 2024. The demurrer was originally set for hearing on January 18, 2024 and was rescheduled to May 22, 2024 pursuant to the court's December 27, 2023 order. MAGSA's reply was filed on May 15, 2024.

II. REQUEST FOR JUDICIAL NOTICE

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evidence Code, § 450.) A precondition to judicial notice in either its permissive or mandatory form is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422 fn. 2; See also *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569 [Since judicial notice is a substitute for proof, it is always confined to those matters that are relevant to the issue at

[1] The court takes judicial notice of Judge Kuhnle's order on its own motion pursuant to Evidence Code section 452(d).

hand.]) It is the Court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b) requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

In support of the demurrer MAGSA has submitted a request for judicial notice of seven documents attached as exhibits 1-7 to the request. These documents are copies of the minutes for MAGSA board meetings on September 2, 2020, November 4, 2020, December 9, 2020, November 3, 2021, December 8, 2021, January 5, 2022, and April 6, 2022. MAGSA asserts that the documents are noticeable under Evidence Code sections 452(c) and (h). (See Request at p. 2:13-20.)

As an initial matter Evidence Code section 452, subdivision (h) has no application to this request. (See *Gould v. Md. Sound Indus*. (1995) 31 Cal.App.4th 1137, 1145 ["Judicial notice under Evidence Code section 452, subdivision (h) is intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."].) None of the submitted documents meet this definition.

While they have limited relevance to the issues presented by this demurrer the court will GRANT notice of the seven documents under Evidence Code section 452, subdivision (c), as "official acts" of MAGSA, a public entity.

III. DEMURRER TO THE FAP

A. General Standards

The court treats a demurrer to both a complaint and a writ petition "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; See also 43 Cal.Jur.3d, Mandamus and Prohibition, § 55.) The various factual and legal conclusions alleged in the FAP are not accepted as true for purposes of this demurrer. Where a demurrer is to an amended complaint or writ petition, the court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer."]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].)

Facts appearing in exhibits attached to the complaint (part of the "face of the pleading") are given precedence over inconsistent allegations in the complaint or petition. (See *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."]) A plaintiff /petitioner bears the burden of proving an amendment would cure the defect in cause of action identified on demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. This includes declarations. The court has considered the declaration of MAGSA counsel Shawnda Grady only to the extent it discusses the parties' meet and confer efforts.

Finally, "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1273; See also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].)

B. Discussion

MAGSA demurs to all five causes of action on the grounds that they are all time barred by the applicable statutes of limitation and fail to state sufficient facts. (See Notice of Demurrer and Demurrer at pp. 7:12-8:14.)[2]

1. First Cause of Action (CEQA violation)

The District alleges that MAGSA violated CEQA (Pub. Res. Code §21000, et seq.) by adopting the Policy on December 9, 2020 and adopting the Rules on April 22, 2022 without conducting CEQA review. (See FAP at ¶¶ 30-36.) MAGSA argues that this claim is time-barred by the applicable statute of limitations (Pub. Res. Code § 21167) and fails to state sufficient facts because neither the adoption of the Policy or the Rules constituted a "project" under CEQA.[3]

[2] At times the demurrer mistakenly refers to the FAP as alleging six causes of action.
[3] MAGSA also contends that the first cause of action is time-barred under Water Code section 10726.6(c). (See MAGSA's supporting memo. at p. 14:11-21.) Public Resources Code section 21167 is the statute of limitation applicable to an alleged CEQA violation.

"A complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.) The running of the statute must appear clearly and affirmatively from the dates alleged—it is not enough that the complaint might be barred. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42.)

Public Resources Code section 21167 states in pertinent part that: "An action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows:

(a) An action or proceeding alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project.

(b) An action or proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment shall be commenced within 30 days from the date of the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152.

(c) An action or proceeding alleging that an environmental impact report does not comply with this division shall be commenced within 30 days from the date of the

filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152 by the lead agency.

(d) An action or proceeding alleging that a public agency has improperly determined that a project is not subject to this division pursuant to subdivision (b) of Section 21080 shall be commenced within 35 days from the date of the filing by the public agency, or person specified in subdivision (b) or (c) of Section 21065, of the notice authorized by subdivision (b) of Section 21108 or subdivision (b) of Section 21152. If the notice has not been filed, the action or proceeding shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project.

(e) An action or proceeding alleging that another act or omission of a public agency does not comply with this division shall be commenced within 30 days from the date of the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152.

"In general, challenges to governmental action under the California Environmental Quality Act (CEQA) face unusually short statutes of limitation." (*Committee for Green Foothills, supra,* 48 Cal.4th at p. 38.) "Which subdivision of section 21167 applies depends upon the nature of the CEQA violation alleged." (*Id*. at p. 44.) Here, as the FAP alleges that the approvals of the Policy and Rules without CEQA review were the CEQA violations, the applicable subdivision is subdivision (a), with a limitations period of 180 days. This is the longest possible limitation period under CEQA. Assuming for purposes of argument that either approval constituted a "project" for purposes of CEQA, any CEQA challenge to the approval of the Policy on December 9, 2020 became time-barred after June 7, 2021 and any CEQA challenge to the

approval of the Rules on April 6, 2022 became time-barred after October 3, 2022. As the District's original petition was filed on February 28, 2023, the first cause of action is time-barred on its face.

The District does not dispute this but asserts that equitable estoppel bars MAGSA from asserting the statute of limitations. (See District's opposition at pp. 8:23-11:24.) "When a plaintiff relies on a theory of fraudulent concealment, delayed accrual, equitable tolling, or estoppel to save a cause of action that otherwise appears on its face to be time-barred, he or she *must specifically plead facts* which, if proved, would support the theory." (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 641, emphasis added.)

The FAP alleges at ¶¶ 26-28 that because the general managers of the District and MAGSA had engaged in a dialogue, evidenced by exhibit D to the FAP, to reach an agreement that might have made it unnecessary for the District to comply with MAGSA's Policy or Rules, MAGSA is equitably estopped from asserting the statute of limitations. Exhibit D, a copy of the November 22, 2022 letter from MAGSA's general manager to the Chairman of the District's Board of Directors, states that the general managers for MAGSA and the District had been discussing a potential agreement "for the past year and a half or so," and that a draft agreement had been sent to the District in September 2022 but "we have had little, if any, actual response to the Draft Agreement or other communication, except reassurance from [District general manager] Manny, that JID is continuing in its good faith review and consideration. We believe the writing was complete, but anticipated some discussion, yet none has been forthcoming."

While it normally presents a question of fact, "where the complaint pleads undisputed facts establishing that equitable estoppel does not apply, the issue may be resolved on demurrer."

(*Sofranek v. Merced County* (2007) 146 Cal.App.4th 1238, 1251; See also *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307 (*May*) [affirming trial court order sustaining demurrer to CEQA claim without leave to amend despite assertion of equitable estoppel]; *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 180 [equitable estoppel cannot be applied against a governmental entity if it would nullify a policy adopted for the benefit of the public].)

CEQA's short statute of limitations reflects a policy adopted for the benefit of the public. "To ensure finality and predictability in public land use planning decisions, statutes of limitations governing challenges to such decisions are typically short. The limitations periods set forth in CEQA adhere to this pattern . . . CEQA's purpose to ensure extremely prompt resolution of lawsuits claiming noncompliance with the Act is evidenced throughout the statute's procedural scheme. . . . Courts have often noted the Legislature's clear determination that ''the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted.''" (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 499-500, internal citations omitted; see also *Guerro v. City of Los Angeles* (2024) 98 Cal.App.5th 1087, 1099 ["An untimely filed challenge is to be dismissed."].)

"A public agency is subject to estoppel from the assertion of either the time limits for filing tort claims, or the statute of limitations on a cause of action. Estoppel generally involves misrepresented or concealed *facts*. . .. [cited cases] reflect the black-letter principle that (in the absence of a confidential relationship) where the material facts are known to all parties and the pertinent provisions of law are equally accessible to them, a party's inaccurate statement of the law or failure to remind the other party about a statute of limitations cannot give rise to an estoppel. Some cases assert that this simply amounts to a 'mutual mistake of law' and others

remark that the estoppel elements of ignorance and *reasonable* reliance are absent. The invocation of estoppel is particularly inappropriate where the party seeking it was represented by counsel at the time of the misrepresentation of law." (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496-1497 (*Jordan*), emphasis in original, internal citations omitted; See also *May, supra,* 217 Cal.App.4th at 1339 [The law particularly disfavors estoppels where the party attempting to raise the estoppel is represented by an attorney, as attorneys are charged with knowledge of the law in California].)

The court of appeal in *May v. City of Milpitas* also noted that, generally, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. The detrimental reliance must be reasonable. The defendant's statement or conduct must amount to a misrepresentation bearing on the necessity of bringing a timely suit. (*May, supra,* 217 Cal.App.4th at 1338.)

Where the facts are undisputed, the existence of an estoppel is a question of law for the court. (*Jordan, supra,* 148 Cal.App.4th at 1496.) The court finds that the undisputed facts here establish that equitable estoppel does not apply, and the first cause of action is time-barred under Public Resources Code § 21167, subdivision (a). MAGSA's demurrer to the first cause of action on statute of limitations grounds is therefore SUSTAINED.

There is no alleged misrepresentation or concealment of facts by MAGSA, and the District and MAGSA are not in a confidential relationship. The mere fact the general

managers of the District and MAGSA had engaged in discussions regarding a potential direct agreement does not establish an equitable estoppel. Both the material facts and the pertinent provisions of law were equally known by both parties. It cannot be reasonably inferred from the FAP's allegations at ¶¶ 26-28 (or from exhibit D, whose language controls over any inconsistent allegations in the FAP) that the party to be estopped—MAGSA—intended by its conduct to mislead the District or that the District reasonably relied on these discussions (or any other conduct by MAGSA) as somehow tolling any applicable statute of limitations. Nor can it be reasonably inferred that any alleged statement or conduct by MAGSA amounted to a misrepresentation regarding the necessity of bringing a timely lawsuit.

The FAP's admission (at ¶ 20) that the District proposed a tolling agreement after receiving MAGSA's November 22, 2022 letter (exhibit D) also makes clear that the District understood at that time that any applicable limitations periods had been running during the parties' discussions, and that the District had not been misled on this point by MAGSA. As the demurrer to the first cause of action is sustained on statute of limitations grounds, it is not necessary for the court to consider MAGSA's argument that the December 9, 2020 and April 22, 2022 approvals were not "projects" for purposes of CEQA.

As noted above, the District bears the burden of demonstrating that the defect identified on demurrer could be cured through amendment. The District has not met this burden, as its opposition simply includes generic requests for further leave to amend if the court were to sustain the demurrer. (See District's opposition at p. 7:18-23 and p. 12:25-27.) This is insufficient to justify further leave to amend. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave

to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].)

As the first cause of action is time-barred on its face even if it is assumed that the challenged actions are "projects" under CEQA, and the discussions between the general managers for the District and MAGSA cannot establish equitable estoppel, no effective amendment is apparent to the court. The defect, the failure to file a timely CEQA claim, cannot be cured. Further leave to amend the first cause of action is DENIED.

2. Second Through Fifth Causes of Action

MAGSA argues that the second through fifth causes of action are time-barred under Water Code section 10726.6(c), as they are expressly based on the December 9, 2020 and April 22, 2022 approvals. (See Notice of Demurrer and Demurrer at p. 7:15-19.)

Water Code section 10726.6, which governs proceedings to attack fees imposed under the SGMA, states in subdivision (c) that "Any judicial action or proceeding to attack, review, set aside, void, or annul the ordinance or resolution imposing a new, or increasing an existing, fee imposed pursuant to Section 10730, 10730.2, or 10730.4 shall be commenced within 180 days following the adoption of the ordinance or resolution."

Exhibit B to the FAP establishes that one of the purposes of the Policy adopted by MAGSA on December 9, 2020 was to "adopt a per-acre-foot export fee or charge on all new and existing export of groundwater, in an amount to be determined and imposed through subsequent action." (See ex. B, p. 5, numbered paragraph 4.) Exhibit C to the FAP states that

the purpose of the Rules adopted on April 22, 2022 "is to provide specific instruction to landowners and/or other interested parties regarding the annual permitting process and fees related to the export of groundwater extracted from lands within the boundary of [MAGSA] to any location outside of MAGSA's boundaries." (See ex. C, p. 1, para. 1 ["Purpose"].) Exhibit C further states that "MAGSA shall use any collected export fees to fund the costs of implementing its GSP," or groundwater sustainability plan. (Ex. C., p. 3.) Based on exhibits B and C the court concludes that Water Code section 10726.6(c) applies to all of the non-CEQA claims alleged by the District—the FAP's second through fifth causes of action.

Any "judicial action or proceeding" to challenge the Policy adopted by MAGSA on December 9, 2020 became time-barred under Water Code section 10726.6, subdivision (c) after June 7, 2021 and any "judicial action or proceeding" to challenge MAGSA's approval of the Rules on April 6, 2022 became time-barred after October 3, 2022. As the original petition was not filed until February 28, 2023, the second through fifth causes of action are time-barred on their face under Water Code section 10726.6(c).

The District does not dispute that Water Code section 10726.6, subdivision (c) applies to the second through fifth causes of action. On the statute of limitations issue the District again solely relies on its argument that MAGSA is equitably estopped from asserting <u>any</u> statute of limitations against the FAP. (See again, District's Opposition at pp. 8:23-11:24.) As discussed above in the court's analysis of the demurrer to the first cause of action, the FAP's allegations at ¶¶ 26-28 and exhibit C fail to establish that MAGSA is equitably estopped from asserting the statute of limitations as a ground for demurrer. The court therefore SUSTAINS MAGSA's demurrer to the second through fifth causes of action on the basis that they are time-barred under Water Code section 10726.6, subdivision (c). As the District fails to identify

any effective amendment, and none is apparent to the court, further leave to amend is DENIED. The defect, the failure to file a timely claim, cannot be cured.

As the demurrer to the second through fifth causes of action is sustained without further leave to amend on statute of limitations grounds, it is not necessary for the court to consider MAGSA's various arguments that these causes of action also fail to state sufficient facts.

The court does note that on February 8, 2024, after the demurrer and opposition were filed, the Fourth District Court of Appeal ruled, as a matter of first impression, that a groundwater user could not bring any cause of action (including causes of action alleging violations of constitutional rights) attacking the propriety of a groundwater extraction fee under the SGMA without first paying any amount owed, because such lawsuits are subject to the "pay first" rule for tax disputes under Cal. Const. art. XIII, section 32 and Water Code section 10726.6(d). (See *Mojave Pistachios, LLC v. Superior Court* (2024) 99 Cal.App.5th 605 (*Mojave Pistachios*).) It is not apparent to the court whether any fees have already been charged to the District by MAGSA.

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Calendar Line 2

Case Name: Perez v. Best Overnite Express, Inc. (Class Action)
Case No.: 22CV393492

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on May 22, 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 and Private Attorneys General Act ("PAGA") action arising out various alleged wage and hour violations. The operative First Amended Complaint ("FAC") against defendant Best Overnite Express, Inc. ("Defendant"), filed on April 12, 2022, sets forth the following causes of action:

(1) Failure to Pay Minimum Wages;

(2) Failure to Reimburse Business Expenses;

(3) Failure to Provide Accurate Itemized Wage Statements;

(4) Failure to Pay All Wages Due Upon Separation of Employment;

(5) Violation of Business and Professions Code §§ 17200[] et seq.; and

(6) Enforcement of Labor Code § 2698 et seq. ("PAGA")

The parties have reached a settlement. Plaintiff Baltazar Perez ("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. [Citation.]" (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, quoting Dunk, supra, 48 Cal.App.4th at p. 1801 and citing 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. [Citation.]" (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. [Citations.]" (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, quoting Dunk, supra, 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

A. Provisions of the Settlement

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

[A]ll California citizens currently or formerly employed by Defendant as a non-exempt employee in the State of California at any time during the Class Period [from June 15, 2019 through June 15, 2023].

(Declaration of Jessica L. Campbell in Support of Motion for Preliminary Approval of Class Action Settlement ("Campbell Decl."), Exh. A, Class Action and PAGA Settlement Agreement and Class Notice ("Settlement Agreement and Class Notice"), ¶¶ 1.5, 1.12.) The class includes a subset of PAGA Members, who are defined as "all California residents currently or formerly employed by Defendant as a non-exempt employee in the State of California at any time during the PAGA Period [from June 15, 2020 through June 15, 2023]." (Id., ¶¶ 1.4, 1.30.)

According to the terms of settlement, Defendant will pay a gross, non-reversionary amount of $450,000. (Settlement Agreement and Class Notice, ¶ 3.1.) The gross settlement

payment includes attorney fees not to exceed one-third of the gross settlement amount (currently estimated at $150,000) (Settlement Agreement and Class Notice, ¶ 3.2.2), litigation costs up to $25,000 (id.), an incentive award up to $15,000 for the class representative (id., ¶ 3.2.1), reasonable costs of settlement administration up to $15,000 (id., ¶ 3.2.3), and a PAGA allocation of $40,000 (75 percent of which will be paid to the Labor and Workforce Development Agency ("LWDA") and 25 percent of which will be available for PAGA Members) (id., ¶ 3.2.5). Per paragraphs 3.2.1, 3.2.2, and 3.2.3 of the Settlement Agreement and Class Notice, amounts not approved or used as an incentive award, attorney's fees, litigation costs, and settlement administration costs will revert to the Net Settlement Amount. Plaintiff submitted a copy of the proposed settlement to the LWDA in compliance with Labor Code section 2699, subdivision (l)(2). (Campbell Decl., Exh. C.)

Individual payments to Participating Class Members will be "calculated by (a) dividing the Net Settlement Amount by the total number of workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks (Settlement Agreement, ¶ 3.2.4) and to PAGA Members will be calculated by "(a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties [] by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods" (id., ¶ 3.2.5.1).

Funds from checks that remained uncashed 180 days after issuance will be sent to the California State Controller's Office's Unclaimed Property Division to be held as unclaimed funds in the name of the Participating Class Member or PAGA Member. (Settlement Agreement and Class Notice, ¶ 4.4.3.)

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

In exchange for the settlement, Settlement Class Members who do not opt out will release " all claims that were alleged, or reasonably could have been alleged, based on the

Class Period facts stated in the Operative Complaint and ascertained in the course of the Action." (Settlement Agreement and Class Notice, ¶ 6.2.) PAGA Members will release "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 and ascertained in the course of the Action." (Id., ¶ 6.3.) Plaintiff also agrees to a general release of claims. (Id., ¶ 6.1.1.)

In the court's view, the release for PAGA Members may be too broad in light of Amaro v. Anaheim Arena Management, LLC (2021) 69 Cal.App.5th 521 (Amaro). Amaro instructs that a release of class claims "must be tied to the factual allegations in the complaint, not the claims or theories of liability asserted. [Citation.]" (Id. at p. 538, italics original; see id. ["Class members could potentially have claims that arise from the same legal theories as [the] complaint but are not based on the same allegations."].) " ' "[A] court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint" ' " but "a court cannot release claims that are outside the scope of the allegations of the complaint." (Amaro, supra, 69 Cal.App.5th at p. 537.) Here, the release encompasses the LWDA Letter. (Campbell Decl., Exh. C, LWDA Letter.) The parties are directed to provide supplemental briefing explaining why including the LWDA Letter in the release is fair and how doing so is consistent with Amaro.

B. Fairness of the Settlement

Plaintiff asserts that the settlement is fair, reasonable, and adequate, given the inherent risks of litigation, including substantial risks relative to class certification and the merits of the claims, and the costs of pursing litigation. Plaintiff states that the settlement is the result of thorough, arm's-length negotiations between the parties and their experienced counsel, and private mediation before Jill R. Sperber. Plaintiff estimates that there are approximately 561 Class Members. By the court's calculation, the estimated net settlement amount is $205,000 and Plaintiff states the average net payment is approximately $380.00 per Class Member. Plaintiff's counsel investigated the claims, applicable law, and potential defense, and obtained formal and informal discovery from Defendant concerning pay records, time sheets, hiring and termination dates, employee handbooks and employee policies. Plaintiff's counsel also obtained an expert to assist in reviewing pay and timekeeping records then comparing them to wage statements to identify potential violations.

By the court's calculation, the total maximum potential recovery is $10,949,813 (including maximum potential recovery of $1,802,200 for the PAGA claim), so the gross settlement amount represents approximately 4 percent of the total maximum potential recovery. Plaintiff provides a detailed breakdown of this amount by claim. (Campbell Decl. at ¶¶ 16-20.) The court notes that this amount is slightly below 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 4.3 to 25-25 percent of the maximum potential exposure].) Considering the anticipated difficulties on the merits and in proving violations on a classwide basis as discussed in the Campbell Declaration, the court agrees that the settlement consideration is appropriate. (Campbell Decl. at ¶¶ 15-20.) Moreover, Plaintiff estimates the maximum realistic recovery for class claims to be $458,000. (Id. at ¶¶ 16-20.) Thus, the gross settlement amount represents approximately 98 percent of the maximum realistic recovery. Overall, the court finds the settlement is fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees, and Costs

Named Plaintiff requests an incentive award of $15,000.

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

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

However, Plaintiff did not submit a declaration in support of this request. The court is unable to meaningfully evaluate the request absent a supporting declaration and will continue

this matter to give Plaintiff an opportunity to file a one. It is not sufficient to wait until final approval to file such a declaration. (See Campbell Decl. at ¶ 22 [Plaintiff will file supporting declaration at final approval].)

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See Garabedian v. Los Angeles Cellular Telephone Co. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will seek attorney's fees of $150,000 (1/3 of the gross settlement fund) as well as up to $25,000 in litigation costs. Plaintiff's counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiff's counsel shall also submit evidence of actual costs incurred 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." 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, Code of Civil Procedure section 382 requires: (1) an ascertainable class; and (2) a well-defined community of interest among the class members. (Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 326.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (Sav-On Drug Stores, Inc. v. Superior Court, supra, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. [Citation.]" (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 . . . both to litigants and the courts.' " (Blue Chip Stamps v. Superior Court (1976) 18 Cal.3d 381, 385 [quoting City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 459].)

As explained by the California Supreme Court,

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

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

Plaintiff states that there are approximately 561 class members that can be determined 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).)

Here, the class notice generally complies with the requirements for class notice. It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion.

However, the court requests the parties modify the language regarding the final approval hearing as follows:

Class members may appear at the final approval hearing 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.

The amended notice shall be provided to the court for approval prior to mailing. The amended notice should also be modified to include the new cy pres. (See Settlement Agreement and Class Notice at p. 26.)

IV. CONCLUSION

As stated above, the court is unable to evaluate Plaintiff's request for an incentive award absent a declaration to support the request and directs Plaintiff to file a declaration providing specific details about Plaintiff's participation in the action, including but not limited to risks incurred, notoriety and personal difficulties encountered, amount of time and effort spent, and personal benefit or lack thereof enjoyed by Plaintiff as a result of this litigation. The parties are directed to provide supplemental briefing explaining why including the LWDA letter in the release is fair and how doing so is consistent with Amaro v. Anaheim Arena Management, LLC (2021) 69 Cal.App.5th 521, explaining why the cost to administer a settlement for approximately 561 Class Members may be up to $15,000, and stating the approximate number of PAGA Members. The parties are further directed to provide a new cy pres in compliance with Code of Civil Procedure section 384 prior to the continued hearing. The declaration and supplemental briefing shall be filed no later than July 10, 2024.

Accordingly, the court will continue the hearing on this matter to July 24, 2024, at 1:30 p.m., in Department 19. The parties shall also provide an amended notice to the court for approval prior to mailing.

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: Hoang v. Tran, et al.
Case No.: 19CV342014

The Court on its own motion finds good cause under Code of Civil Procedure section 437c (a)(3) to continue the hearing on all six pending motions for summary judgment/adjudication to May 23, 2024 at 10:00 a.m. in Department 19.

The Court will provide the parties with proposed tentative rulings on all pending motions prior to the hearing.

The Court will begin pretrial conference discussions with the parties immediately following the hearing on these motions.

- oo0oo -

Calendar Line 4

Case Name: Moniz v. Service King Paint & Body, LLC (Class Action/PAGA)
Case No.: 18CV335706

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on May 22, 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 and Private Attorneys General Act ("PAGA") action arising out various alleged wage and hour violations. The operative Third Amended Complaint, filed on October 9, 2023, against defendants Service King, Inc. and Service King Paint & Body, LLC (collectively, "Defendants") sets forth the following causes of action:

(1) Minimum Wage Violations (Labor Code §§ 1182.12, 1194, 1194.2, 1197);

(2) Failure To Pay All Overtime Wages (Labor Code §§ 204, 510, 558, 1194, 1198);

(3) Rest Period Violations (Labor Code §§ 226.7, 516, 558);

(4) Meal Period Violations (Labor Code §§ 226.7, 512, 558);

(5) Waiting Time Penalties and Failure to Timely Pay Wages During Employment (Labor Code §§ 201-204);

(6) Wage Statement Violations (Labor Code § 226 et seq.);

(7) Civil Penalties Under the Private Attorneys General Act (Labor Code § 2698 et seq.);

(8) Unfair Competition (Bus. & Prof. Code§ 17200 Et Seq.);

(9) Failure To Reimburse for All Business Expenses (Labor Code § 2802); and

(10) Failure To Provide or Compensation Paid Sick Leave.

The parties have reached a settlement. Plaintiffs Erica Moniz, Hagop Ajemyan, Hugo Gutierrez, Philip Gabriel, Adolfo Chavez, and Manuel Ramirez (collectively, "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. [Citation.]" (*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, quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and citing *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. [Citation.]" (*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. [Citations.]" (*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, quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

A. Provisions of the Settlement

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

> [A]ll all current and former non-exempt employees of Defendant in the State of California who held the job title(s) of Service Advisor, Painter, and/or Body Technician during the Class period and thereby received various forms of productivity/commission pay.

(Declaration of Paul K. Haines in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Haines Decl."), Exh. A, Class Action and PAGA Settlement Agreement and Class Notice ("Settlement Agreement"), ¶ 1.7.) " 'Class Period' means September 25, 2014 through January 31, 2023. However, for all persons who participated in the class action settlement in the case of *Roman v. Service King Paint & Body, LLC*, No. CIVDS16002618 ('*Roman*'), the Class Period shall begin on December 9, 2016 and run through January 31, 2023." (*Id*., ¶ 1.14.)

The class includes a subset of Aggrieved Employees ("PAGA Members"), who are defined as "current and former non-exempt employees of Defendant in the State of California who held the job title(s) of Service Advisor, Painter, and/or Body Technician and thereby received various forms of productivity/commission pay at any time during the PAGA Period [from December 21, 2017 through January 31, 2023]." (Settlement Agreement, ¶¶ 1.6, 1.37.)

According to the terms of settlement, Defendants will pay a gross, non-reversionary amount of $4,750,000. (Settlement Agreement, ¶ 3.1.) The gross settlement payment includes attorney's fees not to exceed $1,583,333 (1/3 of the gross settlement amount) (*id*., ¶ 3.2.2), litigation costs up to $150,000 (*id*.), an incentive award of $15,000 each to Plaintiffs Moniz, Ajemyan, Gutierrez, and Gabriel, and $7,500 each to Plaintiffs Chavez and Ramirez (for a total of $75,000) (*id*., ¶ 3.2.1), reasonable costs of settlement administration up to $18,500 (*id*., ¶ 3.2.3),[4] and a PAGA allocation of $100,000 (75 percent of which will be paid to the Labor and Workforce Development Agency ("LWDA") and 25 percent of which will be available for PAGA Members) (*id*., ¶ 3.2.5). Per paragraphs 3.2.1, 3.2.2, and 3.2.3 of the Settlement Agreement, amounts not approved or used for the incentive awards, attorney's fees, litigations costs, or settlement administration costs shall be added to the Net Settlement Amount.

> Individual payments to Class Members will be calculated as follows:
>
> > (i) 15% of the NSA shall be designated as the "Waiting Time Penalty Fund" and shall be distributed in equal, pro-rata shares to each Settlement Class Member who separated their employment

[4] The court notes that Exhibit B and paragraph 16 of the Declaration of Jodey Lawrence of Phoenix Settlement Administrators reflects that estimated settlement administration costs will not exceed $16,500 rather than $18,500. Plaintiffs are directed to file a supplemental declaration addressing this inconsistency.

> with Service King at any time between September 25, 2015 through January 31, 2023;
>
> (ii) 10% of the NSA shall be designated as the "Wage Statement Penalty Fund" and each Settlement Class Member who was employed by Service King at any time from December 21, 2017 through January 31, 2023 ("Wage Statement Period"), shall receive a portion of the Wage Statement Penalty Fund proportionate to the number of workweeks that he or she worked during the Wage Statement Period; and
>
> (iii) the remainder (75%) of the NSA will be distributed to each Settlement Class Member based on the proportionate number of workweeks worked during the Class Period.

(Motion at p. 11; see Settlememt Agreement, ¶ 3.2.4.)

PAGA penalties distributed to PAGA Members will be calculated "by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties by the total number of PAGA Period Workweeks worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Workweeks." (Settlement Agreement, ¶ 3.2.5.1.)

Funds from checks that remained uncashed 180 days after issuance will be sent to the California State Controller's Office's Unclaimed Property Division to be held as unclaimed funds in the name of the Participating Class Member or PAGA Member. (Settlement Agreement, ¶ 4.4.3.)

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

In exchange for the settlement, Settlement Class Members who do not opt out will release "all claims that were alleged, or reasonably could have been alleged, based on the Class Period factual allegations and primary rights stated in the Operative Complaint and any amendments thereto, and ascertained in the course of the Actions[.]" (Settlement Agreement,

¶ 5.2.) PAGA Members will release "all claims for civil penalties under PAGA asserted in any of the complaints filed in the Action, and all claims that could have been asserted in the Action based on the same alleged facts in the complaints or in any PAGA letter sent by Plaintiff to the LWDA[.]" (*Id*., ¶ 1.29.) Plaintiffs also agree to a general release of claims. (*Id*., ¶ 5.1.1.)

In the court's view, the release for PAGA Members may be too broad in light of *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521 (*Amaro*). *Amaro* instructs that a release of class claims "must be tied to the *factual allegations* in the complaint, not the claims or theories of liability asserted. [Citation.]" (*Id*. at p. 538, italics original; see *id*. ["Class members could potentially have claims that arise from the same legal theories as [the] complaint but are not based on the same allegations."].) " ' "[A] court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint" ' " but "a court cannot release claims that are outside the scope of the allegations of the complaint." (*Amaro*, *supra*, 69 Cal.App.5th at p. 537.) Here, the release encompasses the LWDA Letters.[5] The parties are directed to provide supplemental briefing explaining why including the LWDA Letters in the release is fair and how doing so is consistent with *Amaro*.

The court also notes that there is no evidence in the record showing that the proposed settlement was submitted to the LWDA as required under Labor Code section 2699, subdivision (*l*)(2). (Lab. Code, § 2699, subd. (*l*)(2) ["The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court."]; *Boddie v. Signature Flight Support Corp.* (N.D.Cal. June 28, 2021, No. 19-cv-03044-DMR) 2021 U.S.Dist.LEXIS 120176, at *14 ["the LWDA must be afforded an opportunity to review a proposed PAGA settlement"].) Prior to the continued hearing, Plaintiffs shall file a supplemental declaration addressing whether the proposed settlement was submitted to the

[5] Plaintiffs did not provide copies of all the LWDA Letters submitted on behalf of all Plaintiffs. The record reflects LWDA Letters for Plaintiffs Ajemyan and Gutierrez (Haines Decl., Exh. C), Gabriel (Declaration of Marcus J. Bradley [], Exh. 1), and Chavez and Ramirez (Declaration of Donald Potter [], Exh. 1), but not Plaintiff Moniz.

LWDA in compliance with Labor Code section 2699, subdivision (*l*)(2), along with proof of submission.

B. Fairness of the Settlement

Plaintiffs assert that the settlement is fair, reasonable, and adequate, given the inherent risks of litigation, including substantial risks relative to class certification and the merits of the claims, and the costs of pursing litigation. Plaintiffs state that the settlement is the result of extensive discovery and motion practice, arm's-length negotiations between the parties and their experienced counsel, and private mediation before an experienced wage and hour class action mediator, Mark S. Ruby. The parties engaged in extensive formal and informal discovery, with both sides propounding and responding to formal written discovery, meeting and conferring over responses, and providing supplemental discovery responses. Defendants deposed Plaintiffs Moniz, Ajemyan, Gutierrez, and Gabriel, as well as Plaintiffs' declarants who submitted declarations in support of Plaintiffs' class certification motion. Plaintiffs deposed Defendants' corporate witnesses on numerous topics. Defendants produced relevant wage and hour policies, timekeeping records, payroll records, contact information, and records for a sampling of the putative class. Plaintiffs also retained an expert to conduct an analysis on data produced and create a damages model.

Plaintiffs estimate that there are approximately 1,250 Class Members and 1,001 PAGA Members. Plaintiffs state the estimated net settlement amount is $2,823,166.67, and the average net payment is approximately $2,258.53 per Class Member and $24.98 per PAGA Member.

By the court's calculation based on numbers provided in the Haines Declaration (at ¶¶ 18-29), the total maximum potential recovery is $32,325,804[6] (including maximum potential recovery of $7,624,000 for the PAGA claim), so the gross settlement amount represents approximately 14.7 percent of the total maximum potential recovery. Plaintiffs provide a detailed breakdown of this amount by claim. (Haines Decl. at ¶¶ 18-29.) This 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.Ca|. Feb. 18, 2022, No. 1:19-cv-

[6] Plaintiffs did not expressly present a total maximum potential recovery calculation.

00062-DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of 4.3 to 25-25 percent of the maximum potential exposure].) Moreover, Plaintiff estimates the maximum realistic recovery for class claims to be $5,458,697 (including maximum realistic recovery of $381,200 for the PAGA claim). (*Id*. at ¶¶ 20-26.) Thus, the gross settlement amount represents approximately 87 percent of the maximum realistic recovery.

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

C. Incentive Award, Fees, and Costs

Plaintiffs request incentive awards of $15,000 each to Plaintiffs Moniz, Ajemyan, Gutierrez, and Gabriel, and $7,500 each to Plaintiffs Chavez and Ramirez, for incentive awards totaling $75,000.

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

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

Plaintiffs filed declarations in support of their requests for an incentive award. However, the court is not inclined to individual awards of $15,000 and $7,500 (depending on the Plaintiff) entirely as requested for the following reasons. Plaintiffs Moniz and Gabriel contributed approximately 60 to 65 hours to the case while Plaintiffs Ajemyan and Gutierrez contributed approximately 15 to 16.5 hours, yet all four requested $15,000 incentive awards. By comparison, Plaintiffs Chavez and Ramirez requested $7,500 incentive awards and state they contributed approximately 8 to 15 hours to the case. Plaintiffs Moniz, Gabriel, Ajemyan, and Gutierrez prepared for and attended depositions, while Plaintiffs Chavez and Ramirez did not. Three of the Plaintiffs (Moniz, Ajemyan, and Gutierrez) were all Service Advisors and it

is unclear if their contributions to this case were duplicative. Based on the declarations provided, the court is inclined to approve incentive awards of $15,000 each for Plaintiffs Moniz and Gabriel, $7,500 each for Plaintiffs Ajemyan and Gutierrez, and $5,000 each for Plaintiffs Chavez and Ramirez. (See *Cellphone Termination Fee Cases*, *supra*, 186 Cal.App.4th at p. 1395 [These 'incentive awards' to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit. [Citation.]"].) Also, Plaintiff Gabriel is directed to file an amended declaration complying with Code of Civil Procedure section 2015.5 since the filed declaration states that it was made "under penalty of perjury under the laws of the State of Ohio" and executed in Groveport, Ohio.

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's fees of $ 1,583,333.33 (1/3 of the gross settlement fund) as well as up to $150,000 in litigation costs. Plaintiffs' counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. 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." 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, Code of Civil Procedure section 382 requires: (1) an ascertainable class; and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. [Citation.]" (*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 . . . both to litigants and the courts.' " (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385 [quoting *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459].)

As explained by the California Supreme Court,

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

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

Plaintiffs state there are approximately 1,250 Class Members and 1,001 PAGA Members that can be determined 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).)

Here, the class notice generally complies with the requirements for class notice. (Haines Decl., Exh. B.) It provides basic information about the settlement, including the

settlement terms, and procedures to object or request exclusion. However, Plaintiff Philip Gabriel is listed as "Philip Gabriela" and Plaintiff Manuel Ramirez is listed as "Manuel Chavez" in the proposed notice and this should be corrected. (*Id*. at pp. 23, 26.)

Additionally, the court requests the parties modify the language regarding the final approval hearing as follows:

> Class members may appear at the final approval hearing 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.

The amended notice shall be provided to the court for approval prior to mailing.

IV. CONCLUSION

Plaintiffs are directed to file a supplemental declaration addressing the inconsistency in settlement administration costs and whether the proposed settlement was submitted to the LWDA in compliance with Labor Code section 2699, subdivision (*l*)(2), along with proof of submission. The parties are also directed to provide supplemental briefing explaining why including the LWDA Letters in the release is fair and how doing so is consistent with *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521. Plaintiff Gabriel shall file an amended declaration complying with Code of Civil Procedure section 2015.5. The parties are further directed to provide a new *cy pres* in compliance with Code of Civil Procedure section 384 prior to the continued hearing. The supplemental briefing and declarations shall be filed no later than July 10, 2024.

Accordingly, the court will continue the hearing on this matter to July 24, 2024, at 1:30 p.m., in Department 19. The parties shall also provide an amended notice to the court for approval prior to mailing.

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

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